



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

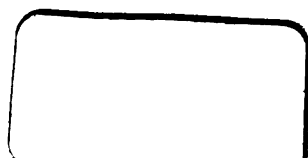
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



**THE
LAWYERS REPORTS
ANNOTATED**

**1915C
BEING VOL. 55 L.R.A.(N.S.)**

**BURDETT A. RICH, HENRY P. FARNHAM,
EDITORS**

TO BE CITED L.R.A.1915C

**THE LAWYERS CO-OPERATIVE PUBLISHING COMPANY,
ROCHESTER, N. Y.**

1915

121968

JUL 29 1942

Copyright 1915

by

THE LAWYERS CO-OPERATIVE PUBLISHING COMPANY.

E. H. ANDREWS PRINTING COMPANY, Rochester, N. Y.

TABLE

OF

CASES REPORTED

A.		Bouchard v. Central Vermont R.	
		Co. (Vt.)	33
Adams, Re (Iowa)	95	Brandau v. McCurley (Md.)	767
Morrow v. (Iowa)	95	Brown, Franklin v. (W. Va.)	557
Alaska Barge Co., Alaska Coast		Browning, Davidson v. (W. Va.)	976
Co. v. (Wash.)	423	Buckley v. Hudson Valley R. Co.	
Alaska Coast Co. v. Alaska		(N. Y.)	134
Barge Co. (Wash.)	423	Butler v. Cabe (Ark.)	702
Allen, Louisville & N. R. Co. v. (Fla.)	20		
v. Puritan Trust Co. (Mass.)	518	C.	
Anderson, Winn v. (Ky.)	581	Cabe, Butler v. (Ark.)	702
Applegate, State v. (N. D.)	315	Campbell Mill Co., Vanderboget	
Arizona & N. M. R. Co. v. Clark		v. (Wash.)	808
(U. S. Sup. Ct.)	834	Campbells Creek R. Co., Moss v.	
Atlantic C. L. R. Co., Gilkerson		(W. Va.)	1183
v. (S. C.)	664	Canton Ins. Office v. Independent	
Aubrey v. Stimson (Ky.)	874	Transp. Co. (C. C. A.)	408
B.		Carter, Thurston v. (Me.)	359
Bank, Hamilton Nat., v. Cook (Tenn.)	831	Caulk, McKinnon, Currie, & Co.	
Walters Nat., v. Bantock		v. (N. C.)	396
(Okla.)	531	Central Vermont R. Co., Bouch-	
Bantock, Walters Nat. Bank v.		ard v. (Vt.)	33
(Okla.)	531	Chesapeake & O. R. Co. v. Friend	
Barber v. Watch Hill Fire Dist.		(Ky.)	148
(R. I.)	245	Chicago, M. & G. R. Co., Hayden	
Barber Asphalt Pav. Co., Kelly		v. (Ky.)	181
Asphalt Block Co. v.		Childs Co., Stewart v.	
(N. Y.)	256	(N. J. Err. & App.)	649
Barnes v. State ... (Tex. Crim. App.)	101	Cincinnati, N. O. & T. P. R. Co.	
Benwood v. Public Service Com.		v. Eastham (Ky.)	27
(W. Va.)	261	Clark, Arizona & N. M. R. Co. v.	
Berlin Dye Works & Laundry		(U. S. Sup. Ct.)	834
Co., Copelin v. (Cal.)	712	Clark Implement Co. v. Wadden	
Bernstein v. Milwaukee (Wis.)	435	(S. D.)	414
Best v. Moorhead (Neb.)	378	Clemans, Hoyt v. (Iowa)	166
Binns v. Vitagraph Co. (N. Y.)	839	Cohen, Neiberg v. (Vt.)	483
Blakeman v. Wichita (Kan.)	578	Columbus R. Co. v. Kitchens .. (Ga.)	570
Board of Affairs, Fruth v. ... (W. Va.)	981	Com., Hillman Land & Iron Co.	
Board of Assessors, Liverpool &		v. (Ky.)	929
London & Globe Ins.		Commonwealth Ins. Co., Gilman	
Co. v. (U. S. Sup. Ct.)	903	v. (Me.)	758
Board of County Comrs., State		Connecticut Co., White v. (Conn.)	609
ex rel. Lorenzino v.		Cook, Hamilton Nat. Bank v. (Tenn.)	831
(N. M.)	898	v. Packard Motor Car Co.	
Bosill v. New Orleans R. & Light		(Conn.)	319
Co. (La.)	419	Copelin v. Berlin Dye Works &	
Boston Store, Hartnett v. (Ill.)	460	Laundry Co. (Cal.)	712
L.R.A.1915C.			

Coppage v. Kansas .. (U. S. Sup. Ct.)	960	Glover v. Southern R. Co. (S. C.)	477
Corporation Com., State ex rel, v. Morrison & Sons Co. (N. C.)	380	Goddard, Spickerman v. (Ind.)	513
Crawford, Yazoo & M. V. R. Co. v. (Miss.)	250	Graffam v. Saco Grange, Patrons of Husbandry No. 53 (Me.)	632
Creamer v. Harris (Ohio St.)	653	Graves, State ex rel. McLaughlin v. (Or.)	259
D.		Great Northern R. Co. v. Har- man (C. C. A.)	843
Davidson v. Browning (W. Va.)	976	Keeley v. (Wis.)	986
Deakin, University Club v. (Ill.)	854	Green, Hostetter v. (Ky.)	870
Diepenbrock v. Luiz (Cal.)	234	v. West Penn Rys. Co. (Pa.)	151
Doane v. Grew (Mass.)	774	Grew, Doane v. (Mass.)	774
Dott, Louisville R. Co. v. (Ky.)	681	Griffin v. State (Ga.)	716
Douglas County, Robinson & Co. v. (Neb.)	922	Gunn, Price v. (Ark.)	158
Dubuque F. & M. Ins. Co., Ras- musson v. (Wash.)	1179	H.	
Duvall v. Ridout (Md.)	345	Hale v. St. Louis & S. F. R. Co. (Okla.)	544
E.		Hall v. Gage (Ark.)	704
Easter, Georgia L. Ins. Co. v. (Ala.)	456	Hamilton Nat. Bank v. Cook (Tenn.)	831
Eastham, Cincinnati, N. O. & T. P. R. Co. v. (Ky.)	27	Hampton, Hampton Beach Im- prov. Co. v. (N. H.)	698
Edelen v. Herman (Ky.)	1208	Hampton Beach Improv. Co. v. Hampton (N. H.)	698
Eisentraut v. Madden (Neb.)	893	Harman, Great Northern R. Co. v. (C. C. A.)	843
Enzenbacher, Schlau v. (Ill.)	576	Harris, Creamer v. (Ohio St.)	653
F.		v. Security Mut. L. Ins. Co. (Tenn.)	153
Fields v. Holland (Ky.)	865	Hart, Re (N. D.)	1169
First Nat. Bank, Re (N. D.)	386	Hartnett v. Boston Store (Ill.)	460
Fisher v. Sun Ins. Office ... (W. Va.)	619	Harvey, State ex inf., v. Mis- souri Athletic Club (Mo.)	876
Floyd, Ireland v. (Okla.)	661	State ex inf., v. St. Louis Club (Mo.)	876
Ford City, Smeltzer v. (Pa.)	700	Hayden v. Chicago, M. & G. R. Co., (Ky.)	181
Fort Smith & W. R. Co. v. Seran (Okla.)	813	Hehemann, Louisville v. (Ky.)	747
Franklin v. Brown (W. Va.)	557	Hemenway v. Milton (Mass.)	949
French, Watson v. (Me.)	355	Herman, Edelen v. (Ky.)	1208
Friend, Chesapeake & O. R. Co. v. (Ky.)	148	Hillman Land & Iron Co. v. Com. (Ky.)	929
Fruth v. Board of Affairs .. (W. Va.)	981	Hines v. Rocky Mount (N. C.)	751
G.		Holland, Fields v. (Ky.)	865
Gage, Hall v. (Ark.)	704	v. Hotchkiss (Cal.)	492
Garber-Buick Co., Reynolds v. (Mich.)	362	Homan v. Redick (Neb.)	601
Georgia L. Ins. Co. v. Easter (Ala.)	456	Homer, Shackley v. (Neb.)	993
German Alliance Ins. Co. v. Lewis ... (U. S. Sup. Ct.)	1189	Horton, Seaboard A. L. R. Co. v. (U. S. Sup. Ct.)	1
Gilkerson v. Atlantic C. L. R. Co. (S. C.)	664	Hostetter v. Green (Ky.)	870
Gilman v. Commonwealth Ins. Co. (Me.)	758	Hotchkiss, Holland v. (Cal.)	492
Glenwood Light & Water Co., Glenwood Springs v. (C. C. A.)	438	Hoyt v. Clemans (Iowa)	166
Glenwood Springs v. Glenwood Light & Water Co. (C. C. A.)	438	Hudson Valley R. Co., Buckley v. (N. Y.)	134
Glidden v. Second Ave. Invest. Co. (Minn.)	190	Huetter v. Warehouse & Realty Co. (Wash.)	671
L.R.A.1915C.		Hunnicke v. Meramec Quarry Co. (Mo.)	789
		Hurless v. Wiley (Kan.)	177
		Hyland v. Oregon Hassam Pav. Co. (Or.)	823

CASES REPORTED.

v

I.		Lorenzino, Estate ex rel., v. Board of County Comrs. (N. M.)	
Independent Transp. Co., Canton Ins. Office v. ... (C. C. A.)	408	Los Angeles Gas & Electric Co., Pinney & Boyle Co. v. (Cal.)	282
Industrial Sav. & Loan Co. v. Plummer (N. J. Err. & App.)	613	Louisville v. Hehemann (Ky.)	747
Illinois C. R. Co., Law v. (C. C. A.)	17	Louisville & N. R. Co. v. Allen (Fla.)	20
v. Rogers (Ky.)	1220	Louisville R. Co. v. Dott (Ky.)	681
Insurance Co., Commonwealth, Gilman v. (Me.)	758	Lowe v. Southern R. Co. (S. C.)	477
Dubuque F. & M., Ras- musson v. (Wash.)	1179	Luiz, Diepenbrock v. (Cal.)	234
Georgia L., v. Easter ... (Ala.)	456	Lusky v. Keiser (Tenn.)	400
German Alliance, v. Lewis (U. S. Sup. Ct.)	1189	M.	
Liverpool & London & Globe, v. Board of As- sessors ... (U. S. Sup. Ct.)	903	McArdle, Ruppert v. ... (D. C. App.)	846
North Coast F., Rasmus- son v. (Wash.)	1179	McCook Waterworks Co., Wood v. (Neb.)	125
Security Mut. L., Harris v. (Tenn.)	153	McCurley, Brandau v. (Md.)	767
Insurance Office, Canton, v. In- dependent Transp. Co. (C. C. A.)	408	McKinnon, Currie, & Co. v. Caulk (N. C.)	396
Ireland v. Floyd (Okla.)	661	McLaughlin, State ex rel., v. Graves (Or.)	259
J.		McLaurin, Western U. Teleg. Co. v. (Miss.)	487
Jones v. State (Miss.)	648	Madden, Eisentraut v. (Neb.)	893
v. Virginian R. Co. ... (W. Va.)	428	May Creek Logging Co. v. Pacific Coast Casualty Co. (Wash.)	153
Jordan, Savannah v. (Ga.)	741	Meaher v. Mitchell (Me.)	467
Spinks v. (Miss.)	634	Mendelson, People v. (Ill.)	627
Julius, Re (C. C. A.)	89	Meramec Quarry Co., Hunicke v. (Mo.)	789
K.		Meyer, Re (N. Y.)	615
Kansas, Coppage v. (U. S. Sup. Ct.)	960	Miller, Re (Iowa)	736
Keaton, Miller v. (Mo.)	690	v. Keaton (Mo.)	690
Keel v. Southern R. Co. (S. C.)	477	v. Public Service R. Co. (N. J. Err. & App.)	604
Keeley v. Great Northern R. Co. (Wis.)	986	v. Toles (Mich.)	595
Keiser, Lusky v. (Tenn.)	400	Milton, Hemenway v. (Mass.)	949
Kelly Asphalt Block Co. v. Bar- ber Asphalt Pav. Co. (N. Y.)	256	Milwaukee, Bernstein v. (Wis.)	435
Kempf v. Spokane & I. E. R. Co. (Wash.)	405	Missouri Athletic Club, State ex inf. Harvey v. (Mo.)	876
Kitchens, Columbus R. Co. v. (Ga.)	570	Missouri, K. & T. R. Co., State v. (Mo.)	778
Koeln, St. Louis Lodge No. 9 v. (Me.)	694	Mitchell, Meaher v. (Me.)	467
Kroger, Sleichter v. (Iowa)	736	Moorhead, Best v. (Neb.)	378
Krug, Tyre v. (Wis.)	624	Morrison & Sons Co., State ex rel. Corporation Com. v. (N. C.)	380
L.		Morrow v. Adams (Iowa)	95
Law v. Illinois C. R. Co. ... (C. C. A.)	17	Moss v. Campbells Creek R. Co. (W. Va.)	1183
Lewis, German Alliance Ins. Co. v. (U. S. Sup. Ct.)	1189	Munday v. Southern R. Co. ... (S. C.)	477
Liverpool & London & Globe Ins. Co. v. Board of As- sessors ... (U. S. Sup. Ct.)	903	Murphy v. Pere Marquette R. Co. (Mich.)	536
Lockwood v. United States Steel Corp. (N. Y.)	471	Myers v. State (Ark.)	302
L.R.A.1915C.		N.	
		Neiberg v. Cohen (Vt.)	483
		New Orleans, R. & Light Co., Bofill v. (La.)	419

New York, N. H. & H. R. Co. v. Vizvari (C. C. A.)	9	Railroad Co., Spokane & I. E., Kempf v. (Wash.)	406
North Coast F. Ins. Co., Rasmusson v. (Wash.)	1179	Yazoo & M. V., v. Crawford (Miss.)	250
Northern P. R. Co., Reeve v. (Wash.)	37	Railway & Light Co., New Orleans, Bofill v. (La.)	419
O.		Railway Co., Arizona & N. M., v. Clark (U. S. Sup. Ct.)	834
Oregon Hassam Pav. Co., Hyland v. (Or.)	823	Central Vermont, Bouchard v. (Vt.)	33
P.		Chesapeake & O., v. Friend (Ky.)	148
Pacific Coast Casualty Co., May Creek Logging Co. v. (Wash.)	155	Cincinnati, N. O. & T. P., v. Eastham (Ky.)	27
Packard Motor Car Co., Cook v. (Conn.)	319	Great Northern, v. Harman (C. C. A.)	843
Parker, State v. (Mo.)	121	Great Northern, Keeley v. (Wis.)	986
Parks v. Yost Pie Co. (Kan.)	179	Hudson Valley, Buckley v. (N. Y.)	114
Paxson, Re (Pa.)	1009	Louisville, v. Dott (Ky.)	661
Pennsylvania R. Co., Soriero v. (N. J. Err. & App.)	710	Missouri, K. & T., State v. (Mo.)	78
People v. Mendelson (Ill.)	627	Northern P., Reeve v. (Wash.)	37
Pere Marquette R. Co., Murphy v. (Mich.)	536	Public Service, Miller v. (N. J. Err. & App.)	604
Pfanschmidt, Wall v. (Ill.)	328	Seaboard A. L., v. Horton (U. S. Sup. Ct.)	1
Pfarr v. Standard Oil Co. (Iowa)	336	Southern, Glover v. (S. C.)	477
Philadelphia, B. & W. R. Co. v. Tucker (D. C. App.)	39	Southern, Keel v. (S. C.)	477
Pinney & Boyle Co. v. Los Angeles Gas & Electric Co. (Cal.)	282	Southern, Lowe v. (S. C.)	477
Plummer, Industrial Sav. & Loan Co. v. (N. J. Err. & App.)	613	Southern, Munday v. (S. C.)	477
Price v. Gunn (Ark.)	168	Southern, Woodward v. (S. C.)	477
Public Service Com., Benwood v. (W. Va.)	261	Virginia, Jones v. (W. Va.)	428
Public Service R. Co., Miller v. (N. J. Err. & App.)	604	Railways Co., West Penn, Green v. (Pa.)	151
Puritan Trust Co., Allen v. (Mass.)	518	Rasmusson v. Dubuque F. & M. Ins. Co. (Wash.)	1179
R.		v. North Coast F. Ins. Co. (Wash.)	1179
Railroad Co., Atlantic C. L., Gilkerson v. (S. C.)	664	Re Adams (Iowa)	95
Campbells Creek, Moss v. (W. Va.)	1183	First Nat. Bank (N. D.)	386
Columbus, v. Kitchens .. (Ga.)	570	Hart (N. D.)	1169
Fort Smith & W., v. Seran (Okla.)	813	Julius (C. C. A.)	89
Illinois C., Law v. (C. C. A.)	17	Miller (Iowa)	736
Illinois C., v. Rogers (Ky.)	1220	Meyer (N. Y.)	615
Louisville & N., v. Allen (Fla.)	20	Paxson (Pa.)	1009
New York, N. H. & H., v. Vizvari (C. C. A.)	9	Redick, Homan v. (Neb.)	601
Pennsylvania, Soriero v. (N. J. Err. & App.)	710	Reeve v. Northern P. R. Co. (Wash.)	37
Pere Marquette, Murphy v. (Mich.)	536	Reynolds v. Garber-Buick Co. (Mich.)	362
Philadelphia, B. & W., v. Tucker (D. C. App.)	39	Ridge, Tebeau v. (Mo.)	367
St. Louis & S. F., Hale v. (Okla.)	544	Ridout, Duvall v. (Md.)	345
		Robinson & Co. v. Douglas County (Neb.)	922
		Rocky Mount, Hines v. (N. C.)	751
		Rogers, Illinois C. R. Co. v. (Ky.)	1220
		Ruppert v. McArdle (D. C. App.)	846
		S.	
		Saco Grange, Patrons of Husbandry No. 53, Grafam v. (Me.)	632
		St. Louis & S. F. R. Co., Hale v. (Okla.)	544

St. Louis Club, State ex inf.		Toles, Miller v. (Mich.)	595
Harvey v. (Mo.)	876	Tucker, Philadelphia, B. & W. R.	
St. Louis Lodge No. 9 v. Koeln (Me.)	694	Co. v. (D. C. App.)	39
Savannah v. Jordan (Ga.)	741	Tyre v. Krug (Wis.)	624
Schlau v. Enzenbacher (Ill.)	576		
Seaboard A. L. R. Co. v. Horton			
(U. S. Sup. Ct.)	1	U.	
Second Ave. Invest. Co., Glidden			
v. (Minn.)	190	United States Fidelity & G. Co.,	
Security Mut. L. Ins. Co., Harris		Young Men's Chris-	
v. (Tenn.)	153	tian Asso. v. (Kan.)	170
Seran, Fort Smith & W. R. Co.		United States Steel Corp., Lock-	
v. (Okla.)	813	wood v. (N. Y.)	471
Shackley v. Homer (Neb.)	993	University Club v. Deakin (Ill.)	854
Shellenberger v. State (Neb.)	1163		
Sleichter v. Kroger (Iowa)	736	V.	
Smeltzer v. Ford City (Pa.)	700		
Soriero v. Pennsylvania R. Co.		Vanderboget v. Campbell Mill	
(N. J. Err. & App.)	710	Co. (Wash.)	808
Southern Bell Teleph. & Teleg.		Vinson v. Southern Bell Teleph.	
Co., Vinson v. (Ala.)	450	& Teleg. Co. (Ala.)	450
Southern R. Co., Glover v. (S. C.)	477	Virginian R. Co., Jones v. (W. Va.)	428
Keel v. (S. C.)	477	Vitagraph Co., Binns v. (N. Y.)	839
Lowe v. (S. C.)	477	Vizvari, New York, N. H. & H.	
Munday v. (S. C.)	477	R. Co. v. (C. C. A.)	9
Woodward v. (S. C.)	477		
Spickerman v. Goddard (Ind.)	513	W.	
Spinks v. Jordan (Miss.)	634		
Spokane & I. E. R. Co., Kempf		Wadden, Clark Implement Co. v.	
v. (Wash.)	405	(S. D.)	414
Standard Oil Co., Pfarr v. (Iowa)	336	Walker v. State (Fla.)	1161
State v. Applegate (N. D.)	315	Wall v. Pfanschmidt (Ill.)	328
Barnes v. (Tex. Crim. App.)	101	Walters Nat. Bank v. Bantock (Okla.)	531
Griffin v. (Ga.)	716	Warehouse & Realty Co., Huetter	
Jones v. (Miss.)	648	v. (Wash.)	671
v. Missouri, K. & T. R. Co.		Watch Hill Fire Dist., Barber v.	
(Mo.)	778	(R. I.)	245
Myers v. (Ark.)	302	Watson v. French (Me.)	355
v. Parker (Mo.)	121	Webster, State ex rel., v. Su-	
Shellenberger v. (Neb.)	1163	perior Ct. (Wash.)	287
Walker v. (Fla.)	1161	Western U. Teleg. Co. v. Mc-	
State ex inf. Harvey v. Mis-		Laurin (Miss.)	487
souri Athletic Club (Mo.)	876	West Penn Rys. Co., Green v. (Pa.)	151
Harvey v. St. Louis Club (Mo.)	876	White v. Connecticut Co. (Conn.)	609
State ex rel. Lorenzino v. Board		Wichita, Blakeman v. (Kan.)	578
of County Comrs. (N. M.)	898	Wiley, Hurless v. (Kan.)	177
McLaughlin v. Graves .. (Or.)	259	Winn v. Anderson (Ky.)	581
Corporation Com. v. Mor-		Wood v. McCook Waterworks	
rison & Sons Co. (N. C.)	380	Co. (Neb.)	125
Webster v. Superior Ct.		Woodward v. Southern R. Co. (S. C.)	477
(Wash.)	287		
Stewart v. Childs Co.		Y.	
(N. J. Err. & App.)	649		
Stimson, Aubrey v. (Ky.)	874	Yazoo & M. V. R. Co. v. Craw-	
Sun Ins. Office, Fisher v. (W. Va.)	619	ford (Miss.)	250
Superior Ct., State ex rel. Web-		Yost Pie Co., Parks v. (Kan.)	179
ster v. (Wash.)	287	Young Men's Christian Asso. v.	
T.		United States Fidel-	
		ity & G. Co. (Kan.)	170
Tebeau v. Ridge (Mo.)	367		
Thurston v. Carter (Me.)	359		
L.R.A.1915C.			

LAWYERS REPORTS

ANNOTATED

NEW SERIES.

UNITED STATES SUPREME COURT.

SEABOARD AIR LINE RAILWAY, Plff.
in Err.,
v.

JAMES T. HORTON.

(233 U. S. 492, 58 L. ed. 1062, 34 Sup. Ct.
Rep. 635.)

Appeal — return day in writ of error — citation.

1. Making the writ of error to a state court and the citation thereon returnable "within thirty days from the date hereof," without inserting a day certain as the return day, is a substantial compliance with the provision of the United States Supreme Court rule 8, clause 5, that (with certain exceptions in favor of the more distant states and territories) "all appeals, writs of error, and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time."

Appeal — decision of Federal question — suit based on Federal statute.

2. A writ of error will lie from the Federal Supreme Court to review a decision of the highest state court, which sustained the action of the trial court in overruling certain contentions made by the plaintiff in error asserting a construction of the Federal employers' liability act of April 22, 1908 as amended by the act of April 5, 1910, which, if acceded to, would presumably have produced a verdict in favor of plaintiff in error, and consequent immunity from the action.

Commerce — employers' liability — conflicting state and Federal legislation.

3. Since Congress, by the act of April 22, 1908, took possession of the field of the employers' liability in interstate transportation by rail, all state laws upon the subject are superseded.

Note.— As to the constitutionality, application, and effect of the Federal employers' liability act, see note, post, 47.
L.R.A. 1915C.

Same — conflicting legislation — safe place or appliances.

4. The limitation of the responsibility of a railway carrier under the employers' liability act of April 22, 1908, § 1, for injuries to its employees resulting from defects or insufficiency in places of work or appliances to those caused by such defects and insufficiencies as are "due to its negligence," governs an action brought under that statute regardless of the measure of responsibility prescribed by the local statutes.

Master and servant — employers' liability — assumption of risk — contributory negligence — violation of statutes.

5. Federal statutes only were intended by the phrase "any statute enacted for the safety of employees" in the employers' liability act of April 22, 1908, §§ 3, 4, abolishing the defenses of contributory negligence and assumption of risk in any case where the violation by the carrier of any statute enacted for the safety of employees contributed to the injury or death of an employee.

Same.

6. The elimination of the defense of assumption of risk by the employers' liability act of April 22, 1908, § 4, in any case where the violation by the carrier of any statute enacted for the safety of the employees contributed to the injury or death of the employee, plainly evidences the legislative intent that in all other cases such assumption of risk shall have its former effect as a complete bar to the action.

Commerce — employers' liability — conflicting legislation — assumption of risk.

7. The common-law rule with respect to the employee's assumption of risk of injury from a defective appliance governs an action brought under the employers' liability act of April 22, 1908, where such appliance is not covered by any Federal statute enacted for the safety of employees, to the exclusion of any state statutes which, like N. C. Revisal 1905, § 2646, abolished the assumption of risk as a bar to an action by a railway employee for an injury attribu-

table to defective appliances furnished by the employer, since otherwise the subject-matter would be controlled by the laws of the several states, and not by the Federal statute, which, in § 4, abolishes the defense of the assumption of risk only when the violation by the carrier of a Federal statute enacted for the safety of employees contributed to the death or injury of an employee.

(April 27, 1914.)

ERROR to the Supreme Court of North Carolina to review a judgment which affirmed a judgment of the Superior Court for Wake County in favor of plaintiff in an action, brought under the Federal employers' liability act, to recover damages for personal injuries sustained by him while in defendant's employ. Reversed.

The facts are stated in the opinion.

Messrs. Benjamin Micon, Murray Allen, Hillary A. Herbert, and Richard P. Whiteley, for plaintiff in error:

In this case is clearly involved the right of the plaintiff in error to be shielded from responsibility under the Federal employers' liability act, because, when properly applied to the facts as presented by the plaintiff in error, no liability on its part from the statute would result.

St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 263, 37 L. ed. 1179, 33 Sup. Ct. Rep. 838; St. Louis, I. M. & S. R. Co. v. Hesterly, 228 U. S. 702, 37 L. ed. 1031, 33 Sup. Ct. Rep. 703.

It was error to confuse assumption of risk and contributory negligence.

Schlemmer v. Buffalo, R. & P. R. Co. 220 U. S. 590, 55 L. ed. 596, 31 Sup. Ct. Rep. 561; Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 48 L. ed. 96, 24 Sup. Ct. Rep. 24, 15 Am. Neg. Rep. 230.

The Federal employers' liability act is in conflict with the state law.

Coley v. North Carolina R. Co. 128 N. C. 534, 57 L.R.A. 817, 39 S. E. 43.

Congress having occupied the field, the Federal act supersedes all state law.

Southern R. Co. v. Reid, 222 U. S. 442, 56 L. ed. 262, 32 Sup. Ct. Rep. 140; Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A. (N.S.) 257, 33 Sup. Ct. Rep. 148; Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 573, 576, 57 L. ed. 363, 33 Sup. Ct. Rep. 135; St. Louis, S. F. & T. R. Co. v. Scale, 229 U. S. 157, 588, 57 L. ed. 1133, 33 Sup. Ct. Rep. 651.

Upon the subject of assumption of risk the common law right is preserved by the employers' liability act, unless there has been a violation by the employer of a statute enacted for the safety of the employee.

Western U. Teleg. Co. v. Call Pub. Co. 181 L.R.A. 1036.

U. S. 92, 45 L. ed. 765, 21 Sup. Ct. Rep. 561; Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 275, 36 L. ed. 703, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A. (N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; United States v. American Tobacco Co. 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 49, 50, 56 L. ed. 345, 346, 38 L.R.A. (N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Barker v. Kansas City, M. & O. R. Co. 88 Kan. 767, 43 L.R.A. (N.S.) 1121, 129 Pac. 1151; Freeman v. Powell, — Tex. Civ. App. —, 144 S. W. 1033; Neil v. Idaho & W. N. R. Co. 22 Idaho, 74, 125 Pac. 331; Bowers v. Southern R. Co. 10 Ga. App. 367, 73 S. E. 677; Hall v. Vandalia R. Co. 169 Ill. App. 12.

Statutes which abolish by express provision assumption of risk as a defense do not affect the defense of contributory negligence.

Schlemmer v. Buffalo, R. & P. R. Co. 220 U. S. 590, 55 L. ed. 596, 31 Sup. Ct. Rep. 561; Denver & R. G. R. Co. v. Arrighi, 63 C. C. A. 649, 129 Fed. 347.

At common law and under the decisions of the Supreme Court of the United States a servant assumes the risk of defects arising from the master's negligence if he continues in the service with knowledge of such defects.

Butler v. Frazee, 211 U. S. 459, 53 L. ed. 281, 29 Sup. Ct. Rep. 136; Texas & P. R. Co. v. Harvey, 228 U. S. 319, 57 L. ed. 852, 33 Sup. Ct. Rep. 518; Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 48 L. ed. 96, 100, 24 Sup. Ct. Rep. 24, 15 Am. Neg. Rep. 230; Texas & P. R. Co. v. Barrett, 166 U. S. 617, 41 L. ed. 1136, 17 Sup. Ct. Rep. 707, 1 Am. Neg. Rep. 745; Worden v. Gore-Meenan Co. 83 Conn. 642, 78 Atl. 422; Smalls v. Southern R. Co. 115 Ga. 137, 41 S. E. 492; Katalla Co. v. Rones, 108 C. C. A. 132, 186 Fed. 30; Sharon Fire Brick Co. v. Miller, 104 C. C. A. 340, 181 Fed. 830; Detroit Crude-Oil Co. v. Grable, 36 C. C. A. 94, 94 Fed. 73; Texas & P. R. Co. v. Archibald, 170 U. S. 671, 42 L. ed. 1197, 18 Sup. Ct. Rep. 777, 4 Am. Neg. Rep. 746; Chicago, B. & Q. R. Co. v. Stalstrom, 45 L.R.A. (N.S.) 387, 115 C. C. A. 515, 135 Fed. 729; St. Louis Cordage Co. v. Miller, 63 L.R.A. 551, 61 C. C. A. 477, 126 Fed. 508, 15 Am. Neg. Rep. 476; Kyner v. Portland Gold Min. Co. 198 C. C. A. 245, 144 Fed. 43; Labatt, Mast. & S. § 1288.

The doctrine of assumption of risk is a bar to the action whenever the abnormal danger was known actually or constructively to the servant at the time when he entered the employment.

Leary v. Boston & A. R. Co. 139 Mass. 580, 52 Am. Rep. 733, 2 N. E. 115; Ragun v. Toledo, A. A. & N. M. R. Co. 97 Mich. 265, 37 Am. St. Rep. 336, 56 N. W. 612.

Assumption of risk is not modified nor controlled by the fact that contributory negligence is no defense.

Jackson v. Chicago, R. I. & P. R. Co. 102 C. C. A. 159, 178 Fed. 435; Labatt, Mast. & S. pp. 749, 768, 772.

Messrs. William C. Douglass and Clyde A. Douglass, for defendant in error:

Assumption of risk is a common-law defense, and not a creation of the Federal power.

Burnett v. Atlantic Coast Line R. Co. 163 N. C. 186, 79 S. E. 414; Pennsylvania R. Co. v. Hughes, 191 U. S. 478, 48 L. ed. 269, 24 Sup. Ct. Rep. 132.

The servant cannot assume the risk of the negligence of the master.

Union P. R. Co. v. O'Brien, 161 U. S. 452, 40 L. ed. 767, 16 Sup. Ct. Rep. 618; Hicks v. Naomi Falls Mfg. Co. 138 N. C. 319, 50 S. E. 703; Marks v. Harriet Cotton Mills, 138 N. C. 402, 50 S. E. 769, 3 Ann. Cas. 812; Pressly v. Dover Yarn Mills, 138 N. C. 417, 51 S. E. 69; Gottlieb v. New York, L. E. & W. R. Co. 100 N. Y. 467, 3 N. E. 344; Mason v. Richmond & D. R. Co. 111 N. C. 482, 18 L.R.A. 845, 32 Am. St. Rep. 814, 16 S. E. 698; Hudson v. Charleston, C. & C. R. Co. 104 N. C. 491, 10 S. E. 669; Schlacker v. Ashland Iron Min. Co. 89 Mich. 262, 50 N. W. 839; Greene v. Minneapolis & St. L. R. Co. 31 Minn. 248, 47 Am. Rep. 785, 17 N. W. 378; Sims v. Lindsay, 122 N. C. 678, 30 S. E. 19; Sibbert v. Scotland Cotton Mills, 145 N. C. 311, 59 S. E. 79; Leggett v. Atlantic Coast Line R. Co. 152 N. C. 111, 67 S. E. 249; Bissell v. Greenleaf-Johnson Lumber Co. 152 N. C. 124, 67 S. E. 259; Tanner v. Frank Hitch Lumber Co. 140 N. C. 477, 53 S. E. 287; Worley v. Laurel River Logging Co. 157 N. C. 490, 73 S. E. 107; Southern P. Co. v. Yeargin, 48 C. C. A. 497, 109 Fed. 441; Wright v. Yazoo & M. Valley R. Co. 197 Fed. 96; Deninger v. American Locomotive Co. 107 C. C. A. 126, 185 Fed. 32.

This case was properly submitted to the jury upon the doctrine of the ideal prudent man.

Kane v. Northern C. R. Co. 128 U. S. 91, 32 L. ed. 339, 9 Sup. Ct. Rep. 16; Snow v. Housatonic R. Co. 8 Allen, 441, 85 Am. Dec. 720, 15 Am. Neg. Cas. 447; Gardner v. Michigan C. R. Co. 150 U. S. 349, 37 L. ed. 1107, 14 Sup. Ct. Rep. 140; 1 White, Personal Injuries on Railroads, §§ 370, 377; Lake Shore & M. S. R. Co. v. McCormick, 74 Ind. 440; Cregg v. Chicago & W. M. R. Co. 91 Mich. 624, 52 N. W. 62; Consolidated Coal Co. v. Haenni, 146 Ill. 614, 35 N. E. 162; Bridges L.R.A.1915C.

v. St. Louis, I. M. & S. R. Co. 6 Mo. App. 389; Parker v. South Carolina & G. R. Co. 48 S. C. 364, 26 S. E. 669, 1 Am. Neg. Rep. 681; Vosburgh v. Lake Shore & M. S. R. Co. 94 N. Y. 374, 46 Am. Rep. 148; 1 Shearm. & Redf. Neg. § 194; Gottlieb v. New York, L. E. & W. R. Co. 100 N. Y. 467, 3 N. E. 344; Mason v. Richmond & D. R. Co. 111 N. C. 491, 18 L.R.A. 845, 32 Am. St. Rep. 814, 16 S. E. 698; Hermanek v. Chicago & N. W. R. Co. 108 C. C. A. 254, 186 Fed. 142; Barber Asphalt Paving Co. v. Austin, 108 C. C. A. 365, 186 Fed. 443; Hudson v. Charleston, C. & C. R. Co. 104 N. C. 491, 10 S. E. 669.

The laws of North Carolina have abolished assumption of risk as a defense, and Congress, in the act under consideration, having left open this part of the field, the state law governs, and assumption of risk can in no case be pleaded in an action brought under the act in the state courts of North Carolina.

Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819; Smith v. Alabama, 124 U. S. 468, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 2 Inters. Com. Rep. 238, 32 L. ed. 352, 9 Sup. Ct. Rep. 28; Southern R. Co. v. King, 217 U. S. 524, 54 L. ed. 868, 30 Sup. Ct. Rep. 594.

Mr. Justice Pitney delivered the opinion of the court:

Horton sued the Seaboard Air Line Railway in the superior court of Wake county, North Carolina, to recover damages for personal injuries sustained by him while in defendant's employ as a locomotive engineer. The action was brought under the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322), as amended April 5, 1910 (36 Stat. at L. 291, chap. 143, U. S. Comp. Stat. Supp. 1911, p. 1324). In the complaint it was sufficiently averred that defendant was a corporation operating a line of railway as a common carrier in interstate commerce, and that plaintiff, at the time he was injured, was employed by defendant in such commerce. These facts were not in issue at the trial.

As to the circumstances of the occurrence of the injury, plaintiff's evidence tended to show that on July 27, 1910, defendant's locomotive engine No. 752 was placed in his charge; that it was equipped with a Buckner water gauge, a device attached to the boiler head for the purpose of showing the level of the water in the boiler, and consisting of a brass frame or case enclosing a thin glass tube which communicated

with the boiler above and below in such manner that the tube received water and steam direct from the boiler and under the full boiler pressure. In order to shield the engineer from injury in case of the bursting of the tube, a piece of ordinary glass, 2 or 3 inches wide, 8 or 9 inches long, and about half an inch thick, known as a guard glass, should have been provided, this being a part of the regular equipment of the Buckner water gauge. There were slots for receiving the guard glass and holding it in position in the front of the water tube. At each end of the tube, valves were provided for the purpose of disconnecting it from the boiler. As an alternative but probably less convenient method of determining the level of the water in the boiler, ordinary gauge cocks were provided.

Plaintiff was an experienced locomotive engineer, and, according to his own testimony, was fully aware of the function of the guard glass and of its importance to his safety. He testified that when he took the engine out on his first trip on July 27th, he observed that the guard glass was missing; that on his return upon the following day he reported this to defendant's roundhouse foreman, to whom reports of such defects were properly made, and asked him for a guard glass; that the foreman stated there were none in stock at that place, and it would be necessary to send to a distance to get one; that he would do this, and that plaintiff should meanwhile run the engine without one; and that, having ineffectually endeavored to get a guard glass from another source, plaintiff proceeded to drive the engine with the use of the unguarded water gauge until August 4th, when the glass exploded and flying fragments struck him in the face, causing the injuries upon which his claim for damages was based.

Defendant's evidence tended to show that when the engine was placed in plaintiff's charge on July 27th the water glass was in good condition, with a guard glass in place; that the gauge cocks were likewise in good working order; that it was the duty of a locomotive engineer to inspect his engine and know that it was in proper order before taking it out, and if not in proper order to make a written report to the roundhouse foreman, specifying the defects; that if anything should happen to the water glass it was the engineer's duty to close the valves so as to exclude the steam pressure from it, and run the engine with the gauge cocks, and that these were sufficient for the purpose; and that plaintiff made repeated reports in writing between July 27 and the time of his injury, mentioning other things needed about his engine, but making no mention of the water gauge or the guard glass. L.R.A.1915C.

The fireman testified specifically that when plaintiff took charge of the engine on the morning of the 27th the water glass had the shield or guard in front of it, but that it was smoky, so that one could not see through it; that he, the fireman, in the presence of plaintiff, removed the guard glass in order to clean it; and that in plaintiff's presence it became broken. The roundhouse foreman specifically denied plaintiff's testimony about the complaint and the promise of reparation.

Under instructions presently to be noticed, the case was submitted to the jury upon three issues, to which responses were made as follows:

(1) Was plaintiff injured by defendant's negligence? Answer, Yes.

(2) If so, did plaintiff assume the risk of injury? Answer, No.

(3) Did plaintiff by his own negligence contribute to his injury? Answer, Yes.

The jury also assessed substantial damages, for which judgment was rendered by the trial court, and upon appeal the supreme court affirmed the judgment (162 N. C. 424, 78 S. E. 494). The case comes here, under § 237, Judicial Code [36 Stat. at L. 1156, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 227], upon questions arising out of instructions given and refused to be given to the jury as to the nature of the duty of the employer and the rules respecting assumption of risk and contributory negligence under the Federal employers' liability act.

There is a motion to dismiss, upon the ground that no return day is specified in the writ of error or citation. *Carroll v. Dorsey* (1857) 20 How. 204, 207, 15 L. ed. 803, 804, and *Sea v. Connecticut Mut. L. Ins. Co.* (1880) 154 U. S. 659, and 25 L. ed. 882, 14 Sup. Ct. Rep. 1191, are relied upon. These decisions were based upon § 22 of the judiciary act of September 24, 1789, 1 Stat. at L. 84, chap. 20, which was held to require a certain return day to be specified in the writ of error. Accordingly, general rule 33, promulgated December terms, 1867 (6 Wall. vi.), afterwards found as clause 5 of rule 8 of the revised rules promulgated January 7, 1884 (108 U. S. 577, 20 L. ed. 902, 3 Sup. Ct. Rep. vii.), required that the writ of error and citation should be returnable on the first day of the term in cases where final judgment was rendered more than thirty days before that day, and on the third Monday of the term in cases where judgment was rendered less than thirty days before the first day. *Blatchf. U. S. Ct. Rules* 77. But under the authority conferred by § 917, Rev. Stat. (U. S. Comp. Stat. 1901, p. 684), the court, on January 26, 1891, amended clause 5 of

rule 8 so as to read: "All appeals, writs of error, and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day" (137 U. S. 710, 34 L. ed. 1122, 11 Sup. Ct. Rep. iii.). And in the present rule as promulgated December 22, 1911 (222 U. S. p. 14, Appx. 56 L. ed. 1297, 32 Sup. Ct. Rep. vii.), the same language is retained, with an exception extending the time to sixty days in writs of error and appeals from the western states, and Alaska, Hawaii, and Porto Rico, and to 120 days as to the Philippine Islands. An extension of the time in favor of the more distant states and territories was first introduced as clause 3 of original rule 63, promulgated at December term, 1853 (16 How. ix. 14 L. ed. 818), and has been continued, with amendments, until the present time (21 How. viii.; 2 Wall. viii.; 108 U. S. 578, 20 L. ed. 903, 3 Sup. Ct. Rep. viii.). It has, however, no bearing upon the form of the writ or citation, aside from the limit of time that may be allowed between date and return.

The present writ of error and citation were dated the 4th day of August, 1913, and in terms were returnable "within thirty days from the date hereof." This form has been usually employed, with the approval of the court, since the amendment of the rule made in 1891, as mentioned. It is a substantial compliance with the present rule, and tends to avoid errors that otherwise might be made in inserting a day certain as a return day.

This motion must therefore be denied.

A second motion to dismiss, based upon grounds still more technical, and which need not be particularly stated, will likewise be denied.

There is a further motion to dismiss for want of jurisdiction, upon the ground that no right, privilege, or immunity under the employers' liability act was especially set up or claimed in the state court of last resort and by that court denied. But since that court sustained the trial court in overruling certain contentions made by plaintiff in error asserting a construction of the act, which, if accepted to, would presumably have produced a verdict in its favor, and consequent immunity from the action, this motion must be denied, upon the authority of *St. Louis, I. M. & S. R. Co. v. McWhirter*, 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 858.

Coming now to the merits, we need consider only certain assignments of error that are based upon exceptions to the action of the trial judge in giving and refusing to

give instructions relating to the issues of defendant's negligence, the assumption of risk, and contributory negligence.

At the outset we observe that the judge evidently misapprehended the effect of the Federal act upon state legislation. Thus, the jury was told that plaintiff had brought the action under the Federal statute; "And where Congress enacts a law within the limits of its power, that law should be enforced uniformly throughout the entire United States. If it is in conflict with the state law, the state law is superseded. But where there is no conflict expressed by the statute of the United States, then the rule of the state prevails." This, of course, in the absence of a specific statement of the applicable rule of the state law, might be treated as academic. But the theory was carried into the specific instructions, to the extent that upon the questions of the employer's duty and the assumption of risk by the employee, the charge was modeled rather upon the North Carolina statute than upon the act of Congress. By § 2646, N. C. Revisal of 1905, "Any servant or employee of any railroad company operating in this state who shall suffer injury to his person, or the personal representative of any such servant or employee who shall have suffered death in the course of his services or employment with such company by the negligence, carelessness, or incompetence of any other servant, employee, or agent of the company, or by any defect in the machinery, ways, or appliances of the company, shall be entitled to maintain an action against such company. Any contract or agreement, expressed or implied, made by any employee of such company to waive the benefit of this section, shall be null and void."

Upon the issue of defendant's negligence, the trial court charged the jury as follows: "It is the duty of the defendant to provide a reasonably safe place for the plaintiff to work, and to furnish him with reasonably safe appliances with which to do his work." And in various other forms the notion was expressed that the duty of defendant was absolute with respect to the safety of the place of work and of the appliances for the work. Thus: "If you find from the evidence that it [the locomotive engine] was turned over to him without the guard, and if you further find from the evidence that the guard was a proper safety provision for the use of that gauge, and that it was unsafe without it, then the defendant did not furnish him a safe place and a safe appliance to do his work, and if it remained in that condition it was continuing negligence on the part of the defendant, and if he was injured in consequence thereof, if

you so find by the greater weight of the evidence, you should answer the first issue, 'Yes.'"

In these instructions the trial judge evidently adopted the same measure of responsibility respecting the character and safe condition of the place of work, and the appliances for the doing of the work, that is prescribed by the local statute. But it is settled that since Congress, by the act of 1908, took possession of the field of the employer's liability to employees in interstate transportation by rail, all state laws upon the subject are superseded. *Second Employers' Liability Cases* (*Mondou v. New York, N. H. & H. R. Co.*) 223 U. S. 1, 55, 56 L. ed. 327, 348, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875.

The act is quoted in full in that case at p. 6. By its 1st section a right of action is conferred (under conditions specified) for injury or death of the employee "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

This clause has two branches; the one covering the negligence of any of the officers, agents, or employees of the carrier, which has the effect of abolishing in this class of cases the common-law rule that exempted the employer from responsibility for the negligence of a fellow employee of the plaintiff; and the other relating to defects and insufficiencies in the cars, engines, appliances, etc. But, plainly, with respect to the latter as well as the former ground of liability, it was the intention of Congress to base the action upon negligence only, and to exclude responsibility of the carrier to its employees for defects and insufficiencies not attributable to negligence. The common-law rule is that an employer is not a guarantor of the safety of the place of work or of the machinery, and appliances of the work; the extent of its duty to its employees is to see that ordinary care and prudence are exercised, to the end that the place in which the work is to be performed and the tools and appliances of the work may be safe for the workmen. *Hough v. Texas & P. R. Co.* 100 U. S. 213, 217, 25 L. ed. 612, 615; *Washington & G. R. Co. v. McDade*, 135 U. S. 554, 570, 34 L. ed. 235, 241, 10 Sup. Ct. Rep. 1044; *Choctaw, O. & G. R. Co. v. McDade*, 191 U. S. 64, 67, 48 L. ed. 96, 100, 24 Sup. Ct. Rep. 24, 15 Am. Neg. Rep. 230. To hold that under the statute the railroad company is liable for the injury or death of an employee resulting from any defect or insufficiency in its

cars, engines, appliances, etc., however caused, is to take from the act the words "due to its negligence." The plain effect of these words is to condition the liability upon negligence; and had there been doubt before as to the common-law rule, certainly the act now limits the responsibility of the company as indicated. The instructions above quoted imposed upon the employer an absolute responsibility for the safe condition of the appliances of the work, instead of limiting the responsibility to the exercise of reasonable care. In effect, the jury was instructed that the absence of the guard glass was conclusive evidence of defendant's negligence. In this there was error.

The questions more particularly discussed, however, and upon which the decision seems to have turned in the supreme court of North Carolina, pertain to the issues of assumption of risk and contributory negligence. By § 3 of the act of 1908 it is declared that "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." And by § 4, "Such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

By the phrase "any statute enacted for the safety of employees," Congress evidently intended Federal statutes, such as the safety appliance acts (27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174; 32 Stat. at L. 943, chap. 976, U. S. Comp. Stat. Supp. 1911, p. 1314; 36 Stat. at L. 298, chap. 160, U. S. Comp. Stat. Supp. 1911, p. 1327; id. 913, chap. 103, U. S. Comp. Stat. Supp. 1911, p. 1333), and the hours of service act (34 Stat. at L. 1415, chap. 2939, U. S. Comp. Stat. Supp. 1911, p. 1321). For it is not to be conceived that, in enacting a general law for establishing and enforcing the responsibility of common carriers by railroad to their employees in interstate commerce, Congress intended to permit the legislatures of the several states to determine the effect of contributory negligence and assumption of risk, by enacting statutes for the safety of employees, since this would in effect relegate

to state control two of the essential factors that determine the responsibility of the employer.

It seems to us that § 4, in eliminating the defense of assumption of risk in the cases indicated, quite plainly evidences the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action. And, taking §§ 3 and 4 together, there is no doubt that Congress recognized the distinction between contributory negligence and assumption of risk; for, while it is declared that neither of these shall avail the carrier in cases where the violation of a statute has contributed to the injury or death of the employee, there is, with respect to cases not in this category, a limitation upon the effect that is to be given to contributory negligence, while no corresponding limitation is imposed upon the defense of assumption of risk—perhaps none was deemed feasible.

The distinction, although simple, is sometimes overlooked. Contributory negligence involves the notion of some fault or breach of duty on the part of the employee; and since it is ordinarily his duty to take some precaution for his own safety when engaged in a hazardous occupation, contributory negligence is sometimes defined as a failure to use such care for his safety as ordinarily prudent employees in similar circumstances would use. On the other hand, the assumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employee. The risks may be present, notwithstanding the exercise of all reasonable care on his part. Some employments are necessarily fraught with danger to the workman,—danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them. These distinctions have been recognized and applied in numerous decisions of this court. *Choctaw, O. & G. R. Co. v. McDade*, 191 U. S. 64, 68, 48 L. ed. 96, L.R.A.1915C.

100, 24 Sup. Ct. Rep. 24, 15 Am. Neg. Rep. 230; *Schlemmer v. Buffalo, R. & P. R. Co.* 220 U. S. 590, 596, 55 L. ed. 596, 800, 31 Sup. Ct. Rep. 561; *Texas & P. R. Co. v. Harvey*, 228 U. S. 319, 321, 57 L. ed. 852, 855, 33 Sup. Ct. Rep. 518; *Gila Valley, G. & N. R. Co. v. Hall*, 232 U. S. 94, 102, 58 L. ed. 521, 524, 34 Sup. Ct. Rep. 229; and cases cited.

When the employee does know of the defect, and appreciates the risk that is attributable to it, then if he continues in the employment without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employee assumes the risk, even though it arise out of the master's breach of duty. If, however, there be a promise of reparation, then during such time as may be reasonably required for its performance, or until the particular time specified for its performance, the employee, relying upon the promise, does not assume the risk unless at least the danger be so imminent that no ordinarily prudent man under the circumstances would rely upon such promise. *Hough v. Texas & P. R. Co.* 100 U. S. 213, 224, 25 L. ed. 612, 617; *Southwestern Brewery & Ice Co. v. Schmidt*, 226 U. S. 162, 168, 57 L. ed. 170, 173, 33 Sup. Ct. Rep. 68. This branch of the law of master and servant seems to be traceable to *Holmes v. Clarke*, 6 Hurlst. & N. 349, 30 L. J. Exch. N. S. 135, 7 Jur. N. S. 397, 3 L. T. N. S. 675, 9 Week. Rep. 419; *Clarke v. Holmes*, 7 Hurlst. & N. 937, 9 L. T. N. S. 178, 10 Week. Rep. 405.

In the light of these principles, the rulings of the trial court in the case at bar must be considered.

Defendant specifically requested an instruction that plaintiff's right to recover damages was to be determined by the provisions of the Federal act, and that "if you find by a preponderance of evidence that the water glass on the engine on which plaintiff was employed was not provided with a guard glass, and the condition of the glass was open and obvious and was fully known to plaintiff, and he continued to use such water glass with such knowledge and without objection, and that he knew the risk incident thereto, then the court charges you that the plaintiff voluntarily assumed the risk incident to such use, and you will answer the second issue 'Yes.'" The court gave this instruction as applicable to the issue of contributory negligence, and instead of the words, "then the court charges you that the plaintiff voluntarily assumed the risk incident to such use, and you will answer the second issue 'Yes,'" used the words, "then the court charges you that the plaintiff was guilty of contributory negli-

gence, and you will answer the third issue 'Yea.' To the refusal to give the instruction as requested, and the modification of it, defendant excepted.

The trial court evidently deemed, as did the state supreme court, that the topic of assumption of risk, with reference to the circumstances of the case, was sufficiently and properly covered by an instruction actually given as follows: after stating in general terms that "a man assumes the risk when he takes employment, incident to the class of work which he is to perform," but that "he does not assume the risk incident to the negligence of his employer in providing machinery and appliances with which he has to work," the court proceeded as follows:

"On the other hand, the employer has the right to assume that his employee will go about his work in a reasonably safe way, and give due regard to the machinery and appliances which are in his hands and under his control, and if you should find from the evidence by its greater weight (because the burden in this instance is on the defendant), that the plaintiff knew of the absence of the guard or shield to the water gauge and failed to give notice to the defendant or to the agent whose duty it was to furnish the water gauge and appliance, and he continued to use it without giving that notice, *it being furnished to him in a safe condition*, then he assumed the risk incident to his work in the engine with the glass water gauge in that condition, although he might have handled his engine in every other respect with perfect care." [Italics ours.]

It will be observed that by this instruction the application of the rule of assumption of risk was conditioned upon the jury finding that the water gauge, when furnished to plaintiff, was in a safe condition. Here again the court appears to have followed the local statute, rather than the act of Congress; for § 2646, N. C. Revisal of 1905, already quoted, has been held by the state supreme court to abolish assumption of risk as a bar to an action by a railroad employee for an injury attributable to defective appliances furnished by the employer. *Coley v. North Carolina R. Co.* 128 N. C. 534, 57 L.R.A. 817, 39 S. E. 43. The trial court, while recognizing that the act of Congress applied so far as its terms extended, and that by its terms the employee is not to be held to have assumed the risk in any case where the violation by the carrier of a statute enacted for the safety of employees contributed to the injury, at the same time held that, since no statute had been enacted covering such an appliance as the glass water gauge, the rights of plaintiff were such as he would have under the L.R.A.1915C.

state law. An instruction to the jury to this effect preceded the instructions we have just quoted.

It is true that such an appliance as the water gauge and guard glass in question is not covered by the provisions of the safety appliance act, or any other law passed by Congress for the safety of employees, in force at the time this action arose. But the necessary result of this is not to leave the employer responsible for the consequences of any defect in such an appliance, excluding the common-law rule as to assumption of risk, but to leave the matter in this respect open to the ordinary application of the common-law rule. The adoption of the opposite view would in effect leave the several state laws, and not the act of Congress, to control the subject-matter.

By the instruction as given, the application of the rule of assumed risk was confined to the single hypothesis that the jury should find the guard glass was in position when the engine was delivered to plaintiff on the morning of July 27th this, as already pointed out, was one of the questions in dispute; plaintiff having testified that the guard glass was missing at that time, while his fireman testified (and in this was corroborated by circumstantial evidence) that it was in place at that time, and was subsequently broken. But by the common law, with respect to the assumption by the employee of the risk of injuries attributable to defects due to the employer's negligence, when known and appreciated by the employee, and not made the subject of objection or complaint by him, it is quite immaterial whether the defect existed when the appliance was first placed in his charge, or subsequently arose. Hence, if the guard glass was missing when plaintiff first took the engine, as he testified, and he, knowing of its absence and the consequent risk to himself, continued to use the water gauge without giving notice of the defect to the defendant or its representative, he assumed the risk.

Defendant was entitled to have the requested instruction given respecting assumption of risk, and as the charge actually given did not cover the same ground, there was error.

Its harmful effect is conspicuously evident when we note that the jury, while finding that plaintiff did not assume the risk, at the same time found that he did by his own negligence contribute to his injury. Presumably, if instructed in the manner requested by defendant, the jury would have found that the risk was assumed, and this would have entitled defendant to a judgment in its favor, instead of a mere mitigation of the damages, which was the conse-

quence of a finding of contributory negligence.

The judgment of the Supreme Court of North Carolina must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

NEW YORK, NEW HAVEN, & HARTFORD RAILROAD COMPANY, Plff. in Err.,

v.

JOSEPH VIZVARL

(126 C. C. A. 632, 210 Fed. 118.)

Pleading — assumption of risk — benefit of evidence.

1. Defendant in an action by a servant to recover damages for personal injuries may have the benefit of evidence tending to show assumption of risk which is given by plaintiff, although such defense was not pleaded.

Master and servant — assumption of risk — Federal employers' liability act.

2. The Federal employers' liability act does not abrogate the defense of assumption of risk of neglect of common-law duties by the master.

Same — simple tool — chisel.

3. A steel chisel for cutting iron rails, pieces of which are likely to fly off and injure employees if it is not properly tempered, and in the manufacture of which it is necessary carefully to test several out of every lot turned out, is not a simple tool in the furnishing of which the master is relieved from the use of ordinary care to furnish a reasonably safe one.

Trial — assumption of risk — matter of law.

4. It cannot be said as matter of law that a railroad employee assumes the risk of injury from using a chisel to cut rails, in continuing to use it after complaining of its defective character, upon the assurance of the foreman that it is good, and that he can try it or go home.

(Ward, Circuit Judge, dissents.)

(December 18, 1913.)

ERROR to the District Court of the United States for the Southern District of New York to review a judgment in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

Note. — As to the constitutionality, application, and effect of the Federal employers' liability act, see note, post, 47. L.R.A.1915C.

Statement by Rogers, Circuit Judge:

This action is brought by an alien, a subject of the Emperor of Austria, against the defendant corporation, a citizen of the state of Connecticut, engaged in interstate commerce and doing business in the state of New York. At the time of the commencement of the action the plaintiff was a resident of the state of New York. The action is to recover damages for an injury suffered by the plaintiff while employed by the defendant as a "section hand" or laborer on the railroad. The injury occurred while the plaintiff was striking a steel chisel with a sledge hammer for the purpose of cutting a steel rail. The chisel and hammer were furnished by the section foreman in charge of the plaintiff. It is claimed that the chisel at the time, and for a long time prior thereto, was in a defective, unsafe, insecure, and dangerous condition. The plaintiff asserts that the chisel was so beaten, used up, and mushroomed that scales and splinters formed thereon, and that when the chisel was struck by the hammer particles of steel were liable to break off and fly about with force and velocity, and that the particles, because of their shape and size, could not be detected by the naked eye. He alleges that the danger was not fully appreciated by him. While the plaintiff was engaged at his work and was striking the head of the chisel with the hammer, the chisel being held on the rail by another of the defendant's employees, one of the scales, he claims, flew off the chisel and struck him in his right eye, destroying the sight. For the permanent injury thus suffered, and for his physical and mental pain and loss of wages, he asked damages in the sum of \$15,000.

Argued before Coxe, Ward, and Rogers, Circuit Judges.

Mr. Frederick J. Moses, with Mr. Charles M. Sheafe, Jr., for plaintiff in error:

The defendant was not negligent.

Wyman v. Lehigh Valley R. Co. 86 C. C. A. 161, 158 Fed. 957; Washington & G. R. Co. v. McDade, 135 U. S. 554, 34 L. ed. 235, 10 Sup. Ct. Rep. 1044; Burns v. Old Sterling Iron & Min. Co. 188 N. Y. 175, 80 N. E. 927; New York, N. H. & H. R. Co. v. Dailey, 102 C. C. A. 660, 179 Fed. 289; McCain v. Chicago, B. & Q. R. Co. 22 C. C. A. 99, 40 U. S. App. 181, 76 Fed. 125; Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469-475, 24 L. ed. 256-259; Chicago, M. & St. P. R. Co. v. Elliott, 20 L.R.A. 582, 5 C. C. A. 347, 12 U. S. App. 381, 55 Fed. 949, 7 Am. Neg. Cas. 478.

Plaintiff assumed the risk.

Kenney v. Meddaugh, 55 C. C. A. 115, 118 Fed. 209; Dresser, Employers' Liability, §

112; *Musser-Sauntry Land, Logging & Mfg. Co. v. Brown*, 61 C. C. A. 207, 126 Fed. 141; *St. Louis Cordage Co. v. Miller*, 63 L.R.A. 551, 61 C. C. A. 477, 126 Fed. 495, 15 Am. Neg. Rep. 476; *James v. Cranford*, 123 App. Div. 558, 108 N. Y. Supp. 142; *Marsh v. Chickering*, 101 N. Y. 396, 5 N. E. 56; *American Dredging Co. v. Walls*, 28 C. C. A. 441, 55 U. S. App. 460, 84 Fed. 428; *King v. Morgan*, 48 C. C. A. 507, 100 Fed. 446, 10 Am. Neg. Rep. 200; *Hall v. United States Canning Co.* 76 App. Div. 475, 78 N. Y. Supp. 617; *Hart v. Clinton*, 115 App. Div. 761, 100 N. Y. Supp. 1092; *Smith v. Green Fuel Economizer Co.* 123 App. Div. 672, 108 N. Y. Supp. 45; *Kelly v. National Starch Co.* 142 App. Div. 286, 126 N. Y. Supp. 979; *Miller v. Erie R. Co.* 21 App. Div. 45, 47 N. Y. Supp. 285; *Garrison v. McCullough*, 28 App. Div. 467, 51 N. Y. Supp. 128; *D'Arcy v. Long Island R. Co.* 34 App. Div. 275, 54 N. Y. Supp. 553; *Heiser v. Cincinnati Abattoir Co.* 141 App. Div. 400, 126 N. Y. Supp. 265; *McMillan v. Minetto Shade Cloth Co.* 134 App. Div. 28, 117 N. Y. Supp. 1081; *Cunningham v. Peirce*, 112 App. Div. 65, 98 N. Y. Supp. 60; *Spencer v. Worthington*, 44 App. Div. 496, 60 N. Y. Supp. 873; *Thorn v. New York City Ice Co.* 46 Hun, 497; *Gallo v. Dunn*, 71 Misc. 132, 127 N. Y. Supp. 1089; *Kellogg v. New York Edison Co.* 120 App. Div. 410, 105 N. Y. Supp. 398.

The fact the plaintiff continued to use the tool which he considered dangerous, rather than lose his job, does not relieve him from assumed risk.

Reed v. Stockmeyer, 20 C. C. A. 381, 34 U. S. App. 727, 74 Fed. 186; *Southern Kansas R. Co. v. Moore*, 49 Kan. 616, 31 Pac. 138; *Sweeney v. Berlin & J. Envelope Co.* 101 N. Y. 520, 54 Am. Rep. 722, 5 N. E. 358; *Wescott v. New York & N. E. R. Co.* 153 Mass. 460, 27 N. E. 10; *Haley v. Case*, 142 Mass. 316, 7 N. E. 877; *Lynch v. Sagamore Mfg. Co.* 143 Mass. 206, 9 N. E. 728; *Atchison, T. & S. F. R. Co. v. Schroeder*, 47 Kan. 315, 27 Pac. 965; *Worlds v. Georgia R. Co.* 99 Ga. 283, 25 S. E. 646; *Dougherty v. West Superior Iron & Steel Co.* 88 Wis. 343, 60 N. W. 274; *Leary v. Boston & A. R. Co.* 139 Mass. 580, 52 Am. Rep. 733, 2 N. E. 115; *Galveston, H. & S. A. R. Co. v. Drew*, 59 Tex. 10, 46 Am. Rep. 261; *Cummings v. Collins*, 61 Mo. 521; *Coyne v. Union P. R. Co.* 133 U. S. 370, 33 L. ed. 651, 10 Sup. Ct. Rep. 382; *Southern P. Co. v. Seley*, 152 U. S. 145, 38 L. ed. 391, 14 Sup. Ct. Rep. 530; *Kilpatrick v. Choctaw, O. & G. R. Co.* 195 U. S. 624, 49 L. ed. 349, 25 Sup. Ct. Rep. 789.
L.R.A.1915C.

Messrs. Herbert C. Smyth and Roderic Wellman, with *Mr. Rufus M. Overlander*, for defendant in error:

The question of defendant's negligence was properly left to the jury.

Maza v. Delaney Forge & Iron Co. 140 App. Div. 937, 125 N. Y. Supp. 846; *Paul v. Consolidated Fireworks Co.* 141 App. Div. 776, 126 N. Y. Supp. 768; *Cleveland, C. C. & St. L. R. Co. v. Clark*, 51 Ind. App. 392, 97 N. E. 822.

Under the Federal employers' liability act plaintiff did not assume the risk of the defective chisel.

Oregon Short Line & U. N. R. Co. v. Tracy, 14 C. C. A. 199, 29 U. S. App. 529, 66 Fed. 931; *Dowd v. New York, O. & W. R. Co.* 170 N. Y. 459, 63 N. E. 541; *Wright v. Yazoo & M. Valley R. Co.* 197 Fed. 94; *Malloy v. Northern P. R. Co.* 151 Fed. 1019; *Philadelphia, B. & W. R. Co. v. Tucker*, 35 App. D. C. 123, post, 39, affirmed in 220 U. S. 608, 55 L. ed. 607, 31 Sup. Ct. Rep. 725; *Wynkoop v. Ludlow Valve Mfg. Co.* 153 App. Div. 507, 138 N. Y. Supp. 482.

Under the common-law rule plaintiff cannot be said to have assumed the risk as a matter of law.

Hawley v. Northern C. R. Co. 82 N. Y. 370; *Harrison v. Denver & R. G. R. Co.* 7 Utah, 523, 27 Pac. 728; *Illinois C. R. Co. v. Langan*, 116 Ky. 318, 76 S. W. 32; *Miller v. Union P. R. Co.* 5 McCrary, 300, 17 Fed. 67; *Allen v. Gilman*, 127 Fed. 609; *Herr v. Green*, 156 Iowa, 532, 136 N. W. 511, 137 N. W. 917; *Root v. Quincy, O. & K. C. R. Co.* 237 Mo. 640, 141 S. W. 610; *Kraft v. Neunkirchen*, 119 Ill. App. 369; *Haas v. Balch*, 6 C. C. A. 201, 12 U. S. App. 534, 56 Fed. 984; *Smith v. King*, 74 App. Div. 1, 77 N. Y. Supp. 3; 1 *Shearm. & Redf. Neg.* 6th ed. p. 569; 2 *Bailey, Personal Injuries*, 2d ed. p. 1257.

Rogers, Circuit Judge, delivered the opinion of the court:

This cause comes here on writ of error to the district court of the United States for the southern district of New York to review a judgment entered in favor of the plaintiff below for the sum of \$5,626.61. The judgment is based upon the verdict of a jury in the amount of \$5,500 with interest thereon from the 7th day of November, 1912, to the date of the judgment, together with the costs. This judgment was awarded to the plaintiff below for injuries received by him while in the employ of the defendant below while working for it in repairs upon its tracks near Bridgeport, Connecticut.

The plaintiff below alleged in his complaint that there was no negligence or want of care on his part contributing to the in-

jury. The defendant in its answer alleged that, if the plaintiff sustained the injury claimed, it resulted to him solely by reason of his contributory negligence and lack of care. The defendant did not plead assumption of risk, but it relied upon it at the trial, and the court left it to the jury to say whether the plaintiff assumed the risk of the use of the chisel. In considering the necessity and sufficiency of the pleas of assumed risk, it is necessary to observe that a difference exists between the assumption of the "ordinary" risks of the employment and the assumption of "extraordinary" risks. If the risk is of the former kind, it is not incumbent on the defendant to plead it; but, if the risk is of the latter kind, the rule in some jurisdictions is that, if the defendant desires to rely upon it as a defense, he must specially plead it. See *Labatt on Master & Servant*, vol. 4, § 1636; 3 *Bailey, Personal Injuries*, 2d ed. § 831. But in this court the question is controlled by the rules which obtain in the state in which the action is tried. *Canadian P. R. Co. v. Clark*, 20 C. C. A. 447, 38 U. S. App. 362, 73 Fed. 76, 81, 74 Fed. 302.

Whether in New York the defense needs to be specially pleaded, it is not necessary to inquire, inasmuch as where the evidence going to prove assumption of risk is given by the plaintiff,—as it was in the case at bar,—it is the rule in New York, and perhaps in all jurisdictions, that the defendant may have the benefit of it. *White v. Lewiston & Y. F. R. Co.* 94 App. Div. 4, 87 N. Y. Supp. 901, 903.

The action is based on the employers' liability act passed by Congress on April 22, 1908. The act provides that the employee "shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." 35 Stat. at L. 66, pt. 1, chap. 149, § 4, Comp. Stat. 1913, § 8660. In *Central Vermont R. Co. v. Bethune*, 124 C. C. A. 528, 206 Fed. 868, the circuit court for the first circuit held that the section cited limited the abrogation of the doctrine of assumed risk to instances where the violation of an express statutory duty by the carrier was charged. The court said: "This section by its letter is clearly limited to a violation of a statute. In the case at bar there was no violation of any statute. . . . In order that the provision might apply here, instead of using the words 'violation of any statute,' it should have been broadened out to cover all the obligations of a carrier required either by the common law or by statute. . . ." L.R.A.1915C.

In this construction of the statute we concur. And we do not know of any statutory provision for the safety of employees which the defendant violated in furnishing the plaintiff with the chisel which occasioned the injury of which he has complained. Whatever the obligation may have been respecting the chisel, it rested upon the common law, and was not derived from statute. The employers' liability act makes the doctrine of assumption of risk inapplicable in certain cases, but is without application to the facts of this case. The case is to be decided on the principles of the common law.

The first question to be considered is whether the defendant was guilty of a breach of duty to the plaintiff. A master is in default as respects his servant unless the appliances furnished are such as would commend themselves to a reasonably prudent man. His duty is to furnish such instrumentalities as are reasonably safe and suitable. The Supreme Court of the United States in *Hough v. Texas & P. R. Co.* 100 U. S. 213, 218, 25 L. ed. 612, 615, said: "The corporation is not to be held as guaranteeing or warranting the absolute safety under all circumstances, or the perfection in all of its parts, of the machinery or apparatus which may be provided for the use of employees. Its duty in that respect to its employees is discharged when, but only when, its agents whose business it is to supply such instrumentalities exercise due care as well in their purchase originally, as in keeping and maintaining them in such condition as to be reasonably and adequately safe for use by employees."

The same court in *Union P. R. Co. v. Daniels* (*Union P. R. Co. v. Snyder*) 152 U. S. 684, 690, 38 L. ed. 597, 601, 14 Sup. Ct. Rep. 756, 758, found no error in an instruction to the jury which said: "The law is well settled, both here and in England, our mother country, that the employer should adopt such suitable implements and means to carry on the business as are proper for that purpose; and where there are injuries to its servants or its workmen, and they happen by reason of improper or defective machinery or appliances in the prosecution or carrying on the work which they are employed to render, the employer is liable, provided he knew, or might have known, by the exercise of reasonable skill, that the apparatus was unsafe and defective."

Conceding this to be the law, the defendant claims that the appliance furnished by it to the plaintiff is not governed by the law as stated, because the chisel was a "simple" tool and that the rule governing "simple" tools constitutes an exception to that which applies to tools in general. The

courts are not in all respects in accord as to the master's duty respecting the "simple" tool doctrine. See *Labatt on Master and Servant*, vol. 3, § 924A.

It is undoubtedly true that in some cases the courts have gone to the length of saying that the rule requiring the master to use ordinary care in furnishing reasonably safe appliances does not apply where the injury was caused by a simple tool. Conceding that to be the case, we do not think that a steel chisel used for cutting steel rails is a "simple" tool within the meaning of the rule. The testimony of one of the defendant's witnesses made it evident that such a chisel would be safe or unsafe according to the temper of the steel. The witness was asked: "If the steel is so hard that it will not mushroom after the striking what will be the effect on the chisel?" He answered: "If you make it that way and strike it with a sledge, it is liable to go through some person,—the whole head is liable to burst off it." He also testified: "A very hard steel is brittle. And the striking head is made softer, so it will mushroom instead of splitting. I would not care to work around one that would not mushroom, because something would happen."

And the manufacturer feels it necessary to test his product—from three to five or six out of every lot turned out,—by striking the chisel on the head with a 12 pound sledge 5,000 or 6,000 blows. It will not do to assert that chisels of this dangerous character fall within the "simple" tool rule, and say that an employer putting such instruments into the hands of a workman is under no obligations to observe reasonable care in seeing that they are suitable for the purposes for which they are to be used.

The defendant, however, asserts that the injury for which this action was brought was one of the risks which the plaintiff voluntarily assumed, and that therefore the defendant is not liable even though it should be found to have been guilty of negligence. We think, for reasons already mentioned, that while the defendant did not set up this defense in its answer, it can have the benefit of the defense so far as the plaintiff's evidence discloses an assumption of the risk.

The plaintiff testified that he objected to the chisel, and that his conversation with the foreman was as follows: "I says, Mr. Collins, this is no good chisel. And Mr. Collins says that chisel is good; to try it. Mr. Collins says, this chisel is pretty good, you try it; if you don't want to try it, you go home." On cross-examination he testified: "I was complaining to Collins because the head (of the chisel) was not good. And that is what I had in mind when I said to L.R.A.1915C.

Collins these chisels are no good." "I was not sure that a piece would come off. At the same time, I thought some time it might,—a piece fly and kill somebody." Again he testified: "And he told me I would have to use that chisel or go home and stop work. He said if I don't want to work with that chisel, I can go and start to go home. And I thought he meant I would lose my job if I quit work and did not work with that chisel. I was afraid of losing my job. That is why I did so." The testimony showed that the plaintiff had been in the employ of the defendant for five and one-half years.

A servant on accepting employment assumes all the ordinary and usual risks and perils incident thereto. The "ordinary" risks are those which are a part of the natural and ordinary method of conducting the business, and which are often recurring. The "usual" risks are those which are common, frequent, and customary. Every risk which is not caused by a negligent act or omission on the part of the employer is an ordinary risk. *Fortin v. Manville Co. (C. C.)* 128 Fed. 642; *St. Louis Cordage Co. v. Miller*, 63 L.R.A. 551, 61 C. C. A. 477, 126 Fed. 495, 15 Am. Neg. Rep. 476; *Patton v. Southern R. Co.* 27 C. C. A. 287, 42 U. S. App. 567, 82 Fed. 979.

But a servant does not assume the extraordinary and unusual risks of the employment, and he does not assume the risks which would not have existed if the employer had fulfilled his contractual duties. But only those risks are assumed which the employment involves after the employer has done everything that he is bound to do for the purpose of securing the safety of his servants. 3 *Labatt, Mast. & S.* §§ 893, 894; *Hough v. Texas & P. R. Co.* 100 U. S. 213, 217, 25 L. ed. 612, 615; *Pantzar v. Tilly Foster Iron Min. Co.* 99 N. Y. 376, 2 N. E. 24, 16 Am. Neg. Cas. 832; *McGovern v. Central Vermont R. Co.* 123 N. Y. 280, 25 N. E. 373; *Illinois Steel Co. v. Bauman*, 178 Ill. 351, 69 Am. St. Rep. 316, 53 N. E. 107, 5 Am. Neg. Rep. 545; *Severance v. New England Talc Co.* 72 Vt. 181, 47 Atl. 833. As said by the supreme court of Vermont: "It is only such injuries as have arisen after the exercise of that diligence and care on the part of the master that can properly be termed accidents or casualties, which the servant has impliedly agreed to risk, and for which the master is not liable." *Noyes v. Smith*, 28 Vt. 59, 65 Am. Dec. 222.

If the plaintiff did not in his original contract of hiring assume the risk growing out of the defective character of the machinery, tools, and appliances which might be furnished him by the defendant, did he

assume the risk when, with knowledge of the defective character of this chisel, he went to work with it? The earlier decisions proceed upon the theory that an employee cannot recover from the employer if it appears that he continued in the employment with full comprehension of the risk from which his injury resulted. In a leading case (*Woodley v. Metropolitan District R. Co.* L. R. 2 Exch. Div. 384), Chief Justice Cockburn said: "If he [the employee] continues to take the benefit of the employment he must take it subject to its disadvantages. He cannot put on the employer terms to which he has now full notice that the employer never intended to bind himself. It is competent to an employer, at least so far as civil consequences are concerned, to invite persons to work for him under circumstances of danger caused or aggravated by want of due precautions on the part of the employer. If a man chooses to accept the employment, or to continue in it with a knowledge of the danger, he must abide the consequences, so far as any claim to compensation against the employer is concerned. Morally speaking, those who employ men on dangerous work without doing all in their power to obviate the danger are highly reprehensible, as I certainly think the company were in the present instance."

But the law thus laid down has been superseded in England and in its dependencies. It has been at last settled in the English courts after prolonged consideration and an elaborate discussion in which some of the ablest of English judges participated, that the employer is not excused from a breach of his duty to the employee unless the evidence discloses something more than that the servant knew of and comprehended the risk from which the injury resulted. This doctrine which had been announced in a number of cases was finally confirmed by the House of Lords in *Smith v. Baker* [1891] A. C. 325. In the course of his opinion in that case Lord Herschell said: "I think that, where a servant has been subjected to risk owing to a breach of duty on the part of his employer, the mere fact that he continues his work, even though he knows of the risk, and does not remonstrate, does not preclude his recovering in respect of the breach of duty, by reason of the doctrine. *Volenti non fit injuria*, which, in my opinion, has no application to such a case."

And Lord Halsbury in the same case put the matter in this wise: "It appears to me that the proposition upon which the defendants must rely must be a far wider one than is involved in the maxim *Volenti non fit injuria*. I think they must go to the L.R.A.1915C.

extent of saying that wherever a person knows there is a risk of injury to himself, he debars himself from any right of complaint if an injury should happen to him in doing anything which involves that risk. For this purpose, and in order to test this proposition, we have nothing to do with the relation of employer and employed. The maxim in its application in the law is not so limited; but where it applies it applies equally to a stranger as to anyone else; and if applicable to the extent that is now insisted on, no person ever ought to have been awarded damages for being run over in London streets; for no one (at all events, some years ago, before the admirable police regulations of later years) could have crossed London streets without knowing that there was risk of being run over."

In the case of *Williams v. Birmingham Battery & Metal Co.* [1899] 2 Q. B. 338, 345, —a case in the court of appeal,—Romer, L. J., said: "Many authorities bearing on the question we have to decide have been cited and discussed. I do not propose to review them. They appear to me to establish the following propositions as to the liability at common law of an employer of labor. If the employment is of a dangerous nature, a duty lies on the employer to use all reasonable precautions for the protection of the servant. If, by reason of breach of that duty, a servant suffers injury, the employer is *prima facie* liable; and it is no sufficient answer to the *prima facie* liability for the employer to show merely that the servant was aware of the risk and of the nonexistence of the precautions which should have been taken by the employer, and which, if taken, would or might have prevented the injury. In order to escape liability the employer must establish that the servant has taken upon himself the risk without the precautions. Whether the servant has taken that upon himself is a question of fact to be decided on the circumstances of each case. In considering such a question, the circumstance that the servant has entered into, or continued in, his employment, with knowledge of the risk and of the absence of precautions, is important, but not necessarily conclusive against him."

A recovery was allowed in the above case where the injury was occasioned by the failure of the employer to furnish proper appliances, although the deceased workman had the same means of knowing the dangerous risk he was exposing himself to as his employer had, and he actually knew it was dangerous.

In *Beven on Negligence*, 3d ed. 1908, p. 620, the law is stated as follows: "Whether continued working in circumstances of danger amounts to an acceptance of the risk

or not is now settled to be a question of fact that must not be withdrawn from the jury."

In this country it seems to have been generally taken for granted by our courts that the earlier English doctrine was correct. See Labatt on Master & Servant, vol. 1, p. 988. The supreme court of Massachusetts has recognized the later doctrine of the English courts as expressed in *Smith v. Baker*, supra, as "a just and reasonable doctrine." That court in *Mahoney v. Dore*, 155 Mass. 513, 30 N. E. 366, said: "But in a much larger class of cases it [the assumption of the risk] is a question of fact, when one has been injured by reason of an exposure which he knew involved some risk, whether he voluntarily took the risk of the injury which he received. The question divides itself into two parts: First, whether he understood and appreciated the risk, which is sometimes a question of law and sometimes a question of fact; secondly, if he appreciated it, whether he assumed it voluntarily or acted under such an exigency, or such an urgent call of duty, or such constraint of any kind, as, in reference to the danger, deprives his act of its voluntary character. He may reluctantly, so far as the danger is concerned, and under extraneous pressure which amounts almost to compulsion, expose himself to a danger which originates in another's fault, and under such circumstances it cannot be said that he assumes the risk voluntarily. . . . The tendency of recent decisions is to hold that, in regard to dangers growing out of the master's negligence, which are not covered by the implied contract between the master and servant when the service was undertaken, it is a question of fact whether a servant who works on appreciating the risk assumes it voluntarily, or endures it because he feels constrained to."

In *Fitzwater v. Warren* (1912) 206 N. Y. 355, 42 L.R.A.(N.S.) 1229, 99 N. E. 1042, the New York court of appeals has decided that, where a master fails to comply with the requirements of a statute for the protection of his servants, it cannot be held as a matter of law that the servant, by knowledge of such failure, assumes the risk caused by the master's violation of the law. The case of *Knisley v. Pratt*, 148 N. Y. 372, 32 L.R.A. 367, 42 N. E. 986, asserting a contrary doctrine, is overruled. In the opinion in *Fitzwater v. Warren*, supra, Chief Justice Cullen, said: "There seems, at the present day, an effort by constitutional amendment to render a master liable to his employee for injury received in his employment, though the master has been guilty of no fault whatever, and I feel that such effort is in no small measure due

to the tendency evinced at times by the courts to relieve the master, though concededly at fault, from liability to his employee on the theory that the latter assumed the risk of the master's fault."

We confess we do not see any adequate reason for making any distinction between an obligation imposed by the common law and one imposed by statute, and holding that if, with knowledge of the defect, one continues to work with a defective instrument furnished him in violation of a common-law obligation, he assumes the risk as matter of law, but if the defective appliance is furnished in violation of statutory obligation, he does not as matter of law assume the risk, even though he had knowledge of the risk arising from the master's failure to comply with the statutory requirement. It almost seems that any such distinction is fanciful and contrary to common sense. We do not understand that the New York court asserts that any such distinction exists.

The attention of the court has been called to *Southern P. Co. v. Seley*, 152 U. S. 145, 38 L. ed. 391, 14 Sup. Ct. Rep. 530. That case involved the right of a railroad employee to recover for an injury in an attempt to couple a car to a train. In attempting to make the coupling he put his foot into an unblocked frog at the switch. He had been warned at the time not to put his foot into the frog, as it would be caught if he did so. He disregarded the warning, put his foot into the frog, from which he was unable to extricate it, and was killed. The Supreme Court of the United States held that as matter of law he could not recover as he had been guilty of contributory negligence, and that the jury should have been instructed to find in the defendant's favor. The court said: "It is not pretended in the present case that the frog in which Seley had put his foot was defective or out of repair. The contention solely is that there is another form of frog, not much used, and which, if used by the defendant, might have prevented the accident."

That case differs in every essential respect from the case at bar. In that case the appliance was not out of repair, and the risk incident to its use was simply the "ordinary" risk which the servant assumed when he entered the employment. In the case at bar the appliance used was alleged to have been out of repair, and the risk assumed was, if the allegation was correct, one of the "extraordinary" risks which was not assumed when the plaintiff entered the employment, and which it would be necessary for the defendant to prove that the plaintiff voluntarily assumed thereafter.

Moreover, in the case at bar the plaintiff had complained of the appliance, and only continued in its use after assurance from his superior that it was all right, and that he was to go on or lose his job.

In *Texas & P. R. Co. v. Archibald*, 170 U. S. 665, 672, 42 L. ed. 1188, 1191, 18 Sup. Ct. Rep. 777, 779, 4 Am. Neg. Rep. 746, the court, in referring to the rule that the servant does not assume the risk arising from the neglect of the master to furnish appliances free from defects, goes on to say: "An exception to this general rule is well established, which holds that where an employee receives for use a defective appliance, and with knowledge of the defect continues to use it without notice to the employer, he cannot recover for an injury resulting from the defective appliance thus voluntarily and negligently used."

That principle does not govern the case at bar. In this case the servant gave notice of the defect and continued at work under specific orders, and what we hold is that the question whether he voluntarily and negligently continued to use the defective appliance was a question for the jury. The question whether, under such circumstances as existed in this case, it was for the court or for the jury to determine whether he voluntarily and negligently continued to use the appliance, was not determined nor discussed in the *Texas & P. R. Co. Case*, supra. So in *Choctaw, O. & G. R. Co. v. McDade*, 191 U. S. 64, 68, 48 L. ed. 96, 100, 24 Sup. Ct. Rep. 24, 25, 15 Am. Neg. Rep. 230, the court said: "In other words, if he [the servant] knows of a defect, or it is so plainly observable that he may be presumed to know of it, and continues in the master's employ without objection, he is taken to have made his election to continue in the employ of the master notwithstanding the defect, and in such case cannot recover." In that case the assumption of risk was left to the jury.

We know of no decision in the Supreme Court of the United States or in this circuit which requires us to hold that on such a state of facts as exists here the court should say as matter of law that the plaintiff is not entitled to recover, and that the jury should have been so instructed. Courts have in some cases, as it appears to us, overemphasized the doctrine of assumption of risk, and underemphasized the duty of employers to furnish safe appliances to their employees. Some of the theories which courts have advanced have led to conclusions the justice of which, as respects the relation of master and servant, has not commanded general assent. For courts to assume as matter of law that one voluntarily assumes the risks involved in con-

tinuing to work with unsafe appliances furnished by the master, rather than lose his employment and subject himself to the consequences which are apt to ensue from the loss of his position, seems to us a harsh and unwise doctrine. It assumes that physical compulsion is the only coercion which a court of justice can recognize. At a time when enlightened states in Europe and America are enacting employers' liability laws and workmen's compensation acts to modify established principles of the law which are now thought to be unsuited to existing economic and social conditions, the courts should be careful not to fall into the error of assuming as matter of law what is far more properly matter of fact. The question of negligence is generally a deduction of fact from other facts, and not a conclusion of law. It is not a question of law unless the statute or the decisions of the courts have established a definite rule of conduct for a given situation. Thus, if the law of a particular jurisdiction establishes the rule that one approaching a railroad track "must stop, look, and listen," and one in disregard of the rule undertakes to cross the track and is injured, there is nothing to submit to the jury. Negligence in such a case is a matter of law, and the question of whether his conduct evinced a want of prudence and discretion cannot be submitted to the jury. The question must go to the jury where the facts are in dispute, or where fair minds might draw different conclusions from the facts as disclosed by the evidence. *Thomp. Neg.* §§ 429, 430. And so in reference to assumption of risks, where an employee has knowledge of a defect or danger, and calls, as in this case, the attention of the employer or his representative to it, and is ordered to go on with the work, the question should go to the jury to say whether the danger was so manifest that a person of ordinary prudence and caution would have incurred it, and also whether the risk was imminent.

Where the facts are clearly established, and the conclusion to be drawn from the facts is a matter which cannot reasonably be the subject of any doubt or controversy, the question of negligence is for the court, and not for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question is for the court. *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 417, 36 L. ed. 485, 489, 12 Sup. Ct. Rep. 679, 12 Am. Neg. Cas. 659; *Patton v. Texas & P. R. Co.* 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275. The doctrine of the Supreme Court of the United States is that the trial court is bound to submit the case to the

jury unless a recovery is impossible upon any view that can be properly taken of the facts which the evidence tends to establish. *Dunlap v. Northeastern R. Co.* 130 U. S. 649, 32 L. ed. 1058, 9 Sup. Ct. Rep. 647; *Kane v. Northern C. R. Co.* 128 U. S. 91, 32 L. ed. 339, 9 Sup. Ct. Rep. 16.

The question of negligence where the facts are undisputed seems to have sometimes been regarded as one of law. But this is believed to be a radically unsound view of the matter.

On the facts disclosed in this case we are not prepared to say that all reasonable men would reach the same conclusions.

The questions involved are not questions of law for the court, but questions of fact for the jury. It was for the jury to say whether the defendant was negligent in furnishing this chisel to the plaintiff, and whether the plaintiff voluntarily assumed the risks incident to its use, and whether those risks were imminent and such that no man of ordinary prudence would encounter them.

We find no error in the charge given to the jury.

The judgment is affirmed.

Ward, Circuit Judge, dissenting:

I find myself unable to concur in the opinion of the court. The sole question for consideration is whether the plaintiff assumed the risk of what injured him. The law itself writes into the contract between master and servant that the servant shall assume the ordinary risks of the employment he enters. A chisel is a tool in ordinary use in the maintenance of all railroads. Its use necessitates the spreading and abraiding of the head. Indeed, it would be proof that the metal was unsuitable if this did not happen. Splinters frequently fly off when the chisel is struck by the hammer. All these things the plaintiff knew. He had used such chisels for over five years, and testified as follows:

Q. And when you say the head was no good, you meant a piece might fly off when it was struck; was that what you were complaining about?

A. I was not sure that a piece would come off. At the same time, I thought some time it might, a piece fly and kill somebody. And I thought it might fly off, and that is the reason I complained to Collins.

Q. And you had seen other chisels used that, after being used during the day, had frayed off and bent over on the top and had broken off this way, hadn't you?

A. I did not see it.

L.R.A.1915C.

Q. You never saw any other chisel bent over like this?

A. Yes, I did, many of them.

Q. And did you never see a piece fly off and break off, or a chisel from which a piece had broken off?

A. I did see that many times more, but it did hit nobody. It might hit somebody on the leg or fall on the ground. And I had seen that happen often, and when I say this chisel had a head bent over like that, and I complained of it, I had in mind that pieces might fly off this chisel the same as they had from others. Collins told me to use the same chisel, because it was a chisel that was good for use; because the point was not sharp to be used; they told me to use this chisel. And he told me I would have to use that chisel or go home and stop work; he said if I don't want to work with that chisel, I can go and start to go home. And I thought he meant I would lose my job if I quit work and did not work with that chisel. I was afraid of losing my job. That is why I did so.

Q. And you thought this piece might fly off?

A. I thought it would fly off, but I was not sure it would. And I went on and worked rather than lost my job. After this accident, this thing struck me in the eye; it hurt me so much that I did not know what to do with myself.

If he had continued to use the chisel because he relied upon the judgment of the foreman as better than his own, or because the foreman had led him to believe that another chisel would be substituted, there might have been a question for the jury. But he states explicitly that he continued to use the chisel rather than quit. I could understand a case being sent to the jury in which the only knowledge the injured servant had of the particular thing which injured him was that imputed to him as matter of law, because he assumed the ordinary risks. But where the servant actually knew and appreciated precisely what the particular danger was, as in this case, before he used the thing which injured him, it seems to me there is no question for the jury. What was there for them to find? Could they, in the face of the plaintiff's own testimony, hold that he did not know and did not appreciate the risk? Or could they say that he continued to strike the chisel for some other reason than the one he himself gave?

I think the motion to direct a verdict in favor of the defendant should have been granted.

**UNITED STATES CIRCUIT COURT OF
APPEALS, SIXTH CIRCUIT.**

**JOHN LAW, Plff. in Err.,
v.**

**ILLINOIS CENTRAL RAILROAD COM-
PANY et al.**

(126 C. C. A. 27, 208 Fed. 869.)

**Evidence — to establish negligence —
setting rivets.**

1. Testimony that, for the purpose of fastening together two sheet-iron plates, a rivet was set on end under the overlap and a nut placed on top of the plates over the rivet, upon which a blow was struck for the purpose of driving the rivet through the plates, which caused the nut to fly off and hit plaintiff in the eye; and that the usual way of doing such work is to drill or punch a hole for the rivet before inserting it,—has a tendency to prove negligence.

Appeal — review — variance.

2. A variance between declaration and proof, as to which no question was raised in the trial, which could have misled no one, and to cure which, had the suggestion been made, it would have been the duty of the court to permit an amendment, is not available to sustain a judgment for defendant.

**Master and servant — fellow servants
— boiler maker and helper.**

3. A boiler maker and his helper are fellow servants.

**Same — Federal employers' liability
act — who entitled to benefit of.**

4. A boiler maker's helper engaged in repairing a locomotive regularly employed in interstate transportation, and which was destined for return thereto upon completion of repairs, is employed in interstate commerce and within the protection of the Federal employers' liability act.

(November 4, 1913.)

ERROR to the District Court of the United States for the Western District of Tennessee to review a judgment in defendants' favor in an action brought to recover damages for personal injuries alleged to have been caused by the negligence of defendants' servant. Reversed.

The facts are stated in the opinion.

Argued before Warrington, Knappen, and Denison, Circuit Judges.

Messrs. D. F. Elllotte and Bell, Terry, & Bell, for plaintiff in error.

Messrs. Charles N. Burch and H. D. Minor, with Messrs. Albert W. Biggs and Thomas A. Evans, for defendants in error:

The power of Congress to legislate as to the relation of master and servant, and the

liability of the master for an injury to a servant, are restricted to those employees who at the time they are injured are engaged in interstate commerce.

Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 500, 52 L. ed. 309, 28 Sup. Ct. Rep. 141; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 46, 56 L. ed. 344, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875.

The employers' liability act of 1908, as amended, is confined to an employee suffering injury while he is employed by an interstate carrier in interstate commerce.

35 Stat. at L. 65, chap. 149, § 1, Comp. Stat. 1913, § 8067; Second Employers' Liability Cases, supra; Pedersen v. Delaware, L. & W. R. Co. 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156; Colasurdo v. Central R. Co. 180 Fed. 832, 113 C. C. A. 379, 192 Fed. 901.

A servant engaged in the construction or repair of instrumentalities used in interstate commerce is not engaged in interstate commerce unless such instrumentalities are at the time being so used, and if they are withdrawn from commerce during the period of their repair, one engaged in repairing the same is not within the purview of the Federal employers' liability act.

Pedersen v. Delaware, L. & W. R. Co. 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779; Central R. Co. v. Colasurdo, 113 C. C. A. 379, 192 Fed. 901; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 46, 56 L. ed. 344, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875.

Where two employees are employed by the same master in the same general undertaking, they are fellow servants, even though one is superior in rank to the other.

Texas & P. R. Co. v. Bourman, 212 U. S. 536, 53 L. ed. 641, 29 Sup. Ct. Rep. 319; Central R. Co. v. Keegan, 160 U. S. 259, 40 L. ed. 418, 16 Sup. Ct. Rep. 269; Northern P. R. Co. v. Peterson, 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843; Northern P. R. Co. v. Egeland, 163 U. S. 93, 41 L. ed. 82, 16 Sup. Ct. Rep. 975; Martin v. Atchison, T. & S. F. R. Co. 166 U. S. 399, 41 L. ed. 1051, 17 Sup. Ct. Rep. 603, 1 Am. Neg. Rep. 747; Alaska Treadwell Gold Min. Co. v. Whelan, 168 U. S. 86, 42 L. ed. 390, 18 Sup. Ct. Rep. 40; New England R. Co. v. Conroy, 175 U. S. 323, 44 L. ed. 181, 20

Note. — As to the constitutionality, application, and effect of the Federal employers' liability act, see note, post, 47.
L.R.A.1915C.

Sup. Ct. Rep. 85, 7 Am. Neg. Rep. 182; Reed v. Moore, 25 L.R.A.(N.S.) 331, 82 C. C. A. 434, 153 Fed. 358; American Bridge Co. v. Seeds, 11 L.R.A.(N.S.) 1041, 75 C. C. A. 407, 144 Fed. 605; Kinnear Mfg. Co. v. Carlisle, 82 C. C. A. 81, 152 Fed. 933; Moit v. Illinois C. R. Co. 82 C. C. A. 430, 153 Fed. 354; United Zinc Cos. v. Wright, 84 C. C. A. 337, 156 Fed. 571; Vilter Mfg. Co. v. Otte, 84 C. C. A. 673; 157 Fed. 230; Florence & C. C. R. Co. v. Whipples, 70 C. C. A. 443, 138 Fed. 13; Illinois C. R. Co. v. Hart, 52 L.R.A.(N.S.) 1117, 100 C. C. A. 49, 176 Fed. 245.

The employers' liability act makes a carrier liable only for negligence, and unless negligence is proven as averred, there can be no recovery, either under the employers' liability act or at common law.

East Tennessee Coal Co. v. Daniel, 100 Tenn. 65, 42 S. W. 1062; Chattanooga Cotton Oil Co. v. Shamblin, 101 Tenn. 263, 47 S. W. 496; Missouri, K. & T. R. Co. v. Williams, 91 Tex. 255, 40 S. W. 350, 42 S. W. 855.

There is no proof in the record showing negligence, and the doctrine of *res ipsa loquitur* does not apply as between master and servant.

Moit v. Illinois C. R. Co. 82 C. C. A. 430, 153 Fed. 356; Illinois C. R. Co. v. Coughlin, 65 C. C. A. 101, 132 Fed. 801; Cincinnati, N. O. & T. P. R. Co. v. South Fork Coal Co. 1 L.R.A.(N.S.) 533, 71 C. C. A. 316, 139 Fed. 528; Carnegie Steel Co. v. Byers, 8 L.R.A.(N.S.) 677, 82 C. C. A. 115, 149 Fed. 667.

Knappen, Circuit Judge, delivered the opinion of the court:

Plaintiff sued to recover for accidental injuries received while in the employ of the defendant companies. At the close of the testimony verdict was directed for defendants. The evidence tended to show the following:

Plaintiff was a "boiler maker's helper" employed in defendants' shops in Memphis, Tennessee. At the time of the accident he was helping the boiler maker, one Morgan, in repairing a "petticoat" for a freight engine regularly employed by defendants in interstate commerce. For the purpose of fastening together two sheet-iron plates, a rivet was set on end under the overlap and a nut placed on top of the plates over the rivet. The boiler maker, in striking the nut for the purpose of driving the rivet through the plates, hit a glancing blow, whereby the nut flew and struck plaintiff in the eye. The grounds on which verdict was directed were (a) that plaintiff and Morgan were fellow servants, and (b) that plaintiff was not engaged in interstate commerce. De-
L.R.A.1915C.

endants contend here that there was no proof of negligence and that the direction should be sustained on that ground.

1. The contention that the proof did not tend to show that Morgan was negligent is without merit. The testimony is that the usual way of riveting plates of the character in question is to drill or punch a hole for the rivet before inserting it; but that in this case, by reason of hurry and to save time, the course stated was followed. The testimony had a tendency to prove negligence, without invoking the doctrine of *res ipsa loquitur*.

A variance between the declaration and the proof is suggested, in that the declaration alleges as ground of negligence the attempt to drive the hole through the metal with a cold rivet, when Morgan knew, or should have known, that this method was dangerous and improper; while the proof showed that the injury occurred because of the glancing blow which caused the nut to fly and strike plaintiff. This criticism is without point. If a variance existed (which we do not intimate), it is enough to say that no question of variance was raised upon the trial, that the alleged variance could have misled no one, and that, had it been suggested, it would have been the duty of the court to permit amendment. Pennsylvania Co. v. Whitney (C. C. A. 6th C.) 95 C. C. A. 70, 169 Fed. 572, 578.

2. Plaintiff claims a right of recovery both under defendants' common-law obligation and under the second employers' liability act.¹ Under the latter, Morgan's negligence would not bar action, for the act makes the negligence of a fellow servant the negligence of the defendants. Southern R. Co. v. Gadd, 125 C. C. A. 21, 207 Fed. 277, decided by this court May 6, 1913; Central R. Co. v. Young (C. C. A. 3d C.) L.R.A.—, 118 C. C. A. 465, 200 Fed. 359, 366. At common law, however, the negligence of the fellow servant bars recovery. Morgan was clearly plaintiff's fellow servant. The two employees were engaged in the same duties. The fact that Morgan was the boiler maker and plaintiff the helper does not alter the situation. Illinois C. R. Co. v. Hart (C. C. A. 6th C.) 52 L.R.A.(N.S.) 1117, 100 C. C. A. 49, 176 Fed. 245, 247, and cases cited. No case is presented of violation of nondelegable duty to provide a safe place to work. The place itself was safe. It was made unsafe only by the negligent operation of the fellow servant. See Illinois C. R. Co. v. Hart, supra, 176 Fed. at pages 250 and 251. On the case presented, plaintiff was therefore

¹ Act April 22, 1908, chap. 149, 35 Stat. at L. 65, Comp. Stat. 1913, § 8657.

not entitled to recover upon defendants' common-law obligation.

3. Was the plaintiff engaged in interstate commerce?

It is the well-settled rule that, in order to bring a railroad employee within the protection of the employers' liability act, it is not necessary that he be directly engaged in train movements. As pointed out by Mr. Justice Van Devanter in *Pedersen v. Delaware, L. & W. R. Co.* 229 U. S. 146, 152, 57 L. ed. 1125, 1128, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779, the true test is whether the work in which the employee is engaged is a part of the interstate commerce in which the carrier is engaged. As illustrating this proposition: In *Norfolk & W. R. Co. v. Earnest*, 229 U. S. 114, 57 L. ed. 1096, 33 Sup. Ct. Rep. 654, Ann. Cas. 1914C, 172, the employee, whose recovery was affirmed, suffered his injuries while piloting a locomotive (by walking in advance of it) through several switches in the railroad yards to a main track, where the locomotive was to be attached to an interstate train to assist in moving it up a grade in the direction of the next station. In *St. Louis, S. F. & T. R. Co. v. Seale*, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156, a yard clerk, whose duties were to take the numbers of, seal up, and label cars, some of which were engaged in interstate and some in intrastate traffic, was held to be engaged in interstate commerce while on his way to the performance of his duties through the yards to one of the tracks therein, to meet an incoming train from another state. In *Lamphere v. Oregon R. & Nav. Co.* 47 L.R.A.(N.S.) 1, 116 C. C. A. 156, 196 Fed. 336, a locomotive fireman in the employ of an interstate railway company was held by the circuit court of appeals of the ninth circuit to be engaged in interstate commerce while approaching a station at which he was to take a train for transportation to another station, to relieve the crew of an interstate train. In *Illinois C. R. Co. v. Porter*, 125 C. C. A. 55, 207 Fed. 311, a trucker who received injuries through the negligence of a fellow trucker while loading a car for interstate transportation was held by this court to be engaged in interstate commerce.

Approaching more nearly the specific question presented: There can be no doubt that railroad employees are within the purview of the employers' liability act while engaged in the repair of engines, cars, bridges, tracks, and switches actually in use in interstate commerce. Such was the express holding of the Supreme Court in the *Pedersen Case*. In *Second Employers' Liability Cases* (Walsh v. New York, N. H. & H. R. L.R.A.1915C.

Co.) 223 U. S. 5, 6, 56 L. ed. 329, 330, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875, the plaintiff was at the time of his injuries engaged in replacing a drawbar upon a car in use in interstate commerce. In *Central R. Co. v. Colasurdo*, 113 C. C. A. 379, 192 Fed. 901, a track walker engaged in repairing a switch in the railroad yards was held, by the circuit court of appeals of the second circuit, to be within the protection of the act.

But the crucial question remains whether the engine, at the time the work in question was being done, was so far withdrawn from commerce as that the work of repair was not a part of the interstate commerce in which the defendant was engaged. The authorities so far cited are not directly decisive of this specific question. In the *Colasurdo Case* the switch and track were still in use. The bridge in the *Pedersen Case* does not affirmatively appear to have been actually out of use. In the *Walsh Case* the car was apparently still upon a track in the railroad yards, although it was of course temporarily out of use during the replacement of the drawbar.

In the instant case the engine was in the shop for what is called "roundhouse overhauling." It had been dismantled at least twenty-one days before the accident. Up to the time it was taken to the shop it was actually in use in interstate commerce. It was destined for return thereto upon completion of repairs. It actually was so returned the day following the accident. It clearly did not lose its interstate character from the mere fact that it was not at the time actually engaged in interstate movement, no more than did the dining car in *Johnson v. Southern P. Co.* 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412, while waiting for a train to make the return trip, or than did the car in the *Walsh Case* while standing on a track awaiting replacement of the drawbar. Were the repairs being made in the roundhouse between two regular daily trips, the engine, while under such repair would clearly not lose its character as an instrumentality of commerce; and plaintiff, in such case, would have been engaged in interstate commerce. We have not here a case of original construction of an engine not yet become an instrumentality of interstate commerce. It had already been impressed with such use and with such character. Its preservation as such was not a matter of indifference to defendant, so far as its interstate commerce was concerned. See *Pedersen Case*, 229 U. S. 151, 152, 57 L. ed. 1127, 1128, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779. Under the existing facts, can the

length of time required for the repairs change the legal situation? If so, where is the line to be drawn? How many days temporary withdrawal would suffice to take it out of the purview of the act? And is it material whether the repairs take place in a roundhouse or in general shops? Is not the test whether the withdrawal is merely temporary in character? As held in the Pedersen Case, the work of keeping the instrumentalities used in interstate commerce (which would include engines) in a proper state of repair while thus used is "so clearly related to such commerce as to be in practice and in legal contemplation a part of it." In *Northern P. R. Co. v. Maerkl*, 117 C. C. A. 237, 198 Fed. 1, the circuit court of appeals of the ninth circuit held that an employee engaged at the railway shops in making repairs upon a refrigerator car theretofore used in interstate commerce, and intended to be again so used when repaired, was within the protection of the employers' liability act. The repairs there in question were substantial in their nature, requiring at least a partial dismantling of the car, which had been in the shop two days when the accident occurred. The rule announced by this decision commends itself to our judgment. We find nothing in the decisions of the Supreme Court opposed to the conclusion so reached. On the contrary, it may be noted that the *Maerkl* Case is cited (with apparent approval) in the opinion in the *Pedersen* Case, 229 U. S. 152, 57 L. ed. 1128, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779, upon the subject of the test to be applied in determining whether the work is a part of the interstate commerce in which the carrier is engaged.

It results from these views that it was error to direct verdict for defendant. The judgment of the District Court is reversed, with costs, and a new trial ordered.

FLORIDA SUPREME COURT.

LOUISVILLE & NASHVILLE RAILROAD
COMPANY, Plff. in Err.,

v.

MALLORY JOHNSON ALLEN.

(— Fla. —, 65 So. 8.)

Joint debtor — release — effect.

1. The general and well-established rule is that a release or discharge of one or more

Headnotes by SHACKLEFORD, Ch. J.

Note. — As to the constitutionality, application, and effect of the Federal employers' liability act, see note, post, 47. L.R.A.1915C.

joint tort feorsors, executed in satisfaction of the tort, is a discharge of them all, on the ground that the party injured can have but one satisfaction for his injury. Each is considered as sanctioning all the acts of the others, thereby making them his own, and each is liable for the whole damage as if it had been occasioned by himself alone; hence the law considers that he who pays for the injury has paid for all, and there is nothing left for which the other tort feorsors can be liable.

Same — presumption of satisfaction.

2. A release, executed to one tort feorsor, in satisfaction of the tort, being taken most strongly against the releasor, as a general rule, is conclusive evidence that he has been satisfied for the wrong; and after satisfaction, although it moved from only one of the tort feorsors, no foundation remains for an action against anyone. A sufficient atonement having been made for the trespass, the whole matter is at an end. It is as though the wrong had never been done.

Same — tort feorsors — liability.

3. Where, although concert is lacking, the separate and independent acts of negligence of several combine to produce directly a single injury, each is responsible for the entire result, even though his act or negligence alone might not have caused it. To make tort feorsors liable jointly there must be some sort of community in the wrong doing, and the injury must be in some way due to their joint work, but it is not necessary that they be acting together or in concert if their concurring negligence occasions injury.

Same — concurrent acts of negligence.

4. The rule under which parties become jointly liable as tort feorsors extends beyond acts or omissions which are designedly co-operative, and beyond any relation between the wrongdoers. If their acts of negligence, however separate or distinct in themselves, are concurrent in producing the injury, their liability is joint as well as several. Each becomes liable because of his neglect of duty, and they are jointly liable for the single injury inflicted because the acts or omissions of both have contributed to it.

Railroad — trolley crossing — construction — negligence.

5. It is negligence on the part of an electric street railway company, in the construction and establishment of its road, to so place one of its trolley wires over the track of a steam railway company as not to afford sufficient space for the latter's trains to easily or conveniently pass, without risk of danger and injury to its servants and employees. It is negligence on the part of a steam railway company to permit an electric street car company to so construct and maintain over the track of the steam railway company a trolley wire that it will endanger the lives of its servants and employees. In the event of an injury to an employee of the steam railway company, while in the discharge of his duty, occasioned by his coming in contact with such

wire, the electric company and the steam railway company are jointly liable as tort feorsors for such injury.

Joint debtors — venue — liability.

6. The mere fact that a plaintiff might not be able to sue all the tort feorsors in the same forum or join them in the same action would not of itself change the liability of such tort feorsors or prevent them from being jointly liable.

Same — release — effect.

7. The acceptance of a sum of money from one joint tort feorsor in satisfaction of a claim for damages, and the execution of a release and discharge under seal of such joint tort feorsor from all damages by reason of the injuries inflicted, reciting that such sum of money was received "in full compromise, payment, discharge, accord, and satisfaction" for or on account of such injuries, operates as a release of the other joint tort feorsor, even though it is stipulated therein that the release of such tort feorsor shall not operate so as to discharge the other, and the right to sue the other joint tort feorsor is expressly reserved. Such an instrument will be held to be a release, and not a covenant not to sue.

(March 27, 1914.)

ERROR to the Court of Record for Escambia County to review a judgment in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Blount & Blount & Carter, for plaintiff in error:

When the negligence of two or more persons concur in producing a single indivisible injury, then such persons are jointly and severally liable, although there was no common duty, design, or concert of action.

Walton v. Miller, 109 Va. 210, 132 Am. St. Rep. 908, 63 S. E. 461; D'Almeida v. Boston & M. R. Co. 209 Mass. 81, 95 N. E. 398, Ann. Cas. 1913C, 751; Brown v. Cox Bros. & Co. 75 Fed. 689; Bagley v. Wonderland Co. 205 Mass. 238, 91 N. E. 317; Nelson v. Illinois C. R. Co. 98 Miss. 295, 31 L.R.A. (N.S.) 689, 53 So. 619; Peru Heating Co. v. Lenhart, 48 Ind. App. 319, 95 N. E. 680; Standard Phosphate Co. v. Lunn, 66 Fla. 220, 63 So. 429.

The release of the Pensacola Electric Company was a bar to the suit against the defendant.

Ducey v. Patterson, 37 Colo. 216, 9 L.R.A. (N.S.) 1066, 119 Am. St. Rep. 284, 86 Pac. 109, 11 Ann. Cas. 393; McBride v. Scott, 132 Mich. 176, 61 L.R.A. 445, 102 Am. St. Rep. 416, 93 N. W. 243, 1 Ann. Cas. 61, 13 Am. Neg. Rep. 336; Cleveland, C. C. & St. L. R. Co. v. Hilligoss, 171 Ind. 417, 131 Am. St. Rep. 258, 86 N. E. 485; Abb v. Northern L.R.A.1915C.

P. R. Co. 28 Wash. 428, 58 L.R.A. 293, 92 Am. St. Rep. 864, 68 Pac. 954; Ellis v. Bitzner, 2 Ohio, 89, 15 Am. Dec. 534, Gunther v. Lee, 45 Md. 60, 24 Am. Rep. 504; Ruble v. Turner, 2 Hen. & M. 38; Tanner v. Bowen, 34 Mont. 121, 7 L.R.A. (N.S.) 534, 115 Am. St. Rep. 529, 85 Pac. 876, 9 Ann. Cas. 517; Leddy v. Barney, 139 Mass. 394, 2 N. E. 107; Snyder v. Mutual Telegraph. Co. 135 Iowa, 215, 14 L.R.A. (N.S.) 321, 112 N. W. 776; Flynn v. Manson, 19 Cal. App. 400, 126 Pac. 181; Farmers' Sav. Bank v. Aldrich, 153 Iowa, 144, 133 N. W. 383; Sircey v. Hans Rees' Sons, 155 N. C. 296, 71 S. E. 310; Babcock & W. Co. v. Pioneer Iron-Works, 34 Fed. 338; O'Shea v. New York, C. & St. L. R. Co. 44 C. C. A. 601, 105 Fed. 563; Eastman v. Grant, 34 Vt. 390; Ellis v. Esson, 50 Wis. 138, 36 Am. Rep. 830, 6 N. W. 518; Rogers v. Cox, 66 N. J. L. 432, 50 Atl. 143.

Messrs. J. P. Stokes and R. P. Reese for defendant in error.

Shackleford, Ch. J., delivered the opinion of the court:

Mallory Johnson Allen brought an action at law against the Louisville & Nashville Railroad Company, a corporation, to recover damages for personal injuries received by him through the alleged negligence of the defendant. The declaration contains two counts, which, omitting the formal parts, are as follows:

"The plaintiff, Mallory Johnson Allen, by his attorneys, sues the defendant, Louisville & Nashville Railroad Company, a corporation organized under the laws of the state of Kentucky, for that, to wit:

"That prior to the institution of this suit defendant was a common carrier by railroad, engaged in commerce between the state of Florida and the state of Alabama, and between the state of Florida and other states, and, as such common carrier, defendant was possessed of, owned, and operated a line of steam railway running from the city of Pensacola, in Escambia county, Florida, to the village or town of Flomaton in Escambia county, Alabama, and to other points in the state of Alabama and to points in other states; and other lines of tracks in and about the said city of Pensacola, used and operated in connection with its lines mentioned herein. That a part of defendant's said line of steam railway ran over and along a certain public street in said city of Pensacola, known and called Alcaniz street, crossing and intersecting another public street in said city, known and called Gregory street. That the Pensacola Electric Company, a corporation organized under the laws of the state of Maine, was possessed of, owned, and operated a line of

electric street railway running over and along said Gregory street, crossing and intersecting said Alcaniz street, and crossing the line of steam railway of defendant herein mentioned. That, for the purpose of providing the electric current necessary to propel its cars, said Pensacola Electric Company provided and placed its trolley wire over and above its line of railway, over and along said Gregory street and across said Alcaniz street, crossing defendant's line of steam railway, aforesaid, at right angles. That said trolley wire was hung so low, and so near the surface of said streets where said streets intersected, that employees of defendant upon the tops of cars drawn by defendant's locomotives, over and along said Alcaniz street, under said trolley wire, could not pass under said trolley wire with safety to themselves. That, prior to the institution of this suit, plaintiff was employed by defendant in the capacity of switchman, and, as defendant's said employee, it was plaintiff's duty to be upon the top of cars, drawn by defendant's locomotives, over and along Alcaniz street, over and across Gregory street, under the trolley wire of the Pensacola Electric Company, as aforesaid. That, as defendant's employee, it was defendant's duty to plaintiff to furnish plaintiff with a reasonably safe place in which to work and to perform his duty to defendant. That, notwithstanding its duty to plaintiff, defendant carelessly and negligently allowed said Pensacola Electric Company to place and install its said trolley wire so near the surface of said streets, where said streets intersected, that employees of defendant, upon the tops of cars drawn by defendant's locomotives, over and along said Alcaniz street, under said trolley wire, could not pass under said trolley wire with safety to themselves. That, prior to the institution of this suit, plaintiff was employed by defendant in the capacity of switchman, and, as defendant's said employee, it was plaintiff's duty to be upon the top of cars, drawn by defendant's locomotives, over and along Alcaniz street, over and across Gregory street, under the trolley wire of the Pensacola Electric Company, as aforesaid. That, as defendant's employee, it was defendant's duty to plaintiff to furnish plaintiff with a reasonably safe place in which to work and to perform his duty to defendant. That, notwithstanding its duty to plaintiff, defendant carelessly and negligently allowed said Pensacola Electric Company to place and install its said trolley wire so near the surface of said Alcaniz street where said street intersected said Gregory street, as to endanger the life and safety of plaintiff when upon the top of cars drawn by defendant's locomotives, in L.R.A.1915C.

the discharge of his duty to defendant, and defendant carelessly and negligently allowed said trolley wire to be and to remain so low as to endanger the life and safety of plaintiff when upon the top of cars drawn by defendant's locomotives, in the discharge of his duty to defendant. That, prior to the institution of this suit, to wit, September 27, A. D. 1912, after dark, plaintiff in the discharge of his duty to defendant, as switchman, aforesaid, was employed by defendant in commerce between the state of Florida and the state of Alabama, and between the state of Florida and other states, and, while so engaged, plaintiff was upon a car, drawn by defendant's locomotive, over and along said Alcaniz street, and, by reason of defendant's negligence in failing to provide plaintiff with a reasonably safe place in which to work and to perform his duty to defendant, plaintiff was forcibly and violently thrown against the trolley wire of the Pensacola Electric Company, placed and installed so near the surface of said Alcaniz street as to be dangerous to the life and safety of plaintiff, as aforesaid, thereby forcibly and violently throwing plaintiff from the top of said car to the pavement, many feet below, thereby giving to and inflicting upon plaintiff divers and sundry wounds, bruises, and sprains and dislocations, and injuring plaintiff's eye, from the effect of which plaintiff was laid up and lost much time from his vocation, and the consequent loss of earnings, and plaintiff suffered, continues to suffer, and will hereafter suffer, intense pain in body and mind, and plaintiff was compelled to lay out and expend much money, and to obligate himself for medical and doctor's bills in and about the treatment of himself, and plaintiff is permanently disabled.

"And plaintiff claims \$20,000.

"Count 2.

"The plaintiff, Mallory Johnson Allen, by his attorneys, sues the defendant, Louisville & Nashville Railroad Company, a corporation organized under the laws of the state of Kentucky:

"That, prior to the institution of this suit, defendant was a common carrier by railroad, engaged in commerce between the state of Florida and the state of Alabama, and between the state of Florida and other states, and, as such common carrier, defendant was possessed of, owned, and operated a line of steam railway running from the city of Pensacola, in Escambia county, Florida, to the village or town of Flomaton, in Escambia county, Alabama, and to other points in the state of Alabama, and to points in other states; and other lines of tracks in and about the city of Pensacola, used and operated in connection with its

lines mentioned herein. That a part of defendant's line of steam railway ran over and along a certain public street in said city of Pensacola, known and called Alcaniz street, crossing and intersecting another public street in said city, known and called Gregory street. That the Pensacola Electric Company, a corporation organized under the laws of the state of Maine, was possessed of, owned, and operated a line of electric street railway, running over and along said Gregory street, crossing and intersecting said Alcaniz street, and crossing the line of steam railway of defendant herein mentioned. That, for the purpose of providing the electric current necessary to propel its cars, said Pensacola Electric Company provided and placed its trolley wire over and above its line of railway, over and along said Gregory street, and across said Alcaniz street, crossing defendant's line of steam railway aforesaid at right angles. That said trolley wire was hung so low and so near the surface of said streets, where said streets intersected, that employees of defendant, upon the tops of cars drawn by defendant's locomotives over and along Alcaniz street, over and across Gregory street, under the trolley wire of the Pensacola Electric Company, as aforesaid. That, prior to the institution of this suit, to wit, September 27, A. D. 1912, after dark, plaintiff, in the discharge of his duty to defendant as switchman, aforesaid, was employed by defendant in commerce between the state of Florida and the state of Alabama, and between the state of Florida and other states, and, while so engaged, plaintiff was upon a car, drawn by defendant's locomotive, over and along said Alcaniz street. That, while plaintiff was so engaged in the discharge of his duty to defendant as switchman, aforesaid, defendant, through its agents and servants, carelessly and negligently propelled the car upon which plaintiff was, over and along said Alcaniz street, over and across said Gregory street, and under the trolley wire of the Pensacola Electric Company, placed and installed as aforesaid, thereby forcibly and violently throwing plaintiff against said trolley wire, thereby forcibly and violently throwing plaintiff from the top of said car to the pavement, many feet below, thereby giving to and inflicting upon plaintiff divers and sundry wounds, bruises, and sprains and dislocations, and injuring plaintiff's eye, from the effect of which plaintiff was laid up and lost much time from his vocation, and the consequent loss of earnings, and plaintiff suffered, continues to suffer, and will hereafter suffer, intense pain in body and mind; and the plaintiff was compelled to lay out and expend much money and to obligate himself L.R.A.1915C.

for much money for doctor's and medical bills, in and about the treatment of himself, and plaintiff is permanently disabled.

"And the plaintiff claims \$20,000."

To this declaration the defendant filed several pleas, not guilty, assumption of risk by the plaintiff, contributory negligence of the plaintiff, and that, prior to the institution of this action, the plaintiff had instituted an action against the Pensacola Electric Company, a corporation, for the recovery of damages for the identical injuries for which this action is brought, and had settled and compromised such action against the Pensacola Electric Company for the sum of \$1,250, and had received and accepted such sum, and had executed the following receipt and release therefor, which release was a bar to this action:

Received of Pensacola Electric Company, this 26th day of June, 1913, the sum of twelve hundred and fifty (\$1,250) dollars, in full compromise, payment, discharge, accord and satisfaction of and from any and all claims and demands which I, Mallory Johnson Allen, have against said Pensacola Electric Company, its employees, officers, or agents, for or on account of any and all damages, injury, expense, or loss of whatsoever kind which may have been sustained by me . . . in person, right, or property, by or through said Pensacola Electric Company, its employees or agents, by reason of an accident to me caused by my being knocked from the top of a car of the L. & N. R. R. Co. while employed as switchman by said company, by a trolley wire of said Pensacola Electric Company, at the crossing of said company's tracks at the intersection of Alcaniz and Gregory streets, on or about September 27, 1912, in the city of Pensacola, Florida; this release shall not release the L. & N. Ry. Co. from liability for said injuries, and said Allen reserves the right to sue said L. & N. Ry. therefor: or for any matter or thing growing out of same, or which may arise therefrom, whether now known or unknown, and the said Pensacola Electric Company, its employees, officers, or agents are hereby, in consideration of said sum of money, forever released, acquitted, and discharged of and from any and all such claims and demands whether now in suit or otherwise.

Mallory Johnson Allen [Seal.]

[Seal.]

Witness: R. P. Reese. E. L. Reese.

We see no occasion for setting forth the pleas in full. The plaintiff interposed demurrers to the pleas of the defendant, which undertook to set up the execution of such release as a bar to the action, which demur-

ers were sustained. A trial was had before a jury upon the pleadings as they then stood, the plaintiff having joined issue upon the other pleas, which resulted in a verdict in favor of the plaintiff for the sum of \$2,783, with interest and costs, upon which judgment was rendered and entered, and which judgment the defendant has brought here for review. Several errors are assigned, but it will not be necessary to consider all of them.

The first point to which we shall direct our attention is as to whether or not the trial court erred in sustaining the demurrer to the pleas, and thereby holding that the receipt or release executed by the plaintiff constituted no defense to this action. The defendant does not question the general and well-established rule, which is thus laid down in 24 Am. & Eng. Enc. Law, 2d ed. 306: "A release or discharge of one or more joint tort feorsors, executed in satisfaction of the tort, is a discharge of them all, on the ground that the party injured can have but one satisfaction for his injury. Each is considered as sanctioning all the acts of the others, thereby making them his own, and each is liable for the whole damage as if it had been occasioned by himself alone; hence the law considered that he who pays for the injury has paid for all, and there is nothing left for which the other tort feorsors can be liable." As is further said on page 307 of the work cited: "Another reason for the rule, as stated by the courts, is that the release, being taken most strongly against the releasor, is conclusive evidence that he has been satisfied for the wrong; and after satisfaction, although it moved from only one of the tort feorsors, no foundation remains for an action against anyone. A sufficient atonement having been made for the trespass, the whole matter is at an end. It is as though the wrong had never been done." We do not discuss the distinction made by the authorities between a release under seal and one executed without a seal, for the reason that no such question is presented to us; the release in the instant case being under seal. We select from the many authorities which we have examined the leading case of *Eastman v. Grant*, 34 Vt. 387, and the well-reasoned case of *Sircey v. Hans Rees' Sons*, 155 N. C. 296, 71 S. E. 310. Many authorities will be found cited in the notes on pages 306 and 307 of 24 Am. & Eng. Enc. Law, 2d ed. in support of the text. See also 34 Cyc. 1086.

It is strenuously contended by the plaintiff that the defendant and the Pensacola Electric Company were not joint tort feorsors; therefore the execution by the plaintiff of the instrument, for the monetary L.R.A.1915C.

consideration therein recited, releasing the Pensacola Electric Company from further liability, constitutes no bar to the action against the defendant. Reliance is placed upon *Chapman v. Pittsburgh R. Co.* (C. C.) 140 Fed. 784, and *Pittsburgh R. Co. v. Chapman*, 76 C. C. A. 418, 145 Fed. 886, affirming the decision of the lower court, as squarely supporting this contention. We have subjected the opinions rendered in these two cases to a careful and critical examination and analysis, and find ourselves unable to follow or to concur in the reasons given for the conclusion reached. So far as is disclosed by the condensed statements in the two opinions as to the pleadings and the evidence adduced in the action, it seems to us that the conclusion announced that the Pittsburgh Railways Company and the Baltimore & Ohio Railroad Company were not joint tort feorsors because, if the latter company was liable at all for negligence, it was by reason of "a negative act of omission" in failing to notify the plaintiff of the presence of the overhanging trolley wire, while the Pittsburgh Railways Company, if liable, was so by reason of "a positive act of commission" in placing its wires at an unsafe distance above the railroad tracks, is opposed to principle and against the weight of authority. We concede that the cited case presents many points of similarity to the instant case. In that case, as in this, the plaintiff was an employee of the railroad company, and while upon the top of a freight car of such company in the discharge of his duty was hurled therefrom to the ground by coming in contact with the trolley wires of the electric company, which were negligently hung too low over the tracks of the railroad company to permit safe passage thereunder by one on the top of a freight car of the railroad company engaged in the discharge of the duties connected with his employment. In the cited case the plaintiff was a member of the relief department of the railroad company, and as such member, after the injury, executed three receipts for the respective sums of \$24, \$26, and \$11, which are set out in the opinion in 145 Fed. 890, whereby he acknowledged to have received the same in payment of the benefits due from such relief department, under its regulations, and in consideration of which he expressly released and discharged the Baltimore & Ohio Railroad Company from all claims or demands for damages by reason of the injuries which he had sustained. It is stated in the opinion that the receipts were signed by the plaintiff with great reluctance, for fear that such settlement "might jeopard his right to sue, and that it was only after an understanding with the officers of the Baltimore

& Ohio Railroad Company that his right of action against the defendant (Pittsburgh Railroad Company) would not be affected, that he finally consented to receive the moneys and execute the three releases." The only authority cited to sustain the conclusion reached in the cited case is *Thomas v. Central R. Co.* 194 Pa. 511, 514, 45 Atl. 344, which holds that "a tortfeasor is not released from liability by a settlement between the injured party and one not shown to be liable." Even if we conceded the correctness of this holding, we fail to see how it would help the plaintiff in the instant case. As a matter of fact, the authorities are divided upon the point. See 24 Am. & Eng. Enc. Law, 2d ed. 308, and authorities cited in notes, and *Snyder v. Mutual Teleph. Co.* 135 Iowa, 215, 112 N. W. 776, 14 L.R.A. (N.S.) 321, and authorities collected in case note on page 322. It must be admitted that to frame a definition of joint tortfeasors that could be universally applied, or which would fit all cases, would be a difficult task, if not one impossible of performance, and we shall not attempt it. The following statement in 38 Cyc. 488, would seem to be well supported by the authorities: "Where, although concert is lacking, the separate and independent acts of negligence of several combine to produce directly a single injury, each is responsible for the entire result, even though his act or neglect alone might not have caused it. It has been said that 'to make tortfeasors liable jointly there must be some sort of community in the wrongdoing, and the injury must be in some way due to their joint work; but it is not necessary that they be acting together or in concert if their concurring negligence occasions the injury.'" See *Strauhal v. Asiatic S. S. Co.* 48 Or. 100, 85 Pac. 230, 20 Am. Neg. Rep. 465, which quotes with approval the following excerpt from the opinion rendered by Judge Seaman in *Brown v. Coxie Bros. & Co.* (C. C.) 75 Fed. 689, which would seem to be a correct statement of the law: "But the rule under which parties become jointly liable as tortfeasors extends beyond acts or omissions which are designedly co-operative, and beyond any relation between the wrongdoers. If their acts of negligence, however separate and distinct in themselves, are concurrent in producing the injury, their liability is joint as well as several. . . . Each becomes liable because of his neglect of duty, and they are jointly liable for the single injury inflicted, because the acts or omissions of both have contributed to it." *Erslew v. New Orleans & N. E. R. Co.* 49 La. Ann. 86, 21 So. 153, would seem to be well in point. In that case it was held as follows: "It is negligence on the L.R.A.1915C.

part of an electric street car company, in the construction and establishment of its plant, to so place one of its guy wires over the track of a steam railway company as not to afford sufficient space for the latter's trains to easily and conveniently pass, without risk of danger and injury to its servants and employees. It is negligence on the part of the steam railway company to permit an electric street car company to so construct and maintain over its tracks a guy wire that will endanger the lives of its servants and employees." The following authorities also support, we think, our conclusion that the allegations in the declaration in the instant case show that the defendant and the Pensacola Electric Company were joint tortfeasors: *Walton v. Miller*, 109 Va. 210, 132 Am. St. Rep. 908, 63 S. E. 458; *D'Almeida v. Boston & M. R. Co.* 209 Mass. 81, 95 N. E. 398, Ann. Cas. 1913C, 751; *Peru Heating Co. v. Lenhart*, 48 Ind. App. 319, 95 N. E. 680; *Bagley v. Wonderland Co.* 205 Mass. 238, 91 N. E. 317; *Nelson v. Illinois C. R. Co.* 98 Miss. 295, 31 L.R.A. (N.S.) 689, 53 So. 619; *Cuddy v. Horn*, 46 Mich. 596, 41 Am. Rep. 178, 10 N. W. 32; *Sircey v. Hans Rees' Sons*, 155 N. C. 296, 71 S. E. 310. *Standard Phosphate Co. v. Lunn*, 66 Fla. 220, 63 So. 429, cited and relied upon by the plaintiff to support his contention, does not conflict with what we have said herein, but, on the contrary, harmonizes with and tends to support the principle which we have just above stated. See also *Symmes v. Prairie Pebble Phosphate Co.* 66 Fla. 27, 63 So. 1. We would also call attention to the fact that the declaration alleges two concurring acts of negligence on the part of the defendant: First, that it negligently allowed the Pensacola Electric Company to place and install its trolley wire so near the surface of the streets that the employees of the defendant on top of the defendant's cars in the discharge of their duty could not pass under such wire with safety; and, second, that the defendant negligently propelled the car upon which plaintiff was, and thereby forcibly and violently threw him against such trolley wire. The plaintiff further contends that the defendant and the Pensacola Electric Company were not, and could not be held to be, joint tortfeasors, because they could not be joined in the same action, for the reason that the liability of the Pensacola Electric Company was founded upon the common law, as held by this court in *Lofton v. Jacksonville Electric Co.* 61 Fla. 293, 54 So. 959, while the liability of the defendant is founded upon the act of Congress known as the Federal employers' liability act (act April 22, 1908, chap. 149, 35 Stat. at L. 65, Comp. Stat.

1913, § 8657). We have carefully examined the argument of the plaintiff upon this point and are of the opinion that his contention is without merit. The mere fact that a plaintiff might not be able to sue all the tort feorsors in the same forum, or join them in the same action, would not in itself change the liability of such tort feorsors or prevent them from being jointly liable. The plaintiff has confused the question of right of action or liability with the question of remedy.

It will be observed that the receipt or release executed by the plaintiff to the Pensacola Electric Company, which we have copied above and which the defendant unsuccessfully sought to plead as a bar to the action, contains the following reservation: "This release shall not release the L. & N. Ry. Co. from liability for said injuries, and said Allen reserves the right to sue said L. & N. Ry. therefor." We must now consider the effect of this reservation. Upon this point the courts are hopelessly divided and in irreconcilable conflict. We have devoted much time to its consideration, and have examined all the authorities which we could find bearing upon the subject. We shall not cite them all, but shall select a few of the leading cases upon each side of the question, from which and the notes appended thereto the other authorities may readily be found, if desired. We have reached the conclusion not only that the numerical weight of authority, but that the better-reasoned cases, are to the effect, as we held in *Abb v. Northern P. R. Co.* 28 Wash. 428, 58 L.R.A. 293, 92 Am. St. Rep. 864, 68 Pac. 954: "The acceptance of a sum of money from one joint tort feor in satisfaction of a claim for damages, and the execution of a release and discharge of such joint tort feor from all damages by reason of the injuries inflicted, operates as a release of the other joint tort feor, though the parties to the agreement may stipulate that the release of one shall not discharge the other." We are impressed with the reasoning in this case. See the authorities cited therein. The authorities upon both sides of the question up to that time are collected in the monographic notes in 58 L.R.A. 293, and 92 Am. St. Rep. 872. In line with the holding in the cited case, see *McBride v. Scott*, 132 Mich. 176, 61 L.R.A. 445, 102 Am. St. Rep. 416, 93 N. W. 243, 1 Ann. Cas. 61, 13 Am. Neg. Rep. 335; *Farmers' Sav. Bank v. Aldrich*, 153 Iowa, 144, 133 N. W. 383; *Flynn v. Manson*, 19 Cal. App. 400, 126 Pac. 181; *Ducey v. Patterson*, 37 Colo. 216, 9 L.R.A.(N.S.) 1066, 119 Am. St. Rep. 284, 86 Pac. 109, 11 Ann. Cas. 393. Perhaps the leading case on the other side of the question, and certainly as well rea-

soned as any reaching that conclusion which we have found, is *Gilbert v. Finch*, 173 N. Y. 455, 61 L.R.A. 807, 93 Am. St. Rep. 623, 66 N. E. 133, wherein it was held that "if a release of one or more joint tort feorsors contains no reservation, it operates to discharge all; but, if the instrument expressly reserves the right to pursue the others, it is not technically a release, but a covenant not to sue, and they are not discharged." To the like effect are *Edens v. Fletcher*, 79 Kan. 139, 19 L.R.A.(N.S.) 618, 98 Pac. 784; *Walsh v. New York C. & H. R. R. Co.* 204 N. Y. 58, 37 L.R.A.(N.S.) 1137, 97 N. E. 408. We cannot follow this line of cases. We would call special attention to the excellent opinion rendered by Mr. Justice De Courcy in *Matheson v. O'Kane*, 211 Mass. 91, 39 L.R.A.(N.S.) 475, 97 N. E. 638, Ann. Cas. 1913B, 267, wherein he clearly differentiates a release and a covenant not to sue, which would seem to have been lost sight of in some of the cases. See also *Chicago v. Babcock*, 143 Ill. 358, 32 N. E. 271. We are of the opinion that the instrument in the instant case must be held to be a release, and not a covenant not to sue. This being true, it follows that the trial court erred in sustaining the demurrers to the pleas which set up such instrument as a bar to the action. For this reason the judgment must be reversed, and it is so ordered.

Taylor, Cockrell, Hocker, and Whitfield, JJ., concur.

Whitfield, J., concurring:

It required both the placing of the wire by the electric company and the running of the train thereunder by the railroad company to cause the injury as alleged, each acting with full notice or knowledge of the other's conduct; therefore, if liability exists as to both, it is joint and several. Each party is liable, if at all, for the entire injury. The release given by the injured person to the electric company is under seal, and it is expressly executed for a consideration of \$1,250 "in full compromise, payment, discharge, accord, and satisfaction of and from any and all claims and damages . . . for or on account of any and all damages, injury, expense, or loss of whatsoever kind . . . by reason of" an injury alleged to be "divers and sundry wounds, bruises, and sprains and dislocations and injury to plaintiff's eye." The release under seal further states that the electric company and its employees, "in consideration of said sum of money, are forever released, acquitted, and discharged of and from any and all such claims and demands whether now in suit or otherwise."

The settlement with and release of the electric company was apparently made upon considerations relating to the existence of a common liability and to the extent of the injury. There is no suggestion of unfair dealing, or that the stated consideration for the release under seal was not in fact paid. The essential purpose of the instrument as clearly expressed was a release upon "full satisfaction" as to one of the joint tort feors. It cannot be regarded as a mere covenant not to sue. The electric company was liable, if at all, for all the damages sustained. The instrument does not purport to evidence a partial satisfaction, but a "full satisfaction" for the injury sustained "by or through said Pensacola Electric Company, its employees, officers, or agents," when the electric company was liable, if at all, for all the injury caused by the joint tort. The reservation contained in the instrument is repugnant to the "full satisfaction" acknowledged under seal for the very substantial consideration paid. The damages, if any, recoverable in an action at law for the injury, are not liquidated or capable of ascertainment by any prescribed or definite rule or method of computation; the amount, if any, depends upon the discretionary estimates and opinions of a jury to be approved by the courts, as may be provided by law. It cannot be determined with any degree of certainty in advance of a legal adjudication what amount of damages, if any, is recoverable. If both are liable, it does not appear that there can be in fact an apportionment of responsibility for the injury on any reliable and just basis, or that any just apportionment has been made or attempted with or without the assent or participation or knowledge of the party not released. It does not appear from the pleadings that the railroad company has, by waiver or estoppel, lost its legal defenses growing out of the release or otherwise, or that because of contributory negligence or other matter the \$1,250 for which the release under seal was given "in full satisfaction" may not be regarded as a fair and just compensation for the injury alleged, to wit, "divers and sundry wounds, bruises, and sprains and dislocations and injury to plaintiff's eye." Under these circumstances the common-law rule in force in this state, and not affected by statute, that an effective release under seal, of one joint tort feor, executed for a substantial consideration in full satisfaction for the injury sustained, releases all who are jointly liable, cannot fairly be regarded as waived or rendered inapplicable here, by the repugnant reservation against the railroad company contained in the release under seal given for the stated consideration.

sideration to the electric company, in which release containing the attempted reservation the railroad company apparently had no part. The law requires only one full satisfaction for a single injury, where full satisfaction has been received from one joint tort feor, it inures to release all who are liable for the joint tort.

If an action had been brought against the electric company alone for the injury, and a judgment for \$1,250 obtained and satisfied in such action, it would have barred another action against either or both of the joint tort feors. A technical release under seal executed by the injured person to the electric company for a consideration of \$1,250 agreed on and paid in "full satisfaction" for the injury on the part of the electric company has in law the same effect in barring an action as a judgment against the electric company would have. The reservation against the railroad company contained in the instrument is repugnant to the acknowledgment of "full satisfaction" from the electric company, and the release executed to the electric company under seal for the agreed consideration in "full satisfaction" operates in law to release the other joint tort feor from further liability; and such release is a bar to an action against the railroad company for the same injury.

Though the remedy against the railroad company be afforded by the Federal law, and the remedy against the electric company be afforded by the state law, each one of the joint tort feors is liable, if at all, for the entire injury; and, as the law requires only one full satisfaction for the injury, the release under seal executed upon full satisfaction received from the electric company operates in law to relieve the railroad company.

KENTUCKY COURT OF APPEALS.

CINCINNATI, NEW ORLEANS, & TEXAS
PACIFIC RAILWAY COMPANY, Appt.,

v.

FANNIE EASTHAM, Admr., etc., of Mat
Swan, Deceased.

(— Ky. —, 169 S. W. 886.)

Master and servant — Federal employers' liability act — determination of negligence by state law.

1. In an action in a state court to hold a railroad company liable under the Federal employers' liability act for injury to an

Note. — As to the constitutionality, application, and effect of the Federal employers' liability act, see note, post, 47.

employee through the negligence of a coemployee, the law of the state must be looked to, to determine whether or not the act complained of amounted to negligence.

Same — duty to foreman — approach of train.

2. A railroad company owes no duty to a foreman of a gang engaged in construction work along the track whose duty is to know the time for the passing of trains, keep the track clear, and protect the men working under him from injury, to keep trains under control, keep a lookout for persons on the track, or give warnings of the approach of trains which are practically on time, so that failure to do so may render it liable under the Federal employers' liability act for injuries inflicted upon him by a train which hits him.

Same — reliance on rules.

3. A foreman of a gang engaged in construction work along a railroad track, whose duty is to know the time of and keep a lookout for trains in order to keep the tracks clear and protect his men from injury, is not entitled to rely on the observance by those in charge of trains, of the rules established for the movement of trains at meeting points and stations, so that he can hold the company liable for injuries due to such reliance when the rules were not observed.

(October 22, 1914.)

A PPEAL by defendant from a judgment of the Circuit Court for Boyle County in plaintiff's favor in an action brought, under the Federal employers' liability act, to recover damages for the death of plaintiff's intestate. Reversed.

The facts are stated in the opinion.

Messrs. John Galvin, Charles H. Rodes and Nelson D. Rodes, for appellant:

A verdict should have been directed for defendant because there was no evidence of any negligent conduct causing the death of Mat Swan.

Cincinnati, N. O. & T. P. R. Co. v. Harrod, 132 Ky. 445, 115 S. W. 699; Cincinnati, N. O. & T. P. R. Co. v. Swan, 149 Ky. 141, 147 S. W. 889; Illinois C. R. Co. v. Long, 146 Ky. 170, 142 S. W. 212; Snare & T. Co. v. Friedman, 40 L.R.A.(N.S.) 367, 94 C. C. A. 369, 169 Fed. 1, 21 Am. Neg. Rep. 311; Blankenship v. Norfolk & W. R. Co. 147 Ky. 260, 143 S. W. 995.

Messrs. Robert Harding, Emmett Puryear, and J. W. Rawlings, with Messrs. O'Rear & Williams, for appellee:

The law as announced in Cincinnati, N. O. & T. P. R. Co. v. Swan, 149 Ky. 141, 147 S. W. 889, is inapplicable, because the case was then under the state, and not the Federal law.

A railroad company owes a lookout duty L.R.A.1915C.

to give warning of the approach of its trains to those engaged in repairing its tracks.

2 Thomp. Neg. § 1756; Barber v. Cincinnati, N. O. & T. P. R. Co. 14 Ky. L. Rep. 869, 21 S. W. 340; Louisville & N. R. Co. v. Lowe, 118 Ky. 260, 65 L.R.A. 122, 80 S. W. 768; Illinois C. R. Co. v. Murphy, 123 Ky. 787, 11 L.R.A.(N.S.) 352, 97 S. W. 729.

An employee of a railroad company violating its rules thereby injuring another employee renders the railroad company liable.

Chesapeake & O. R. Co. v. Barnes, 132 Ky. 728, 117 S. W. 261; Nolan v. New York, N. H. & H. R. Co. 70 Conn. 159, 43 L.R.A. 305, 39 Atl. 115.

Defendant owed not only a lookout duty, but also a duty to warn Swan of the approach of its trains, and the question of his contributory negligence is for the jury.

Bluedorn v. Missouri P. R. Co. 108 Mo. 439, 32 Am. St. Rep. 615, 18 S. W. 1103; Dick v. Indianapolis, C. & L. R. Co. 38 Ohio St. 389; St. Louis, I. M. & S. R. Co. v. Jackson, 78 Ark. 100, 6 L.R.A.(N.S.) 646, 93 S. W. 746, 8 Ann. Cas. 328.

Plaintiff's intestate had a right to presume that the regular signals would be given at the public crossing.

Cahill v. Cincinnati, N. O. & T. P. R. Co. 92 Ky. 345, 18 S. W. 2; Illinois C. R. Co. v. McIntosh, 118 Ky. 145, 80 S. W. 496, 81 S. W. 270; Louisville & N. R. Co. v. Schroader, — Ky. —, 113 S. W. 874; Shearm. & Redf. Neg. § 470.

Carroll, J., delivered the opinion of the court:

M. B. Swan, while engaged as an employee of the appellant railway company, was killed by one of its trains, and in this suit by his administratrix to recover damages for his death, there was a verdict and judgment against the railway company, followed by this appeal.

On a former appeal a judgment against the railway company was reversed, with direction to direct a verdict in its favor if the case was retried. The opinion on the former appeal may be found in 149 Ky. 141, 147 S. W. 889. On a return of the case the former suit, which was brought under the state law, was dismissed, and this suit instituted under the Federal legislation known as the employers' liability act.

At the time Swan came to his death, the railway company was engaged in interstate commerce, and he was employed by it in such commerce. Therefore no question is raised as to the right to maintain this action under the Federal act.

It also seems to be conceded by counsel that the evidence in this trial was in every substantial respect the same as the evi-

dence on the first trial, and as the facts are very fully stated in the opinion referred to, it is unnecessary that we should restate them in detail here. In order, however, that this opinion may show the facts as well as the law that we consider applicable to this case, we will briefly set them out.

The railway company was putting in two water columns near the railroad tracks at Williamstown station. One of these was known as the north column and the other as the south column, and the work on these columns had been in progress about ten days when Swan was killed. On the day in question Swan was the acting foreman of the crew of men engaged in putting in these water columns. At Williamstown the railway company has a passing track, and shortly before 8:25 in the morning a south-bound accommodation train went in on this passing track for the purpose of letting a fast north-bound train, known as the Carolina Special, go through on the main track. This train was due at Williamstown at 8:23 A. M. and on this morning arrived there at 8:25 A. M. When it passed the south water column the engine struck and instantly killed Swan, who was standing on or near the end of the ties, on the main track, looking into the pit near the track, which had been excavated for the water column. He had only been in this position a few seconds when he was struck by the engine. The evidence shows, virtually without contradiction, that Swan could have looked into this pit as he was doing when struck, from certainly two and probably three other places, and that if he had chosen any of these other places the engine or train could not have struck him. Why he selected this dangerous place in preference to the safe place does not appear. Probably he did so because it was more convenient to stand on the end of the ties than to walk around and look into the pit from the other sides of it. Williamstown was not a regular stopping place for this Carolina Special, and it never stopped there except to receive orders, and on this morning was going by the station at a speed of probably 30 or 40 miles an hour. The perilous position of Swan was not discovered by either the fireman or engineer until the engine was within a few feet of him, and it was then too late to take any steps to prevent the engine from striking him. The reason he was not sooner discovered was that the train rounded a sharp curve in the track just before coming to the point where Swan was standing.

It was the duty of Swan as foreman of this work to keep advised of the time of trains, so that he might warn the men under him of their approach, and also to keep the track free from tools and material used by

the men in the progress of the work, and he was required to and did keep a watch as well as a time card. In short, one of his duties was to keep a lookout for the approach of trains, so that the track would be safe and the men under his charge protected. There is also evidence that a day or so before his death the attention of Swan had been sharply called, as the result of a controversy between some of the men, to the time of the arrival of this Carolina Special, but we do not attach importance to this circumstance, as it was his duty to know, and he did know, the time when it was due, and on this morning it was only two minutes behind its schedule time. It was also shown in evidence for the administratrix that a public highway crossed the tracks of the railway company a short distance south of the point where Swan was struck; and that it was the duty of the engineer, before reaching this highway crossing, to give the statutory signals, is of course not denied, but whether he did give them or not is in dispute. Rules of the company were also introduced showing that it was the duty of the persons in charge of this train to have it under control, keep the bell ringing, and proceed at a much slower rate of speed than the train was going at places where the conditions were similar to those existing at Williamstown.

The acts of negligence charged in the petition and sustained by some evidence are as stated by counsel for appellee: (a) That the train was being run at a reckless and dangerous rate of speed; (b) that the engineer and those in charge of the train negligently failed to keep a lookout for Swan and others engaged in putting in the water column beside the track; (c) that no warning was given by the engineer of the train's approach. The answer, besides traversing the averments of the petition, affirmatively set up contributory negligence on the part of Swan, as well as the assumption of risk. But we shall not enter into a discussion of these defenses except in so far as they may throw light on the question whether the employees of the railway company in charge of the train were, as a matter of law, negligent in the particulars named, or any of them. In other words, we shall devote what we have to say to a consideration of the question whether the railway company owed to Swan the duty of having its train under control, keeping a lookout, and giving warning of its approach, or the duty of doing any one of these acts. If the railway company was not guilty of negligence in one of these respects, or if it did not owe Swan the duty of observing the measure of care indicated, there can be no recovery in behalf of his estate.

The Federal statute known as the employers' liability act expressly provides that in cases like this a cause of action arises "for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves, or other equipment." So that unless the death of Swan resulted in whole or in part from the negligence of the employees in charge of the train that struck him, there can be no recovery; and it is equally true that these employees could not have been guilty of negligence towards him unless they failed to discharge some duty owing to him. *Long v. Southern R. Co.* 155 Ky. 286, 159 S. W. 779; *Helm v. Cincinnati, N. O. & T. P. R. Co.* 156 Ky. 240, 160 S. W. 945.

It will be noticed that the Federal act under which this action was brought does not undertake to define the character or degree of negligence necessary to a recovery. This being so, we think that when an action is brought under the Federal act in our state courts to recover damages for injuries suffered on account of the negligence of another employee, the rules of law prevailing in this state must be looked to in determining whether the acts or omissions complained of amount to negligence. There is no difference in cases like this in the character or degree of negligence necessary to sustain a verdict and judgment, whether the action be brought under the Federal or state law. The negligence that would authorize a recovery under one would authorize it under the other, and if the evidence is not sufficient to sustain a recovery under one, neither will it be sufficient to sustain it under the other. This statement is of course confined to cases presenting facts similar to those disclosed in this record which do not involve defects in cars, engines, machinery, or other equipment, and also leaves out of consideration entirely the question of contributory negligence and the rules of law relating thereto. Therefore, if the railway company, or its employees, under the rules of law prevailing in this state when the cause of action arose, were not guilty of actionable negligence, there can be no recovery in this case.

Having this view of the matter, we might rest a reversal of the judgment upon the ground that the decision in this case should be controlled by the opinion on the former appeal. In that opinion it was said, on the same facts here shown, that the court should have instructed the jury peremptorily to find for the defendant, and this conclusion, as we conceive, was put upon the ground

that the railway company did not commit towards Swan any breach of duty, and hence there was no negligence on its part.

The opinion, however, does not distinctly state whether the finding of the court was rested on the failure of the evidence to show negligence on the part of the company or on proof of the contributory negligence of Swan; and therefore it is insisted by counsel for appellee that the court on the other appeal reached the conclusion indicated, because it believed Swan was guilty of such contributory negligence as would defeat a recovery under the state law. If this construction of the opinion is correct, the former decision does not control in this case, because the effect of contributory negligence is not the same in actions brought under the Federal act as it is in actions brought under the state law. The contributory negligence that would defeat a recovery under the state law might reduce the recovery under the Federal act, but would not necessarily defeat it. *Nashville, C. & St. L. R. Co. v. Henry*, 158 Ky. 88, 164 S. W. 310.

In view of this situation, and as the new action was brought under the Federal act, in an effort to avoid the bar of contributory negligence, we will again examine into the question of the negligence of the company for the purpose of ascertaining what breach of duty, if any, it was guilty of, and in doing this will put entirely aside the contributory negligence of Swan. Looking at the case from this standpoint, it becomes important to keep distinctly in mind the position that Swan occupied and the duties he was required to perform. He was the foreman in charge of this work. As such foreman it was his duty to keep advised of the time of the arrival of trains, so that he might have the track clear of tools and materials used in the work, and protect his men from injury. He was required to and did keep a watch and had a time-table, or, at any rate, there was a time-table furnished for his use. He knew the schedule time of the arrival of this Carolina Special, and further knew that Williamstown was not a station at which this train stopped. In addition to this, his duties did not require that he should stand or be in the place he was when struck. In place of selecting this position of danger, he could have selected a place of safety. The question now is, Did the railway company, or its employees in charge of this train, on the facts as stated, owe him the duty of reducing the speed of the train, or of having it under control, or of giving warning of its approach, or of keeping a lookout? We think not. It has been so written in several cases.

In *Coleman v. Pittsburg, C. C. & St. L.*

R. Co. 139 Ky. 559, 63 S. W. 39, Coleman, who was employed as a crossing flagman, was killed by one of the railway company's trains. In an action by his administrator against the railway company to recover damages, this court said: "There is shown to have been ample room between the tracks for decedent to have performed his services in safety to himself. It was his duty to watch for trains and to keep himself out of unnecessary danger. It is difficult to imagine how decedent could possibly have been struck by the train unless he was neglecting one of these duties, for if he failed to note the approach of the train, it was a neglect of his duty, and such a one that, had it resulted in the injury to a stranger, would unquestionably have made his master, the appellee, liable. Or, did he know of the train's approach, and from his experience and the nature of his employment knew the danger of standing too close to the track and yet did so, the calamity of his death would be due solely to his own carelessness. A servant of a steam railroad company who is charged with an important and particular duty to his master and to the public will not be allowed to profit by any neglect of that duty. Not only the fairest principles of justice between men would prevent it, but also public policy forbids that a premium should be placed by the law upon the neglect of such a duty, and such would be done did the courts allow a recovery by the servant from the master for the former's injury which could not have resulted save from his neglect of such duty. Those in charge of the train had the right to presume that decedent was in the discharge of his duty at the point of the crossing, and that therefore he was noting the train's approach and doing all that was necessary to relieve the master from liability on that account. The master was under no obligation to give the flagman special notice of that which it was already his duty to know, or to provide a brakeman or other servant for the rear of the car to warn him to take notice of that which it was his primary duty to observe. From a careful inspection of this record we are unable to see wherein any negligence from appellee toward the decedent is proven. Therefore the court should have given to the jury the peremptory instruction asked for at the close of the plaintiff's testimony."

In *Conniff v. Louisville, H. & St. L. R. Co.* 124 Ky. 763, 99 S. W. 1154, which presented a similar state of facts, the rule announced in the Coleman Case was adopted and followed.

In *Wickham v. Louisville & N. R. Co.* (Crume v. Louisville & N. R. Co.) 135 Ky. 288, 48 L.R.A.(N.S.) 150, 122 S. W. 154, L.R.A.1915C.

Wickham was employed by the railroad company as a watchman, his duties being to protect the property of the company and to see that school children and other trespassers were kept off the track and not injured by passing trains. He was struck by a train and killed, and in an action by his administrator to recover damages for his death, the court said there could be no recovery, putting its decision upon the ground that, as it was the duty of Wickham to know the time of the arrival of trains and to protect the track, the company did not owe him the duty of reducing the speed of the train, although it was shown that there was a customary use by the public of the railroad company's tracks at that point, and it was insisted that as the accident happened in an incorporated town, the railroad company should have run its trains with reference to persons on its tracks.

In *Louisville & N. R. Co. v. Hunt*, 142 Ky. 778, 135 S. W. 288, a recovery was also denied upon the ground that it was the duty of Hunt, who was killed, to keep a lookout for trains, and theretofore the only duty the company owed him was to exercise ordinary care to prevent injury to him after his peril was discovered. To the same effect is *Ellis v. Louisville, H. & St. L. R. Co.* 155 Ky. 745, 160 S. W. 512.

In *Blankenship v. Norfolk & W. R. Co.* 147 Ky. 260, 143 S. W. 995, Blankenship, who was a track walker, was killed by a passing train, and in an action by his administrator against the railway company to recover damages for his death, the court held that there could be no recovery, saying: "His work as a track walker necessarily placed Blankenship upon the tracks of the road, and it goes without argument that the duty was imposed upon him to take such reasonable care of himself in the performance of his duties as would prevent him from being injured by a passing train."

In *Cincinnati, N. O. & T. P. R. Co. v. Harrod*, 132 Ky. 445, 115 S. W. 699, Harrod, who was a brakeman in the employ of the Southern Railway Company, was killed on tracks in the yard at Georgetown that were used by the Southern Railway Company and the Cincinnati, New Orleans, & Texas Pacific Railway Company. In an action brought to recover damages for his death, the petition charged that the employees in charge of the train that killed him were guilty of negligence in failing to give warning of the approach of the train and in running it at a high and dangerous rate of speed. In holding that there could be no recovery, the court, among other things, said as peculiarly applicable to the facts of this case: "If Harrod had been a section workman in the yards at Georgetown, his case

would not have been less than it is. Section men work in railroad yards, as well as in the country, at all times, and may reasonably be expected there at any time. They must be aware of the time of the running of the trains over the track on which they are at work. Even though those in charge of a fast train knew they were working at that point, or might reasonably be expected to be working there, they also knew it was their duty to maintain a clear track for that train, and to themselves keep out of its way, as they well could. Would the speed of the train, even though negligence to the passengers or licensees, have been negligence as to them? We think not, and it would make no difference whether they were in the yards at Georgetown, at Kincaid, or in the country where there was no station; for it must always be borne in mind that negligence toward a person is the antithesis of a duty owing to that person.

"But the facts of this case carry us one step further: Decedent actually knew that train No. 4, a fast through passenger train, was due to pass his point at 6:49. He obtained the knowledge for the very purpose of keeping out of its way. When it came along at the very moment it was due to come, it were as if he had at that moment notice of the fact. Why do trains whistle and ring their bells? Obviously to notify people, whom they owe a duty to, of their approach. If, then, the person to be notified already knows the fact, why again notify him? . . .

"But those who know that the fast train is due and coming in cannot rely upon its duty towards others ignorant of the fact, so as to charge its operatives with negligence in running it at high rate of speed, for with their knowledge, by keeping off the track, the speed of the train would be harmless to them. But the facts here carry us still another step: Decedent unnecessarily went from a place of perfect safety to one of great hazard, to serve his own convenience alone, and thereby put himself in a position where no amount of care in operating train No. 4 would have saved him. They could not see him till he suddenly stepped out on the track immediately in front of their engine. Whether running 20 or 50 miles an hour then, the train could not have been stopped in time to avoid striking him. Between the tracks was a safe place in which to do his work. On the west side it was safer, though not quite so convenient. To step into the middle of the main track, at the moment a fast, heavy train was due, and which he knew was due, without looking, is such an act of negligence that its quality is not debatable. Nor can it be ignored in law. Being established L.R.A.1915C.

without question, its legal effect is a pure question of law. From whatever point the facts are viewed, we are unable to say that appellant failed in any duty it owed the decedent."

In opposition to the authority of these cases, we are referred by counsel for appellee to *Barber v. Cincinnati, N. O. & T. P. R. Co.* 14 Ky. L. Rep. 869, 21 S. W. 340; *Louisville & N. R. Co. v. Lowe*, 118 Ky. 280, 65 L.R.A. 122, 80 S. W. 768; *Cason v. Covington & C. Elev. R. & Transfer & Bridge Co.* 29 Ky. L. Rep. 352, 93 S. W. 19; 2 *Thomp. Neg.* § 1756.

In the *Barber Case*, *Barber*, while engaged in getting out ballast for the railway company at a point on its line of road, was struck by one of its passing trains and killed. There being evidence tending to show that the employees in charge of the train that struck him failed to give warning of the approach of the train and ran it at a high rate of speed, it was held that the case should have gone to the jury, as under the circumstances of that case it owed him the duty of warning him of the approach of the train.

In the *Lowe Case*, *Lowe*, who was an assistant inspector of trains at Lebanon junction, was struck and injured by an engine backing down on the track. The company, in defense of the action, said that it owed no duty to *Lowe* to keep a lookout or give him notice of the movement of the engine; but this court took a different view of the matter, and held that there could be a recovery. To the same effect is *Cason v. Covington & C. Elev. R. & Transfer & Bridge Co.* 29 Ky. L. Rep. 352, 93 S. W. 19.

In *Thompson on Negligence*, vol. 2, § 1756, it is said: "The position of track walkers, track repairers, and especially that of car repairers, is materially different, in respect of the question of their contributory negligence, from that of ordinary travelers at highway crossings, and still more so from that of trespassers. They are not only lawfully upon the railway track, and hence in a position of danger, but they are there under contract with the railway company for the performance of certain duties which require, to a greater or less extent, the exercise of their faculties, in the performance of which their faculties may become so absorbed as not to enable them to take the same care for their safety which might reasonably be expected from travelers at crossings and from intruders upon railway tracks or in railway yards. These considerations impose upon the railway company, with peculiar force, the duty of giving them warning upon the approach of a train or engine, by the use of audible signals, and by checking or stopping the train or engine

in time to avoid injuring them, if the engineer perceives that, for any reason, they are not paying attention to those signals. As a general rule, it is not contributory negligence, as matter of law, for a person so employed not to be on a constant lookout for approaching trains. This must be so if we are paying the slightest attention to the position of a man who is fastening a fishplate, or who is oiling or repairing the wheel of a car in a passenger train which has stopped temporarily at a station for that purpose. Such a person cannot keep his eyes on his work and at the same time keep them strained in both directions for approaching trains, or for ocular signals. Such persons are therefore not blameworthy, as a matter of law, merely because they become so engrossed in their work as not to heed the approach of a train, or because they rely upon the reasonable expectation that the railway company will, through its trainmen, perform the duty of giving them the necessary and proper signals."

It seems to us apparent that there is no conflict in these two lines of authorities, the plain distinction between them being that in one line recovery was denied because the injured party was under a duty to keep a lookout for trains so that he might protect the track and prevent injury to other persons. In the other line of authorities the injured employee was not charged with this duty, and a recovery was allowed. And it can easily be understood why the law imposes upon railroad companies a different rule of care in these different classes of cases. The reasons for the distinction are fully stated in the authorities referred to.

To the employee like Swan, whose duty it is to look out for trains and protect the track, the company does not owe any of the duties assigned as negligence in this case. It only owes him the duty of exercising ordinary care to protect him from danger after his peril is discovered, and there is no claim in this case that the collision with Swan could have been prevented after his danger was discovered. What duties railroad companies owe to other classes of employees, engaged on or about the track, we need not determine, as such an inquiry would not be pertinent to the case in hand.

Some rules of the company were introduced respecting the movement of trains at meeting points and at stations where conditions were similar to those that existed at Williamstown, and it is said that Swan had the right to rely on the observance of these rules, and their violation by the company was negligence as to him. The rules

promulgated by the company are of course intended for the guidance as well as the protection of its employees. But obviously rules regulating the movements of trains are only made and intended for the benefit and safety of those who are entitled to rely on them, and who come within the class meant to be protected by the particular rules, and Swan was not in that class. It was his business, not only to take care of himself, but to take care of the men and property under his charge, and the company and its employees in other branches of the service had the right to assume that he would perform this duty, and were relieved of the necessity of exercising towards him the degree of care other employees not charged with like duties might have the right to demand. When the railroad company employs a man to keep a lookout for trains at a particular place, and charges him with the duty of knowing the time of their arrival, it should not be subjected to liability for failing to observe towards him the same degree of care employees not charged with these duties have the right to expect. Men in charge of trains, especially in the engine, have a multitude of duties to perform in the interest of and for the protection of the public, and they ought not to be distracted from the performance of these duties by being required to regulate the speed of the train and give notice and keep a lookout for other employees whose business it is to keep out of the way of trains.

Upon the facts shown by the record, we think the lower court should have directed a verdict in favor of the railway company, and if there is a retrial and the facts are substantially the same as they were on the last trial, the trial court should give such a direction.

Wherefore the judgment is reversed, for proceedings in conformity with this opinion.

VERMONT SUPREME COURT.

LEVI BOUCHARD

v.

CENTRAL VERMONT RAILWAY COMPANY.

(87 Vt. 399, 89 Atl. 475.)

Pleading — joinder of causes of action — common law and employers' liability act.

1. Counts at common law and under the Federal employers' liability act may be

Note. — As to the constitutionality, application, and effect of the Federal employers' liability act, see note, post, 47.

joined in the same complaint in an action to recover for alleged negligent injury to a railroad employee.

Master and servant — railroad engineer — disobedience of orders.

2. An engineer of a train is not guilty of disobedience of orders to meet another train at a certain station, which will prevent his holding the railroad company liable for injuries resulting from a collision with it, if he acts upon information in the train register at the station that the train has gone on, and proceeds on his journey, whereas the train to be met had gone back and was again coming towards the station where he was directed to meet it.

Proximate cause — failure to establish rules for operation of railroad.

3. Failure to establish proper rules and give proper orders is the proximate cause of injury to a railroad engineer by collision with a train which he was ordered to meet at a certain station the train register at which showed that it had gone on, upon which information he acted and proceeded on his journey, whereas it had gone back and was again coming over the road towards him.

Pleading — argumentativeness — demurrer.

4. Argumentativeness cannot be taken advantage of by general demurrer.

Same — special demurrer.

5. A special demurrer for argumentativeness is not sufficient which fails to point out wherein the argumentativeness resides.

Same — negating contributory negligence.

6. Contributory negligence is sufficiently negated in a complaint to recover damages for personal injuries, by an allegation that they were solely on account of the negligence of the defendant in the premises.

(January 28, 1914.)

EXCEPTIONS by defendant to a ruling of the Windham County Court overruling *pro forma* a demurrer to a complaint filed to recover damages for alleged negligent injury to plaintiff in his occupation of railroad engineer. Affirmed.

The facts are stated in the opinion.

Messrs. C. W. Witters, Clarke C. Flitts, and Hermon E. Eddy, for defendant:

Counts under the common law, and counts under the Federal statute, cannot properly be joined in the same declaration.

Morrison v. Bedell, 22 N. H. 234; Smith v. Meanor, 16 Serg. & R. 375; Wachusett Nat. Bank v. Steel, 135 Mich. 688, 98 N. W. 748; Hogsett v. Ellis, 17 Mich. 351; McKenzie v. Gibson, 73 Ala. 204; Swift v. Applebone, 23 Mich. 252.

The right of action under the Federal statute is exclusive in all cases where that statute applies.

Second Employers' Liability Cases (Mon-L.R.A.1915C.

dou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Bottoms v. St. Louis & S. F. R. Co. 179 Fed. 318; Dewberry v. Southern R. Co. 175 Fed. 307.

A plaintiff cannot recover upon two or more inconsistent counts in his declaration.

23 Cyc. 396; Perkins v. Hershey, 77 Mich. 504, 43 N. W. 1021; Union P. R. Co. v. Wyler, 158 U. S. 285, 39 L. ed. 983, 15 Sup. Ct. Rep. 877.

The company was obliged to promulgate only such rules as were reasonable and sufficient.

26 Cyc. 1159; Nolan v. New York, N. H. & H. R. Co. 70 Conn. 159, 43 L.R.A. 305, 39 Atl. 115; Little Rock & M. R. Co. v. Barry, 43 L.R.A. 349, 28 C. C. A. 644, 56 U. S. App. 37, 84 Fed. 944.

In order for these charges, failure to promulgate proper rules and to give proper orders, to avail the plaintiff, they must be shown by the allegations to have been the proximate cause of the injury.

26 Cyc. 1163; Wright v. New York C. R. Co. 25 N. Y. 562; Kennelly v. Baltimore & O. R. Co. 166 Pa. 60, 30 Atl. 1014; Relyea v. Kansas City, Ft. S. & G. R. Co. 112 Mo. 86, 18 L.R.A. 817, 20 S. W. 480; Burke v. Syracuse, B. & N. Y. R. Co. 69 Hun, 21, 23 N. Y. Supp. 458; Peaslee v. Fitchburg R. Co. 152 Mass. 155, 25 N. E. 71; Cole v. Rome, W. & O. R. Co. 72 Hun, 467, 25 N. Y. Supp. 276; Gibson v. Oregon Short Line R. Co. 23 Or. 493, 32 Pac. 295; Stevens v. Dudley, 56 Vt. 158; Gilson v. Delaware & H. Canal Co. 65 Vt. 213, 36 Am. St. Rep. 802, 26 Atl. 70; Davis v. Central Vermont R. Co. 66 Vt. 290, 44 Am. St. Rep. 852, 29 Atl. 313; Corbin v. Grand Trunk R. Co. 78 Vt. 458, 63 Atl. 138; Davenport v. North Eastern Mut. Life Asso. 47 Vt. 528; Mahoney v. Rutland R. Co. 78 Vt. 244, 62 Atl. 722.

Messrs. Robert C. Bacon and Green & Bennett for plaintiff.

Haselton, J., delivered the opinion of the court:

The action is case for negligence, and was heard on a demurrer to the declaration and to counts 1, 2, 3, 4, 5, and 6 of the declaration. The demurrer was overruled *pro forma*, and to this ruling the defendant excepted. The case comes here before trial on the questions of pleading raised by the assigned grounds of demurrer.

The plaintiff, to state the case made by the declaration, was an engineer in the employ of the defendant and was injured in the course of such employment. Four counts of the declaration are at common law. The others, three in number, assert

in substance that the plaintiff was injured while the defendant was engaged in interstate commerce, and while the plaintiff was employed by the defendant in such commerce. No question is made as to the character of the counts. The latter counts refer expressly to the Federal employers' liability act, and rest the right of action thereon; but this reference is unnecessary, for the state courts do and must take notice of the Federal act. *Metropolitan Stock Exchange v. Lyndonville Nat. Bank*, 76 Vt. 303, 57 Atl. 101; *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 576, 57 L. ed. 355, 363, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134.

The demurrer to the whole declaration raises the question, chiefly argued, of whether the counts at common law can be joined with the counts under the Federal statute. The object of the pleader in joining the two sets of counts may be inferred to have been uncertainty as to what the evidence would develop as to the character of the freight carried by the train on which he was injured, and the purpose to have a count applicable to the facts that the evidence might tend to show. The two sets of counts state what must be regarded as different causes of action. *St. Louis, S. F. & T. R. Co. v. Seale*, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651; *Troxell v. Delaware, L. & W. R. Co.* 227 U. S. 434, 57 L. ed. 586, 33 Sup. Ct. Rep. 274; *Winfree v. Northern P. R. Co.* 227 U. S. 296, 57 L. ed. 518, 33 Sup. Ct. Rep. 273; *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192.

But the mere fact that the causes of action are different is no objection to the joinder. It is the policy of the law to permit and encourage the joinder of causes of action that are of the same nature and are to be pursued in the same form of action. *Sawyer v. Childs*, 83 Vt. 329, 75 Atl. 886; *Gordan v. Journal Pub. Co.* 81 Vt. 237, 69 Atl. 742; *Lee v. Springer*, 73 Vt. 183, 50 Atl. 809; *Holton v. Muzzy*, 30 Vt. 365; 1 Chitty, Pl. **199-202; Gould, Pl. chap. 4, §§ 79-83. And it is not now considered material, if other conditions are met, that a statutory cause of action is joined with one at common law. *Ranney v. St. Johnsbury & L. C. R. Co.* 64 Vt. 277, 24 Atl. 1053; *Preston v. St. Johnsbury & L. C. R. Co.* 64 Vt. 280, 25 Atl. 486; *McDuffee v. Boston & M. R. Co.* 81 Vt. 52, 75, 130 Am. St. Rep. 1019, 69 Atl. 124; *Marquette Third Vein Coal Co. v. Dielle*, 208 Ill. 116, 70 N. E. 17; *Green v. Michigan C. R. Co.* 168 Mich. 104, 133 N. W. 956, Ann. Cas. 1913C, 98; *Clark v. Worthington*, 12 Pick. 571; *Worster v. Canal Bridge*, 16 Pick. 541; *McL.R.A.* 1915C.

Laughlin v. Hebron Mfg. Co. (C. C.) 171 Fed. 269.

The tradition, sometimes called a principle, that a common-law cause of action cannot be joined with one given by statute, seems in the remote analysis to have no better support than a case, reported anonymously in *Jenkins Centuries*, which goes only to the extent of holding that where the two actions are different in nature and form, as an action of trespass on a statute and an action of detinue at common law, they cannot be joined. *Jenkins Centuries*, Case, 46, p. 211.

The question is not that of allowing an amendment which introduced a new cause of action, a matter that has led to much discussion in view of the common law and the more or less limited statutory power to grant amendments. *Acts of 1912*, No. 91, § 1; *P. S.* 1498; *Sowles v. Hartford L. Ins. Co.* 85 Vt. 56, 81 Atl. 98; *Derosia v. Ferland*, 83 Vt. 372, 28 L.R.A.(N.S.) 577, 138 Am. St. Rep. 1092, 76 Atl. 153; *Estabrooks v. Fidelity Mut. F. Ins. Co.* 74 Vt. 202, 52 Atl. 420; *Brodek v. Hirschfeld*, 57 Vt. 12; *McDermid v. Tinkham*, 53 Vt. 615; *Dana v. McClure*, 39 Vt. 197; *Union P. R. Co. v. Wyler*, 158 U. S. 285, 39 L. ed. 983, 15 Sup. Ct. Rep. 877.

We have here, omitting a question presently to be discussed, the simple and ordinary case of the original joinder in an action of case of two causes of action, both properly brought in that form, and there is no difficulty about the matter unless it is found in the inconsistency of the counts, a point somewhat dwelt upon by the defendant.

It is true that the counts are inconsistent in that the Federal law is exclusive to the extent to which it applies, so that, if the plaintiff makes out a case of liability under that law, there can be no liability under the common-law counts. But the common-law doctrine of repugnancy relates to inconsistent matters of substance in the same count or plea. Counts and pleas which are merely inconsistent are not for that reason repugnant in a legal sense. *Doyle v. Melendy*, 85 Vt. 297, 81 Atl. 1129; *White v. Snell*, 9 Pick 16; *Barton v. Gray*, 48 Mich. 164, 12 N. W. 30. Though inconsistent methods of pleading are not to be tolerated, inconsistency between pleas is permissible. *Powers v. Rutland R. Co.* 83 Vt. 415, 419, 76 Atl. 110. Inconsistency of statement between counts is merely the common-law way of providing for the exigencies of the evidence. In equity the same thing is done in a proper case by the drawing of a bill in a double aspect; that is, in the alternative. *Blondin v. Brooks*, 83 Vt. 472, 76 Atl. 184; *Nichols v. Nichols*, 61 Vt. 429, 18 Atl. 153;

McConnell v. McConnell, 11 Vt. 290. So it is that, in many of the states that have abolished or greatly modified the common-law system of pleadings, a complainant may present his case in a double aspect, and may say, "If that is not true, then this is, and in either case I claim to recover." *Payne v. New York, S. & W. R. Co.* 201 N. Y. 436, 95 N. E. 19; *Astin v. Chicago, M. & St. P. R. Co.* 143 Wis. 477, 31 L.R.A. (N.S.) 158, 128 N. W. 265; *Jones v. Holtzen*, — Tex. Civ. App. —, 141 S. W. 121; *Morrison v. Bartlett*, — Tex. Civ. App. —, 131 S. W. 1146; *Carbary v. Detroit United R. Co.* 157 Mich. 683, 122 N. W. 367; *Cleveland, C. C. & St. L. R. Co. v. Gossett*, 172 Ind. 525, 87 N. E. 723; *Sloss Iron & Steel Co. v. Tilson*, 141 Ala. 152, 37 So. 427; *Bankson v. Illinois C. R. Co.* (D. C.) 196 Fed. 171.

The defendant calls attention to the fact, that if the plaintiff had been killed, and that if his personal representatives had sued, joining counts as they are here joined, the recovery, if one was had, would not, at least not necessarily, be for the benefit of the same person. But that is not this case, and it is unwise to anticipate. Neither do we consider the matter of election after the coming in of the evidence, or at any other stage of the case. The demurrer to the declaration on the ground of the misjoinder of counts was properly overruled. Counts 1, 2, 5, and 6 were demurred to on the ground that, under the allegations of those counts, the plaintiff was injured because of disobedience of orders of the defendant.

The story of this accident, as told in the different counts in ways which differ slightly, is this: The defendant was required by its rules to transmit to conductors and engineers orders for the government of their trains, and kept at stations books called train registers, in which conductors, by requirement of the defendant, registered the arrival and departure of their respective trains for the information and instruction of the conductors and engineers of other trains, thereafter arriving at and departing from such stations, "in respect to running and operating" their respective trains. The plaintiff and his conductor on a certain train going north received orders to meet a certain other train at Roxbury. On their arrival at Roxbury the defendant's train register showed that the train to be met had arrived and departed. It had in fact departed not by going on, but by going back to Montpelier, and it was making a second trip over the line from Montpelier to Roxbury. Of this the plaintiff and his conductor knew nothing, but believed from the information given in the train register that the train they

were to meet had already gone on, and so they started out from Roxbury towards Montpelier with the result that a collision occurred with the train, which, having been registered out of Roxbury, was in fact coming in. Both the orders to the plaintiff and his conductor, and the entries on the train register by conductors of other trains, were for the guidance of the plaintiff and his conductor.

The negligence charged in two of the counts under consideration is the failure to make and enforce a proper system of rules applicable to the orders to the plaintiff and his conductor in the situation. The negligence charged in the other counts is the failure of the defendant to give a plain, safe, and proper order in the particular case. As the situation is set out, we cannot say, as matter of law, that negligence is not charged in each and every count. The pleader does not present a simple case of disobedience of orders. *Mahoney v. Rutland R. Co.* 78 Vt. 244, 62 Atl. 722. Nor do any of the counts charge, as the defendant claims with regard to some, a duty to give the reasons for orders, nor do the allegations amount to that.

Counts 1, 2, 5, and 6 are demurred to on the further ground that the negligence charged to the defendant was not the proximate cause of the injury to the plaintiff. But the allegations are sufficient as against this ground of demurrer. The claim is that under the allegations there were intervening causes sufficiently shown by the above narrative, independent of the alleged negligence of the defendant; but, as we read the counts, they point out the negligence of the defendant as the proximate and efficient cause of the injury, and the so-called intervening causes are made to appear otherwise. *Isham v. Dow*, 70 Vt. 588, 45 L.R.A. 87, 67 Am. St. Rep. 691, 41 Atl. 585, 5 Am. Neg. Rep. 106; *Ide v. Boston & M. R. Co.* 83 Vt. 66, 79, 74 Atl. 401.

The third count of the declaration is demurred to as containing an argumentative allegation as to the legal effect of orders given to the plaintiff. Argumentativeness cannot be taken advantage of by general demurrer. *Wiley v. Carpenter*, 64 Vt. 212, 15 L.R.A. 853, 23 Atl. 630; *Walker v. Wooster*, 61 Vt. 403, 17 Atl. 792; *Sheridan v. Sheridan*, 58 Vt. 504, 5 Atl. 494.

And if the demurrer be treated as special, though the grounds of it were not filed until about three weeks after the demurrer was filed, then it is of no avail, for it does not point out wherein the argumentativeness resides. *Webster v. State Mut. F. Ins. Co.* 81 Vt. 75, 69 Atl. 319; *Wiley v. Carpenter*, 64 Vt. 212, 15 L.R.A. 853, 23 Atl.

630; Walker v. Wooster, 61 Vt. 403, 17 Atl. 792.

Counts 1, 2, 3, and 4 are demurred to on the ground that, being at common law, they do not negative contributory negligence on the part of the plaintiff in connection with matters and things constituting the proximate cause of the injury under the allegations of the counts. But each count, after its allegations of negligence on the part of the defendant, has in its closing paragraph the allegation that the collision and injury were "solely on account of the negligence of the defendant in the premises." On this branch of the case that was all that the plaintiff need prove, and therefore all that he was required to allege. The allegations in this respect sufficiently negated contributory negligence. Bovee v. Danville, 53 Vt. 183, 189; Henry v. Fitchburg R. Co. 65 Vt. 436, 26 Atl. 485; Benedict v. Union Agri. Soc. 74 Vt. 91, 103, 52 Atl. 110.

All the grounds of demurrer assigned below have been noticed in the order in which they appear in the specification thereof.

Pro forma judgment affirmed, and cause remanded for trial on its merits.

WASHINGTON SUPREME COURT.
(Department No. 2.)

MIKE REEVE, Appt.,

v.

NORTHERN PACIFIC RAILWAY COMPANY, Respnt.

(— Wash. —, 144 Pac. 63.)

Master and servant — Federal employers' liability act — negligence of employees.

The negligence of employees of a railroad company in pushing another employee out of a car door to his injury, while they were wrestling inside the car, is not within the operation of the Federal employers' liability act, providing that an interstate carrier shall be liable to an employee engaged in interstate commerce for injuries resulting in whole or in part from "negligence of any of the officers, agents, or employees of such carrier," since the negligence must, to come within the statute, occur in the course of their employment.

(November 16, 1914.)

Note. — As to the constitutionality, application, and effect of the Federal employers' liability act, see note, post, 47. L.R.A.1915C.

APPEAL by plaintiff from a judgment of the Superior Court for King County dismissing an action brought under the Federal employers' liability act to recover damages for personal injuries. Affirmed.

The facts are stated in the opinion.

Messrs. George B. Cole and John Wesley Dolby, for appellant:

It was the duty of the court under the employers' liability act, to render judgment for the plaintiff, and under said act there was no other alternative for the court.

Horton v. Oregon-Washington R. & Nav. Co. 72 Wash. 503, 47 L.R.A.(N.S.) 8; Northern P. R. Co. v. Maerkl, 130 Pac. 897, 117 C. C. A. 237, 198 Fed. 1; Western & A. R. Co. v. Ferguson, 113 Ga. 708, 54 L.R.A. 802, 39 S. E. 306, 10 Am. Neg. Rep. 227.

Mr. C. H. Winders, for respondent:

The Federal act does not attempt to abolish the defense of assumption of risk, except where there is a violation of the safety appliance act, and if, under any theory, it could be held that a coemployee, in an action as against him, was guilty of negligence, it would be equally true that the plaintiff himself, participating in the scuffling or playing, would necessarily assume all risks until the conclusion of such an affair.

Central Vermont R. Co. v. Bethune, 124 C. C. A. 528, 206 Fed. 868; New York, N. H. & H. R. Co. v. Vizvari, ante, 9, 126 C. C. A. 632, 210 Fed. 118; Barker v. Kansas City, M. & O. R. Co. 88 Kan. 767, 43 L.R.A. (N.S.) 1121, 129 Pac. 1151; Bowers v. Southern R. Co. 10 Ga. App. 367, 73 S. E. 677; Gulf, C. & S. F. R. Co. v. McGinnis, 228 U. S. 173, 57 L. ed. 785, 33 Sup. Ct. Rep. 426, 3 N. C. C. A. 806; Freeman v. Powell, — Tex. Civ. App. —, 144 S. W. 1033.

A master is not responsible to an employee, even under a fellow-servant act, for an accident which has no connection with the employment.

1 White, Personal Injuries on Railroads, § 227; Jackson v. Chicago, R. I. & P. R. Co. 102 C. C. A. 159, 178 Fed. 432; Bowen v. Illinois C. R. Co. 70 L.R.A. 915, 69 C. C. A. 444, 136 Fed. 306; Robinson v. McNeill, 18 Wash. 163, 51 Pac. 355; Chase v. Knabel, 46 Wash. 484, 12 L.R.A.(N.S.) 1155, 90 Pac. 642; Jones v. Hoge, 47 Wash. 663, 14 L.R.A.(N.S.) 216, 125 Am. St. Rep. 915, 92 Pac. 433.

Fullerton, J., delivered the opinion of the court:

The appellant was in the employment of the respondent as a laborer, his specific duties being to assist in supplying the respondent's baggage, mail, and other cars with water and fuel, and to aid otherwise

in fitting them for service on the respondent's railway. On the evening of June 23, 1911, the appellant and another employee of the respondent, after performing their duties with respect to certain cars, entered a baggage car of the respondent in which was a third employee. On entering the baggage car the appellant sat down on the floor in the door of the car, with his feet outside of the door resting on the iron steps or stirrups which hung below the floor. While so sitting the other employees began wrestling or scuffling in the body of the car, and while so engaged, whether intentionally so or not the evidence does not disclose, one of them brushed against, or pushed against, the appellant, causing him to fall to the ground below. In the fall the appellant received severe and lasting injuries, fracturing the radius and ulna and dislocating the wrist of his right arm. The respondent is a common carrier by railroad of interstate commerce, and it is conceded in the record that the appellant was employed by "such carrier in such commerce," within the meaning of the act of Congress of April 22, 1908, commonly known as the employers' liability act. 35 Stat. at L. 65, chap. 149 (Comp. Stat. 1913, §§ 8657-8665). This action was instituted by the appellant under the provisions of the statute above cited to recover in damages for the injuries suffered. The cause was tried before the court sitting without a jury, and resulted in a judgment of dismissal.

In this court the appellant relies upon the 1st section of the statute, which provides that any common carrier by railroad, while engaged in commerce between any of the several states, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, resulting in whole or in part from negligence of any of the officers, agents, or employees of such carrier. He argues that the act of his coemployee in pushing him from the car door was an act of negligence within the contemplation of the statute cited, and, since the act resulted in his injury while he was in the carrier's employ, the carrier is liable to answer for the injury. Read literally, and without consideration of its object and purpose, the statute relied upon would seem broad enough to create liability on the part of the carrier under circumstances such as are here shown. But we cannot think it subject to such a literal construction. To those acquainted with the history of the law on the subject of actions for personal injuries, it is apparent that the primary purpose of the L.R.A.1915C.

statute was to permit a recovery in that class of cases where the right would be otherwise defeated under the common-law doctrine of fellow servant. Its purpose was not to render the carrier liable in all instances, and under all circumstances, where one employee of a carrier is injured by the careless and negligent acts of another. It is not enough that the negligent act causing the injury occur during the existence of the employment, nor is it enough that it occur during the hours the employees are required to be on duty. To render the carrier liable the negligent act must occur while the employees are doing some act required in the prosecution of the carrier's business.

"For the employer to be held liable, in damages, for an injury to an employee, the injury must not only arise out of, but it must also occur 'in the course of,' the employment. If the employee, instead of attending to the business of the employer, at the time of the injury, was engaged upon some business of his own, or if the work done by him was outside the scope of his employment, and as a result of the performance of such outside duties he was injured, then the employer is not responsible, for in the performance of such duties the relation of employer and employee did not exist, since he was not employed to perform any such service. And not only is an employee himself precluded from recovering for an injury, where he had voluntarily abandoned his service of his employer and engaged himself upon some independent business, but his employer is not responsible for any injury that he may occasion other employees while so engaged upon such outside business, for, to render the employer liable for injuries caused by his employees, the act that caused the injury must have been done in the scope of the employee's duties for the employer." White, *Personal Injuries on Railroads*, § 227.

It remains to inquire whether the injury here suffered by the appellant was the result of a negligent act of a fellow employee committed while he was in the prosecution of the employer's business. Clearly it was not, and is not so claimed by the appellant. The liability is rested on the broad wording of the statute, which, as we say, was not intended to cover negligent acts of an employee in no way connected with the business the prosecution of which he was employed to aid.

The judgment is affirmed.

Crow, Ch. J., and Parker, Mount, and Morris, JJ., concur.

DISTRICT OF COLUMBIA COURT OF APPEALS.

PHILADELPHIA, BALTIMORE, & WASHINGTON RAILROAD COMPANY, Appt.,
v.

LILLIAN TUCKER, Admr., etc., of Sidney R. Tucker, Deceased.

(35 App. D. C. 123.)

Master and servant — employers' liability act — who is employee.

1. A locomotive fireman who, in response to a call for duty, takes a customary path across the company's tracks to assume his duties, is, after entering on the company's property and while traveling along the path, an employee within the meaning of an employers' liability act making employers liable for injury to employees during the course of their employment.

Same — unsafe way — workman's path.

2. A path established through long-continued use by railroad employees in going to and from their work across the property of the company is a way within the meaning of a statute making the company liable for injuries to an employee through an insufficiency due to its negligence in its ways.

Same — insufficiency of path.

3. An employee's way across railroad tracks is insufficient within the meaning of a statute making the company liable for an injury to an employee resulting from insufficiency of the way due to its negligence, if no protection whatever is provided against injuries from passing trains which are likely to result from the surrounding conditions.

Same — abolition of assumption of risk.

4. The defense of assumption of risk is removed in an action to hold a master liable for injury to an employee, by a statute providing that no contract of employment shall constitute any bar or defense to an action brought to recover such damages.

Damages — death — failure to prove age and condition of widow — effect.

5. Failure to prove the age and condition of health of the widow and child of one killed by another's negligence does not invalidate an assessment of damages, where the age of decedent was proved and the widow and child appeared before the jury and afforded them the opportunity of determining such facts.

(April 6, 1910.)

A PPEAL by defendant from a judgment of the Supreme Court in plaintiff's favor in an action brought to recover damages under the employers' liability act for

Note. — As to the constitutionality, application, and effect of the Federal employers' liability act, see note, post, 47. L.R.A.1915C.

the alleged negligent killing of plaintiff's intestate. Affirmed.

The facts are stated in the opinion.

Messrs. Frederic D. McKenney, John S. Flannery, and William Hitz, for appellant:

Tucker, at the time of the accident, was not an employee of the defendant company, for whose injury or death an action might be maintained under the employers' liability act of 1906.

Fletcher v. Baltimore & P. R. Co. 168 U. S. 135, 42 L. ed. 411, 18 Sup. Ct. Rep. 35; Baltimore & O. R. Co. v. State, 33 Md. 542; Orman v. Salvo, 54 C. C. A. 265, 117 Fed. 233.

An employee is not such, in the strict sense, after business hours, or when he is not actually employed, if his engagement is intermittent and by the day.

Wink v. Weiler, 41 Ill. App. 336; Cincinnati, N. O. & T. P. R. Co. v. Conley, 14 Ky. L. Rep. 568, 20 S. W. 816; Washburn v. Nashville & C. R. Co. 3 Head, 638, 75 Am. Dec. 784; Baker v. Chicago, R. I. & P. R. Co. 95 Iowa, 163, 63 N. W. 667; McDaniel v. Highland Ave. & Belt R. Co. 90 Ala. 64, 8 So. 41, 13 Am. Neg. Cas. 134; State use of Abell v. Western Maryland R. Co. 63 Md. 433; Savannah, F. & W. R. Co. v. Flannagan, 82 Ga. 579, 14 Am. St. Rep. 183, 9 S. E. 471; Corbin v. American Mills, 27 Conn. 274, 71 Am. Dec. 63, 13 Am. Neg. Cas. 735.

The use made of the opening did not make it a "way" under the act of 1906.

At the time and place in question Tucker was not an employee traversing or attempting to make use of a way provided by the company, which it was the duty of the latter to render safe; but he was a mere licensee, to whom the defendant owed no duty except to refrain from inflicting wanton and wilful injury after discovering him in a position of peril.

23 Am. & Eng. Enc. Law, 2d ed. 736; Baltimore & O. R. Co. v. State, 62 Md. 479, 50 Am. Rep. 233; Illinois C. R. Co. v. Godfrey, 71 Ill. 500, 22 Am. Rep. 112; Morrissey v. Eastern R. Co. 126 Mass. 377, 30 Am. Rep. 686; Chesapeake Beach R. Co. v. Donahue, 107 Md. 119, 68 Atl. 507.

The doctrine of assumed risks is founded upon the maxim, *Volenti non fit injuria*, and is applied in all cases where the injured person, whether a servant or a stranger, notwithstanding his knowledge of the possibilities of danger, voluntarily undertakes or continues in an employment, and suffers injury in the course thereof.

1 Labatt, Mast. & S. §§ 368 et seq.; 1 Andrews, Am. Law, pp. 879, 880; Butler v. Frazee, 25 App. D. C. 392.

No presumption of negligence arises from

the fact of accident as in the case of a passenger, but the servant must prove every material allegation of his declaration, and if he fails to do so, or his proof leaves the matter in doubt, he cannot recover damages of the master.

Patton v. Texas & P. R. Co. 179 U. S. 658, 663, 45 L. ed. 361, 364, 21 Sup. Ct. Rep. 275; *Butler v. Frazee*, *supra*.

Messrs. *Alvin L. Newmyer and Levi H. David*, for appellee:

Decedent was an employee at the time of the accident.

Northwestern Union Packet Co. v. McCue, 17 Wall. 508, 21 L. ed. 705; *Walbert v. Trexler*, 156 Pa. 112, 27 Atl. 65; *Texas & P. R. Co. v. Gentry*, 163 U. S. 353, 41 L. ed. 186, 16 Sup. Ct. Rep. 1104; *Ewald v. Chicago & N. W. R. Co.* 70 Wis. 420, 5 Am. St. Rep. 178, 36 N. W. 12, 591; *Adams v. Iron Cliffs Co.* 78 Mich. 272, 18 Am. St. Rep. 441, 44 N. W. 270; *Powers v. Calcasieu Sugar Co.* 48 La. Ann. 483, 19 So. 455; *International & G. N. R. Co. v. Ryan*, 82 Tex. 565, 18 S. W. 1219; *St. Louis, A. & T. R. Co. v. Welch*, 72 Tex. 298, 2 L.R.A. 839, 10 S. W. 529; *McDonough v. Lanpher*, 55 Minn. 501, 43 Am. St. Rep. 541, 57 N. W. 152; *Ionnone v. New York, N. H. & H. R. Co.* 21 R. I. 452, 46 L.R.A. 730, 79 Am. St. Rep. 812, 44 Atl. 592, 7 Am. Neg. Rep. 163; *Parkinson Sugar Co. v. Riley*, 50 Kan. 401, 34 Am. St. Rep. 123, 31 Pac. 1090; *Broderick v. Detroit Union R. Station & Depot Co.* 56 Mich. 261, 56 Am. Rep. 382, 22 N. W. 802; *Whatman v. Pearson*, L. R. 3 C. P. 422, 37 L. J. C. P. N. S. 156, 18 L. T. N. S. 290, 16 Week. Rep. 649; *Wright v. Northampton & H. R. Co.* 122 N. C. 852, 29 S. E. 100; *Thomas v. Wisconsin C. R. Co.* 108 Minn. 485, 23 L.R.A. (N.S.) 954, 122 N. W. 456; *Olsen v. Andrews*, 168 Mass. 261, 47 N. E. 90, 2 Am. Neg. Rep. 570; *International & G. N. R. Co. v. Brooks*, — Tex. Civ. App. —, 54 S. W. 1056; *Riley v. Cudahy Packing Co.* 82 Neb. 319, 117 N. W. 765; *Chicago, K. & W. R. Co. v. Pontius*, 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585; *Stone v. United States*, 3 Ct. Cl. 262; *Schlereth v. Missouri P. R. Co.* 115 Mo. 88, 21 S. W. 1110; *Cotten v. Fidelity & C. Co.* 41 Fed. 506.

The fact that the opening in the wall was originally left to accommodate a side track would not excuse the defendant for omitting reasonable precautions to safeguard the opening, if, as a matter of fact, it was also being used as a way across its tracks. Nor was actual notice by an official of the defendant company necessary, if, from the long-continued use of over two years, the company might have known of such use.

Baltimore & P. R. Co. v. Golway, 6 App. D. C. 143; *Glaria v. Washington Southern L.R.A.* 1915C.

R. Co. 30 App. D. C. 559; *Kister v. Reeser*, 98 Pa. 1, 42 Am. Rep. 608; 2 Labatt, Mast. & S. § 668, p. 1953; *Willets v. Watt* [1802] 2 Q. B. 92, 61 L. J. Q. B. N. S. 540, 66 L. T. N. S. 818, 40 Week. Rep. 497, 56 J. P. 772; *Kansas City, M. & B. R. Co. v. Burton*, 97 Ala. 240, 12 So. 88; *Louisville & N. R. Co. v. Bouldin*, 110 Ala. 185, 20 So. 325; *McQuade v. Dixon*, 14 Sc. Sess. Cas. 4th series, 1039; *McGiffin v. Palmer's Shipbuilding & Iron Co. L. R.* 10 Q. B. Div. 5, 52 L. J. Q. B. N. S. 25, 47 L. T. N. S. 346, 31 Week. Rep. 118, 47 J. P. 70; *Pegram v. Dixon*, 55 L. J. Q. B. N. S. 447, 51 J. P. 198; *Tutt v. Illinois C. R. Co.* 44 C. C. A. 320, 104 Fed. 741.

The act of 1906 expressly abolishes the defense of assumption of risk.

Coley v. North Carolina R. Co. 128 N. C. 534, 57 L.R.A. 817, 39 S. E. 43, reaffirmed on rehearing in 129 N. C. 407, 57 L.R.A. 834, 40 S. E. 195; *Thomas v. Raleigh & A. Air Line R. Co.* 129 N. C. 392, 40 S. E. 201; *Cogdell v. Southern R. Co.* 129 N. C. 398, 40 S. E. 202; *Mott v. Southern R. Co.* 131 N. C. 234, 42 S. E. 601; *O'Maley v. South Boston Gaslight Co.* 158 Mass. 135, 47 L.R.A. 161, 32 N. E. 1119.

The act of 1906 makes assumption of risk a form of contributory negligence.

Nadaw v. White River Lumber Co. 76 Wis. 120, 20 Am. St. Rep. 29, 43 N. W. 1135; *Darcey v. Farmers' Lumber Co.* 87 Wis. 249, 58 N. W. 382; *Hazen v. West Superior Lumber Co.* 91 Wis. 213, 64 N. W. 857; *Peterson v. Sherry Lumber Co.* 90 Wis. 93, 62 N. W. 948; *Kraeft v. Mayer*, 92 Wis. 252, 65 N. W. 1032; *Atkyn v. Wabash R. Co.* 41 Fed. 193; *The Serapis*, 49 Fed. 393; *The Chandos*, 6 Sawy. 554, 4 Fed. 645; *Richmond & D. R. Co. v. Finley*, 12 C. C. A. 595, 25 U. S. App. 16, 63 Fed. 228; *Great Northern R. Co. v. Kasischke*, 43 C. C. A. 626, 104 Fed. 440; *Southern P. Co. v. Yergin*, 48 C. C. A. 497, 109 Fed. 436; *Mason & O. R. Co. v. Yockey*, 43 C. C. A. 228, 103 Fed. 265; *Green Bros. v. Brown*, 7 Kan. App. 398, 51 Pac. 926; *Bunt v. Sierra Butte Gold Min. Co.* 138 U. S. 485, 34 L. ed. 1032, 11 Sup. Ct. Rep. 464.

If the act abolishes assumption of risk as to a fellow servant's negligence, it certainly abolishes it with respect to any defect or insufficiency in cars, engines, ways, etc.

Kilpatrick v. Grand Trunk R. Co. 74 Vt. 288, 93 Am. St. Rep. 887, 52 Atl. 531; *Murphy v. Grand Rapids Veneer Works*, 142 Mich. 677, 106 N. W. 211; *Sipes v. Michigan Starch Co.* 137 Mich. 258, 100 N. W. 447, 16 Am. Neg. Rep. 401; *Durant v. Lexington Coal Min. Co.* 97 Mo. 62, 10 S. W. 484, 16 Am. Neg. Cas. 397; *Green v. Western American Co.* 30 Wash. 87, 70 Pac. 310; *Stehle v. Jaeger Automatic Mach. Co.*

220 Pa. 617, 69 Atl. 1116, 14 Ann. Cas. 122; Whelan v. Washington Lumber Co. 41 Wash. 153, 111 Am. St. Rep. 1006, 83 Pac. 98, 19 Am. Neg. Rep. 587; Western Furniture & Mfg. Co. v. Bloom, 76 Kan. 127, 11 L.R.A.(N.S.) 225, 123 Am. St. Rep. 123, 90 Pac. 821.

Robb, J., delivered the opinion of the court:

This is an appeal from a judgment of the supreme court of the District of Columbia upon a verdict for \$5,000, against appellant, the Philadelphia, Baltimore, & Washington Railroad Company, defendant below, in an action under the employers' liability act of June 11th, 1906 (34 Stat. at L. 232, chap. 3073), for the recovery of damages resulting from the alleged negligent killing of plaintiff's intestate, Sidney R. Tucker, in the early morning of August 26, 1907, as he was crossing the defendant's tracks on his way to assume his duties as fireman in response to a call from the defendant to report for that purpose.

In 1905, during the progress of elevating and depressing its tracks along Virginia avenue, and excavating tunnels leading to the Navy Yard and through the Capitol grounds, the defendant company built along the north side of Virginia avenue, which was the south side of Garfield park, a stone wall varying in height from 4½ to 20 feet, and about 2 feet in thickness. This wall extended from the west portal of the Navy Yard tunnel, beyond East Capitol street. About 840 feet west of the tunnel, an opening about 80 feet wide was left in this wall, primarily to admit a side track leading out into Garfield park, which track was used in connection with construction work. Immediately adjacent to this wall were the two main tracks of the defendant company, the one the nearer to the wall leading westwardly from the tunnel toward the Sixth Street station, and the second track leading in the opposite direction. Beyond these two tracks there was a spur track which accommodated the "Annex," or work train, which carried the freight crews to and from work. The evidence shows that this train usually stopped about opposite the opening in the wall, for the purpose of receiving the train crews and other workmen. About 370 feet southwest of this opening in the wall, and quite near said main tracks, stood the so-called ND tower, from which signals were displayed for trains approaching from the direction of the tunnel. About 560 feet west of said opening was South Capitol street, at which point the tracks were elevated above the street. About 750 feet southwest of said opening was a roundhouse or engine house of the L.R.A. 1915C.

defendant company, and between this house and said opening was a network of tracks forming what was called the Jersey yards, where passenger cars were stored. North of said opening in Garfield park was one path leading directly to the opening. The evidence shows that this opening, for two years prior to the accident, had been used constantly not only by the men riding on said Annex, but by the other employees of the defendant company in going to and in returning from their work in said Jersey yards and roundhouse. The evidence bearing upon this phase of the case will be considered more in detail later.

Tucker entered the employ of the defendant company in July, 1907, as an extra locomotive fireman, and, while his work appears to have been regular and constant, he was nevertheless paid by the trip. Except on one occasion, when he was summoned by telephone for passenger train service, he had always been called for service, and had served, on freight trains. Tucker and his wife boarded with a Mrs. McGrain, who kept a boarding house at 230 First street, S. E., which was northeast of said opening. On the morning of the accident the regular call boy was off duty, and a machinist's helper was sent by the engine despatcher to call Tucker for passenger train No. 302, to leave the engine house at 4 A. M. It was customary in calling for freight train service to have the men sign a duplicate slip or call. On this occasion, however, no duplicate was sent, because Tucker was wanted for passenger train service. The messenger, according to the testimony of Mrs. McGrain, rang the door bell at her house at about a quarter of 3, whereupon she looked out of the window and saw the boy at the door, who said: "I want Tucker for 3:30;" that she went out into the hall and called to Tucker, who was on the next or third floor, and when he answered, "Yes, Mrs. McGrain, I am up," she delivered the verbal message to him as requested; that after Tucker had been killed, she found a paper upon which the call for Tucker was written "lying on the floor of the vestibule, where the call boy had slipped it under the vestibule door." The boy in his testimony admitted that he did not see Tucker, and that he placed the paper containing the call under the door.

The theory of the plaintiff's case was that Tucker assumed, when he was called for 3:30, that he was called for freight train service, that being the time the Annex usually left with train crews; that he accordingly proceeded to the opening to take the Annex, which upon that morning was standing almost opposite said opening, and not more than 100 feet therefrom; and

that, in attempting to cross said main tracks, he was struck and killed by a passenger train running westwardly from the tunnel on the track nearest the wall. His remains, according to the testimony of nearly all the witnesses, were found scattered along the track nearer the wall, and between that track and the wall, and, according to all the witnesses, west of the opening. Examination of the passenger engine soon after the accident "showed that it had struck something, and there was blood and stuff on it." A freight train going in the opposite direction passed on the second track about the same instant the passenger train passed on the first track. The elements of negligence upon which plaintiff bases her action are that the defendant, having in effect established a way for the use of its employees, was bound to take proper precautions to make said way reasonably safe; that there were no signalmen, gates, signal lights, or other protective devices at said opening; and further that said passenger train was running at an excessive rate of speed, namely, 30 miles an hour, while, under a municipal regulation in force at that time, it was limited to 12 miles an hour.

In the brief of appellant, which is one of unusual merit, the constitutionality of the employers' liability act of June 11th, 1906 (34 Stat. at L. 232, chap. 3073), is challenged. This act has been twice considered by the Supreme Court of the United States. In the *Employers' Liability Cases* (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141, which embraced a series of cases, and which were elaborately presented by able and astute counsel, the court declared the act unconstitutional in so far as it related to carriers engaged in business in the states. Subsequently, in *El Paso & N. E. R. Co. v. Gutierrez*, 215 U. S. 87, 54 L. ed. 106, 30 Sup. Ct. Rep. 21, the constitutionality of the act as applied to the District of Columbia and the territories was brought under review. The court, in a unanimous opinion, reached the conclusion "that in the aspect of the act now under consideration the Congress proceeded within its constitutional power." This court, in *Hyde v. Southern R. Co.* 31 App. D. C. 466, carefully considered the act as applicable to the District of Columbia, the decision in *El Paso & N. E. R. Co. v. Gutierrez*, then not having been rendered, and pronounced the act constitutional in so far as it applies to this District and the territories. An examination of the points advanced by counsel, as disclosed by the report of the case, shows that most, if not all, the questions raised by counsel in this case were brought L.R.A.1915C.

to the attention of the court in the *Employers' Liability Cases*. But even if this were not the fact, we would hesitate to declare a law unconstitutional that had been twice before the court of last resort, and, so far as it applies to this District, had been declared to be constitutional. In such a situation we must assume that the Supreme Court, before declaring the act constitutional, considered it in all its phases. Certainly it would not be becoming in a court of inferior jurisdiction to attempt to demonstrate to the higher tribunal the incorrectness of its conclusion in a given case. Such being the situation, we shall dispense with a useless task, and pass over without comment this assignment of error.

2. It is specified as error that the court refused to hold "that the plaintiff's intestate at the time of the accident was not on duty, was not in the actual service of the defendant, and was not an employee within the contemplation of the employers' liability act of 1906, and that said act was inapplicable to the case at bar."

It is conceded by defendant that, had Tucker reached the Annex, assuming that he had been called for freight train service, he would have been in the employ of the defendant company within the meaning of § 1 of said act of 1906, notwithstanding that technically his term of service would not have commenced until he reached the freight yards to which the Annex was to carry him. This concession is made upon the theory that he would then have been upon a conveyance provided by the master, and hence under the master's control. There are numerous cases sustaining this view. It is contended, however, that, until Tucker did reach the Annex, he was not a servant of the company within the contemplation of the act. When Tucker was killed he was upon the premises of the defendant in response to its call to assume the duties he had been engaged by the defendant to assume, and for their mutual interest and advantage. Can it be that under such circumstances the relation which the decedent sustained to the defendant was that of a mere stranger? Is it possible that the act under consideration warrants a distinction so fine as to permit a master to escape liability for negligence resulting in the injury of one hired to perform service, because the injury occurs before the service is actually undertaken, notwithstanding that, at the time of the injury, the servant is properly and necessarily upon the premises of the master for the sole purpose of his employment? We think not. Such a rule, in our view, would be as technical and artificial as it would be unjust. We think the better rule, the one founded in reason

and supported by authority, is that the relation of master and servant, in so far as the obligation of the master to protect his servant is concerned, commences when the servant, in pursuance of his contract with the master, is rightfully and necessarily upon the premises of the master. The servant in such a situation is not a mere trespasser nor a mere licensee. He is there because of his employment, and we see no reason why the master does not then owe him as much protection as it does the moment he enters upon the actual performance of his task. In the present case, assuming for the moment the existence of a way through said opening, and across the two main tracks adjacent thereto, we can see no reason for a distinction between the master's obligation to Tucker while he was traveling over that way, and its obligation to him after he had entered the Annex, which was only another agency provided by the master for the accommodation of its servants.

In *Northwestern Union Packet Co. v. McCue*, 17 Wall. 508, 21 L. ed. 705, a bystander was hired on a wharf to assist in loading a boat which was soon to sail. This man had been occasionally employed in such work. His service occupied about two and one-half hours, when he was directed to go to the office, which was on the boat, and get his pay. This he did, and then attempted to go ashore. While on the gang plank the plank was recklessly pulled from under his feet, and he was thrown against the dock, receiving injuries from which he died. Owing to the somewhat peculiar nature of the case, it was held that it was for the jury to say, although the facts were undisputed, whether the relationship of master and servant existed until the man got completely ashore. The concluding sentence of the opinion by Mr. Justice Davis was as follows: "The defense at best was a narrow one, and in our view more technical than just."

In *Ewald v. Chicago & N. W. R. Co.* 70 Wis. 420, 5 Am. St. Rep. 178, 36 N. W. 12, 591, it was held that an engine wiper employed in the defendant's roundhouse, while going to his work along a pathway crossing the defendant's yard and tracks, was an employee of the defendant, hence could not recover for injury resulting from the negligence of a fellow servant on the freight train causing the injury. The court in its opinion said: "The peculiar facts of this case which make him such appear to involve precisely the same principle as that class of cases where the plaintiff was being carried on his way from and to his place of labor by the railroad company, by consent, custom, or contract, and was injured by the L.R.A.1915C.

negligence of other employees of the company. This carriage of the plaintiff was the means, facility, and advantage to which he was entitled by reason of his being an employee or servant, which entered into and became a part of his contract of employment, or were incidental and necessary to it. . . . Again it may be said that the plaintiff was still an employee because he was attempting to use the pathway between the cars as the only customary and convenient means of access to and exit from the roundhouse, which the company had provided and was under obligation to keep open and safe for him and his fellow workmen, when he was injured."

In *Boldt v. New York C. R. Co.* 18 N. Y. 432, plaintiff was injured while walking on a new track from his house to his work. The court said: "But he was in the defendants' employment, and doing that which was essential to enabling him to discharge his particular duty, viz., going to the spot where it was to be performed, and he was, moreover, going on the track where, except as the servant of the company, he had no right to be. He was there as the employee of the company, and because he was such an employee."

But it is urged that *Fletcher v. Baltimore & P. R. Co.* 168 U. S. 135, 42 L. ed. 411, 18 Sup. Ct. Rep. 35, sustains the view of the defendant on this question. We do not so read that case. There the plaintiff at the time of the accident had ended his work for the day, "and had left the workshop and grounds of the defendant, and was moving along a public highway in the city with the same rights as any other citizen would have," when he was struck by the rebounding of a stick of timber thrown from a train of the defendant by one of its employees, a practice permitted by the company, and injured. It was held that "the liability of the defendant to the plaintiff for the act in question is not to be gauged by the law applicable to fellow servants, where the negligence of one fellow servant by which another is injured imposes no liability upon the common employer." Manifestly that case and this are materially different. There the plaintiff was not on the premises of the defendant, but upon a public highway, where his relations to the defendant were precisely those of the general public to it. Its relation to him, therefore, in such a situation, was precisely what it would have been to any other pedestrian. Here, however, the plaintiff was upon the premises of the defendant, upon its invitation, in the line of his employment, and solely because of such employment. We hold, therefore, that,

at the time of his death, Tucker was within the protection of said act.

3. Did the court err in refusing to hold that the defendant company, as a matter of law, was not guilty of negligence? Under this assignment it is urged that the act under consideration "refers only to ways and works established and maintained by the carrier,—the language used being 'its' ways and works,—and not the ways which might be established by others, whether employees or third parties, of which the carrier might or might not have knowledge," and hence that the court erred in refusing to instruct the jury as in effect requested by the defendant, that there was no duty imposed by any law in force at the time of the accident, requiring the defendant to maintain watchmen, gates, signals, or other appliances, to indicate the approach of engines and trains upon its tracks at or near said opening.

Section 1 of said act (34 Stat. at L. 232, chap. 3073) provides "that every common carrier engaged in trade or commerce in the District of Columbia . . . shall be liable to any of its employees . . . for all damages which may result from the negligence of any of its officers, agents, or employees, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways, or works."

Was this a way within the meaning of the act? The uncontradicted testimony shows, as previously stated, that, for two years prior to this accident, employees of the defendant daily used this opening in going to and returning from their work. The policeman on that beat testified that "they came through there a dozen in a string, straggling along like men coming from work." Another witness, an extra brakeman of the defendant, testified "that he had seen railroad men on lots of occasions go through the opening, prior to Tucker's death." A switchman of the defendant employed at said ND tower, where, of course, he would usually have an unobstructed view of said opening, testified "that he had quite often seen employees of the company use that opening as a crossing place to go to the Annex, or to go to or come from their work." Another railroad man testified that, from December, 1906, to March, 1907, his employment was such that "he saw defendant's employees every morning and every evening make use of the opening in the wall as a crossing place." Several other witnesses testified to the same effect. The testimony further showed that there was a path through Garfield park in the north leading to this opening, and, as previously pointed out, that the Annex would

usually stop at a point about opposite the opening to receive the men coming there-through.

This opening was upon the premises of the defendant, and, of course, under its control. Had the defendant desired to prevent the use of this opening and the tracks adjacent thereto as a means of access to and exit from its Annex, yard, and round-house, it might easily have done so; but no precautions whatever were taken to prevent such use. The long-continued practice fully justified the inference that this was with the knowledge and consent of the defendant. *Baltimore & P. R. Co. v. Goltway*, 6 App. D. C. 143; *Glaria v. Washington Southern R. Co.* 30 App. D. C. 559.

It is, we think, clear that, had the defendant provided a way for pedestrians through this opening and across the tracks adjacent thereto, by putting ordinary planking between the rails and possibly between the opening and the tracks, and had then notified its employees that such way was for their convenience, such a way would have been within the protection of the act. The word "ways" was placed in the act for some purpose, and if it does not embrace a path provided by the master on its premises for the use of the master's servants, we fail to appreciate its function. If the master, therefore, may establish such a way by positive action, why should it be relieved of responsibility if it permits the establishment of a like way by others? In either case, we think, the way is its way within the meaning of said act.

The learned trial justice in his charge to the jury on this phase of the case said: "The theory of the plaintiff's case is that the railroad company was at fault in providing him a way of approach to his work over its tracks, which was insufficient or defective in that it was not properly guarded, and also in that it ran its train at an improper rate of speed over this way, where he was expected to pass.

"The first point I will direct your attention to is this point in regard to the way itself. The theory of the plaintiff's case is that the railroad company had permitted the men to come in through this opening, and go to this train called the Annex, so regularly, for such a long period of time, at all hours of the day and night, that it had become an established way for the men to use, as much so as if there had been a regular beaten path there, or something to indicate that that was the crossing. The theory of the plaintiff's case is that the railroad company had so treated it, knowing that the men were using it, making no objection to it whatever, putting up no warnings, and never intimating to them

that it was not to be so used; that it had thereby become, by the conduct and treatment of the defendant, a regular way of approach which the men, as reasonable men, in the service of the company, had a right to understand they were to use, because it was so much quicker than the safer way around.

"So . . . it is urged that they ought to have had some watchman there, if they were to establish it as a way, or some guard of some sort, or some signal; so that when the men were crossing to come to the Annex, they would be warned that the train was about to pass over the tracks."

Section 1 of the act visits upon the carrier or master responsibility for damage resulting "from the negligence of any of its officers, agents, or employees, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways, or works." What is the significance and meaning of the word "insufficiency" as above used? The word as defined in the Century Dictionary means "lack of sufficiency; deficiency in amount, force, or fitness; inadequateness; incompetency; as insufficiency of supplies; insufficiency of motive." The adjective "insufficient," as defined by the same authority, means "not sufficient; lacking in what is necessary or required; deficient in amount, force, or fitness; inadequate; incompetent." A failure of a common carrier to provide proper and adequate brakes on its engines and cars would be an insufficiency of equipment, within the meaning of the act. Can it be said that this way, which, as we have seen, had become established for the use of the servants of the defendant in going to and from their work, was an adequate and fit way? Is it not apparent that it was lacking in what was necessary or required, in that no protection whatever was provided against accidents that such a situation was liable to result in? Congress in this act was evidently attempting to require common carriers to take proper precautions to protect their servants. Why, then, should the carrier be absolved from responsibility for neglecting to provide a way for its employees properly safeguarded, and therefore adequate and sufficient? It seems to us that such a situation is within the spirit and purpose of the act, and equally within the letter thereof. We conclude, therefore, that the question of the sufficiency of this way was properly submitted to the jury.

4. Did the court err in permitting the jury to compare the negligence of the decedent with the negligence of the defendant, and to render a verdict in favor of the plaintiff if they found the negligence L.R.A.1915C.

of the decedent slight, and that of the defendant gross? Section 2 of the act in terms provides that this shall be done, but further provides for the diminution of damages in proportion to the amount of negligence attributable to the employee. The court's charge to the jury was in strict compliance with these provisions of the law.

5. In this assignment it is sought to interpose as a defense to the action the doctrine of assumption of risk. While the act does not in terms refer to this doctrine, it does provide in § 3 "that no contract of employment . . . shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employee." The doctrine of assumption of risk results from the contractual relations of the parties. In the absence of any statute regulating the matter, the law implies that the contract of employment contemplates that the servant assumes certain risks. It is argued that Congress did not intend to change this rule, and hence that Tucker assumed the risks incident to the use of said way as a means of going to his work.

In this connection it is argued that Tucker voluntarily selected the more dangerous way when he might have proceeded down Virginia avenue to South Capitol street, where he could have gone under the tracks, and thence back to the Annex. Had he chosen that way, it would have required him to go 1,100 feet further, and, moreover, the testimony shows beyond dispute that the way he did choose was the customary and usual way for employees living in his locality. Moreover, the act ordains that "all questions of negligence and contributory negligence shall be for the jury."

In 1897 an employers' liability act was passed in North Carolina. Section 2 of that act provides "that any contract or agreement expressed or implied, made by an employee of said company to waive the benefit of the aforesaid section, shall be null and void." Thereafter suit was brought by a railroad employee who was injured by reason of a patent defect in an engine, and the defense was that, inasmuch as he had continued to use this engine for some time after this defect was known to him, he assumed the risk of accident resulting from said defect. The court, however, ruled otherwise. The court said (Coley v. North Carolina R. Co. 128 N. C. 534-538, 57 L.R.A. 817, 39 S. E. 43): "It is agreed that assumption of risk is contractual, either by express terms or by implication; and disputes usually were as to whether the plaintiff contracted by implication or assumption for dangers not existing at the date of employment. And it would seem

by this act that the legislature intended to put an end to such contentions, by saying in the 1st section that he shall have a right of action for injuries caused by such defective machinery, and by providing in the 2d section that he cannot waive this right by contract expressed or implied." The court in this opinion also called attention to the English case of *Smith v. Baker* [1891] A. C. 325, 60 L. J. Q. B. N. S. 633, 65 L. T. N. S. 467, 40 Week. Rep. 392, 55 J. P. 660, in which was considered the English employers' act of 1880, which provides that an employee shall not maintain an action against his master for injuries received from defective machinery, ways, etc., unless he gives notice of such defects to the master or some superior, unless the master already knows of the defects. A majority of the lords who rested their opinions upon the act agreed that it did away with implied assumption of risk.

In *O'Maley v. South Boston Gaslight Co.* 158 Mass. 135, 47 L.R.A. 161, 32 N. E. 1119, the court held that the statute of that state did not strike down the doctrine of assumption of risk, because "the statute does not attempt to take away the right of the parties to make such contracts as they choose, which will establish their respective rights and duties." See also *Davis Coal Co. v. Polland*, 158 Ind. 607, 92 Am. St. Rep. 319, 62 N. E. 492; *Narramore v. Cleveland*, C. C. & St. L. R. Co. 48 L.R.A. 68, 37 C. C. A. 499, 96 Fed. 298; *Kelley v. Great Northern R. Co.* 152 Fed. 211.

In interpreting this act we should bear in mind "the purpose of Congress to regulate the liability of employer to employee, and its evident intention to change certain rules of the common law which theretofore prevailed, as to the responsibility for negligence in the conduct of the business of transportation." *El Paso & N. E. R. Co. v. Gutierrez*, 215 U. S. 87, 54 L. ed. 106, 30 Sup. Ct. Rep. 21. Having that purpose in mind courts ought not to place such a construction upon the act, unless compelled by its terms so to do, as will in a large measure defeat such purpose. There are comparatively few employees of common carriers who would sacrifice their positions because of known defects. We think this act was intended to quicken the responsibility of carriers, and, by doing away with the doctrine of assumption of risk in cases based upon their negligence, compel them to take proper precautions for the safety of their servants. In other words, the act was meant to discourage negligence. It is an easy thing to say that no one is compelled to remain in the service of the carrier, but experience demonstrates that this is only half a truth. It is the policy L.R.A.1915C.

of the law to protect, so far as possible, those pursuing, and oftentimes necessarily pursuing, so hazardous an employment. It is enough that they must assume the intrinsic risks of their calling without compelling them to assume the negligence of their employers.

Our attention is directed to the difference in the phraseology of the employers' liability act of April 22d, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), as bearing upon the question under consideration. That act excuses employees from the rule of contributory negligence in any case where a failure by the carrier to comply with any statute enacted for the safety of employees contributed to the injury complained of. The act then provides that the doctrine of assumption of risk shall not be applicable to such a situation. We see no reason why that act should be interpreted as a legislative declaration that the prior act of 1906 did not do away with the doctrine of assumption of risk, in so far at least as the injury forming the basis of the action resulted from the negligence of the carrier. There was special reason in the later act for inserting a provision in respect of the doctrine. Moreover, it well might be held that, since the 1st section of the earlier act in terms charges the master with responsibility for any defect or insufficiency due to its negligence in its cars, engines, appliances, etc., such a statute was "enacted for the safety of employees," and hence that the failure of the carrier to keep its cars, engines, appliances, etc., sufficiently free from defects would prevent such carrier not only from interposing the defense of assumption of risk, but also from interposing the defense of contributory negligence. In other words, would the carrier, after admitting its negligence in failing to install and maintain proper and sufficient cars, engines, appliances, etc., and the injury resulting therefrom, be permitted to escape responsibility by resorting to the defense of assumption of risk? Clearly had § 1 in terms provided that carriers should install and maintain proper and sufficient cars, etc., and that the failure to do so would render it liable for accidents resulting from such failure, and deprive it of the defense of contributory negligence, the carrier would not be permitted to defeat the law by resorting to the doctrine of assumption of risk. *Kilpatrick v. Grand Trunk R. Co.* 74 Vt. 238, 93 Am. St. Rep. 887, 52 Atl. 531. We are not called upon, however, to interpret the act of 1908, and have alluded to it for the sole purpose of ascertaining, if possible, whether it sheds any light upon the meaning of the prior act. We are not prepared to say that there is

anything in the later act which compels a different view than we have taken of the earlier one. Having in mind, therefore, the scope and purpose of the act of 1906, we rule that the trial court was right in refusing the defendant's instruction upon the subject of the assumption of risk.

6. The defendant requested the court to charge the jury as follows: "The burden of proof is upon the plaintiff to establish, by a fair preponderance of the evidence, that the accident occurred in the manner alleged and described in her declaration, and if the jury shall be unable to determine definitely from the evidence that the decedent, Sidney R. Tucker, was struck by the engine of a train on the southbound track coming from the tunnel, as alleged in the plaintiff's declaration, their verdict must be for the defendant." The court on this point instructed the jury that "the question has been made here as to whether the declaration has been proved in respect to the allegation therein that the decedent was struck by the locomotive of the defendant company. It is necessary that you should find that by a fair balance of the testimony. If you cannot find it, the plaintiff has failed to make out her case. It is a pure question of fact for you to decide. I have nothing to do with it." This was a substantial compliance with the defendant's request. There was ample evidence for the jury on this point, which, however, we do not deem it necessary to review.

7. As to the instruction of the court in respect to the assessment of damages. It is not disputed that the evidence as to the age, health, earning capacity, etc., of the decedent, was amply sufficient. It was in evidence that the widow was wholly dependent upon him for support. It was also in evidence that the child was born shortly after the death of decedent. The widow appeared as a witness before the jury, but there was no direct evidence as to her age or health, or evidence as to the health of

the child. Neither was there any evidence as to their probable duration of life. It is insisted that the assessment of damages was therefore mere guesswork. We do not think so. The jury was fully advised as to the decedent, who, when he was killed, was only twenty-four years of age. The jury saw the widow, and, as intelligent men, could judge as to her age and health. While annuity or life tables are admissible in evidence, they are not controlling. *Vicksburg & M. R. Co. v. Putnam*, 118 U. S. 545, 30 L. ed. 257, 7 Sup. Ct. Rep. 1, 10 Am. Neg. Cas. 574; *Boswell v. Barnhart*, 96 Ga. 521, 23 S. E. 414; *Sutherland, Damages*, § 1265. It is not claimed that the damages assessed were excessive, and indeed it could not well be, when it is considered that the plaintiff must have been a comparatively young woman, and that the child was a babe in arms. In *Grogan v. Broadway Foundry Co.* 87 Mo. 321, it was held that the jury may find the amount of damages from proof of the age of the deceased, and the circumstances and condition in life of the plaintiff. In *Southern P. Co. v. Lafferty*, 6 C. C. A. 474, 15 U. S. App. 193, 57 Fed. 537, the testimony showed the age of the decedent at the time of his death, the condition of his health, the amount of his earnings, and the extent of his contributions to his mother, in whose behalf the suit was brought. The court held this testimony sufficient on the question of damages. See also *Illinois C. R. Co. v. Barron*, 5 Wall. 90, 18 L. ed. 591.

Finding no error in the record, we affirm the judgment, with costs.

On application of the appellant, a writ of error to the Supreme Court of the United States was allowed, April 15, 1910.

Affirmed by the Supreme Court of the United States, May 29, 1911, 220 U. S. 608, 55 L. ed. 607, 34 Sup. Ct. Rep. 725.

Note. — Constitutionality, application, and effect of the Federal employers' liability act.

I. Introduction and scope of note, 48.

II. Validity and construction generally.

1. Constitutionality, 48.

2. Retrospective operation, 48.

3. Liberal or strict construction, 48.

III. Operation and effect generally.

1. General purpose and effect, 48.

2. Effect on state laws, 49.

IV. Contracts exempting carriers from liability—benefit associations, 53.

V. Negligence, existence of, as basis of liability, 54.

VI. Defects or insufficiencies in ways, cars, engines, appliances, etc., 55.

VII. Carriers and employments within the statute—interstate commerce.

1. In general, 56.

2. Carriers embraced within the act, 58.

3. Application where employee is not actively at work, 58.

4. Where employee is acting outside the scope of his employment, 60.

VII.—continued.

5. Character of employments falling within the act.
 - a. Miscellaneous employments, 60.
 - b. Employees on interstate trains, 60.
 - c. Switching cars—making up trains, 61.
 - d. Repairing roadbed, tracks, etc., 62.
 - e. Repairing rolling stock, 62.
 - f. New construction, 63.
 - g. Installation and repair of signal devices, 63.
 6. Burden of proof as to the applicability of the Federal act, 64.
- VIII. Defenses abrogated or modified.
1. Fellow servant doctrine, 65.
 2. Contributory negligence, 65.
 3. Assumption of risk, 69.
- IX. For whose benefit the statute inures; survival of action.
1. Employees of other companies, 72.
 2. Injured employee, 72.
 3. In case of death of the employee.
 - a. Nature of the action, 72.
 - b. Beneficiaries; necessity of existence of and dependence of, 72.
 - c. Nonresident alien dependents, 74.
 - d. Survival of the cause of action, 74.
 - e. Next of kin, who are, 74.
- X. Jurisdiction, 75.
- XI. Parties.
1. Plaintiff, 76.
 2. Defendant, 77.
- XII. Pleading.
1. Complaint, 78.
 2. Answer, 79.
- XIII. Practice.
1. In general, 79.
 2. Shifting from law to law—amendment of pleadings, 80.
 3. Practice where action is brought by widow in her own name, 83.
 4. Waiver of right under the act; when claim may be raised, 84.
- XIV. Damages.
1. In general, 85.
 2. Amount of damages, 87.

I. Introduction and scope of note.

The earlier cases passing upon the Federal employers' liability act are collected and discussed in a note to *Lamphere v. Oregon R. & Nav. Co.* 47 L.R.A.(N.S.) 38. The present note is a continuation of the earlier note, and the later cases contained herein L.R.A.1915C.

will be arranged in accordance with the classification of that note. The earlier cases will not be cited unless it is necessary so to do in order to show the present state of the law. The full text of the present statute as first passed will be found in one of the cases to which the earlier note is appended (see 47 L.R.A.(N.S.) 32), and the amendments of 1910 will be found in the first subdivision of that note.

*II. Validity and construction generally.**1. Constitutionality.*

Supplementing note in 47 L.R.A.(N.S.) 39.

As is shown in the earlier note, the statute has been upheld by the United States Supreme Court,¹ and is now the law of the land so far as cases falling within the scope of its application are concerned. Of course, no state or lower Federal court has questioned its validity since the decision of the Federal Supreme Court.

2. Retrospective operation.

Supplementing note in 47 L.R.A.(N.S.) 45.

The act has been held not to apply to accidents happening before it took effect, but the provision relative to contracts whereby the carrier seeks to exempt itself from the application of the act applies to existing contracts as well as to contracts entered into after the passage of the act; and the provision denying the right of removal to the Federal court applies to causes of action which had arisen previously to the taking effect of the act.²

3. Liberal or strict construction.

Supplementing note in 47 L.R.A.(N.S.) 45.

The tendency of the courts is to construe the statute liberally as being remedial in character, although it is in derogation of the common law.³

*III. Operation and effect generally.**1. General purpose and effect.*

Supplementing note in 47 L.R.A.(N.S.) 46.

¹ *Second Employers' Liability Cases* (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875.

² See note in 47 L.R.A.(N.S.) 45, subdiv. II. 2.

³ *Armbruster v. Chicago, R. I. & P. R. Co.* — Iowa, —, 147 N. W. 337; *Thornbro v. Kansas City, M. & O. R. Co.* 91 Kan. 684, 139 Pac. 410; *Campbell v. Canadian Northern R. Co.* 124 Minn. 245, 144 N. W. 772.

The effect of the act in cases to which it is applicable is to abolish the defense embodied in the so-called fellow servant doctrine; to abolish the defense of contributory negligence in all cases where the injury was contributed to by the violation by the carrier of any statute enacted for the safety of its employees, and in all other cases to establish the doctrine of comparative negligence, so that the contributory negligence of the employee will not bar a recovery, but merely diminish the damages; to abrogate the defense of assumption of risk in all cases where the injury was contributed to by the violation by the carrier of any statute enacted for the safety of employees; and to prevent the common carrier from exempting itself from liability under the

act by any contract, rule, regulation, or other device.⁴

As the statute under consideration is a Federal statute, the decisions of the Federal courts, and especially those of the Supreme Court, are binding upon the state courts.⁵

2. Effect on state laws.

Supplementing note in 47 L.R.A.(N.S.) 47.

As it has been determined by the Federal Supreme Court that Congress has power to prescribe the rules of liability as between interstate carriers and their employees, while the latter are engaged in interstate commerce, the act supersedes all state laws on the subject,⁶ and any state statute in conflict therewith must give way.⁷ And the provisions of the act are exclusive,⁸ and

⁴ See note in 47 L.R.A.(N.S.) 46, subd. III. 1.

⁵ *Southern R. Co. v. Howerton*, — Ind. —, 105 N. E. 1025, rehearing denied in 106 N. E. 369; *Armbruster v. Chicago, R. I. & P. R. Co.* — Iowa, —, 147 N. W. 337; *Peery v. Illinois C. R. Co.* 123 Minn. 264, 143 N. W. 724; *Hardwick v. Wabash R. Co.* 181 Mo. App. 156, 168 S. W. 328; *Dooley v. Seaboard Air Line R. Co.* 163 N. C. 454, 79 S. E. 970; *Lauer v. Northern P. R. Co.* — Wash. —, 145 Pac. 606.

The final word upon the interpretation of the statute will rest with the Supreme Court of the United States. *McCoullough v. Chicago, R. I. & P. R. Co.* 160 Iowa, 524, 47 L.R.A.(N.S.) 23, 142 N. W. 67.

⁶ *Louisville & N. R. Co. v. Kemp*, 140 Ga. 657, 79 S. E. 558; *Wagner v. Chicago & A. R. Co.* 265 Ill. 245, 106 N. E. 809; *Vandalia R. Co. v. Stringer* — Ind. —, 106 N. E. 865; *Louisville & N. R. Co. v. Strange*, 156 Ky. 439, 161 S. W. 239; *Penny v. New Orleans G. N. R. Co.* — La. —, 66 So. 313; *La Casse v. New Orleans T. & M. R. Co.* — La. —, 64 So. 1012; *Fish v. Chicago, R. I. & P. R. Co.* — Mo. —, 172 S. W. 340; *Eastern R. Co. v. Ellis*, — Tex. Civ. App. —, 153 S. W. 701; *Vaughan v. St. Louis & S. F. R. Co.* 177 Mo. App. 155, 164 S. W. 144; *Miller v. Kansas City Western R. Co.* 180 Mo. App. 371, 168 S. W. 336; *Erie R. Co. v. Welch*, 89 Ohio St. 81, 105 N. E. 189; *Missouri, K. & T. R. Co. v. Lenahan*, 39 Okla. 283, 135 Pac. 383; *Chicago, R. I. & P. R. Co. v. McBee*, — Okla. —, 145 Pac. 331; *White v. Central Vermont R. Co.* 87 Vt. 330, 89 Atl. 618.

"Now that Congress has acted, the laws of the states, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is." *Second Employers' Liability Cases* (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875.

Since Congress, by the act of April 22, 1908, took possession of the field of the employers' liability in interstate transportation, L.R.A.1915C.

tion by rail, all state laws upon the subject are superseded. *SEABOARD AIR LINE R. CO. v. HORTON*.

Where the facts are such as to make the Federal act applicable, there is no other law authorizing the court to render judgment in favor of the plaintiff. *Vaughan v. St. Louis & S. F. R. Co.* 177 Mo. App. 155, 164 S. W. 144.

Where liability exists under the Federal act, the state law disappears. *Peery v. Illinois C. R. Co.* 123 Minn. 264, 143 N. W. 724.

Where the injury occurred while the employee was himself engaged in interstate commerce, he cannot recover in a common-law action. *Lauer v. Northern P. R. Co.* — Wash. —, 145 Pac. 606.

⁷ *Cole v. Atchison, T. & S. F. R. Co.* 92 Kan. 132, 139 Pac. 1177.

⁸ *Ex parte Atlantic Coast Line R. Co.* — Ala. —, 67 So. 256; *Devine v. Chicago, R. I. & P. R. Co.* — Ill. —, 107 N. E. 595; *McIntosh v. St. Louis & S. F. R. Co.* 182 Mo. App. 288, 168 S. W. 821; *Gee v. Lehigh Valley R. Co.* 163 App. Div. 274, 148 N. Y. Supp. 882; *Oberlin v. Oregon-Washington R. & Nav. Co.* — Or. —, 142 Pac. 554; *Hogarty v. Philadelphia & R. R. Co.* 245 Pa. 443, 91 Atl. 854; *Carolina, C. & O. R. Co. v. Shewalter*, — Tenn. —, 161 S. W. 1136; *Southern R. Co. v. Jacobs*, — Va. —, 81 S. E. 99; *Niles v. Central Vermont R. Co.* 87 Vt. 356, 89 Atl. 629.

In *Southern R. Co. v. Howerton*, — Ind. —, 105 N. E. 1025, rehearing denied in 106 N. E. 369, the court said: "That the act is necessarily exclusive in the field to which it is addressed irresistibly appears when it is considered that no cause of action or remedy can arise under the common law which is not preserved and embraced within the Federal act, which embraces every common-law right and remedy which can, under any circumstances, arise, so far as employers engaged in interstate commerce are concerned."

A case which, by allegations and proof, is brought within the Federal employers' liability act of April 22, 1908, is controlled

not merely cumulative.⁹ Where both employer and employee are engaged in interstate commerce, the railroad company is liable, if at all, under the Federal statute.¹⁰ So, if either side to an action falling within its purview claims the benefit of the act, it is fatal error not to apply it,¹¹ and where the conditions of the statute are met, an opportunity to elect between the Federal and state remedies is never afforded.¹² The pending of an action under the state statute is no defense to an action under the Federal statute.¹³

But the Federal act does not undertake

by that act, although its provisions may not have been referred to in express terms in the pleadings, or pressed at the trial. *Grand Trunk Western R. Co. v. Lindsay*, 233 U. S. 42, 58 L. ed. 838, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914C, 168.

Where a minor employee of an interstate railroad was injured at a time when he himself was engaged in interstate commerce, the Federal act applies to the exclusion of a state statute giving a right of action to the parent to recover damages for his mental pain and suffering and for the loss of services caused by the wrongful death of a minor child. *Flanders v. Georgia S. & F. R. Co.* — Fla. —, 67 So. 68.

⁹ *Wabash R. Co. v. Hayes*, 234 U. S. 86, 58 L. ed. 1226, 34 Sup. Ct. Rep. 729.

¹⁰ *Armbruster v. Chicago, R. I. & P. R. Co.* — Iowa, —, 147 N. W. 337.

An employee injured while engaged in interstate commerce has no remedy other than that afforded by the Federal statute. *Moliter v. Wabash R. Co.* 180 Mo. App. 84, 168 S. W. 250.

In a case to which the Federal employers' liability act is applicable, it is error to refuse to charge that there can be no recovery under the state Constitution. *Atlantic Coast Line R. Co. v. Jones*, — Ala. App. —, 67 So. 632.

There can be no recovery as upon the authority of a local statute in a case governed exclusively by the Federal Act. *Ex parte Atlantic Coast Line R. Co.* — Ala. —, 67 So. 256.

¹¹ *Graber v. Duluth, S. S. & A. R. Co.* — Wis. —, 150 N. W. 489.

¹² *Vickery v. New London Northern R. Co.* 87 Conn. 634, 89 Atl. 277.

¹³ In *Cory v. Lake Shore & M. S. R. Co.* 208 Fed. 847, where the complaint stated a cause of action under the Federal statute, the court, on motion of the plaintiff, struck from the answer an allegation that there was an action pending in the same court based solely on the state statute.

¹⁴ If the employee of a railroad engaged in both interstate and intrastate commerce is injured or killed while in the former service, the carrier's liability is controlled, and must be determined, solely by the Federal law; if in the latter service, such liability rests wholly upon the state law unaffected by any of the provisions of the Federal act. L.R.A.1915C.

to affect the force of the state statutes in their appropriate sphere,¹⁴ and is not applicable where the injured workman was not engaged in interstate commerce.¹⁵ The Federal act does not have the effect of rendering state statutes referring to carriers generally invalid; it merely limits their application to carriers or employees engaged in intrastate business.¹⁶ The Illinois appellate court has held that the Federal act and the workmen's compensation act of that state are not in conflict as they operate in separate fields.¹⁷

Employees subject to the Federal act are

Corbett v. Boston & M. R. Co. 219 Mass. 351, L.R.A.—, 107 N. E. 60.

¹⁵ Where an employee of an interstate railroad is injured, but at a time when such employee was not engaged in interstate traffic, a recovery may be had, if at all, either under the common law or under some state statute. *Vandalia R. Co. v. Stringer*, — Ind. —, 106 N. E. 865.

Where the declaration did not aver that the defendant was doing interstate business, nor allege facts to show that the Federal act controlled, the case is to be decided by the state law. *Hemmick v. Baltimore & O. S. W. R. Co.* 184 Ill. App. 275.

¹⁶ A state act which by its terms applies generally to carriers is not unconstitutional because not limited to intrastate commerce, but will be construed to so apply, and consequently is not superseded as so applied by the Federal act. *Fernette v. Pere Marquette R. Co.* 175 Mich. 672, 141 N. W. 1084, 144 N. W. 834.

In *Missouri, K. & T. R. Co. v. Turner*, — Tex. Civ. App. —, 138 S. W. 1126, decided before the Federal statute had been declared constitutional by the United States Supreme Court, it was held that the Texas statute, modeled closely after the Federal statute, was not invalid as applying to interstate commerce. The court said that if the Federal statute was invalid, the state law would apply to all commerce whether interstate or local, but if the Federal act was constitutional the state law would be construed to apply to local commerce only. To the same effect were the decisions in *Texas & N. O. R. Co. v. Yerkes*, — Tex. Civ. App. —, 156 S. W. 579; *Houston & T. C. R. Co. v. Bright*, — Tex. Civ. App. —, 156 S. W. 304.

¹⁷ *Staley v. Illinois C. R. Co.* 186 Ill. App. 593. The court said: "The Federal act was one designed to operate upon and in a manner regulate commerce among the several states, and it was sustained by the Supreme Court of the United States because it tended to promote commerce and related to the instruments by which interstate commerce was carried on. *Second Employers' Liability Cases* (*Mondou v. New York, N. H. & H. R. Co.*) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875. This statute does not in any manner seek to affect commerce, nor

not within the protection of the Massachusetts workmen's compensation act.^{17a}

Although the Federal act is supreme in its field, and where the facts bring the case within its scope, no recovery can be had under any other law, yet it has been held that the state law governs in all matters not expressly provided for in the statute. Thus, a general allegation of negligence, if sufficient in a state before the passage of the act, is sufficient in an action brought under the act.¹⁸ So, the state rules of evidence govern an action brought under the stat-

ute,¹⁹ and the sufficiency of the evidence in an action so brought will be determined by the same tests as though the action were brought under the state law.²⁰ As the act does not attempt to define negligence, the question what constitutes negligence will be determined by the state law.²¹

A state statute providing for a verdict by less than the whole number of jurymen is applicable to an action brought under the act.²² So, generally, in administering the Federal statute, the state court will apply the same rule of procedure as that which

does it affect the employee while he is engaged in the act of commerce, but it is designed to provide for him while he is incapacitated by reason of injuries received in the course of his employment, or, in case of his death under such circumstances, to provide for his immediate family or for collateral heirs dependent upon him, or, if he leaves none of these, to provide for his burial expenses. There is no good reason why each act should not operate in the field it is designed to cover."

^{17a} See *Young v. Duncan*, 218 Mass. 346, 106 N. E. 1.

¹⁸ *Louisville & N. R. Co. v. Stewart*, 156 Ky. 550, 161 S. W. 557. The court, however, intimated that such a general allegation would not have been sufficient had the action been brought in the Federal court.

¹⁹ In actions in a state court to enforce rights given by a Federal statute, the rules of evidence of the state court must control, unless otherwise provided by Federal law. *Kansas City Southern R. Co. v. Leslie*, — Ark. —, 167 S. W. 83.

Under the Federal statute the state court may follow the scintilla rule of evidence in force in that state, and need not follow the rule of the Federal court which permits the trial court to take the case from the jury, where the evidence preponderates in favor of one side or the other. *Louisville & N. R. Co. v. Holloway*, — Ky. —, 173 S. W. 343.

²⁰ If the evidence in a case heard and determined under the Federal act would be sufficient to take the case to the jury and support the verdict if the suit had been brought under the state law, it would be sufficient to take the case to the jury and support the verdict if it was brought under the Federal act. *Louisville & N. R. Co. v. Johnson*, — Ky. —, 171 S. W. 847.

It is the well-settled practice in common-law actions in this state, which will be followed in actions brought under the Federal act, that the case should go to the jury if there is evidence conducing to support the averments of a petition constituting the grounds of action relied on for recovery, although the weight of the evidence, both numerically and in probative value, may be with the defendant. *Ibid*.

A similar ruling was made in *Louisville & N. R. Co. v. Winkler*, — Ky. —, 173 S. W. 151, citing the *Johnson Case*. L.R.A.1915C.

²¹ As the Federal act does not undertake to define the character or degree of negligence necessary to a recovery, the rules of the law prevailing in the state in which the action is brought must be looked to in determining whether the acts or omissions complained of amount to negligence. *Cincinnati, N. O. & T. P. R. Co. v. Swann*, — Ky. —, 169 S. W. 886.

The act of Congress does not undertake to define negligence and in no way limits the application of the common-law rule upon the subject; therefore, since there is no Federal common law, it is the common law of the state where the accident occurred which must be looked to in determining whether the acts complained of amount to negligence. *Helm v. Cincinnati, N. O. & T. P. R. Co.* 166 Ky. 240, 160 S. W. 945.

²² An instruction advising the jury that nine of their number concurring may return a verdict is not prejudicial to the defendant where the state statute so provides. *St. Louis & S. F. R. Co. v. Brown*, — Okla. —, 144 Pac. 1075.

The state five-sixth jury law applies to actions in the state court based on the Federal act. *Bombolis v. Minneapolis & St. L. R. Co.* — Minn. —, 150 N. W. 385.

In *Winters v. Minneapolis & St. L. R. Co.* 126 Minn. 260, 148 N. W. 100, the court, in holding correct an instruction to the effect that the jury might return a five-sixths verdict as provided for by the state law, said: "The defendant claims that this [the instruction in question] was error; that the cause of action came from an act of Congress, and that it was entitled to a jury such as is contemplated by the Federal Constitution. The state court had jurisdiction. The law of the forum as to what constitutes a lawful jury applies. The character of the cause of action does not determine it. The five-sixth jury law is authorized by the state Constitution, and is not prohibited to the state by the Federal Constitution. It is not meant that a Federal court sitting in this state would apply our five-sixths jury law. That question is not here. The instruction of the court was correct."

²³ A verdict of three fourths of the jury, in accordance with the state law, is sufficient. *Louisville & N. R. Co. v. Winkler*, — Ky. —, 173 S. W. 151.

obtains in the administration of state laws.²³ And the question who are next of kin of a deceased employee is to be answered by the state law.²⁴

But where the provisions of the statute do cover any point of substantive law, or of practice or procedure, the state statute is superseded, and the Federal statute alone controls. Thus, where a recovery is sought for injuries caused by defects, it must be shown that those defects were due to the negligence of the railroad company,²⁵ and the state statute providing that in certain cases there is a presumption of negligence is not applicable.²⁶ If there are no dependent relatives, there can be no recovery under

the Federal statute, although the state statute might provide for a recovery for the benefit of the decedent's estate.²⁷ So, the amount of damages recoverable under the act is in nowise limited by any state statute on the question.²⁸ And the proceeds of a judgment secured under the act belonged to designated beneficiaries regardless of the state statutes of distribution.²⁹ So, a state statute as to a waiver of the objection of lack of capacity to sue does not apply to an action under the Federal statute, which expressly provides that in case of death the action must be brought by the personal representative of the deceased workman.³⁰

Louisville & N. R. Co. v. Johnson, — Ky. —, 171 S. W. 847; Howell v. Atlantic Coast Line R. Co. — S. C. —, 83 S. E. 639.

Where an act of Congress commits to the state court the duty of trying cases thereunder, such cases may be tried according to the state rules of procedure. Sweet v. Chicago & N. W. R. Co. 157 Wis. 400, 147 N. W. 1054.

In Louisville & N. R. Co. v. Johnson, supra, the court said: "Except in so far as the act itself modifies or changes rules of practice and procedure or substantive law, cases arising under the act should be heard and determined in the state courts in the same manner as would like cases arising under the law prevailing in this state."

In St. Louis & S. F. R. Co. v. Brown, — Okla. —, 144 Pac. 1075, the court said: "The state is called upon often to enforce and administer the Federal laws in her court; yet she is only required to do so in the manner provided by, and in harmony with, the state law, and cannot be compelled to follow the procedure provided by the Federal government for its own court."

In a case arising under the statute, the state courts are not required to administer the common law of the Federal court as distinct from the common law of the state court. Saunders v. Southern R. Co. — N. C. —, 83 S. E. 573.

Under the North Carolina statutes the supreme court has the power to allow the plaintiff to amend the complaint by alleging that there are beneficiaries. Kenney v. Seaboard Air Line R. Co. 165 N. C. 99, 80 S. E. 1078.

As to pleading and procedure, the courts of each state must necessarily pursue their own statutory methods. McCoullough v. Chicago, R. I. & P. R. Co. 160 Iowa, 524, 47 L.R.A.(N.S.) 23, 142 N. W. 67.

Whether or not the defendant waived a departure by the plaintiff in filing an amended petition based on the Federal statute, where the original petition alleged a common-law action, is to be determined by the rules of the state court. McAdow v. Kansas City Western R. Co. — Mo. App. —, 164 S. W. 188.

²³ Kenney v. Seaboard Air Line R. Co. — N. C. —, L.R.A.—, 82 S. E. 968. L.R.A.1915C

²⁵ The limitation of the responsibility of a railway carrier under the employers' liability act of April 22, 1908, § 1, for injuries to its employees resulting from defects or insufficiencies in places of work or appliances, to those caused by such defects and insufficiencies as are "due to its negligence," governs an action brought under that statute regardless of the measure of responsibility prescribed by the local statutes. SEABOARD AIR LINE R. CO. v. HORTON.

²⁶ It is error for a court to charge the provisions of a state statute which raises a presumption in certain cases against a railroad company upon proof of injury by the running of locomotives or cars. Louisville & N. R. Co. v. Kemp, 140 Ga. 657, 79 S. E. 558.

²⁷ Jones v. Charleston & W. C. R. Co. 98 S. C. 197, 82 S. E. 415.

²⁸ Devine v. Chicago, R. I. & P. R. Co. — Ill. —, 107 N. E. 595; Thornbro v. Kansas City, M. & O. R. Co. 91 Kan. 684, 139 Pac. 410; South Covington & C. Street R. Co. v. Finan, 153 Ky. 340, 155 S. W. 742.

Interest on a verdict in favor of the administrator from the time of the death of the intestate, as provided for by the New York statute, will not be added in a case under the Federal act. Norton v. Erie R. Co. 163 App. Div. 468, 148 N. Y. Supp. 771.

²⁹ Nothing in the state statute for the distribution of personal property can defeat the right of the childless widow of an interstate railway employee who was fatally injured while employed by the carrier in interstate commerce, to the entire net proceeds of a judgment for the resulting damages recovered by her as administratrix in an action against the carrier, whether her action was based upon the provisions of § 1 of the employers' liability act, or upon the provision of § 9, added by the act of April 5, 1910, since such provisions govern the distribution of the damages to the exclusion of any applicable state legislation. Taylor v. Taylor, 232 U. S. 363, 58 L. ed. 638, 34 Sup. Ct. Rep. 350.

³⁰ The provisions of the Kansas statute that lack of capacity to sue is waived by failure to demur or to raise the objection by answering do not apply to an action brought under the Federal statute, where

It has been held by the Oklahoma supreme court that the act of 1906, although suspending the territorial act so far as it covered the same field, became inoperative as a Federal act upon the admission of Oklahoma to statehood, and it could not be presumed that that act was adopted as the law of the state by the adoption of the state Constitution, since at the date of statehood the act had been declared void by several Federal courts; the act itself on its face, so far as the states were concerned, purported to deal exclusively with interstate commerce, and the Oklahoma Constitution provided for recovery in case of death, in terms of general and comprehending application, which provisions were utterly inconsistent and irreconcilable with the provisions of the act of 1906.³¹

In a Missouri case, it was held that the defense of assumption of risk was still open to the defendant, but that it would be applied in accordance with the rules relative thereto prevailing in the state in which the cause of action arose; consequently, as the rule prevailing in Missouri is that the defense is never open to the master where he has been negligent, the defense is not open in an action brought under the act if the carrier's negligence caused the injury.³² Whether the United States Supreme Court will sustain this ruling is very questionable, since in jurisdictions in which the Missouri doctrine as to assumption of risk prevails, the decisions of the United States Supreme Court are practically nullified. See VIII. 3, *infra*.

IV. *Contracts exempting carriers from liability — benefit associations.*

Supplementing note in 47 L.R.A.(N.S.) 50.

Under § 5, providing that any contract,

the objection to lack of capacity to sue is raised merely by demurrer to the evidence before judgment is rendered. *Vaughan v. St. Louis & S. F. R. Co.* 177 Mo. App. 155, 164 S. W. 144. The court said: "While the Federal act does not attempt to control state procedure, yet it does not leave state procedure so free and untrammelled as to allow such procedure to work a change in the terms in the statute."

³¹ *Chicago, R. I. & P. R. Co. v. Holliday*, — Okla. —, 145 Pac. 786.

³² *Fish v. Chicago, R. I. & P. R. Co.* — Mo. —, 172 S. W. 340.

³³ *Hogarty v. Philadelphia & R. R. Co.* 245 Pa. 443, 91 Atl. 854.

³⁴ *Wagner v. Chicago & A. R. Co.* 180 Ill. App. 196, affirmed in — Ill. —, 106 N. E. 809.

L.R.A.1915C.

rule, regulation, or device, the purpose of which is to exempt the carrier from any liability created by the act, shall be void, the acceptance of benefits from the relief association of the defendant carrier does not bar an injured employee from maintaining an action under the statute;³³ nor does the acceptance by an injured employee of benefit from the relief department of the railroad discharge a joint tortfeasor of his liability for the injury.³⁴ But where an employee of a railroad company sued the company owning the tracks upon which the employer ran its cars, it is error to charge that the defendant company should not be credited upon the judgment secured by the plaintiff with the amount which the employing company had paid the plaintiff out of its relief department; such error, however, may be cured by remittitur.³⁵

In an action under the Federal employers' liability act, a contract whereby the employee agrees to assume all hazard and risk of personal injury and damage, however caused, is properly excluded.³⁶ But it has been held that where an employee of the defendant railroad who was injured by the joint negligence of the railroad and an electric company accepted a sum of money from the electric company in satisfaction of a claim for damages, and executed a release and discharge under seal of such electric company from all damages by reason of the injuries inflicted, which release recited that such sum of money was received "in full compromise, payment, discharge, accord and satisfaction" for or on account of such injuries, the acceptance of the money and the execution of the release operated as a release of the railroad company, even though it is stipulated in the release that the release of the electric company should not operate so as to discharge the railroad company, and the right to sue the latter was expressly reserved.³⁷

³⁵ *Wagner v. Chicago & A. R. Co.* — Ill. —, 106 N. E. 809.

³⁶ Where the evidence shows that a student brakeman was expected to perform and did perform such tasks as were assigned to him by the members of the crew, helped to load and unload freight, threw switches, and did whatever he was ordered to do in the operation of the train, he is to be deemed an employee, and not a mere licensee, and consequently an agreement whereby he assumed all hazard and risk of personal injury from any source whatsoever was held properly excluded. *Rief v. Great Northern R. Co.* 126 Minn. 430, 148 N. W. 309.

³⁷ *LOUISVILLE & N. R. Co. v. ALLEN*.

V. Negligence, existence of, as basis of liability.

Supplementing note in 47 L.R.A.(N.S.) 50.

Negligence is the basis of all liability under the act;³⁸ and there can be no recovery under the act in the absence of negligence on the part of the railroad company or on the part of some of its employees.³⁹ An instruction is erroneous which makes the railroad company liable for defects, if such defects are not attributable to the negligence of the company or its servants.⁴⁰

Negligence must be proven; but it may be shown by circumstantial evidence.⁴¹ A

state court has held that the general doctrine of *res ipsa loquitur* is applicable where the accident is of such a kind as does not ordinarily occur if proper care is used.⁴² But the contrary rule has been held by a Federal court which follows a rule laid down by a majority of the Federal courts, namely, the maxim is never applicable in master and servant cases.⁴³

The burden of proving that the negligence of the employer was the proximate cause of the injury rests upon the plaintiff.⁴⁴

In the note below are cited several cases arising under the statute, in which the question of negligence *vel non* was determined.⁴⁵

³⁸ *Hardwick v. Wabash R. Co.* 181 Mo. App. 156, 168 S. W. 328.

³⁹ *Southern R. Co. v. Howerton*, — Ind. —, 105 N. E. 1025, rehearing denied in 106 N. E. 369; *Cincinnati, N. O. & T. P. R. Co. v. Goldston*, 156 Ky. 410, 161 S. W. 246; *Chesapeake & O. R. Co. v. Walker*, 159 Ky. 237, 167 S. W. 128; *Helm v. Cincinnati, N. O. & T. P. R. Co.* 156 Ky. 240, 160 S. W. 945; *Cincinnati, N. O. & T. P. R. Co. v. Swann*, — Ky. —, 169 S. W. 886; *Cincinnati, N. O. & T. P. R. Co. v. Hill*, — Ky. —, 170 S. W. 590; *Collins v. Pennsylvania R. Co.* 163 App. Div. 452, 148 N. Y. Supp. 777; *Gee v. Lehigh Valley R. Co.* 163 App. Div. 274, 148 N. Y. Supp. 882; *Hobbs v. A. Great Northern R. Co.* 80 Wash. 678, L.R.A. —, 142 Pac. 20.

The fellow servants of the injured employee cannot be guilty of negligence toward him unless they fail to discharge some duty owing to him. *Cincinnati, N. O. & T. P. R. Co. v. Swann*, *supra*.

⁴⁰ *SEABOARD AIR LINE R. Co. v. HORTON*.

⁴¹ *Thornton v. Seaboard Air Line R. Co.* 98 S. C. 348, 82 S. E. 433.

⁴² *Ridge v. Norfolk Southern R. Co.* — N. C. —, 83 S. E. 762.

⁴³ *Midland Valley R. Co. v. Fulgham*, L.R.A. —, 104 C. C. A. 171, 181 Fed. 91, cited in note in 47 L.R.A.(N.S.) 51.

⁴⁴ *Charleston & W. C. R. Co. v. Brown*, 13 Ga. App. 744, 79 S. E. 932; *Fish v. Chicago, R. I. & P. R. Co.* — Mo. —, 172 S. W. 340.

⁴⁵ Whether or not the defendant railroad company was negligent in furnishing a lubricator indicator tube which should have had a tensile strength to withstand 300 pounds of pressure, but exploded when subjected to a pressure of 145 pounds, is a question of fact for the jury. *Woodruff v. Yazoo & M. Valley R. Co.* 129 C. C. A. 411, 210 Fed. 849.

It is the duty of the master to exercise reasonable care even in furnishing simple tools for the employee to use. *Gekas v. Oregon-Washington R. & Nav. Co.* — Or. —, 146 Pac. 970.

Testimony that the train was running 25 or 30 miles an hour when it reached a curve, at which point the engineer, without any warning, suddenly put on the brakes, and L.R.A.1915C.

then instantly released them, so jarring the train that the plaintiff, a brakeman, was thrown off, and evidence of a rule of the defendant that the maximum speed of such a train as the one in question was 20 miles an hour, are sufficient to take the case to the jury upon question of the negligence of the defendant's engineer. *Hartman v. Western Maryland R. Co.* 246 Pa. 460, 92 Atl. 698.

The act of a section foreman who, together with a superior foreman and the men of both crews, was on a work train standing on a switch, in shouting to the men to get off the work train, is imputable to the railroad company, although the foreman was under the mistaken belief that such work train was about to be struck by a through train; and the railroad company is liable under the Federal act for injuries received by a member of the crew of the superior foreman who was injured while obeying such direction of the other foreman. *Cincinnati, N. O. & T. P. R. Co. v. Wilson*, — Ky. —, 171 S. W. 430.

It cannot be said that an engineer's negligence, even though it was the proximate cause of his death, was the sole cause, if, as matter of fact, the conductor of the train which collided with the deceased's train could, in the exercise of ordinary care, have known of the decedent's negligence, and failed to stop his train in time to avoid the collision. *Louisville & N. R. Co. v. Heinig*, — Ky. —, 171 S. W. 853.

Negligence is not imputable to the foreman of a train for failing to signal the engineer to blow his whistle to attract the attention of a track walker to the approaching train, where there was nothing to indicate to the foreman, who had observed the walker for a quarter of a mile, that the latter intended to step onto the track in front of the engine as he did immediately prior to his being struck and killed. *New York, N. H. & H. R. Co. v. Pontillo*, 128 C. C. A. 573, 211 Fed. 331.

Whether or not employees riding on the first of two hand cars at a speed of 9 or 10 miles an hour were negligent in slackening their speed without warning to the men on the car following them is a question of

VI. Defects or insufficiencies in ways, cars, engines, appliances, etc.

Supplementing note in 47 L.R.A.(N.S.) 51.

The act of 1906 made the common carrier liable for defects in its "ways" as well as in its cars, engines, etc. This word was omitted from the act of 1908, but as is stated in the earlier note, it is not probable that Congress intended to in any way limit the liability of the carrier, since the phrase "other equipment" was added, and it

is difficult to conceive of any instrumentality which would be covered by the term "ways" which is not covered by the terms employed,—“appliances,” “track,” “road-bed,” “works,” and “other equipment.”

A path established through long-continued use by railroad employees in going to and from their work across the property of the company is a "way" within the meaning of the act of 1906.⁴⁶

In the note below will be found several cases which pass upon the question of what constitutes defects and insufficiencies.⁴⁷

fact for the jury. *San Pedro, L. A. & S. L. R. Co. v. Davide*, 127 C. C. A. 454, 210 Fed. 870.

In Evans v. Detroit, G. H. & M. R. Co. — Mich. —, 148 N. W. 490, where a car repairer had been injured by the alleged negligence of an assistant foreman in unlocking a switch and permitting cars to be run thereon without notifying the car repairers at work on cars stationed on the switch, the court held that there was sufficient evidence of negligence on the part of the assistant foreman to make it a case for the jury.

Testimony that, for the purpose of fastening together two sheet iron plates, a rivet was set on end under the overlap and a nut placed on top of the plates over the rivet, upon which a blow was struck for the purpose of driving the rivet through the plates, which caused the nut to fly off and hit plaintiff in the eye; and that the usual way of doing such work is to drill or punch a hole for the rivet before inserting it, has a tendency to prove negligence. *LAW v. ILLINOIS C. R. Co.*

The jury may find the railroad company negligent in using a road engine with a pilot instead of a front footboard, for switching purposes. *Louisville & N. R. Co. v. Lankford*, 126 C. C. A. 247, 209 Fed. 321.

The falling of a wooden bridge, some of the supports of which had been burned, whereby the crew of a rotary snowplow were injured, shows actionable negligence on the part of the railroad company. *Copper River & N. W. R. Co. v. Reed*, 128 C. C. A. 39, 211 Fed. 111.

In Osborne v. Cincinnati, N. O. & T. P. R. Co. 158 Ky. 176, 164 S. W. 818, it was held that the violation of the Federal hours of service act was not in itself sufficient to sustain an action under the act, but the plaintiff must show some act of negligence on the part of the defendant "that, concurring with or attributable to the violation of the act, contributed to the death" of the employee. The court cited *St. Louis, I. M. & S. R. Co. v. McWhirter*, 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 858, as authority for this remarkable statement; an examination of the latter case shows that L.R.A.1915C.

what the court held was that there must be shown some causal connection between the violation of the statute and the injuries, and not that there must be some additional act of negligence on the part of the defendant.

Instructing the jury to the effect that if a servant is injured through defective instrumentalities (in this case a defective ash pan or damper in another engine and rotten wood in a trestle, likely to take fire), it is prima facie evidence of the master's negligence, and that the master "assumes the burden" of showing that he exercised due care in furnishing them, is not reversible error where the charge recognized and stated later that the burden of proving negligence rests on the plaintiff throughout. *Southern Railway-Carolina Division v. Bennett*, 233 U. S. 80, 58 L. ed. 860, 34 Sup. Ct. Rep. 566.

Where the evidence showed that the employee was a brakeman in the employ of the defendant; that he was on top of a car in the performance of his duties; that another car was kicked against that car with unusual force, and that he was thereby thrown from the car and killed, the question of negligence is for the jury. *Kenney v. Seaboard Air Line R. Co.* 165 N. C. 99, 80 S. E. 1078.

⁴⁶ *PHILADELPHIA, B. & W. R. Co. v. TUCKER.*

⁴⁷ An employee's way across railroad tracks is insufficient within the meaning of the act if no protection whatever is provided against injuries from passing trains which are likely to result from the surrounding conditions. *PHILADELPHIA, B. & W. R. Co. v. TUCKER.*

A pile of cinders permitted to remain in dangerous proximity to the tracks is a defect under the Federal act. *Southern R. Co. v. Jacobs*, — Va. —, 81 S. E. 99.

A railroad company operating its trains over the track of another company under a traffic arrangement is liable under the Federal employers' liability act for defects in the track, since the track over which it was operating its trains was "its" track within the meaning of the statute. *Campbell v. Canadian Northern R. Co.* 124 Minn. 245, 144 N. W. 772.

VII. Carriers and employments within the statute — interstate commerce.

1. In general.

Supplementing note in 47 L.R.A. (N.S.) 52.

It has been said that the act applies only where the particular service in which the employee was engaged at the time of the injury is interstate commerce.⁴⁸ The test is the nature of the work which the employee is doing at the time of the injury, and not what he expected to do after the completion of that task.⁴⁹ So, a fireman employed by an interstate railway carrier on a switching engine, who was killed while aiding in the work of moving several cars all loaded with intrastate freight between two points in the same city, was not employed in interstate commerce within the meaning of the act, although upon completion of that task the crew was to have gathered up and taken to other points several other cars as a step or link in both interstate and intrastate transportation.⁵⁰ The decision in the Behrens Case was followed, and a recovery under the statute denied, by the Oklahoma court in a case where a brakeman was injured while making a coupling between the tender and a baggage car, where it did not appear that the engine tender or baggage car contained any person or thing *en route* from or to any place beyond the state, or that either of

these had come from beyond the state, notwithstanding the defendants intended immediately thereupon to incorporate into the train a number of freight cars including three then in the service of interstate freight.⁵¹ Conceding, as we must, the correctness of the decision of the United States Supreme Court, it would seem that the two decisions are clearly distinguishable. In the Behrens Case, it does not appear that the intended movement of the interstate cars was in any way connected with the movement of the intrastate cars in question; the movements of the two cars were entirely distinct and independent of each other so far as the direct movement thereof was concerned. In the Pitts Case, the movement of the intrastate cars, or rather of the engine and the baggage car, was necessary before the interstate cars could be moved. The coupling of the baggage car to the tender was necessary for the forming of the train which was intended to move interstate commerce.

What the employee was doing immediately before the accident is immaterial. Even if the employee immediately prior to the injury had been employed in interstate commerce, and the next service which he was to perform, had he not been injured, was connected with such commerce, he is not within the protection of the statute, where there was no evidence that at the time of the injury he was actually engaged in such commerce.⁵²

⁴⁸ Congress intended by the provisions of the statute to confine its action to injuries occurring when the particular service in which the employee was engaged was a part of interstate commerce. *Illinois C. R. Co. v. Behrens*, 233 U. S. 473, 58 L. ed. 1051, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914C, 163.

The provisions of the act are limited to injuries occurring while the particular service in which the employee was engaged is a part of interstate commerce. *Patry v. Chicago & W. I. R. Co.* 265 Ill. 310, 106 N. E. 843.

The Federal act covers injury occurring at the moment when the particular service performed is part of interstate commerce. *Corbett v. Boston & M. R. Co.* 219 Mass. 351, 107 N. E. 60.

⁴⁹ *Shanks v. Delaware, L. & W. R. Co.* 163 App. Div. 565, 148 N. Y. Supp. 1034.

⁵⁰ *Illinois C. R. Co. v. Behrens*, supra. The court said: "Here, at the time of the fatal injury the interstate was engaged in moving several cars, all loaded with intrastate freight, from one part of the city to another. That was not a service in interstate commerce, and so the injury and resulting death were not within the statute. That he was expected, upon the completion of that task, to engage in another which would have been a part of interstate L.R.A.1915C.

commerce, is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury."

It might be well argued that as the railroad in question transported both interstate and intrastate commerce, it was necessary for the furtherance of the former that cars loaded with intrastate freight should be removed from the tracks so that they would be free for the movement of the interstate cars. In other words, as the defendant handled both interstate and local commerce, the movement of the latter was necessary to further the movement of the former. The clearing away of a wreck from tracks over which both interstate and intrastate commerce passes is undoubtedly a work in furtherance of interstate commerce, and it might well be argued that there could be no logical distinction between the removal of a wreck which interfered with the furtherance of interstate commerce, and the removal of cars loaded with intrastate freight which, unless moved, would interfere with the furtherance of the interstate commerce.

⁵¹ *Atchison, T. & S. F. R. Co. v. Pitts*, — Okla. —, 145 Pac. 1148.

⁵² The state law, and not the Federal statute, applies where at the time of his injury a yard conductor was handling a caboose concerning which there was no evi-

But where the work which the employee was doing at the time of the accident, although intrastate in character, was so interwoven with interstate business as to be inseparable, and is proper conduct tended to promote interstate traffic, the Federal act, and not the state act, controls.⁵³ So, it has been held that where on the outward run a conductor had charge of an interstate train, and upon his return trip would have taken interstate cars had any been ready, he is on the return trip within the protection of the statute, although as a matter of fact he did not have charge of any interstate cars.⁵⁴ But in a lower New York case, it was held that a locomotive and caboose with the crew, which, after an interstate trip was ended, had been devoted to intrastate operation, and subsequently were on their way back without

transporting any object of commerce from one state to the other, were not engaged in interstate commerce.⁵⁵

The hauling of empty cars from one state to another is interstate commerce within the meaning of the employers' liability act of April 22, 1908, giving a right of recovery against an interstate railway carrier for the death of an employee while engaged in interstate commerce.⁵⁶ But the hauling of a dead engine belonging to the carrier from one place on its railroad to a point in another state has been held not to be interstate commerce.⁵⁷

After an interstate train has reached the terminal point in a state and has been broken up, the subsequent transfer of its cars to different points within the state has been held not to be interstate commerce.⁵⁸

Whether a particular service or engage-

dence to show that it was engaged in interstate commerce, although the plaintiff shortly before his injury was assisting in shifting an interstate car, and there was some evidence tending to show that the next service he would be required to perform, would be in relation to interstate cars. *Erie R. Co. v. Welsh*, 89 Ohio St. 81, 105 N. E. 189. The court said: "The mere fact that shortly before that time he had been so engaged [shifting an interstate car], or that the next service his master would require would be of interstate character, cannot and does not establish the fact that at the time of the injury he was so engaged. The facts in this case having wholly failed to show that plaintiff was engaged in interstate commerce at the time of the accident and injury, the law of the forum applies, and the trial court properly gave in charge to the jury the law of this state."

⁵³ In reference to the power of Congress to legislate relatively to matters pertaining to interstate commerce, the United States Supreme Court in *Illinois C. R. Co. v. Behrens*, 233 U. S. 473, 58 L. ed. 1051, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914C, 163, said: "Considering the status of the railroad as a highway for both interstate and intrastate commerce, the interdependence of the two classes of traffic in point of movement and safety, the practical difficulty in separating or dividing the general work of the switching crew, and the nature and extent of the power confided to Congress by the commerce clause of the Constitution, we entertain no doubt that the liability of the carrier for injuries suffered by a member of the crew in the course of its general work was subject to regulation by Congress, whether the particular service being performed at the time of the injury, isolatedly considered, was in interstate or intrastate commerce."

An employee while actually performing a service essential to or so closely connected with interstate commerce as to be substantially a part of it, though not necessarily

exclusive of all intrastate features, is in the performance of interstate service within the meaning of the act. *Graber v. Duluth, S. S. & A. R. Co.* — Wis. —, 150 N. W. 489.

The Federal statute controls although matters of state regulation are indissolubly commingled with matters exclusively controlled by the Federal act. *Flanders v. Georgia S. & F. R. Co.* — Fla. —, 67 So. 68.

⁵⁴ A conductor whose run was from the terminal point of the railroad to another point within the state and return, the round trip being made in a day, and whose trains on his outward run consisted almost entirely of interstate cars, and on his return of such cars, if any, as were ready to be taken to the terminal station, is upon his return trip within the protection of the statute, although the train consisted only of the locomotive, a partially disabled locomotive, and the caboose, and also for a portion of the way of a pile-driving outfit which had been left at a way station. *Peery v. Illinois C. R. Co.* 123 Minn. 264, 143 N. W. 724. This ruling was adhered to upon a second appeal. 150 N. W. 382.

⁵⁵ *McAuliffe v. New York C. & H. R. Co.* 164 App. Div. 846, 150 N. Y. Supp. 512.

⁵⁶ *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159, reversing 156 N. C. 496, 72 S. E. 858. See also *Pennsylvania R. Co. v. Knox*, — C. C. A. —, 218 Fed. 748.

⁵⁷ *McAuliffe v. New York C. & H. R. Co.* supra.

⁵⁸ In *Louisville & N. R. Co. v. Strange*, 156 Ky. 439, 161 S. W. 239, it was held that where a train containing interstate cars was broken up at a certain point, and the interstate cars were then transferred by other state, trains to other points within the same state, the interstate cars had finished their interstate journey at the point where the train was broken up, and consequently employees

ment therein is of interstate character is a question of law.⁵⁹

The workman whose negligence caused the injury need not be engaged in interstate commerce.⁶⁰

2. Carriers embraced within the act.

The lessor of an intrastate railway to an interstate railway carrier is, through its lessee, a "common carrier by railroad engaging in commerce between the states," within the meaning of the employers' liability act of April 22, 1908, where, under the local law, the lessor is responsible for all acts of negligence of its lessee occurring in the conduct of the business upon the lessor's road.⁶¹

Where, in an action against two corporations, the complaint alleged that one company was operating a line of railroad and that the second company was a subsidiary company of the first, and the latter in operating its road did so partly through the second company as its agent, and it was proven that the first company was at the time of the accident a common carrier, both defendants will be regarded as common car-

riers, and within the application of the Federal act.⁶²

An interurban trolley or electric system of railway running through more than one state, carrying passengers or freight, or both, is engaged in interstate commerce, and is a railroad within the meaning of the Federal statute.⁶³ And an electric railroad, although a carrier of passengers only, is within the act.^{63a}

The act of 1908 is limited to common carriers by railroad, and does not apply to a vessel which was not a part of the railroad system, and which was under charter, and consequently was not a common carrier, but only a private carrier.⁶⁴

3. Application where employee is not actively at work.

It is not necessary for the employee to be actively engaged in his work in order to be within the protection of the statute. It has been held that employees who have finished their work and are proceeding along the track to a boarding car maintained on the premises are within the statute.⁶⁵ And an employee while on the defend-

injured while subsequently handling such cars were not within the protection of the statute.

See also *Pennsylvania R. Co. v. Knox*, — C. C. A. —, 218 Fed. 748.

⁵⁹ *Graber v. Duluth, S. S. & A. R. Co.* supra.

Where the evidence shows that the employee was at the time of his injury engaged in interstate commerce, it is error for the trial court to leave to the jury the question whether the Federal statute or the state law applies. *Oberlin v. Oregon-Washington R. & Nav. Co.* — Or. —, 142 Pac. 554.

Where the fact that the plaintiff was engaged in interstate commerce at the time of his injury was established, the court may properly give a peremptory instruction thereon, and it is not error prejudicial to the defendant to submit the question to the jury. *Pelton v. Illinois C. R. Co.* — Iowa, —, 150 N. W. 236.

⁶⁰ *Louisville & N. R. Co. v. Walker*, — Ky. —, 172 S. W. 517.

⁶¹ A railway fireman killed while employed in interstate commerce by a lessee interstate railway carrier must be regarded as employed also by the lessor railway company in such commerce, within the meaning of the act of April 22, 1908, although the leased railway is an intrastate one, where, under the local law, the lessor is responsible for all acts of negligence of its lessee occurring in the conduct of the business upon the lessor's road. *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159, reversing 156 N. C. 496, 72 S. E. 858.

The Zachary Case was followed by *Lloyd L.R.A.1915C*.

v. Southern R. Co. 166 N. C. 24, 81 S. E. 1003, in which the facts were similar.

⁶² *Copper River & N. W. R. Co. v. Heney*, 128 C. C. A. 131, 211 Fed. 459.

⁶³ Where, by a traffic arrangement between an interurban electric railway company and a street car company, the street car company was to receive the cars of the interurban company at a point in one state and carry them over its lines into another state, and return them to the point at which they were received, where they were to be delivered back to the interurban company, the street car company furnishing the electric power and a conductor to be in charge of the car, and the interurban company furnishing one of its motormen to run the car upon its own schedule through the second state, passengers being received to be transported from one state to the other,—the interurban company is engaged in interstate commerce, and its employees are within the protection of the statute. *McAdow v. Kansas City Western R. Co.* — Mo. App. —, 164 S. W. 181.

^{63a} *Washington, A. & Mt. U. R. Co. v. Downey*, 40 App. D. C. 147.

⁶⁴ *The Pawnee*, 205 Fed. 333.

⁶⁵ An employee engaged in installing a new block system upon the railroad, while returning from his work to the boarding car maintained by the company, on a gas motor tricycle, is within the statute. *Grow v. Oregon Short Line R. Co.* — Utah, —, 138 Pac. 398.

A workman employed in interstate commerce is, while walking along the tracks from his place of work to the boarding car, where he ate and slept, engaged in interstate commerce. *Louisville & N. R. Co. v.*

ant's premises is within the statute, although not actively at work, if his presence there is necessary for the fulfilment of his duties.⁶⁶ So, also, employees are within the statute while they are on the carrier's premises proceeding to their place of work.⁶⁷ And an employee who leaves the premises for necessary refreshments is within the statute while crossing the company's tracks upon returning to his work.⁶⁸ Evidence that a fireman in the employ of an interstate railway carrier, after inspecting, oiling, firing, and preparing his engine for the intrastate haul of a train containing some cars that had come from another state, was killed by a switching engine while he was attempting to cross the tracks intervening between the engine and his

boarding house, is at least sufficient to require the submission to the jury of the question of the carrier's liability under the employers' liability act of April 22, 1908, giving a right of recovery against an interstate railway carrier for the death of an employee while engaged in interstate commerce.⁶⁹

But a conductor is not engaged in interstate commerce, who, after having finished his run and registered his arrival, boards another engine with the operation of which he has no connection, in order to ride to his home.⁷⁰ And where an employee is engaged in both intrastate and interstate commerce, and the work is entirely distinct, part of his time being devoted to one and part to the other, with intervals between

Walker, — Ky. —, 172 S. W. 517. Carroll, J., said: "We, therefore, have a case in which the employee not only worked for the company in the daytime, but ate his meals and occupied at night a place on its premises set apart by the company for his use and accommodation. And so we think that under these circumstances an employee such as Walker was should be treated as engaged in interstate commerce not only when actually employed at his work, but while using the premises of the company in going to and from the place set apart for him to eat and sleep and his work on the premises of the company. In other words, within the contemplation of the act, the course of his employment covered not only the time he was actually engaged at work, but the time he was engaged in going to and from his work."

⁶⁶ An "extra" brakeman who was at all times subject to call, whose time and pay when called to duty went on until he returned to his home, is within the statute while returning on a passenger train from an interstate trip. *St. Louis Southwestern R. Co. v. Brothers*, — Tex. Civ. App. —, 165 S. W. 488.

The head brakeman of a freight crew, who, together with the other members of the crew, was called to duty and assigned to a special passenger train for interstate cars, is himself engaged in interstate commerce, although ordinarily passenger trains have but one brakeman, and the head brakeman had no particular duties to perform in the transportation of the train. *Pelton v. Illinois C. R. Co.* — Iowa, —, 150 N. W. 236. The court said: "The fact that only one brakeman is usually necessary for the operation of a passenger train, or that there was no pressing need for more than one brakeman for this particular train, is not a controlling fact. If the plaintiff was ordered by the directing officers of the corporation to the operation of this train as a member of Emory's crew, and if he boarded the train in obedience to such order, we see no room to claim that he was not employed in its operation, whether his duties thereon were many or few. That the defendant so regarded him is indicated by the further fact that it paid him for the run in precisely the same manner that it paid the other members of the crew."

employed in its operation, whether his duties thereon were many or few. That the defendant so regarded him is indicated by the further fact that it paid him for the run in precisely the same manner that it paid the other members of the crew."

⁶⁷ An engineer of a switch engine used in interstate traffic is, while on his way through the defendant's yards to the roundhouse to get his engine, within the protection of the statute. *Missouri, K. & T. R. Co. v. Rentz*, — Tex. Civ. App. —, 162 S. W. 959.

A locomotive fireman who, in response to a call to duty, takes a customary path across the company's tracks to assume his duties, is, after entering on the company's property and while traveling along the path, an employee within the meaning of the statute. *PHILADELPHIA, B. & W. R. Co. v. TUCKER*.

⁶⁸ A brakeman who, upon the conclusion of an interstate run, being in need of refreshment, went into a saloon, and then crossed some tracks to go to the station to inquire whether the conductor had any further orders for him, was, while crossing the track, still engaged in interstate commerce. *Graber v. Duluth, S. S. & A. R. Co.* — Wis. —, 150 N. W. 489. *Marshall, J.*, said: "Neither the period or nature or continuity of service is changed by such a brief stepping aside from or cessation of activity as that of customarily visiting a wayside place for a lunch or other legitimate and common means of refreshment, or waiting after one task shall have been done for orders as to the next movement,—the employee all the time being within customary reach for continuance of the day's service, and holding himself in readiness to immediately respond."

⁶⁹ *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159, reversing 156 N. C. 496, 72 S. E. 858.

⁷⁰ *Dodge v. Great Western R. Co.* — Iowa, —, 146 N. W. 15.

the periods of active duty, he is not engaged in interstate commerce during the time when he is not actively engaged in work.⁷¹

4. Where employee is acting outside the scope of his employment.

There can be no recovery unless the employee at the time of his injury was acting within the scope of his employment.⁷² So, an employee has no right of action against the railroad company for injuries caused by his being pushed from a car by other employees while they were scuffling and wrestling.⁷³ But there may be a recovery under the act where the jury may infer from the circumstances that the employee was doing the work that was required of him, not at the time it was required, but at a time when it was not forbidden.⁷⁴

5. Character of employments falling within the act.

Supplementing note in 47 L.R.A.(N.S.) 54.

a. Miscellaneous employments.

An employee engaged in coaling an engine which was being prepared for an interstate run is within the statute, although the engine was not as yet attached to the train.⁷⁵

An employee engaged in wheeling coal to be used as fuel in a shop in which other employees were engaged in repairing cars

used in interstate commerce is within the protection of the statute.⁷⁶

An employee engaged in framing up a new office in a freight shed used for both interstate and intrastate commerce is within the protection of the act.⁷⁷ But a lower New York court has held that the work of millwrights in changing the position of machinery in car shops is not within the statute, although such machinery had been used, and was to be used, in repairing interstate cars.⁷⁸

An assistant gardener employed by an interstate railroad to cultivate land around a station, and to gather trash and burn it, is not engaged in interstate commerce.⁷⁹

Logs, while being carried within a state to a point where they are to be manufactured into lumber, are not interstate commerce, although after they are sawed the lumber is shipped to other states.⁸⁰

An employee of an electric railroad company, conducting a local car between points within a state, is not within the protection of the Federal act.⁸¹

b. Employees on interstate trains.

Supplementing note in 47 L.R.A.(N.S.) 54.

Where the employee is engaged in assisting to operate an interstate train, there is no question as to the application of the statute,⁸² and although the train itself may run only between points within the state, an employee thereon is within the

⁷¹ In *Gray v. Chicago & N. W. R. Co.* 153 Wis. 637, 142 N. W. 505, the court intimated that a car hostler who spends part of his time on interstate and part on local engines is not, while walking back to his rest shanty to await the arrival of another engine, engaged in interstate commerce so as to be within the protection of the Federal statute. The view taken by the court was that where he was not at work all the time on interstate commerce, it could not be said that while he was resting, or during the interval between his periods of active duty, he was engaged in such commerce.

⁷² *Hobbs v. Great Northern R. Co.* 80 Wash. 678, L.R.A.—, 142 Pac. 20.

In *Cincinnati, N. O. & T. P. R. Co. v. Wilson*, — Ky. —, 171 S. W. 430, the court said that, in the absence of specific provisions to the contrary, the act should not be construed as imposing liability upon the master for the neglect of his servants unless their negligent acts were performed within the course of their employment.

⁷³ *REEVE v. NORTHERN P. R. Co.*

⁷⁴ *Padgett v. Seaboard Air Line R. Co.* — S. C. —, 83 S. E. 633.

⁷⁵ *Armbruster v. Chicago, R. I. & P. R. Co.* — Iowa, —, 147 N. W. 337.

⁷⁶ *Cousins v. Illinois C. R. Co.* 126 Minn. 172, L.R.A.—, 148 N. W. 58. L.R.A.1915C.

⁷⁷ *Eng v. Southern P. Co.* 210 Fed. 92.

The work of repairing a roundhouse which had been partially destroyed by fire is within the application of the Federal act, where the roundhouse was used for housing of interstate engines. *Thomas v. Boston & M. R. Co.* — C. C. A. —, 219 Fed. 180.

⁷⁸ *Shanks v. Delaware, L. & W. R. Co.* 163 App. Div. 565, 148 N. Y. Supp. 1034.

⁷⁹ *Galveston, H. & S. A. R. Co. v. Chojnacky*, — Tex. Civ. App. —, 163 S. W. 1011.

⁸⁰ *Nordgard v. Marysville & N. R. Co.* — C. C. A. —, 218 Fed. 737, affirming 211 Fed. 721.

⁸¹ *Miller v. Kansas City Western R. Co.* 180 Mo. App. 371, 168 S. W. 336. The court said: "If the work of a local employee is on or with a particular car, that car must be an interstate car in order that such employee be engaged in interstate commerce."

⁸² A brakeman helping to move an interstate train is engaged in furthering interstate commerce. *Vaughan v. St. Louis & S. F. R. Co.* 177 Mo. App. 155, 164 S. W. 144.

A switchman, while riding on the stirrup of a freight car loaded in part with interstate freight, which was being moved to a

statute if the train contains cars loaded with interstate freight.⁸³

A messenger or watchman on a dead engine being carried on a train part of which is composed of interstate cars is himself engaged in interstate commerce.⁸⁴

c. Switching cars — making up trains.

Supplementing note in 47 L.R.A.(N.S.) 54.

platform to be unloaded, is within the protection of the statute. *Hall v. Vandalia R. Co.* 169 Ill. App. 12.

Uncontradicted evidence that one of the cars on a train was going out of the state is sufficient to show that an employee on the train was engaged in interstate commerce. *Devine v. Chicago, R. I. & P. R. Co.* — Ill. —, 107 N. E. 595.

In *Cincinnati, N. O. & T. P. R. Co. v. Goode*, 155 Ky. 153, 159 S. W. 695, which was a rehearing (former opinion in 153 Ky. 247, 154 S. W. 941), it was held that a brakeman on an interstate passenger train was within the statute.

⁸³ A brakeman working on a train running between points in a state, which train at the time of the injury was composed partly of interstate cars, is within the protection of the statute. *Moliter v. Wabash R. Co.* 180 Mo. App. 84, 168 S. W. 250.

A train running between points within a state, but containing cars carrying merchandise billed to points outside the state, is an interstate train within the meaning of the act. *Fernette v. Pere Marquette R. Co.* 175 Mich. 672, 141 N. W. 1084, 144 N. W. 834.

⁸⁴ *Atlantic Coast Line R. Co. v. Jones*, 9 Ala. App. 499, 63 So. 693. The court said: "Clearly the defendant was at the time engaged in interstate commerce, and the dead engine was one of the instrumentalities ordinarily used by the defendant in carrying on its business, and the fact that this instrumentality was not being put to the precise use for which it was designed at the particular time when the injury occurred to the plaintiff does not alter the fact that the defendant was engaged in an act of interstate commerce at the time the plaintiff was injured, and that the plaintiff was in the performance of his duties in the line of his employment, and was injured by the defective condition (as he claims) of one of the instrumentalities ordinarily used in that business by the defendant, but at that time temporarily removed from service."

⁸⁵ A switchman making up an interstate train is within the protection of the statute. *Bramlett v. Southern R. Co.* 98 S. C. 319, 82 S. E. 501.

Where the shifting of cars had to do with the making up of an interstate train, the work is within the statute, although the particular cars being shifted were purely local in character. *Southern R. Co. v. Jacobs*, — Va. —, 81 S. E. 99.

A switchman engaged in making up a train destined for a point in another state L.R.A.1915C.

The switching of cars necessary for the making up of an interstate train is within the statute.⁸⁵ So, the switching of interstate cars in a yard is within the statute.⁸⁶ And the picking up of a way car, and the putting of it into an interstate train, have such connection with interstate commerce as to bring the act within the purview of the statute.⁸⁷ And a brakeman engaged in switching interstate cars is within the stat-

is engaged in interstate commerce, although some of the cars in the train are to be sent out at stations within the state where the employee is engaged. *Crandall v. Chicago & W. R. Co.* — Minn. —, 150 N. W. 165.

A member of a switching crew which handled all classes and character of freight and all kinds of cars during its working hours, and which transferred and put into other trains everything that came in for transfer, making no difference or distinction between interstate and intrastate cars, is engaged in interstate commerce, although at the particular time of the injury the crew had gone with only their engine outside of the yard, in order to re-enter upon another track to continue their switching work. *Pittsburgh, C. C. & St. L. R. Co. v. Glinn*, — C. C. A. —, 219 Fed. 148.

⁸⁶ A freight conductor, while engaged in transferring baggage cars loaded with interstate freight from one yard to another, is engaged in interstate commerce. *Wagner v. Chicago & A. R. Co.* 180 Ill. App. 196, affirmed in 265 Ill. 245, 106 N. E. 809.

An employee connected with a switch engine in a yard, which moves indiscriminately local and interstate cars, is within the statute, although at the time he was injured the engine was attached to a purely local car. *Oberlin v. Oregon-Washington R. & Nav. Co.* — Or. —, 142 Pac. 554.

The shifting in a yard of cars loaded with intrastate freight is not within the statute, although the cars might have been brought into the yard by an interstate train, where such train had proceeded on its way before the injury. *Norton v. Erie R. Co.* 163 App. Div. 466, 148 N. Y. Supp. 769.

⁸⁷ *Thornbro v. Kansas City, M. & O. R. Co.* 91 Kan. 684, 139 Pac. 410. The court said: "It cannot be doubted that the work of the deceased had a real and substantial relation to interstate commerce. The rearrangement, as well as delay, required in picking up a car by the way, necessarily affects the operation and movement of a train, and it cannot be held that an employee upon such a train as this, while doing such work, is not engaged in interstate commerce, whatever may be the origin or destination of the particular car. To hold otherwise would be contrary to the manifest purpose of the act, which, as we have seen, has been generally construed broadly and liberally, as it should be, in the interest of humanity and commerce alike."

ute notwithstanding the train which he works on is an intrastate train.⁸⁸

But the Oklahoma court has held that where a brakeman was injured while making a coupling between the tender and the baggage car, and it did not appear that the engine tender or baggage car contained any person or thing *en route* from or to any place beyond the state, or that either of these had come from beyond the state, the brakeman was not engaged in interstate commerce, notwithstanding it was the carrier's intent to immediately thereupon incorporate in said train a number of freight cars, three of which were then in the service of interstate commerce.⁸⁹ See, however, the criticism of this case in subdivision VII. 1, *supra*.

d. Repairing roadbed, tracks, etc.

Supplementing note in 47 L.R.A.(N.S.) 54.

The work of maintaining roadbed and track in a proper condition after they have become instrumentalities of interstate com-

merce is within the act.⁹⁰ This includes the work of ballasting the track,⁹¹ taking up⁹² or laying rails,⁹³ repairing bridges⁹⁴ and trestles,⁹⁵ and the work of sweeping snow from switches.⁹⁶

A section foreman, while removing a hand car from the tracks in front of an interstate train, is without the protection of the statute.⁹⁷ And an employee who has been engaged in ballasting the track of an interstate railroad is, while taking, after his regular work is done, the hand car to a point where it may be taken from the track, which work he was doing at the direction of his foreman, still engaged in interstate commerce, and is within the protection of the statute.⁹⁸

e. Repairing rolling stock.

Supplementing note in 47 L.R.A.(N.S.) 54.

The work of repairing or cleaning rolling stock which has been used and is to be subsequently used in interstate commerce is within the act.⁹⁹ So, an engineer engaged

⁸⁸ Nashville, C. & St. L. R. Co. v. Banks, 156 Ky. 609, 161 S. W. 554.

In Erie R. Co. v. Welsh, 89 Ohio St. 81, 105 N. E. 189, the court said: "Notwithstanding his employment may have been entirely local and wholly within the state, yet if, in the course of his service, it became his duty to handle or assist in handling cars engaged in interstate commerce, either by taking them out of or putting them into trains, or shifting them about the various parts of the railway yards, he must be held to have been engaged in interstate commerce while actually so engaged in this service, and the Federal laws upon that subject would apply to any transaction occurring while he was actually so employed."

⁸⁹ Atchison, T. & S. F. R. Co. v. Pitts, — Okla. —, 145 Pac. 1148.

⁹⁰ Allegations in a complaint to the effect that while the plaintiff was employed in operating a steam shovel in the removal of earth from the roadbed and track of the defendant, and in the repair and maintenance of the track and roadbed, which were employed for the transportation and movement of defendant's trains in the conduct of business which was interstate business, are sufficient to show that the employee's relation to interstate traffic was so close and direct that his injuries tended to stop or delay the movement of trains engaged in such commerce. *Tralich v. Chicago, M. & St. P. R. Co.* 217 Fed. 675.

⁹¹ San Pedro, L. A. & S. L. R. Co. v. Davide, 127 C. C. A. 454, 210 Fed. 870.

⁹² Truesdell v. Chesapeake & O. R. Co. 159 Ky. 718, 169 S. W. 471. See also *Cherpeski v. Great Northern R. Co.* — Minn. —, 150 N. W. 1091.

⁹³ Southern R. Co. v. Howerton, — Ind. L.R.A.1915C.

—, 105 N. E. 1025, rehearing denied in 106 N. E. 369.

⁹⁴ McIntosh v. St. Louis & S. F. R. Co. — Mo. App. —, 168 S. W. 821.

⁹⁵ Louisville & N. R. Co. v. Walker, — Ky. —, 172 S. W. 517.

⁹⁶ A railroad sectionman, while sweeping snow from switches connected with tracks carrying both interstate and intrastate commerce, is within the protection of the act. *Hardwick v. Wabash R. Co.* 181 Mo. App. 156, 168 S. W. 328.

⁹⁷ Louisville & N. R. Co. v. Kemp, 140 Ga. 657, 79 S. E. 558.

⁹⁸ San Pedro, L. A. & S. L. R. Co. v. Davide, 127 C. C. A. 454, 210 Fed. 870.

⁹⁹ A shop employee engaged in repairing a car which has been used, and is to be used after the repairing is completed, in interstate commerce, is within the protection of the statute. *Missouri, K. & T. R. Co. v. Denahy*, — Tex. Civ. App. —, 165 S. W. 529.

A car repairer injured while at work on a car which had come into the state on an interstate errand, and was being returned, is within the statute. *Gaines v. Detroit, G. H. & M. R. Co.* — Mich. —, 148 N. W. 397.

A boiler maker's helper engaged in repairing a locomotive regularly employed in interstate transportation, and destined for return thereto upon completion of repairs, is employed in interstate commerce, and is within the protection of the Federal employers' liability act. *LAW v. ILLINOIS C. R. Co.*

An employee in a roundhouse injured while repairing an engine which for some time before and immediately prior to his injury, had been used in hauling both intrastate and interstate commerce, and which

in inspecting, oiling, and testing an engine which had just been taken from a repair shop, and which was upon a side track being made ready for a trial trip, after which, if found satisfactory, it was to draw an interstate train, is himself engaged in interstate commerce.¹⁰⁰ A workman at work in the car shops of a railroad on appliances to be placed on cars engaged in interstate commerce is within the act.¹⁰¹

But the Wisconsin court has held that taking care of an engine after its run and preparing it for the roundhouse are not interstate commerce, although on its run it may have drawn an interstate train.¹⁰² The court followed an earlier case in the same state in which it was held that an employee engaged in repairing a boiler, part of the wrecking appliance of the carrier, was not engaged in interstate commerce when at the time the boiler was lying near a wrecking car in a roundhouse.¹⁰³ These decisions are against the decided weight of authority, and also apparently against the spirit of the rule laid down by the United States Supreme Court.¹⁰⁴

An employee in a roundhouse engaged in

was likewise used immediately afterward, is within the protection of the statute. *Winters v. Minneapolis & St. L. R. Co.* 126 Minn. 260, 148 N. W. 106.

A car in process of transposition from one state to another is in transit, and is being used in interstate commerce while being switched at an intermediate yard with other interstate cars, although there may be a purpose to switch a defective car to a repair track for the repair of a defective coupler before it leaves the yard. *Otos v. Great Northern R. Co.* — Minn. —, 150 N. W. 922.

¹⁰⁰ *Lloyd v. Southern R. Co.* 66 N. C. 24, 81 S. E. 1003.

¹⁰¹ *Lauer v. Northern P. R. Co.* — Wash. —, 145 Pac. 607.

¹⁰² *Gray v. Chicago & N. W. R. Co.* 153 Wis. 637, 142 N. W. 505.

¹⁰³ *Ruck v. Chicago, M. & St. P. R. Co.* 153 Wis. 158, 140 N. W. 1074, cited in the earlier note.

¹⁰⁴ See note in 47 L.R.A.(N.S.) 57.

¹⁰⁵ *La Casse v. New Orleans, T. & M. R. Co.* — La. —, 64 So. 1012.

¹⁰⁶ Employees engaged in constructing a tunnel are not within the statute, although after the tunnel is completed it is intended to be used for interstate commerce. *Jackson v. Chicago, M. & St. P. R. Co.* 210 Fed. 495. The court cited *Pedersen v. Delaware, L. & W. R. Co.* 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153 (included in the earlier note), as conclusive of this point; but in that case the statement of the court is merely argumentative and wholly *obiter*. The injured employee was repairing a bridge which was already in use, and the court said: "Of L.R.A.1915C.

taking care of a locomotive the last prior trip of which was in intrastate commerce is not himself within the purview of the statute merely because the engine was whenever needed used in interstate commerce.¹⁰⁵

f. New construction.

Supplementing note in 47 L.R.A.(N.S.) 54.

It seems to be the rule enunciated by the reported cases, so far as they have touched upon the point, that employees engaged in new construction are not within the act, although the structure when completed is to be devoted to interstate commerce.¹⁰⁶

g. Installation and repair of signal devices.

An employee of an interstate railway company, engaged in installing a new and improved block system along the track of the defendant, in place of another system already in use, who at the time of his death was returning to his work train, from which he had been absent for a necessary

course, we are not here concerned with the construction of tracks, bridges, engines, or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such."

In *Bravis v. Chicago, M. & St. P. R. Co.* 217 Fed. 234, the court said: "Those employed in the preparation or construction of roadbeds, rails, ties, cars, engines, and other instrumentalities which are intended for use in interstate commerce, but have never been and are not in use therein, are not employed in interstate commerce, and are not protected by that [Federal employers' liability] act."

In *Eng v. Southern P. Co.* 210 Fed. 92, the court apparently proceeded upon the theory that an employee engaged in the construction of a new building would not be within the act, although such building was intended to be used as an instrumentality of interstate commerce.

An employee engaged in the construction of a bridge 600 feet distant from the railroad, on a cut-off more than a mile in length, which had never been provided with rails or used as a railroad, is not employed in interstate commerce, although his employer is so engaged and intends to use the cut-off therein when completed. *Bravis v. Chicago, M. & St. P. R. Co.* supra.

Employees engaged in building a railroad over which interstate commerce has never passed is not within the protection of the statute. *Chicago & E. R. Co. v. Steele*, — Ind. —, 108 N. E. 4.

In *Thomas v. Boston & M. R. Co.* — C. C.

purpose only a few minutes, is within the protection of the statute.¹⁰⁷ And the work of installing a new block system on a railroad engaged in both interstate and intrastate commerce is within the protection of the statute.¹⁰⁸ An action for the death of a signalman whose duties were to keep in proper order and repair the electric signals over a portion of the defendant's road upon which interstate trains passed must be prosecuted under the Federal employers' act.¹⁰⁹

6. Burden of proof as to the applicability of the Federal act.

As a prerequisite to the right of a plaintiff to recover under the Federal act, it is necessary for him to show that at the time of injury he was actually engaged in interstate commerce.¹¹⁰ When the question arises whether the Federal act applies, the

burden is upon the person asserting it to show that the facts at the time of the happening abated the original and primary sovereignty of the state, and permitted the exceptional and limited power of the Federal government to attach.¹¹¹

There can be no recovery under the Federal statute where the plaintiff fails to show that the train upon which he was working at the time of the injury was an interstate train, although that fact might be a matter of common knowledge.¹¹² And while the court may take judicial cognizance of the fact that trunk-line railroads are engaged in interstate commerce, it will not dispense with proof that a particular employee of such a railroad was at the time of his injury engaged in such commerce, rather than intrastate traffic.¹¹³

In the note below are several cases which pass upon the question of the sufficiency of evidence to show that the employee was engaged in interstate commerce.¹¹⁴

A. —, 219 Fed. 180, the court apparently took the view that while the work of repairing a roundhouse which had partially been destroyed by fire was within the application of the Federal statute, yet if the work consisted of tearing down the roundhouse, so that an entirely new structure could be erected, such work would not be within the application of the statute.

¹⁰⁷ *Saunders v. Southern R. Co.* — N. C. —, 83 S. E. 573.

¹⁰⁸ *Grow v. Oregon Short Line R. Co.* — Utah, —, 138 Pac. 398. It was contended that since the portion of the system upon which the employee was at work had not yet been devoted to any commerce, as it was not completed, it could not be said to be within the statute, but the court said that this contention was completely answered by the United States Supreme Court in the *Pederson Case*.

¹⁰⁹ *Cincinnati, N. O. & T. P. R. Co. v. Bonham*, — Tenn. —, 171 S. W. 79.

¹¹⁰ *Knowles v. New York, N. H. & H. R. Co.* 164 App. Div. 711, 150 N. Y. Supp. 99; *St. Louis & S. F. R. Co. v. Brown*, — Okla. —, 144 Pac. 1075; *Hench v. Pennsylvania R. Co.* 246 Pa. 1, L.R.A.—, 91 Atl. 1056.

¹¹¹ *McAuliffe v. New York C. & H. R. R. Co.* 164 App. Div. 846, 150 N. Y. Supp. 512.

¹¹² *Gordon v. New Orleans G. N. R. Co.* — La. —, 64 So. 1014.

¹¹³ In *Chicago, R. I. & P. R. Co. v. McBee*, — Okla. —, 145 Pac. 331, the court said: "While this court may properly, in certain cases, take judicial cognizance of the fact that any one of the many great trunk lines of railway extending through the various states is engaged in interstate commerce, yet the fact is equally as notorious, and as much the subject of judicial notice, that every such railway is also engaged in intrastate traffic; and clearly it is not a matter of such general knowledge as to dispense L.R.A.1915C.

with proof that any specific portion of the equipment or any particular employee of such railway is engaged in interstate, rather than intrastate, commerce at any precise time or place."

¹¹⁴ There can be no recovery under the Federal act where all that the evidence shows, is that the employee was a brakeman in the general freight yard of the defendant, and that in the yard wherein he was employed cars containing both intrastate and interstate shipments were received, stored, shifted, and reloaded for transportation from time to time, and that the cars upon which he was at work at the time of the injury were empties. *Hench v. Pennsylvania R. Co.* supra.

The mere surmise on cross-examination of a fireman, that there may have been coal in some of the cars, and the further surmise that some of the coal may have been coal from other states, are not sufficient to justify the court in holding that the employee was engaged in interstate commerce, where the defendant had full knowledge of the subject, but did not plead that the train was engaged in said commerce, nor put in evidence any testimony on the part of the conductor or engineer as to such fact, nor show by the bills of lading that any articles in the train were being transhipped from a point outside the state to a point within the state. *Ingle v. Southern R. Co.* — N. C. —, 83 S. E. 744.

Where there was no direct evidence that the train upon which the employee was an engineer contained cars loaded with interstate freight, that question is to be submitted to the jury where the superintendent of motor power for the defendant said that in a train as long as the one in question most of the cars would have to come from without the state, and the engineer on another train testified that he thought that all the oil and lumber with which most of

VIII. Defenses abrogated or modified.**1. Fellow servant doctrine.**

Supplementing note in 47 L.R.A. (N.S.) 60.

Probably the most important change in the common law made by the Federal law is the abrogation of the so-called fellow servant doctrine, so that a common carrier is liable for an injury to an employee although such injury was caused by the negligence of a fellow servant. That the fellow servant doctrine is not available as a defense to an action under the statute is expressly declared in one case, and is assumed in practically every other case which has construed the act.¹¹⁵

The so-called fellow servant doctrine is frequently considered as a branch of the doctrine of assumption of risk. This leads to confusion, for the defense of assumption of risk is still open, as is shown in subdivision 3, *infra*, while the defense of co-service is abolished. In a number of decisions it is stated that the defense of assumption of the risk of negligence on the part of fellow servants is not available in an action under the statute.¹¹⁶

In one case arising in the circuit court of appeals, it has been held that an employee does not assume the risk of the neg-

ligence of fellow servants which consists of the customary negligent operation of trains.¹¹⁷ This decision seems contrary to the spirit of the act. There can be no question that an employee does assume the risks of defective conditions of which he is aware, although such conditions were caused by the prior negligence of fellow servants. But this decision goes further and holds that the employee will be held to have assumed the risk of future negligent acts, provided only that such acts are customary. This is not the view ordinarily taken, and furthermore such a view is based upon the theory that the employee must presume that the fellow servant will continue to be negligent, and it is a basic principle that negligence will not be presumed.

2. Contributory negligence.

Supplementing note in 47 L.R.A. (N.S.) 61.

The statute establishes the old doctrine of comparative negligence, and consequently contributory negligence is not a complete defense.¹¹⁸ It has apparently been held in a case in the Federal court of appeals that contributory negligence is a complete defense, but if this is the holding of the court, it is clearly erroneous and in

the cars of the train were loaded must have come from without the state, since there were no sawmills or oil wells within the state from which it was reasonable to suppose that the material for the loads could have come. *Southern P. Co. v. Vaughn*, — Tex. Civ. App. —, 165 S. W. 885.

¹¹⁵ *Devine v. Chicago, R. I. & P. R. Co.* — Ill. —, 107 N. E. 595.

¹¹⁶ *Sweet v. Chicago & N. W. R. Co.* 157 Wis. 400, 147 N. W. 1054.

Whatever risks the deceased employee may have assumed as to the defendant's method of doing business, he did not assume the risk of injury from the negligence of another employee. *Caverhill v. Boston & M. R. Co.* — N. H. —, 91 Atl. 917.

A freight conductor does not assume the risk of the negligence of a flagman in failing to flag the train. *Pennsylvania R. Co. v. Goughnour*, 126 C. C. A. 39, 208 Fed. 961.

In *Graber v. Duluth, S. S. & A. R. Co.* — Wis. —, 150 N. W. 489, it is said: "The assumption of risk saved to employers under the Federal act as a shield against the consequences of injuries to employees does not include risk of unexpected negligent acts of coemployees."

¹¹⁷ In *Boldt v. Pennsylvania R. Co.* 218 Fed. 367, the court held that it was not error for the trial judge to refuse to charge as follows: "The risk the employee now assumes since the passage of the Federal employers' liability act is the ordinary L.R.A.1915C.

dangers incident to his employment, which does not now include the assumption of risk incident to the negligence of defendant's officers, agents, or employees." The ground of this decision was that the negligence complained of was the operation of the cars by the deceased's fellow servants, causing violent striking of standing cars by other cars being let down a decline, and that this was of almost daily occurrence, and that consequently, if this operation was negligent, it was negligence obvious to the deceased, and that the jury might find that such usual operation was a risk which he assumed.

¹¹⁸ *Bombolis v. Minneapolis & St. L. R. Co.* — Minn. —, 150 N. W. 385; *Saunders v. Southern R. Co.* — N. C. —, 83 S. E. 573.

The plaintiff is not required to show that he was free from fault. *Charleston & W. C. R. Co. v. Brown*, 13 Ga. App. 744, 79 S. E. 932.

A request to charge as a matter of law that a switchman whose arm was crushed between two cars moving in interstate commerce could not recover from the carrier if he gave the "come ahead" signal as he entered between the cars to examine the defective coupling mechanism is properly refused as incompatible with the provisions of the employers' liability act of April 22, 1908, establishing the rule of comparative negligence. *Grand Trunk Western R. Co. v. Lindsay*, 233 U. S. 42, 58 L. ed. 838, 34 Sup. Ct. Rep. 581.

conflict with the ruling of the United States Supreme Court cited in the last note.¹¹⁹

Contributory negligence is still a factor in the case,¹²⁰ but it goes only to the diminution of the damages.¹²¹ An instruction is properly denied which made a negligent act on the part of the plaintiff imperatively reduce the damages to a nominal sum.¹²²

The plaintiff in an action under the statute has a right to a plain and unambiguous instruction to the effect that contributory negligence is not a complete defense under the Federal statute, but that it should be considered in mitigation of damages.¹²³ So, where the defendant claims that the employee has been guilty of contributory negligence, an instruction upon the amount

of the recovery is erroneous if it fails to tell the jury that the recovery is to be diminished by the contributory negligence, if any.¹²⁴

And it has been held that contributory negligence is not a separate issue in the case.¹²⁵ So, where the issue of contributory negligence has been fairly tried and submitted, and there is no question of excessive damages, the question of contributory negligence is of no importance on the appeal.¹²⁶

Under the statute it is not a question of majority of negligence, but rather one of proportion;¹²⁷ and the damages are to be diminished in proportion to the amount of negligence attributed to the negligent employee as compared with the combined

¹¹⁹ In *Atchison, T. & S. F. R. Co. v. Hines*, 127 C. C. A. 632, 211 Fed. 264, a judgment for the plaintiff was reversed by reason of the failure of the trial judge to give an instruction to the effect that if the jury believed from the evidence that the plaintiff was negligent in pulling out a nail which fastened a shield encasing the water gauge without first turning off the steam valve and the water valve and opening the drain cock, they should find for the defendant. It is impossible to determine upon what theory the court rendered this decision. The complaint showed that both the defendant and the plaintiff were engaged in interstate commerce at the time of the injury, but the majority opinion ignores the statute entirely, and treats contributory negligence as a complete bar to the action; and this notwithstanding that Shelby, Circuit Judge, in a dissenting opinion, points out that the statute prevents the defense of contributory negligence from completely barring any action properly brought under the act.

¹²⁰ Contributory negligence may still be shown, but its effect is only to diminish the damages. *Fish v. Chicago, R. I. & P. R. Co.* — Mo. —, 172 S. W. 340.

Contributory negligence is to be considered except in the case of a violation of a statute enacted for the benefit of the employees. *Gee v. Lehigh Valley R. Co.* 163 App. Div. 274, 148 N. Y. Supp. 882.

¹²¹ *La Mere v. Railway Transfer Co.* 125 Minn. 159, 145 N. W. 1068; *Hardwick v. Wabash R. Co.* 181 Mo. App. 156, 168 S. W. 328; *Kenney v. Seaboard Air Line R. Co.* 165 N. C. 99, 80 S. E. 1078; *White v. Central Vermont R. Co.* 87 Vt. 330, 89 Atl. 618.

¹²² *Louisville & N. R. Co. v. Lankford*, 126 C. C. A. 247, 209 Fed. 321.

¹²³ Where the language used by the trial court in instructing the jury as to the effect of contributory negligence was doubtful in meaning and confusing, and the presiding judge, with full opportunity of observation, believed that the instruction did not fairly and sufficiently inform the jury upon a material matter of the law, the L.R.A.1915C.

order granting a new trial will not be reversed. *Ross v. St. Louis & S. F. R. Co.* — Kan. —, 144 Pac. 844.

¹²⁴ *Hall v. Vandalia R. Co.* 169 Ill. App. 12.

¹²⁵ In *Lloyd v. Southern R. Co.* 166 N. C. 24, 81 S. E. 1083, the following issues were tendered by the defendant: "(1) Did the plaintiff contribute by his negligence to his own injury as alleged in the answer? (2) How much is the whole amount of damages sustained by the plaintiff by reason of the injuries received by him? (3) What sum should be deducted from the damages sustained by the plaintiff as the proportion or just share thereof attributable to the negligence of the plaintiff?" The appellate court held that they were properly refused, as contributory negligence was not a defense or bar to the action under the Federal act, but could be considered only on the inquiry as to damages, and no separate issue was necessary for this purpose.

Where the courts submit to issue "whether the intestate of the plaintiff was killed by the negligence of the defendant as alleged in the complaint," and "what damage, if any, the plaintiff is entitled to recover," which instruction submitted the whole matter in dispute fairly to the jury, it is not error not to submit separate issues as to how much was assessed by the jury as the total damages, and how much was deducted for the contributory negligence of the employee. *Gray v. Southern R. Co.* — N. C. —, 83 S. E. 849.

¹²⁶ *La Mere v. Railway Transfer Co.* 125 Minn. 159, 145 N. W. 1068.

¹²⁷ It is not error for the trial court to refuse an instruction on the question of the measure of damages to the effect that if the plaintiff's negligence was equal to or exceeded that of the defendant, the jury must find for the defendant. *Chadwick v. Oregon-Washington R. & Nav. Co.* — Or. —, 144 Pac. 1165. The court said: "Let us suppose that both parties were equally negligent in the estimation of the jury, and that the actual damages of the defendant were properly assessable at \$2,000. In such a case the verdict should be for the plain-

negligence of him and the employer.¹²⁸ The damages recoverable in case of contributory negligence on the part of the employee bear "the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both."¹²⁹ The Kentucky court of appeals has reversed a judgment for the

plaintiff where the trial court gave an instruction which it construed as telling the jury that the negligence of the plaintiff was to be compared with that of the defendant.¹³⁰ The position of the Kentucky court is not entirely clear. Its statement as quoted is not very explicit, and it is difficult to read into the instruction the

tiff in the sum of \$1,000, for the reason that his negligence is one half of the sum total of all the negligence of both parties."

¹²⁸ *White v. Central Vermont R. Co.* 87 Vt. 330, 89 Atl. 618.

Where the cause of negligence is partly attributable to the decedent and partly to the carrier, the administratrix cannot recover full damages, but only a proportional amount bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both. *Louisville & N. R. Co. v. Heinig*, — Ky. —, 171 S. W. 853.

Contributory negligence of the plaintiff alone will not operate to defeat his cause of action, but may be shown to reduce the damages which he might otherwise claim, in the proportion which his negligence bears to the sum total of all the negligence affecting the transaction from every source. *Chadwick v. Oregon-Washington R. & Nav. Co.* supra.

If the plaintiff has been guilty of contributory negligence, the jury should apportion the negligence between the plaintiff and the defendant. *Martin v. Atelison, T. & S. F. R. Co.* — Kan. —, 145 Pac. 849.

Contributory negligence is not a bar to a recovery, but the damages shall be diminished by the jury in proportion to the amount of the negligence attributable to the employee. *Hall v. Vandalia R. Co.* 169 Ill. App. 12.

In *Tilghman v. Seaboard Air Line R. Co.* — N. C. —, 83 S. E. 315, the court intimated that in a case where the negligence of the plaintiff was equal to that of the defendant, the plaintiff would be entitled to the full amount of damages less an allowance of one half to be deducted on account of his contributory negligence.

Under the act, in a case otherwise proper, it is necessary to submit the matter of contributory negligence of the plaintiff to the jury in order that the same may be compared with the negligence of the defendant and the damages apportioned as the negligence of each caused the injury, and diminished accordingly. *Pfeiffer v. Oregon-Washington R. & Nav. Co.* — Or. —, 144 Pac. 762.

The defendant is liable if, through other employees, it is guilty of any causative negligence, no matter how slight in comparison to that of the plaintiff, and the total damages are to be apportioned between the plaintiff and the defendant according to their respective fraction of the total negligence. *New York, C. & St. L. R. Co. v. Niebel*, 214 Fed. 952.

¹²⁹ *Louisville & N. R. Co. v. Lankford*, L.R.A.1915C.

126 C. C. A. 247, 209 Fed. 321, quoting *Norfolk & W. R. Co. v. Earnest*, 229 U. S. 114, 57 L. ed. 1096, 33 Sup. Ct. Rep. 654, Ann. Cas. 1914C, 172.

In the latter case, the Supreme Court, after stating that the instruction with reference to the diminution of damages because of contributory negligence was not happily worded, thus construed the statute: "We say this because the statutory direction that the diminution shall be 'in proportion to the amount of negligence attributable to such employee' means, and can only mean, that, where the causal negligence is partly attributable to him and partly to the carrier, he shall not recover full damages, but only a proportional amount, bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both; the purpose being to abrogate the common-law rule completely exonerating the carrier from liability in such a case, and to substitute a new rule confining the exoneration to a proportional part of the damages corresponding to the amount of negligence attributable to the employee."

¹³⁰ In *Nashville, C. & St. L. R. Co. v. Banks*, 156 Ky. 609, 161 S. W. 554, the trial court had instructed the jury to the effect that if they found both parties to have been guilty of negligence, "then you will diminish the damages, if any, you may assess in his favor, in proportion to the amount of negligence, if any, attributable to him in causing or producing the injury complained of by him." The Kentucky court of appeals, holding that this instruction violated the rule laid down by the United States Supreme Court in the *Earnest Case*, said: "The instruction of the court does not conform to the rule thus laid down. It does not in terms state what the amount of negligence attributable to him is to be in proportion to; but, as in the previous part of the instruction the negligence of the defendant and his negligence are referred to, we think the natural meaning of the instruction is that the damages are to be diminished in the proportion to the amount of negligence attributable to him and that attributable to defendant, which, as shown above, is not the construction of the statute adopted by the Supreme Court."

Similar instructions were held erroneous and the judgment for the plaintiff reversed in *Cincinnati, N. O. & T. P. R. Co. v. Goode*, — Ky. —, 173 S. W. 320, although the court in speaking of the *Banks* case said: "We had doubt then and it may well be doubted now if the construction we placed on that opinion was correct, but we think it

meaning which the court of appeals did. And it should also be noted that while the United States Supreme Court said that the language was not happily chosen, nevertheless the mistake was not improbably a purely verbal one, and the judgment was not reversed because of it.

The Kentucky court has also held that an instruction not embracing a rule stated by the Supreme Court was erroneous, although it was in the language of the statute.¹³¹ But the South Carolina supreme court has held that a trial court does not err in telling the jury that they are to "deduct" a reasonable amount for contributory negligence, instead of telling them that the damages are to be diminished on account of contributory negligence.¹³²

safer practice to now follow the views expressed in these opinions and accordingly the judgment must be reversed."

In *Louisville & N. R. Co. v. Holloway*, — Ky. —, 173 S. W. 343, the court held that an instruction which did not follow the rule laid down in the Earnest case was erroneous notwithstanding the instruction used the language of the statute.

¹³¹ In *Nashville, C. & St. L. R. Co. v. Henry*, 158 Ky. 88, 164 S. W. 311, the court held that the following instruction was erroneous: "Then you will diminish the damages, if any, you may assess in his favor, in proportion to the amount of negligence, if any, attributable to him in causing or producing the injury complained of by him." The court said that this instruction did not follow the rule laid down by the Earnest Case, although it did follow the language of the statute.

In an action brought under the Federal statute, the instructions on the measure of damages and on contributory negligence should be given in the form approved by the Supreme Court of the United States. *Cincinnati, N. O. & T. P. R. Co. v. Nolan*, — Ky. —, 170 S. W. 650.

¹³² *Tilghman v. Seaboard Air Line R. Co.* — N. C. —, 83 S. E. 315. The appellate court said that this appeared to be a distinction without a difference, and that a jury of twelve men would not know the difference between the two, even if there was any difference beyond a metaphysical distinction.

¹³³ *Gray v. Southern R. Co.* — N. C. —, 83 S. E. 849. The court said: "It is not sufficient defense of the negligence of the defendant that the engineer could not have stopped the train in time to avoid the death of the plaintiff's intestate, after he perceived him on the track. The question is whether the engineer could have stopped the train in time to have avoided killing the deceased after he could have perceived the danger of the deceased, had the engineer and fireman been in the exercise of proper diligence on the lookout."

¹³⁴ *Smith v. Atlantic Coast Line R. Co.* 127 C. C. A. 311, 210 Fed. 761; *Pennsylvania R. Co. v. Goughnour*, 126 C. C. A. 39, 208 Fed. 961.

In a proper case the doctrine of last clear chance is applicable to an action brought under the act.¹³⁵

Where the plaintiff's negligence was the sole cause of the injury, there can be no recovery.¹³⁴ So, where the injury was caused by the act of the employee in selecting a dangerous rather than a safe way of avoiding an on-coming train, his negligence in so doing will be deemed the proximate cause of the injury.¹³⁵

Contributory negligence is not available where the violation by the common carrier of any Federal statute enacted for the safety of the employees contributed to the injury.¹³⁶ But Federal statutes only were embraced by the phrase, "any statute enacted for the safety of employees," in the pro-

vanian R. Co. v. Goughnour, 126 C. C. A. 39, 208 Fed. 961.

It is only when the plaintiff's act is the sole cause, when the defendant's act is no part of the causation, that defendant is free from liability under the act. *Grand Trunk Western R. Co. v. Lindsay*, 120 C. C. A. 166, 201 Fed. 837; *Pennsylvania Co. v. Cole*, 214 Fed. 948.

Assuming that the act of the plaintiff in obeying the order of his superior in making a coupling by placing his foot against the bumper was negligence, nevertheless the question still remains open whether such negligent act was the sole cause of the injury, or whether the defective condition of the bumper contributed thereto. *Smith v. Atlantic Coast Line R. Co. supra*.

To prevent a recovery the contributory negligence must be the sole cause of the injury. *Louisville & N. R. Co. v. Winkler*, — Ky. —, 173 S. W. 151.

In *Louisville & N. R. Co. v. Holloway*, — Ky. —, 173 S. W. 343, the court said that an instruction is erroneous which permits recovery if the contributory negligence of the employee was the sole cause of the injury.

¹³⁵ *Pankey v. Atchison, T. & S. F. R. Co.* 180 Mo. App. 185, 168 S. W. 274.

¹³⁶ *Nashville, C. & St. L. R. Co. v. Henry*, 158 Ky. 88, 164 S. W. 311; *Otos v. Great Northern R. Co.* — Minn. — 150 N. W. 922.

The contributory negligence of a switchman whose arm was crushed between two cars moving in interstate commerce, while he was examining a defective coupling mechanism which had several times refused to work automatically by impact, as required by the Federal safety appliance act, does not operate even to diminish his recovery. *Grand Trunk Western R. Co. v. Lindsay*, 233 U. S. 42, 58 L. ed. 838, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914C, 168.

The mere failure to observe a rule requiring inspection of coupling apparatus by a brakeman is contributory negligence only, and constitutes no defense where a violation of the safety appliance act contributed to the injury. *Thornbro v. Kansas City, M. & O. R. Co.* 91 Kan. 684, 139 Pac. 410.

vision of the statute abrogating the defense of contributory negligence.¹³⁷

The absence of contributory negligence need not be alleged in the complaint.¹³⁸ The question of contributory negligence is for the jury.¹³⁹ And it has been said in a Federal case that under the act no degree of negligence on the part of the plaintiff, however gross or proximate, can, as a matter of law, defeat recovery.¹⁴⁰ But a less extreme view was taken by the Oregon court.¹⁴¹

The burden of proof as to contributory negligence is on the defendant.¹⁴²

In the note below will be found several

cases dealing with the question of contributory negligence in particular cases.¹⁴³

3. Assumption of risk.

Supplementing note in 47 L.R.A.(N.S.) 62.

It has now been authoritatively established by a decision of the United States Supreme Court, that the common-law defense of assumption of risk is open to the defendant except in case of the violation of the statute passed for the protection of an employee.¹⁴⁴ It has also been so held in

Contributory negligence is eliminated where the violation by the common carrier of the Federal safety appliance act contributes to the injury. *Ibid.*

¹³⁷ SEABOARD AIR LINE R. Co. v. HORTON. The court said: "For it is not to be conceived that, in enacting a general law for establishing and enforcing the responsibility of common carriers by railroad to their employees in interstate commerce, Congress intended to permit the legislatures of the several states to determine the effect of contributory negligence and assumption of risk, by enacting statutes for the safety of employees, since this would in effect relegate to state control two of the essential factors that determine the responsibility of the employer."

¹³⁸ A complaint is sufficient which alleges that the defendant was engaged in interstate commerce, that the plaintiff was employed by it on an interstate train, and that he suffered an injury; even if this injury was partly due to his own negligence, if the jury also resulted in part from the negligence of an employee of the carrier, he is entitled to recover. *Charleston & W. C. R. Co. v. Brown*, 13 Ga. App. 744, 79 S. E. 932.

¹³⁹ *Missouri, K. & T. R. Co. v. Rentz*, — Tex. Civ. App. —, 162 S. W. 959.

¹⁴⁰ *Pennsylvania Co. v. Cole*, 214 Fed. 948.

¹⁴¹ In *Pfeiffer v. Oregon-Washington R. & Nav. Co.* — Or. —, 144 Pac. 762, the court said: "This law lessens the necessity which prevailed before its enactment for the court to declare as a matter of law when the plaintiff is guilty of contributory negligence. This prerogative should be exercised by a trial court only in a case where it is plain that, from all the evidence and circumstances, only one conclusion could be reasonably deduced, namely, that the plaintiff was at fault in such respect and thereby contributed to his injury."

¹⁴² *White v. Central Vermont R. Co.* 87 Vt. 330, 89 Atl. 618.

¹⁴³ A judgment for the plaintiff will be reversed where the jury finds that the plaintiff was not guilty of contributory negligence in the matters charged, and then reduces the verdict one half upon the ground of contributory negligence. *Cole v. Atchison, T. & S. F. R. Co.* 92 Kan. 132, 139 Pac. 1177.

A switchman reaching in between slowly L.R.A.1915C.

moving cars to remove a coupling pin after repeated unsuccessful attempts to operate the automatic coupler is not, as a matter of law, guilty of such contributory negligence as defeats his right to recover for the resulting injuries, because he did not anticipate that his foot might slip and catch, as it did, in an unblocked guard rail of which he had, or could be charged with, knowledge. *Chicago, R. I. & P. R. Co. v. Brown*, 229 U. S. 317, 57 L. ed. 1204, 33 Sup. Ct. Rep. 840, 3 N. C. C. A. 826.

A failure of a car repairer to set out a blue flag before going between cars to repair them, as he was required to do by a rule of the company, does not bar a recovery under the employers' liability act, where it appeared that the rule, to the knowledge of the company, had been habitually disregarded. *St. Louis, I. M. & S. R. Co. v. Sharp*, — Ark. —, 171 S. W. 95.

¹⁴⁴ The elimination of the defense of assumption of risk by the employers' liability act of April 22, 1908, § 4, in any case where the violation by the carrier of any statute enacted for the safety of the employees contributed to the injury or death of the employee, plainly evidences the legislative intent that in all other cases such assumption of risk shall have its former effect as a complete bar to the action. SEABOARD AIR LINE R. Co. v. HORTON.

The question of the operation of the Federal employers' liability act of April 22, 1908, as amended by the act of April 5, 1910, on the doctrine of assumption of risk, cannot be said to arise on a record which shows that the trial court's statement in reply to an exception to the general charge based on the court's silence as to assumption of risk, that he understood the doctrine to have been abolished by that statute, was so qualified as to convey clearly the idea that, as the matters to which the excepted charge related purely concerned the common-law principles of fellow servant and contributory negligence, they were controlled by the provisions of the statute, and there was nothing in the excepted portion of the general charge which in any possible way was relevant to the doctrine of assumption of risk,—especially as this question was not presented by any request to charge, nor raised on the motion for new trial, nor referred to in the assignments of error either

a number of lower Federal and state courts,¹⁴⁵ and assumed in several others.¹⁴⁶ Instructions which in effect make the master an insurer of the safety of the place of work, thus excluding the defense of assumption of risk, are erroneous.¹⁴⁷ But a holding of the circuit court of appeals, in affirming a judgment of a circuit court in an action to recover damages for personal injuries, to the alleged effect that the Federal employers' liability act abolished, as to all cases coming under its provisions, the defense of assumption of risk, furnished no ground for reversal where the benefit of the defense of assumption of risk was accorded to the railway company at the trial.¹⁴⁸

The violation of the company's rules by an employee has no bearing on the question of his assumption of risk, but goes only to the question of contributory negligence.¹⁴⁹

But an employee does not assume risks which are unknown to him, or the dangers from which are not appreciated,¹⁵⁰ nor does he assume the risk where he has complained of the defect and been peremptorily ordered to continue work.¹⁵¹

The distinction between "assumption of risk" as applied to ordinary risks of the service, and as applied to extraordinary risks caused by the master's negligence, is frequently overlooked,¹⁵² but the Iowa

in the circuit court of appeals or in the Supreme Court. *Southern R. Co. v. Gadd*, 233 U. S. 572, 58 L. ed. 1099, 34 Sup. Ct. Rep. 696.

¹⁴⁵ *NEW YORK, N. H. & H. R. Co. v. VIZVARI*; *Guana v. Southern P. Co.* 15 Ariz. 413, L.R.A.—, 139 Pac. 782; *Charleston & W. C. R. Co. v. Brown*, 13 Ga. App. 744, 79 S. E. 932; *Hall v. Vandalia R. Co.* 169 Ill. App. 12; *Fish v. Chicago. R. I. & P. R. Co.* — Mo. —, 172 S. W. 340; *Bramlett v. Southern R. Co.* 98 S. C. 319, 82 S. E. 501; *Ft. Worth & D. C. R. Co. v. Copeland*, — Tex. Civ. App. —, 164 S. W. 857; *Southern R. Co. v. Jacobs*, — Va. —, 81 S. E. 99; *Graber v. Duluth, S. S. & A. R. Co.* — Wis. —, 150 N. W. 489.

The assumption of risk is still available except where the accident was caused by the failure of the railroad company to obey the requirements of a statute enacted for the benefit of the employees. *Glenn v. Cincinnati, N. O. & T. P. R. Co.* 157 Ky. 453, 163 S. W. 461 (holding that a servant working alongside of an unguarded pit assumes the risk of injury therefrom).

¹⁴⁶ *Pelton v. Illinois C. R. Co.* — Iowa, —, 150 N. W. 236; *Pfeiffer v. Oregon-Washington R. & Nav. Co.* — Or. —, 144 Pac. 762; *Hartman v. Western Maryland R. Co.* 246 Pa. 460, 92 Atl. 698; *Texarkana & Ft. S. R. Co. v. Casey*, — Tex. Civ. App. —, 172 S. W. 729.

Assumption of risk is a question for the jury. *Kirbo v. Southern R. Co.* — Ga. App. —, 84 S. E. 491.

¹⁴⁷ *Southern R. Co. v. Howerton*, — Ind. —, 105 N. E. 1025, rehearing denied in 106 N. E. 369.

¹⁴⁸ *Seaboard Air Line R. Co. v. Moore*, 228 U. S. 433, 57 L. ed. 907, 33 Sup. Ct. Rep. 580.

¹⁴⁹ *Oberlin v. Oregon-Washington R. & Nav. Co.* — Or. —, 142 Pac. 554.

¹⁵⁰ *Niles v. Central Vermont R. Co.* 87 Vt. 356, 89 Atl. 629.

A section hand who is ordered by his foreman to aid another hand in removing a motor car from the track in front of an approaching train, and who immediately obeys, does not assume the risk of injury because of insufficient help in removing the motor car. *Missouri, K. & T. R. Co. v. L.R.A.* 1915C.

Freeman, — Tex. Civ. App. —, 168 S. W. 69.

One employed to assist in caring for and moving engines in a roundhouse in the nighttime without artificial light does not, as a matter of law, assume the risk of injury in being caught, in the customary performance of his duties, between a standing post and an engine so much wider than those upon which he had been working as to make the space between it and the post dangerous, of which fact he was not notified. *Guana v. Southern P. Co.* 15 Ariz. 413, L.R.A.—, 139 Pac. 782.

A locomotive engineer does not, as a matter of law, assume the risk of the use of insufficient lubricator indicator tubes used on locomotives, where the tensile strength of such tubes could be ascertained only by a test, and insufficient tubes had the same general appearance as those that were sufficient. *Woodruff v. Yazoo & M. Valley R. Co.* 129 C. C. A. 411, 210 Fed. 849.

An engineer does not assume the risk of a defective ash pan lever, of which defect he was ignorant. *Lloyd v. Southern R. Co.* 166 N. C. 24, 81 S. E. 1003.

In *Yazoo & M. Valley R. Co. v. Wright*, 235 U. S. 376, 59 L. ed. —, 35 Sup. Ct. Rep. 130, the Supreme Court proceeded upon the theory that the defense of assumption of risks was available, but it was decided that the case was not one in which the doctrine was applicable, since it was clear that the injured employee did not voluntarily incur the risk by which he was injured.

¹⁵¹ In *NEW YORK, N. H. & H. R. Co. v. VIZVARI*, it was held that an employee does not assume, as a matter of law, the risk of injury from a defective chisel used to cut steel rails, although he believes that it was defective, where he calls the attention of the employer's representative to it, and is ordered to go on with the work.

¹⁵² In *Cincinnati, N. O. & T. P. R. Co. v. Goldston*, 156 Ky. 410, 161 S. W. 246, it was held that if the jerk of the train which threw a conductor from a caboose step was only an ordinary jerk, the appellant was, under the plea of assumed risk, entitled to an instruction upon that subject. This is,

court clearly points out the distinction.¹⁵³ That the question of assumption of risk is immaterial where there has been no negligence on the part of the carrier is shown by a North Carolina decision.¹⁵⁴

In Missouri, the state rule as to assumption of risk is that the defense is not open where the master has been guilty of negligence. And in one case it has been held that, although the common-law defense of assumption of risk was still open to the master in the absence of a violation of a Federal statute, nevertheless what constituted assumption of risks was to be determined by the state court, and as the master had been guilty of negligence there could not be an assumption of risk.¹⁵⁵ This case presents an extremely interesting question, viz., whether or not in an action brought under the Federal statute, the employee can be held to have assumed the risk where the master has been negligent, in those states like Missouri, in which it is held that the doctrine of assumption of risk has no application where the master has been negligent.

In North Carolina it has been held that assumption of risk is a defense except in the cases specified in the statute, but to be available it must be pleaded.¹⁵⁶ But in a

Federal court it has been held that the defendant may have the benefit of evidence tending to show assumption of risk, which is given by the plaintiff, although such defense was not pleaded.¹⁵⁷ And it has been held that the burden of proving assumption of risk is upon the defendant.¹⁵⁸

Where the master has been guilty of the violation of a Federal statute enacted for the benefit of employees, such as the safety appliance act, the defense of assumption of risk is abrogated by the statute.¹⁵⁹ But an employee working around stockyards on a railroad where cattle are fed and watered and loaded into and off cars is not an "employee" within the meaning of the Federal hours of service act of March 4, 1907, and consequently must be held to have assumed the risk of working an excessive number of hours, so that there can be no recovery under the Federal employers' liability act.¹⁶⁰

The statute used the phrase "any statute" passed for the protection of employees, and this phrase was taken by a state court as embracing state as well as Federal statutes.¹⁶¹ But the United States Supreme Court has decided that only Federal statutes are meant, and consequently the defense is open although the carrier has vio-

to say the least, a confusing statement of the law applicable to the situation. If the jerk was only an ordinary jerk, there was no negligence either on the part of the railroad company or of a fellow servant, and consequently there could be no recovery, not because the defense of assumption of risk was available to the defendant, but because there was no negligence upon which to predicate any cause of action whatsoever.

¹⁵³ In *Pelton v. Illinois C. R. Co.* — Iowa, —, 150 N. W. 236, the court distinguished between the assumption of the risk of the employment or the ordinary risk of the service, and the obvious or extraordinary risk; assumption of risk in its true sense is an affirmative defense, and the defendant in pleading assumption of risk, must have meant the assumption of the extraordinary or obvious risks of the service; otherwise, under the state rule, there was no occasion for pleading it all.

¹⁵⁴ *Kenney v. Seaboard Air Line R. Co.* 165 N. C. 99, 80 S. E. 1078, where the court said that there was no evidence to support the plea of assumption of risk, and the only reason presented by the defendant to sustain his contention was that, if the witnesses for the defendant were to be believed, the cars collided in the usual way and without violence, and that upon this aspect of the evidence, the intestate should be held to have assumed the risk. In reply to this contention the court said: "The difficulty about this position is that if this view of the evidence had been accepted, the issue L.R.A.1916C.

of negligence would have been answered in the negative and the issue of assumption of risk would never have been reached."

¹⁵⁵ *Fish v. Chicago, R. I. & P. R. Co.* — Mo. —, 172 S. W. 340. The effect of this ruling of the Missouri supreme court is somewhat weakened by the fact that it goes further and apparently decides that the risk in question was not known to the plaintiff, and consequently it would not be assumed by him under any rule as to assumption of risk.

¹⁵⁶ *Lloyd v. Southern R. Co.* 166 N. C. 24, 81 S. E. 1083.

¹⁵⁷ *NEW YORK, N. H. & H. R. Co. v. VIZVARI.*

¹⁵⁸ *Vickery v. New London Northern R. Co.* 87 Conn. 634, 89 Atl. 277; *Thornbro v. Kansas City, M. & O. R. Co.* 91 Kan. 684, 139 Pac. 410.

¹⁵⁹ *La Mere v. Railway Transfer Co.* 125 Minn. 159, 145 N. W. 1068; *Nashville, C. & St. L. R. Co. v. Henry*, 158 Ky. 88, 164 S. W. 311.

That the court may have committed error in charging the jury upon the question of assumption of risk does not warrant a reversal where the defendant's liability to the plaintiff arises out of a violation of a statutory duty arising under an act of Congress. *St. Louis & S. F. R. Co. v. Brown*, — Okla. —, 144 Pac. 1075.

¹⁶⁰ *Schweig v. Chicago, M. & St. P. R. Co.* 216 Fed. 750.

¹⁶¹ In *Opeahl v. Northern P. R. Co.* 78 Wash. 197, 138 Pac. 681, it was held that

lated a state statute passed for the protection of the employees;¹⁶² and this is so although the state statute expressly abolishes the defense.¹⁶³ That the act referred only to Federal statutes was also held by various state courts.¹⁶⁴

IX. For whose benefit the statute inures; survival of action.

1. Employees of other companies.

Supplementing note in 47 L.R.A.(N.S.) 64.

The statute does not make a railroad company liable for injuries to any but its own employees.¹⁶⁵

2. Injured employee.

Supplementing note in 47 L.R.A.(N.S.) 64.

Primarily, the statute gives a cause of action to an employee injured while engaged in interstate commerce, and if the injury is not fatal, then no person other than the injured employee has any right of action.

an employee did not assume the risk of injury from an unguarded grindstone, which the state statute required to be guarded.

¹⁶² SEABOARD AIR LINE R. Co. v. HORTON.

¹⁶³ The common-law rule with respect to the servant's assumption of risk of injury from a defective appliance governs in an action brought under the statute, where such appliance is not covered by any Federal statute enacted for the safety of employees, and the case is not controlled by the local statute which abolishes the defense of assumption of risk in an action by a railroad employee for injuries attributable to defective appliances furnished by the employer. SEABOARD AIR LINE R. Co. v. HORTON. The court said: "It is true that such an appliance as the water gauge and guard glass in question is not covered by the provisions of the safety appliance act, or any other law passed by Congress for the safety of employees, in force at the time this action arose. But the necessary result of this is not to leave the employer responsible for the consequences of any defect in such an appliance, excluding the common-law rule as to assumption of risk, but to leave the matter in this respect open to the ordinary application of the common-law rule. The adoption of the opposite view would in effect leave the several state laws, and not the act of Congress, to control the subject-matter."

¹⁶⁴ The Federal act does not abolish the defense of assumption of risk save in cases where the violation by the carrier of some Federal statute enacted for the safety of employees contributed to the injury or death of the employee. Farley v. New York, N. H. & H. R. Co. 88 Conn. 409, 91 Atl. 651.
L.R.A.1915C.

3. In case of death of the employee.

a. Nature of the action.

Supplementing note in 47 L.R.A.(N.S.) 64.

The statute provides for two causes of action, one for the benefit of the injured employee himself, and one for certain prescribed beneficiaries in case of the death of the employee, and those actions are wholly independent.¹⁶⁶

b. Beneficiaries; necessity of existence of and dependence of.

Supplementing note in 47 L.R.A.(N.S.) 65.

As the action in case of death is purely statutory, the terms of the statute must govern. Therefore, in case of death all recovery must be for the benefit of the widow and the next of kin,¹⁶⁷ and only such next of kin as are dependent have a right of action.¹⁶⁸ If there are no representatives of any of the classes of beneficiaries mentioned in the statute, there is no cause of action.¹⁶⁹ If there are no dependent rela-

It is only where the injury grows out of the violation of some Federal statute enacted for the safety of employees that the doctrine of assumed risk no longer applies. Truesdell v. Chesapeake & O. R. Co. 159 Ky. 718, 169 S. W. 471.

The defense of assumption of risk is not eliminated except in the case of a Federal statute. Oberlin v. Oregon-Washington R. & Nav. Co. — Or. —, 142 Pac. 554.

The term "any statute," as used in §§ 3 and 4 of the act relatively to contributory negligence and assumption of risk, is limited to Federal statutes, and does not include state statutes. Lauer v. Northern P. R. Co. — Wash. —, 145 Pac. 607. The court expressly overruled Opsahl v. Northern P. R. Co. 78 Wash. 197, 138 Pac. 681, decided prior to the decision of the United States Supreme Court in the HORTON CASE.

¹⁶⁶ See note in 47 L.R.A.(N.S.) 64.

¹⁶⁷ Farley v. New York, N. H. & H. R. Co. 87 Conn. 328, 87 Atl. 990.

The statute as to the loss of contributions on account of the death of the husband and father creates a right of action for the benefit of the widow and the next of kin wholly independent of the right of action given to the injured person for the pain and suffering which he endured on account of the injury. Kansas City Southern R. Co. v. Leslie, — Ark. —, 167 S. W. 83.

¹⁶⁷ St. Louis, I. M. & S. R. Co. v. Sharp, — Ark. —, 171 S. W. 95.

¹⁶⁸ Collins v. Pennsylvania R. Co. 163 App. Div. 452, 148 N. Y. Supp. 777.

¹⁶⁹ McCoullough v. Chicago, R. I. & P. R. Co. 160 Iowa, 524, 47 L.R.A.(N.S.) 23, 142 N. W. 67.

tives, there can be no recovery under the Federal statute, although the state statute might provide for a recovery for the benefit of the decedent's estate. ¹⁷⁰

The existence of the beneficiaries must be alleged ¹⁷¹ and proven. ¹⁷²

It will be presumed that the widow and children are dependent; ¹⁷³ as to other beneficiaries, it is necessary to aver and prove their pecuniary loss by appropriate allegation and evidence. ¹⁷⁴ But according to the North Carolina court, it is not neces-

sary to show that an unmarried adult son contributed to the support of the parent in order to establish a reasonable expectation of pecuniary benefit from the continuance of the life of the son. ¹⁷⁵

The existence of the first class of beneficiaries excludes the others, and existence of the second class excludes the third. ¹⁷⁶

In the note below will be found several cases which consider the sufficiency of evidence to show dependence. ¹⁷⁷

¹⁷⁰ Jones v. Charleston & W. C. R. Co. 98 S. C. 197, 82 S. E. 415.

¹⁷¹ "There is no basis for a presumption that one dying leaves a husband, widow, child, parent, or next of kin dependent upon him. Absence of allegation to that effect cannot therefore be supplied by presumption. It must appear in the complaint that such a person there was, or there is a failure to state a cause of action." Farley v. New York, N. H. & H. R. Co. 87 Conn. 328, 87 Atl. 990.

¹⁷² Chesapeake & O. R. Co. v. Dwyer, 157 Ky. 590, 163 S. W. 752.

¹⁷³ Substantial damages will be presumed in favor of the widow and children without special averment or proof other than a showing of the pecuniary value of the life of the decedent to his family. M'Coullough v. Chicago, R. I. & P. R. Co. supra.

¹⁷⁴ If the action be brought on behalf of parents, it is not enough to show their mere survival, but pecuniary loss must be shown. Ibid.

¹⁷⁵ Dooley v. Seaboard Air Line R. Co. 163 N. C. 454, 79 S. E. 970.

¹⁷⁶ M'Coullough v. Chicago, R. I. & P. R. Co. 160 Iowa, 524, 47 L.R.A. (N.S.) 23, 142 N. W. 67.

¹⁷⁷ In an action under the Federal statute brought by a father for the death of his son, the father is entitled to more than nominal damages, where the evidence tends to prove that the relations between the deceased and his father were affectionate, and that the former had contributed to the support of his father, from which the jury had the right to infer that he would continue to do so. Saunders v. Southern R. Co. — N. C. —, 83 S. E. 573.

A finding that the father had a reasonable expectation of pecuniary benefit from the continuance of the life of the son is supported by evidence that the deceased was strong, healthy, intelligent, and industrious, and was a young man of good habits and good character, had helped his father, and was so disposed to him that he would give him his last cent if the father needed it, and the latter was growing old, and while not actually dependent upon the son for support at the time of the son's death, did not know how soon he might be. Dooley v. Seaboard Air Line R. Co. supra.

It is not error to refuse an instruction to the effect that the sister of the deceased L.R.A.1915C.

employee, if able to make her own living at the time of her brother's death, cannot recover, where the evidence showed that the brother had contributed substantially to her support and probably would continue to do so. Richelieu v. Union P. R. Co. — Neb. —, 149 N. W. 772.

A sister of a deceased employee, who sued as administratrix of the estate, and on the trial establishes the fact that the decedent contributed to her support by gift of money, by the payment of her board, and otherwise, will be considered a dependent, and entitled to recover damages because of his death, even though she is possessed of property and has a clerical position which in part supports her. Ibid.

Evidence that a brother and sister were of tender years and without estate is sufficient evidence of dependence. Kenney v. Seaboard Air Line R. Co. — N. C. —, L.R.A.1915, —, 82 S. E. 968.

Where the action was in behalf of the widow and an adult imbecile child, and the court had made it plain that compensation for the pecuniary loss only was recoverable, the use of the word "protection" with reference to the imbecile child is not reversible error, as it must have been understood to mean pecuniary protection from want or penury. Sweet v. Chicago & N. W. R. Co. 157 Wis. 400, 147 N. W. 1054.

In an action by a mother against a railroad company for the death of an adult son, the failure of such son to contribute to the mother's support is a relevant circumstance, and it is reversible error for the trial judge to refuse to permit the attorney for the defendant to comment upon the fact that no evidence of such contribution had been given. Irvin v. Southern R. Co. 164 N. C. 5, 80 S. E. 78.

The parents of a deceased workman, who work on a farm, but do not own it, may be found to be dependent on the deceased, who was twenty-three years of age and unmarried, had remained with them until a short time before his death, and had sent his father \$10 out of his first month's wages. Lundeen v. Great Northern R. Co. — Minn. —, 150 N. W. 1088.

Where the employee was unmarried and left only brothers and sisters, and their earnings had been pooled and the employee had been supported out of the pool, there can be no recovery if his earnings were

c. Nonresident alien dependents.

It has been held in a Federal court that nonresident alien dependents of an employee killed while engaged in interstate commerce have no right of action for his death in the absence of special treaty provisions.¹⁷⁸ On the other hand, the Minnesota court has held that as this question has not been passed upon by the United States Supreme Court, it would follow its own ruling in regard to the state statutes, to the effect that nonresident aliens are entitled to the benefit of the act.¹⁷⁹

In this connection it is interesting to note that the English House of Lords, reversing the British Columbia court of appeal, has held that nonresident alien dependents are within the purview of the British Columbia workmen's compensation act. The decision rests upon the ground that the case did not fall within any of the expressed exceptions contained in the act.¹⁸⁰

d. Survival of the cause of action.

Supplementing note in 47 L.R.A.(N.S.) 66.

sufficient only for his own maintenance. *Collins v. Pennsylvania R. Co.* 163 App. Div. 452, 148 N. Y. Supp. 777.

There can be no recovery by a father where there is no evidence that the deceased, an adult son, had ever contributed to his support. *Carolina, C. & O. R. Co. v. Shewalter*, — Tenn. —, L.R.A.—, 161 S. W. 1136.

¹⁷⁸ In *McGovern v. Philadelphia & R. R. Co.* 209 Fed. 975, the court said: "It is not to be presumed that Congress intended to legislate for the benefit of persons residing out of the jurisdiction of the state and Federal laws. The right to recover damages for death is not a right at common law, and, when Congress undertakes to impose a liability upon interstate carriers for the benefit of their employees, and the relatives of their employees in case of death through the carriers' negligence, in the absence of any provision to the contrary in a treaty or act of Congress, it must be presumed that such benefits are not intended for nonresident aliens."

¹⁷⁹ *Bombolis v. Minneapolis & St. L. R. Co.* — Minn. —, 150 N. W. 385.

¹⁸⁰ *Krzus v. Crow's Nest Pass Coal Co.* [1912] A. C. 590, 81 L. J. P. C. N. S. 227, 107 L. T. N. S. 77, 28 Times L. R. 488, 56 Sol. Jo. 632, 6 B. W. Comp. Cas. 271, Ann. Cas. 1912D, 859, reversing 16 B. C. 120, 4 B. W. Comp. Cas. 469.

¹⁸¹ *Carolina, C. & O. R. Co. v. Shewalter*, — Tenn. —, L.R.A.—, 161 S. W. 1136.

¹⁸² "Under the employers' liability act and its amendment of April 5, 1910, appellee, as administrator of the estate of Leslie Old, was entitled to recover damages by way of compensation for the financial L.R.A.1915C.

The amendment of 1910 in respect to the survival of the action has no application where the killing was instantaneous.¹⁸¹

Although under the original act there could be no recovery by the dependents of a deceased workman for the latter's pain and suffering, it has been held that, under the amendment of 1910, the surviving widow and children of a deceased employee who was not killed instantaneously may recover for his pain and suffering in addition to their own pecuniary loss.¹⁸²

e. Next of kin, who are.

In North Carolina, it has been held that an action in behalf of minor children lies for negligence causing the death of an illegitimate son of their mother, since under the state statute they, the mother being dead, are the next of kin of the illegitimate brother.¹⁸³

But a man born out of lawful wedlock long after his parents had been divorced is not kin to the widow and infant children of his father, who subsequently married, and they cannot recover for his death, although he had contributed to their support; nor can

loss to the widow and child of deceased by reason of the death of the husband and father; also appellee could recover for the conscious pain and suffering which the husband and father endured after the injury, which survived to appellee as the personal representative of Old for the benefit of his widow and child." *Kansas City Southern R. Co. v. Leslie*, — Ark. —, 167 S. W. 83.

¹⁸³ *Kenney v. Seaboard Air Line R. Co.* — N. C. —, L.R.A.—, 82 S. E. 968. As authority for this position the court cited *Hutchinson Invest. Co. v. Caldwell*, 152 U. S. 65, 38 L. ed. 356, 14 Sup. Ct. Rep. 504, where it was held that the word "heirs" as used in the United States Revised Statutes relating to the pre-emption laws of the United States was to be construed by the state statute. The Supreme Court said: "Undoubtedly the word 'heirs' was used as meaning, as at common law, those capable of inheriting, but it does not follow that the question as to who possessed that capability was thereby designed to be determined otherwise than by the law of the state which was both the situs of the land and the domicile of the owner."

In the *Kenney Case*, the court further said: "The contention that the next of kin must be the same in all the states is not in accordance with the intent of the act. Indeed, there could be no uniformity, if that was desirable, for there is no common law in Louisiana, and the common law is much modified in some of the states which we acquired from Mexico and France, and on many subjects the rule of the common law has been held differently in the different states."

children of his parents born in lawful wedlock recover where it does not appear that he had ever contributed to their support. ¹⁸⁴

X. Jurisdiction.

Supplementing note in 47 L.R.A.(N.S.) 67.

The remedy afforded by the Federal statute may be pursued in the state courts, ¹⁸⁵ and these courts must enforce the remedy even if it is contrary to the policy of the state. ¹⁸⁶ The state and Federal courts have

concurrent jurisdiction over actions brought under the act. ¹⁸⁷

The right of removal to the Federal court does not exist where the action is brought under the Federal statute, ¹⁸⁸ even if there be diversity of citizenship. ¹⁸⁹ The mere filing of a reply in the Federal court after a case has been removed is not a waiver of the plaintiff's right to have the case remanded. ¹⁹⁰

Whether or not the case presents a Federal question so as to be reviewable by the United States Supreme Court has been raised in several cases brought under the act. ¹⁹¹

¹⁸⁴ Cincinnati, N. O. & T. P. R. Co. v. Wilson, 157 Ky. 460, 51 L.R.A.(N.S.) 308, 163 S. W. 493.

¹⁸⁵ Penny v. New Orleans G. N. R. Co. — La. —, 66 So. 313; Corbett v. Boston & M. R. Co. 219 Mass. 351, L.R.A.—, 107 N. E. 60; Fish v. Chicago, R. I. & P. R. Co. — Mo. —, 172 S. W. 340; Moliter v. Wabash R. Co. 180 Mo. App. 84, 168 S. W. 250; Hardwick v. Wabash R. Co. 181 Mo. App. 156, 168 S. W. 328; McIntosh v. St. Louis & S. F. R. Co. 182 Mo. App. 288, 168 S. W. 821; Missouri, K. & T. R. Co. v. Lenahan, 39 Okla. 283, 135 Pac. 383.

The act of Congress is a part of the law of the land, and is equally so with any state statute. McIntosh v. St. Louis & S. F. R. Co. *supra*.

The Federal statute is as much a Pennsylvania act as the enactments of the state legislature. Hogarty v. Philadelphia & R. R. Co. 245 Pa. 443, 91 Atl. 854.

¹⁸⁶ Gee v. Lehigh Valley R. Co. 163 App. Div. 274, 148 N. Y. Supp. 882.

¹⁸⁷ Southern R. Co. v. Howerton, — Ind. —, 105 N. E. 1025, rehearing denied in 106 N. E. 369; McCoullough v. Chicago, R. I. & P. R. Co. 160 Iowa. 524, 47 L.R.A.(N.S.) 23, 142 N. W. 67; McIntosh v. St. Louis & S. F. R. Co. 182 Mo. App. 288, 168 S. W. 821.

¹⁸⁸ Eng v. Southern P. Co. 210 Fed. 92; Burnett v. Spokane, P. & S. R. Co. 210 Fed. 94; Tralich v. Chicago, M. & St. P. R. Co. 217 Fed. 675; Kansas City Southern R. Co. v. Leslie, — Ark. —, 167 S. W. 83; Fish v. Chicago, R. I. & P. R. Co. — Mo. —, 172 S. W. 340.

¹⁸⁹ Pankey v. Atchison, T. & S. F. R. Co. 180 Mo. App. 185, 168 S. W. 274. See note in 47 L.R.A.(N.S.) 69.

¹⁹⁰ Burnett v. Spokane, P. & S. R. Co. *supra*.

¹⁹¹ It is immaterial whether the question of employment in interstate commerce is raised according to the state practice or not. If the defendant claimed immunity on that ground, and the highest court of the state either decided or assumed that the record sufficiently presented a question of Federal right, and decided against the party asserting that right, it is the duty of the United States Supreme Court to pass upon the merits of the Federal question. North Carolina L.R.A.1915C.

lina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159, reversing 156 N. C. 496, 72 S. E. 858.

A judgment of compulsory nonsuit in a Federal district court, under the employers' liability act, which rests upon the ground that the evidence produced at the trial did not disclose that the plaintiff at the time of the happening of the accident was engaged in interstate commerce, does not present a question as to the power of that court as a Federal court to hear and determine the case, which is essential under the Judicial Code, § 238, to sustain a direct writ of error from the Federal Supreme Court sued out on the ground that the jurisdiction below was in issue. Farrugia v. Philadelphia & R. R. Co. 233 U. S. 352, 58 L. ed. 996, 34 Sup. Ct. Rep. 591. The court said that the same questions would have arisen had the case been brought in the state court, because the act itself provides that the state courts shall have concurrent jurisdiction with the Federal courts, and the right of recovery given by the act is restricted to injuries suffered while the employee is employed in interstate commerce.

The certificate of the chief justice of the highest court of a state cannot cure the entire failure of the record to show that a Federal question was so raised and decided as to sustain a writ of error from the Supreme Court of the United States. Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477, 56 L. ed. 1171, 32 Sup. Ct. Rep. 790.

To sustain a writ of error from the Federal Supreme Court to review a judgment of the highest court of a state on the ground that there was set up and denied a right, privilege, or immunity claimed under a Federal statute, it must appear from the record that there was necessarily present a definite issue as to the correct construction of the act, so directly involved that the state court could not have given the judgment it did without deciding against the contention of the plaintiff in error. *Ibid*.

The contention that a right or immunity under the Federal employers' liability act of April 22, 1908, was denied by the ruling of a state court that a declaration stating a good cause of action under that act could serve as the basis of recovery under the

Under the New York Constitution, the court of appeals has no power to determine the question whether the deceased engineer was engaged in interstate commerce, where there had been a unanimous affirmance by the appellate division of a verdict for the plaintiff in an action for the death of a railroad engineer, which was brought under the state law.¹⁹²

state law after first eliminating the allegation that the injury occurred in interstate commerce, which the proof demonstrated was unwarranted, is so lacking in merit as not to serve as the basis for a writ of error from the Federal Supreme Court to the state court. *Wabash R. Co. v. Hayes*, 234 U. S. 86, 58 L. ed. 1226, 34 Sup. Ct. Rep. 729.

A question of interpretation of the Federal employers' liability act of April 22, 1908, as amended by the act of April 5, 1910, is not presented for review in the Federal Supreme Court on writ of error to a circuit court of appeals, by the refusal of the request of the defendant, in a suit based on that statute, to take the case from the jury by a peremptory instruction, where, in view of the state of the proof, such request was absolutely without merit. *Southern R. Co. v. Gadd*, 233 U. S. 572, 58 L. ed. 1099, 34 Sup. Ct. Rep. 696.

A writ of error will lie from the Federal Supreme Court to review a decision of the highest state court, which sustained the action of the trial court in overruling certain contentions made by the plaintiff in error asserting a construction of the Federal employers' liability act of April 22, 1908, as amended by the act of April 5, 1910, which, if acceded to, would presumably have produced a verdict in favor of plaintiff in error, and consequent immunity from the action. *Seaboard Air Line R. Co. v. Horton*, 233 U. S. 492, 58 L. ed. 1062, 34 Sup. Ct. Rep. 635.

An immunity from liability under the employers' liability act of April 22, 1908, must be regarded as sufficiently asserted for the purpose of sustaining a writ of error from the Federal Supreme Court to the highest court of a state, whether the question was properly raised in the trial court, according to the local practice, or not, where such immunity was expressly claimed, and the highest court of the state either decided or assumed that the record sufficiently presented a question of Federal right, and decided against the party asserting that right. *North Carolina R. Co. v. Zachary*, *supra*.

A judgment of a Federal circuit court of appeals in an action based upon the Federal employers' liability act of April 22, 1908, as amended by the act of April 5, 1910, will be affirmed by the Supreme Court where all the questions presented for decision are of general law, not involving the interpretation of a statute, and it does not clearly

XI. Parties.

1. Plaintiff.

Supplementing note in 47 L.R.A.(N.S.) 73.

In case of the death of the injured employee, the cause of action being wholly statutory, the provisions of the statute must be strictly observed, and the action must be brought by the personal representative.¹⁹³ And this is so although the de-

appear that error was committed in the decision of such questions. *Southern R. Co. v. Gadd*, *supra*.

On a writ of error to a circuit court of appeals, resting on the employers' liability act, but involving no contention as to its meaning, the Supreme Court need determine only whether plain error was committed in relation to the principles of general law involved. *Yazoo & M. Valley R. Co. v. Wright*, 235 U. S. 376, 59 L. ed. —, 34 Sup. Ct. Rep. 130.

The original Federal employers' liability act of June 11, 1906 (34 Stat. at L. 232, chap. 3073), though in form a statute of general operation throughout the United States, having been held unconstitutional so far as it embodied anything but the exertion of the local power of Congress over the District of Columbia and the territories, can no longer be regarded as a "law of the United States" within the meaning of the provision of the Judicial Code, § 250, for the appellate review in the Federal Supreme Court of judgments and decrees of the court of appeals of the District of Columbia in cases in which the "construction of any law of the United States is drawn in question by the defendant." *Washington, A. & Mt. V. R. Co. v. Downey*, — U. S. —, 59 L. ed. —, 35 Sup. Ct. Rep. 406.

A controlling Federal question is necessarily involved in a judgment of a state court refusing to measure the liability of the defendant interstate railway carrier in an action by an employee to recover damages for personal injuries, by the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), where, although the pleadings contained no reference to that act, evidence was admitted over the plaintiff's objection which showed that the train on which he was riding at the time of the injury was engaged in interstate commerce, whereupon the defendant carrier insisted that the case was governed by that statute, and that its application and enforcement would defeat any recovery. *Toledo, St. L. & W. R. Co. v. Slavin*, — U. S. —, 59 L. ed. —, 35 Sup. Ct. Rep. 306.

¹⁹² *Tyndall v. New York C. & H. R. R. Co.* — N. Y. —, 107 N. E. 577.

¹⁹³ The action must be brought and maintained by the decedent's personal representative. *Flanders v. Georgia S. & F. R. Co.* — Fla. —, 67 So. 68.

The claim for damages must be prosecuted by the personal representative of the deced-

ceased left no estate.¹⁹⁴ The widow has no cause of action in her own name,¹⁹⁵ even if she is the sole beneficiary.¹⁹⁶ The widow cannot maintain an action in her own behalf and in that of the minor children and the parents of the deceased employee; and this objection may be raised after answering to the merits, at any time before trial and judgment.¹⁹⁷

In the note below will be found several other cases dealing with the waiver of the right to object where the action is not brought by the personal representative.¹⁹⁸

An administrator of a deceased employee duly appointed in the state in which the death occurred is the "personal representative" of the employee within the meaning

of the statute, although an administrator had previously been appointed in the state in which the deceased had been domiciled.¹⁹⁹

2. Defendant.

Supplementing note in 47 L.R.A.(N.S.) 74.

Under the act, the employee of one railroad has no right of action against another railroad whose tracks are used by the employing railroad.²⁰⁰ And a railroad company is not liable for injuries to an employee of an industrial corporation which were caused by the joint negligence of the employer corporation and the railroad.^{200a}

ent, and can be prosecuted by no one else. *Penny v. New Orleans G. N. R. Co.* — La. —, 60 So. 313.

¹⁹⁴ *St. Louis Southwestern R. Co. v. Brothers*, — Tex. Civ. App. —, 165 S. W. 488.

¹⁹⁵ *La Casse v. New Orleans, T. & M. R. Co.* — La. —, 64 So. 1012; *Missouri, K. & T. R. Co. v. Lenahan*, 39 Okla. 283, 135 Pac. 383.

¹⁹⁶ *Vaughan v. St. Louis & S. F. R. Co.* 177 Mo. App. 155, 164 S. W. 144.

The widow of an employee who was killed while engaged in interstate commerce cannot maintain an action under the Federal act in her own name, although she is the sole surviving heir of the deceased employee. *Cincinnati, N. O. & T. P. R. Co. v. Bonham*, — Tenn. —, 171 S. W. 79.

A judgment in favor of a widow suing in her own name for the death of her husband, who was killed while engaged in interstate commerce, must be reversed. *Ibid.*

¹⁹⁷ *Eastern R. Co. v. Ellis*, — Tex. Civ. App. —, 153 S. W. 701.

¹⁹⁸ In an action brought by the surviving wife against a common carrier by railroad, to recover damages for the wrongful death of her husband, recoverable, if at all, under authority of the Federal statute, where it appears from the amended answer that the carrier and the deceased were, at the time of the injury, engaged in interstate commerce, which allegation of the answer is not put in issue though a reply was filed, and where defendant company files a motion for judgment on the pleadings, objects to the introduction of any evidence, demurs to the evidence introduced at the close of plaintiff's case, and after all the evidence is in, moves for a peremptory instruction in its favor, it cannot be said that said defendant has waived its right to insist, on appeal, that the action could not be brought by such wife suing in her own right. *Missouri, K. & T. R. Co. v. Lenahan*, 39 Okla. 283, 135 Pac. 383.

The provision requiring the act to be brought by the personal representative of the deceased cannot be affected by mere possible waivers resulting from the order of presenting pleadings or of procedure that might operate in a local forum to affect

a right given by a local law. *Flanders v. Georgia, S. & F. R. Co.* — Fla. —, 67 So. 68.

The provision of the Federal act that the action is to be brought by the personal representative is not waived by the defendant where, by demurring to the evidence, he objected to the judgment before it was rendered. *Vaughan v. St. Louis & S. F. R. Co.* supra.

¹⁹⁹ *Anderson v. Louisville & N. R. Co.* 127 C. C. A. 277, 210 Fed. 689. The court said: "What reason then remains to accord to the domiciliary administrator, and deny to the other independent administrator, the right to maintain the suit? Certainly the statute law, as we have seen, is not so written. The Tennessee administrator's official character, as well as that of the Kentucky administratrix, corresponds with the statutory description, 'personal representative;' and, in as much as the authority of the former is in Tennessee superior to that of the latter, the denial of such right in the former is equivalent to saying that a suit cannot be maintained in Tennessee at all. And yet the statute within its prescribed scope operates and is effective as the paramount law in Tennessee as well as in Kentucky and the other states. . . . And since, as stated, the death occurred in Tennessee, and the suit was brought and prosecuted there with the approval of the Kentucky administratrix and principal beneficiary, no question of conflict in jurisdiction, or of difference between the plaintiff and the other administrator or the beneficiaries, arises. Thus, the right to maintain the suit in the name of the present plaintiff is met by objection only of the alleged negligent railroad; and while it is true that the defendant is entitled to have the suit instituted so that any final judgment rendered will protect it against everyone else, including the beneficiaries, it cannot be doubted that the court having control of the plaintiff can compel distribution of any amount received according to the terms of the statute."

²⁰⁰ *Wagner v. Chicago & A. R. Co.* 265 Ill. 245, 106 N. E. 809.

^{200a} *Ft. Worth Belt R. Co. v. Perryman*, — Tex. Civ. App. —, 158 S. W. 1181.

XII. Pleading.**1. Complaint.**

Supplementing note in 47 L.R.A.(N.S.) 74.

This section is confined to matters of pleading of a general character, and the sufficiency of the complaint as to substantive matters is discussed in the appropriate subdivisions above.

Counts at common law and under the Federal liability act may be joined in the same complaint.²⁰¹ So, a plaintiff may declare the cause of action in two counts, one under the Federal act, and the other under the state law.²⁰² It is not error for the court to refuse to strike out a count in a complaint drafted under the Federal act as improperly joined with other counts seeking a recovery under the state employers' liability act.²⁰³

The statute need not be pleaded,²⁰⁴ for

²⁰¹ *BOUCHARD v. CENTRAL VERMONT R. Co.*

²⁰² *Pelton v. Illinois C. R. Co. — Iowa*, —, 150 N. W. 236; *Ex parte Atlantic Coast Line R. Co. — Ala.* —, 67 So. 256.

²⁰³ *Atlantic Coast Line R. Co. v. Jones*, 9 Ala. App. 499, 63 So. 693. The court said: "The systems of jurisprudence of the state and of the United States together form one system which constitutes the law of the land for the state, and concurrent jurisdiction with the Federal courts is conferred on the state courts by the Federal act in the enforcement of rights of action accruing under it. Under the practice in vogue in this state, separate and independent causes of action arising out of the same transaction, and relating to the same subject-matter, may be joined in different counts of the same complaint, and one who is entitled to sue for the consequences of a wrongful or negligent act of another is not required to split up his cause of action, but may recover all the damages in one action."

But a complaint should be so drawn that the court may be enabled to determine under which of the two enactments, state or Federal, the respective counts are intended to assert a claim for liability. *Ex parte Atlantic Coast Line R. Co. — Ala.* —, 67 So. 256.

²⁰⁴ *Grand Trunk Western R. Co. v. Lindsay*, 233 U. S. 42, 58 L. ed. 838, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914C, 168; *Erie R. Co. v. Welsh*, 89 Ohio St. 81, 105 N. E. 180; *Gray v. Chicago & N. W. R. Co.* 153 Wis. 637, 142 N. W. 505.

²⁰⁵ *Erie R. Co. v. Welsh*, *supra*; *Chicago, R. I. & P. R. Co. v. McBee*, — Okla. —, 145 Pac. 331; *Cincinnati, N. O. & T. P. R. Co. v. Bonham*, — Tenn. —, 171 S. W. 79; *BOUCHARD v. CENTRAL VERMONT R. Co.*

It is not necessary to specifically allege that a railroad is engaged in interstate commerce in order that the court should take knowledge that the Federal act regu-
L.R.A.1915C.

the state courts as well as the Federal courts must take judicial notice of the act; ²⁰⁵ but facts must be alleged to show that it is applicable. ²⁰⁶

But if the complaint fails to allege that the employee was engaged in interstate commerce at the time of the injury, that fact may be supplied by the answer.²⁰⁷ And the judgment for the plaintiff will not be reversed upon the sole ground that the complaint did not allege a cause of action within the statute, where the defendant was allowed to prove the facts which made the case governed by that statute, and was accorded all the rights and defenses it was entitled to under the act.²⁰⁸ And a judgment for the plaintiff will not be reversed merely because the complaint alleged facts tending to show that it was an intrastate railroad, where the defendant was afforded all the rights secured to him by the statute.²⁰⁹ A petition which alleged that the

relating interstate commerce is applicable thereto. *McIntosh v. St. Louis & S. F. R. Co.* 182 Mo. App. 288, 168 S. W. 821.

²⁰⁶ The terms and provisions of the Federal act need not be pleaded; it is necessary only that the complaint allege facts which show that the Federal act, and not the state act, applies. *Erie R. Co. v. Welsh*, *supra*.

The facts, and not the pleadings, determine whether the wrong done in any given case gives a right to recover under the Federal or under the state statute. *Corbett v. Boston & M. R. R. Co.* 219 Mass. 351, L.R.A.—, 107 N. E. 60.

²⁰⁷ The failure of the complaint to allege that the plaintiff was engaged in interstate commerce at the time of the injury is aided by the answer alleging such fact. *White v. Central Vermont R. Co.* 87 Vt. 330, 89 Atl. 618.

Even if it is necessary for a complaint to allege that an employee was engaged in interstate commerce by an interstate railroad, the failure of the complaint to contain such an allegation is cured by a paragraph of the answer which expressly alleges such fact. *Vickery v. New London Northern R. Co.* 87 Conn. 634, 89 Atl. 277.

The rights of the parties must be determined by the terms of the Federal statute, where, although the complaint does not expressly declare upon such statute, nor contain an allegation that the employee was engaged in work on a car used in interstate commerce, such facts are set forth in the answer, and the case was tried under the terms of that statute. *St. Louis, I. M. & S. R. Co. v. Sharp*, — Ark. —, 171 S. W. 95.

²⁰⁸ *McIntosh v. St. Louis & S. F. R. Co.* *supra*.

²⁰⁹ In *McIntosh v. St. Louis & S. F. R. Co.* *supra*, the court sustained a complaint which did not allege that the defendant was an interstate railroad, but did allege facts

company was a domestic corporation operating a railroad between various points within the state, but did not rely upon any particular statute, is sufficient to state an action under the Federal statute against the single objection that it did not allege that the company was engaged in interstate commerce. ²¹⁰

The complaint should allege that the action was brought for the benefit of the surviving widow and children of the employee, and not that it was brought for the benefit of the widow and next of kin. ²¹¹

2. Answer.

Supplementing note in 47 L.R.A.(N.S.) 76.

which showed that it was an intrastate railroad, where, upon the trial, the plaintiff was accorded no right not vouchsafed to him by the Federal statute, and the defendant was denied no rights given it by that statute.

²¹⁰ McIntosh v. St. Louis & S. F. R. Co. 182 Mo. App. 288, 168 S. W. 821.

²¹¹ Hall v. Vandalia R. Co. 169 Ill. App. 12.

²¹² In Pelton v. Illinois C. R. Co. — Iowa, —, 150 N. W. 236, the court said: "By the Federal enactment, an employee plaintiff who has a good cause of action has been put in an anomalous position. He does not necessarily know, and frequently does not know, whether at the time of his injury the commerce in which he was engaged was interstate or not. That fact is peculiarly within the knowledge of the defendant employer. Two doors of remedy are set before him. But they are not cumulative; neither are they optional. Only one is available to him. He cannot choose. He can only try. If driven back from the one he has at least the assurance that he may enter the other; but, whichever door he enters, he comes before the same court. He brings the same case before it. The door of entry only determines the rule of measure of the relief granted. The reason for appropriate pleading by the defendant on this question of abatement is precisely the same whether the plaintiff knocks first at the Federal door or at the other. If challenged at the first, the plaintiff may prefer to acquiesce and to enter by the other door; and this ought to end the issue on that question. *Vice versa*, if plaintiff brings his action under the Federal act by appropriate allegation, and the defendant acquiesces, this also ought to end the issue on such question. If the defendant desires to make issue on such question, it should be done unequivocally. He should not be permitted to spread the net of a mere general denial, so as to hold in reserve the question of abatement, and in that manner to render it equally available in a second action as in the first. Under cover of such a method of pleading, the defendant might L.R.A.1915C.

Where the plaintiff has averred in proper allegation that at the time of the injury he was engaged in interstate commerce, the question cannot be put in issue by a general denial on the part of the defendant, but can be raised only by an affirmative pleading. ²¹³

XIII. Practice.

1. In general.

Supplementing note in 47 L.R.A.(N.S.) 76.

In the note below will be found a number of cases involving questions of practice of a somewhat general nature. ²¹³

abate both actions successively, the first through plaintiff's failure of proof of the interstate character of the commerce, and the second through defendant's conclusive proof of such character. A method of pleading which would permit such mobility to an abatement defense carries its own condemnation."

²¹³ Five per cent damages for delay will be awarded under United States Supreme Court rule 23 upon the affirmation of a judgment of a circuit court of appeals in a suit based on the Federal employers' liability act of April 22, 1908, as amended by the act of April 5, 1910, where the contentions that the interpretation of the statute was involved are wholly lacking in merit, the only questions presented for decision being those of general law, as to which it does not clearly appear that any error was committed. Southern R. Co. v. Gadd, 233 U. S. 572, 58 L. ed. 1099, 34 Sup. Ct. Rep. 696.

A holding of the circuit court of appeals, when affirming a judgment of the circuit court to the alleged effect that a railroad employee injured in the course of his employment could avail himself of the benefits of the statute, although at the time of the injury he was not actually engaged in interstate commerce, furnishes no ground for reversal where upon the trial the right of the employee to recover was made dependent upon his establishing that at the time he was injured he was actually engaged in interstate commerce. Seaboard Air Line R. Co. v. Moore, 228 U. S. 433, 57 L. ed. 907, 33 Sup. Ct. Rep. 580.

Any irregularity in transferring to the Federal district court for the district of Arizona a suit begun prior to statehood in a territorial court, based upon the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149), as amended by the act of April 5, 1910 (36 Stat. at L. 291, chap. 143, Comp. Stat. 1913, § 8662), is waived where defendant answered upon the merits the amended complaint filed in the Federal court, without questioning the jurisdiction. Arizona & N. M. R. Co. v. Clark, 235 U. S. 669, 59 L. ed. —, 35 Sup. Ct. Rep. 210.

2. *Shifting from law to law—amendment of pleadings.*

Supplementing note in 47 L.R.A.(N.S.) 76.

In a large number of cases the plaintiff has sought recovery under either the Fed-

eral statute or the state law, and the evidence has disclosed that a recovery must be had, if at all, under the other law; under such circumstances the courts are in sharp conflict as to the proper procedure.

It has been held that if the case is tried and submitted to the jury upon the theory

Where, in an action against a common carrier for a negligent injury, but one party, if any, is entitled to recover on the alleged cause of action, and the rules of law governing the trial of the issues in the case are the same under the Federal employers' liability act and under the state law,—there being no substantial evidence of the plaintiff's assumption of the risk of injury or of his contributory negligence, and no question of jurisdiction being involved,—it is immaterial whether the action, trial, and judgment are had under the Federal law or under the state law. *Illinois C. R. Co. v. Nelson*, 128 C. C. A. 525, 212 Fed. 69. It should, perhaps, be noted that the defendant was offered its choice of the defense of a cause of action for an admitted liability under the Federal law or under the state law, and its purpose in injecting the question of the application of the Federal statute was conclusively shown to be merely an attempt to postpone the plaintiff's recovery of damages.

The admissions of the deceased employee are not admissible against interest in an action by the personal representative for the benefit of the widow and next of kin based on the loss of contributions on account of the death of the employee. *Kansas City Southern R. Co. v. Leslie*, — Ark. —, 167 S. W. 83.

In the absence of an appropriate request, the trial court is not required to charge the jury that the state doctrine that in certain circumstances negligence will be presumed against the railroad company does not apply in an action brought under the Federal act. *Charleston & W. C. R. Co. v. Brown*, 13 Ga. App. 744, 79 S. E. 932.

Where the court rendered an opinion in the original trial of an action held under the state law, which action was subsequently dismissed and another action brought under the Federal act, such opinion contains the law of the case where there is no substantial difference in the evidence produced upon the two trials. *Helm v. Cincinnati, N. O. & T. P. R. Co.* 156 Ky. 240. 160 S. W. 945.

A settlement made between the defendant railroad and a special administrator appointed by the probate court, which court had no jurisdiction to make the appointment if no petition was presented to it for the appointment, in no way binds the next of kin of the deceased, dependent upon him for support. *Bombolis v. Minneapolis & St. L. R. Co.* — Minn. —, 150 N. W. 385.

Where a defendant in an action predicated on the state law files a plea in abatement alleging that the Federal act applies, and also a plea to the merits, and L.R.A.1915C.

by consent all the issues are tried together, the better practice is that there should be separate verdicts upon the different pleas; but where there is a general finding for the plaintiff, this by necessary implication is to be construed as a finding against all of the pleas. *Southern R. Co. v. Murphy*, 9 Ga. App. 190, 70 S. E. 972. The court said: "The proof was that the plaintiff was a member of a crew working on a short branch line terminating at a smelting works. This crew would make three or four trips a day out to the main line, carrying cars both for local and interstate business. At other times during the day they would shift the coal and coke cars from what were known as the 'coke tracks,' and distribute them at different points, all local. The plaintiff was hurt while engaged in doing this purely local work; hence the action was properly based on the Alabama statute, and not upon the Federal law."

Where a widow of a deceased employee had recovered judgment in her own name, and such judgment was subsequently reversed upon the ground that she was not the proper party plaintiff, and upon such reversal she was substituted as personal representative, and ultimately recovered judgment, the court does not err in not taxing the costs that had accrued up to the time of the making of the new parties against the plaintiff. *St. Louis, S. F. & T. R. Co. v. Smith*. — Tex. Civ. App. —, 171 S. W. 513.

Where the defendant railroad in an action under the Federal act in its answer draws in question the constitutionality of the amendment to the Federal employers' liability act, and that point was not decided by the Federal Supreme Court until after the appeal was taken, an appeal lies from the Missouri court of appeals to the Missouri supreme court, although the amount in dispute is within the pecuniary limit of the jurisdiction of the court of appeals. *Fish v. Chicago, R. I. & P. R. Co.* — Mo. —, 172 S. W. 340.

A mother suing a railroad company for the death of an adult son is a competent witness under the North Carolina statute, since, although she is an interested party, she is not testifying against the representative of a deceased person. *Irvin v. Southern R. Co.* 164 N. C. 5, 80 S. E. 78.

Although the plaintiff complained of a defective "footboard," and the statute refers to defective "running boards" only, the defendant is not entitled to a peremptory charge in its favor where its attorney had during the trial used the terms interchangeably. *Bramlett v. Southern R. Co.* 98 S. C. 319, 82 S. E. 501.

that the state law controlled, there can be no recovery even if the evidence shows a right of action under the Federal act,²¹⁴ and a judgment for the plaintiff under such circumstances will be reversed outright, and the case will not be remanded for a new trial.²¹⁵ And where the pleadings are founded on the state law, and the trial was conducted upon the theory that that law controlled, it is error to submit the case to the jury under the Federal act.²¹⁶ So, where the plaintiff brought the action under the mistaken belief that the term "any statute" as used in § 3 of the act included also state statutes, the case cannot be submitted to the jury as a common-law action.²¹⁷ But the United States Supreme Court has held that a recovery may be had under the state law, although

the complaint contained an allegation unwarranted by the proof that the injury occurred in interstate commerce.²¹⁸

The Missouri court has held that the plaintiff will not be allowed to amend his complaint where he has pleaded the state law, and the evidence shows that the Federal law controls.²¹⁹ But that such an amendment is permissible is the view taken by other courts.²²⁰ In a Federal court, it has been held that, having amended his complaint so as to state a cause of action under the Federal act, the plaintiff cannot revoke it after a directed verdict for the defendant.²²¹

Again, it has been held that the plaintiff will not be permitted to shift from law to law.²²² But the Pennsylvania court takes the view that, as there is but one law which

²¹⁴ Where no facts constituting a cause of action under the Federal statute are pleaded, and the case is not submitted to the jury under that statute, there can be no recovery even if the evidence shows a right of action thereunder. *Moliter v. Wabash R. Co.* 180 Mo. App. 84, 168 S. W. 250.

²¹⁵ Where the plaintiff pleaded a cause of action under the state statute, and the proof showed that the action, if any, was controlled by the Federal statute, the judgment should be reversed outright, and the cause should not be remanded for a new trial. *Ibid.*

²¹⁶ Where the action, by the allegations of the complaint, was founded entirely upon the state statute, and the trial proceeded throughout upon the theory of liability or nonliability thereunder, the action of the trial court in submitting the case to the jury under the Federal act was a clear departure from the issues presented and the course of the trial, and was unauthorized. *Creteau v. Chicago & N. W. R. Co.* 113 Minn. 418, 129 N. W. 855.

²¹⁷ *Lauer v. Northern P. R. Co.* — Wash. —. 145 Pac. 606.

²¹⁸ A declaration stating a good cause of action under the Federal employers' liability act of April 22, 1908, may be treated as affording a basis for a recovery under the state law after first eliminating the allegation that the injury occurred in interstate commerce, which the proof demonstrated was unwarranted, since by so doing the court is merely giving effect to a rule of local practice, the application of which was not in anywise in contravention of the Federal statute. *Wabash R. Co. v. Hayes*, 234 U. S. 86, 58 L. ed. 1226, 34 Sup. Ct. Rep. 729.

²¹⁹ *Moliter v. Wabash R. Co.* supra.

²²⁰ In *Collins v. Pennsylvania R. Co.* 163 App. Div. 452, 148 N. Y. Supp. 777, the action was originally brought under the state compensation act, but as that was subsequently declared unconstitutional, the plaintiff was permitted to amend so as to bring the action within the Federal act.

Where a declaration sets out facts which

would impose a liability on the defendant under the Federal act, if it had charged that at the time of the accident the defendant was engaged in interstate commerce, it was the duty of the trial court upon the coming in of the proofs to permit an amendment of the pleadings to conform thereto. *Fernette v. Pere Marquette R. Co.* 175 Mich. 672, 141 N. W. 1084, 144 N. W. 834. The supreme court treated the plaintiff's complaint as amended so as to aver that the defendant was engaged in interstate commerce at the time of the injury, where the complaint was otherwise entirely sufficient.

In *Cincinnati, N. O. & T. P. R. Co. v. Goode*, 153 Ky. 247, 154 S. W. 941, it was held that the court erred in refusing a peremptory instruction for the defendant upon the ground of the plaintiff's contributory negligence. On a petition for rehearing (155 Ky. 153, 159 S. W. 695) the court stated that, as the evidence disclosed the fact that the Federal statute applied, and the case as made by the lower court on the pleading, evidence, and instructions was under the state law, it did not see its way clear to define the rights of the parties, and consequently withdrew the direction for a peremptory instruction, and the trial court was directed to permit the parties to amend the pleadings as they saw fit, and to try and adjudge the case under the Federal statute.

²²¹ Where, at the close of the plaintiff's evidence in an action upon the complaint, which in a single count set forth a cause of action under the state law, the plaintiff so amends his complaint as to make it state in a single count a cause of action under the Federal employers' liability act, he thereby makes an election to abandon his cause of action under the state law, and to rely on his cause of action under the Federal act, and he is stopped from revoking or repudiating after a directed verdict against him on his pleading and evidence. *Bravis v. Chicago, M. & St. P. R. Co.* 217 Fed. 234.

²²² A shifting from the state law to the Federal law at the close of the trial is not a mere informality. *Creteau v. Chicago &*

can apply to any given state of facts, there can be no departure from law to law.²²³ So, it has been said that an opportunity to elect between the Federal act and the state law is never afforded.²²⁴

Again, in Kentucky the court of appeals has held that the plaintiff cannot rely upon both the state and the Federal statutes, and if both are pleaded he will be required to elect upon which he will proceed.²²⁵ And a similar view has been taken by the Iowa

court.²²⁶ But in Massachusetts it has been held that plaintiff may plead both and have a recovery, if negligence is shown upon one or the other, as the facts justify.²²⁷ And in Indiana it has been held that the plaintiff may simply plead the facts and have a recovery under either law as the facts develop.²²⁸

A number of courts have apparently taken the position that if the law as applied is more favorable to the appellant than the

N. W. R. Co. 113 Minn. 418, 129 N. W. 855.

As the plaintiff's pleading was either under the common law or under the state statute, and not under the Federal statute, he cannot recover under the Federal statute without changing his cause of action from law to law, and this he cannot do. *Moliter v. Wabash R. Co.* 180 Mo. App. 84, 168 S. W. 250. To the same effect, see *McAdow v. Kansas City Western R. Co.* — Mo. App. —, 164 S. W. 188.

²²³ If the facts show the Federal statute to be applicable, the plaintiff may rely thereon, although he has not pleaded it; and since it is the only law that can apply, there is no departure from "law to law." *Hogarty v. Philadelphia & R. R. Co.* 245 Pa. 443, 91 Atl. 854.

²²⁴ *Vickery v. New London Northern R. Co.* 87 Conn. 634, 89 Atl. 277.

²²⁵ In *Louisville & N. R. Co. v. Strange*, 156 Ky. 439, 161 S. W. 239, the plaintiff alleged that at the time of the injury her intestate was in the service of the defendant as a brakeman upon a train "then being used and operated on one of its highways of interstate commerce, and that said cars and trains were then being used in interstate commerce, or were being used in intrastate commerce, and that one of the two states of facts is true, and she does not know and cannot state which is true, and that her said intestate was killed while so engaged as the direct result," etc. The court held that a motion to elect made by the defendant before proceeding to trial was in due time, and it had the right to know in advance under which law it would be required to defend.

In a dissenting opinion, Nunn, J., said: "She does not plead a legal conclusion, or say that this law or that is applicable, but she pleads alternatively the fact that the train was either engaged in interstate or intrastate commerce, and she does not know which. It is no answer to say that her purpose was to invoke the application of both the state and Federal statutes. Both were enacted for the benefit of litigants, and she had a right to invoke the aid of either if the facts should come within the purview of their provisions. She was not claiming under both laws, but under that law which one fact would make applicable to her case, and that one fact she did not, and could not, know, but which was within the knowledge of the railroad company. Neither can it be said that there was a misjoinder, or L.R.A.1915C.

that she was attempting to join two causes of action. She had but the one grievance, and a single cause of action against one party for the same negligent acts. If the negligent acts be proven, the defendant is liable under either the state or Federal law."

Where the complaint alleges that a defective car which caused the injuries was an instrument of interstate commerce, and in another count pleads the state statute, it is error not to require the plaintiff to elect under which statute she will proceed. *South Covington & C. Street R. Co. v. Finan*, 153 Ky. 340, 155 S. W. 742.

²²⁶ In *Armbruster v. Chicago, R. I. & P. R. Co.* — Iowa, —, 147 N. W. 337, it was held that there was nothing in the contention that, in insisting that the plaintiff elect which cause of action she would prosecute, defendant led the plaintiff into error, for the ruling merely exacted that she must determine whether she would rely for remedy upon the state or the United States statute.

²²⁷ In *Corbett v. Boston & M. R. Co.* 219 Mass. 351, L.R.A.—, 107 N. E. 60, the court, in holding that a plaintiff, the widow of a deceased workman, who brought two actions, one in her own name, relying upon the state statute, and one as administratrix, relying upon the Federal statute, would not be compelled to elect which action she would rely upon, said: "It would be a saving of expense, both to the parties and to the commonwealth, if the two actions could be prosecuted together so that by one trial the facts could be ascertained and the causes ended by the determination of the governing principles of law. Where the settlement of an issue of fact depends upon conflicting evidence, it seems more likely that the truth will be ascertained by adducing all the evidence at one time before a single tribunal and enabling it to find out the real situation under an adequate statement of the governing rules of law applicable to all phases, than to require two distinct and successive inquiries before separate tribunals, where only a single aspect of the incident could be open to investigation at one time."

²²⁸ The Federal statute need not be expressly stated, but the proper procedure is to plead the facts, and recovery may then be had accordingly as the evidence may develop the case under one law or the other. *Vandalia R. Co. v. Stringer*, — Ind. —, 106 N. E. 865.

law which the facts show to be controlling, there is no reversible error. ²²⁹

In one case, it has been held that if the action had been brought under the state law, and the facts as developed on the trial showed that the Federal act controlled, an amendment to the petition may be had after the two-year limitation. ^{229a}

3. *Practice where action is brought by widow in her own name.*

Supplementing note in 47 L.R.A.(N.S.) 76.

Where a widow brought suit in her own name, it has been held that the reversal of the judgment will be without prejudice to

the right of the personal representative to bring an action. ²³⁰ Under such circumstances it has been held that judgment for the defendant will not be rendered, ²³¹ but the case will be remanded to the trial court, and the latter may permit the petition to be amended by substitution of the personal representative as plaintiff. ²³² But where judgment was rendered without authority of law, because in favor of the widow in her own behalf, the entry of her appearance after judgment as administratrix, and her adoption as such administratrix of all the pleadings, steps, and proceedings, verdict and judgment thereunder do not validate the judgment. ²³³

²²⁹ It is not prejudicial error to permit a recovery under the state statute, although the plaintiff had alleged and proven a cause of action under the Federal act, where the court ruled that the proof was insufficient to show that the plaintiff was engaged in interstate commerce, and the state statute did not differ materially from the Federal act, and the evidence offered was pertinent to the issue as originally joined. *Cole v. Atchison, T. & S. F. R. Co.* 92 Kan. 132, 139 Pac. 1177.

In *Graber v. Duluth, S. S. & A. R. Co.* — Wis. —, 150 N. W. 489, it was held that it was not error not to compel the employee to elect whether he would claim under the Federal law or under the state law, where the Federal law, which was applied, was more valuable to the employer than the state law.

If the Federal act and the state statutes were identical, there would be no good reason for requiring the plaintiff to elect between paragraphs of the complaint alleging the different statutes. *Louisville & N. R. Co. v. Strange*, 156 Ky. 439, 161 S. W. 239.

Although a case falling within the Federal act was tried on the theory that it was a common-law action, and the applicability of the Federal statute was first raised in oral argument before the appellate court, the judgment for the plaintiff, if sustainable under the Federal act, will not be reversed where all of the instructions given were more favorable to the defendant than it was entitled to under the Federal act. *Southern R. Co. v. Howerton*, — Ind. —, 105 N. E. 1025, rehearing denied in 106 N. E. 369.

^{229a} "When the cause of action arises under the Federal statute, but suit is brought under the state law, or by some person not authorized to maintain an action under the Federal statute, defects in the original petition may be cured by an amendment that does not set up a new and distinct cause of action filed after the expiration of two years from the accrual of the cause of action as the amendment will relate back to the filing of the original petition." *Cincinnati, N. O. & T. P. R. Co. v. Goode*, — Ky. —, 173 S. W. 329.

²³⁰ The reversal of a judgment in favor of a widow suing in her own name for the L.R.A.1915C.

death of her husband, who was killed while engaged in interstate commerce, will be without prejudice to the right of the personal representative of the deceased. *Cincinnati, N. O. & T. P. R. Co. v. Bonham*, — Tenn. —, 171 S. W. 79.

²³¹ Where an action was originally brought by the widow in her own behalf and that of her minor children and the parents of the deceased, and after judgment it was sought to amend the pleadings by substituting the personal representative of the deceased employee as plaintiff, the judgment will be reversed and remanded, and judgment for the defendant will not be rendered. *Eastern R. Co. v. Ellis*, — Tex. Civ. App. —, 153 S. W. 701.

Where the plaintiff brought an action for the death of her husband in her own name, and sought recovery under the state act, and subsequently, having been appointed administratrix of her husband, brought an action as such under the Federal act, it is error for the trial judge to render a judgment in favor of the defendant in the action brought under the state act, upon the ground that the bringing of the action under the Federal act had the effect of superseding the action under the state act. *Corbett v. Boston & M. R. Co.* 219 Mass 351, L.R.A.—, 107 N. E. 60. The court said: "Even if the presiding judge was right in his ruling, judgment ought not to have been rendered in favor of the defendant in the action under the state statute. A court without jurisdiction over a case cannot enter judgment in favor of either party. It can only dismiss the case for want of jurisdiction."

²³² Where the surviving widow brought the action in her own name, and, after judgment, filed, as administratrix, an application to be substituted as plaintiff, and thereafter the defendant filed its answer and denied the fact of the appointment, and also plaintiff's right to appointment, the appellate court held that, as it did not have original jurisdiction, it must reverse the judgment, but it would remand the case, and the district court had power to grant the application. *Missouri, K. & T. R. Co. v. Lenahan*, 39 Okla. 283, 135 Pac. 383.

²³³ *Vaughan v. St. Louis & S. F. R. Co.*

In an action brought by a widow in her own name for the sole benefit of herself and minor child, a demurrer based on the ground that "the plaintiff have no legal capacity to sue" refers only to the legal disability of the plaintiff, such as infancy, idiocy, and coverture, and does not raise the question of the application of the Federal act, under which the action can be brought only by the personal representative.²³⁴

Where an action brought by a widow in her own name is brought within the statutory time, she may subsequently, by amendment to her petition, be substituted as administratrix and recover in a proper case, although the two-year limitation has expired.²³⁵

Upon the subject of amendment of pleading after limitation period by changing from common law to statute, or *vice versa*, or from statute of one jurisdiction to statute

of another, see notes to Missouri, K. & T. R. Co. v. Bagley, 3 L.R.A.(N.S.) 259, and Allen v. Tuscarora Valley R. Co. 30 L.R.A.(N.S.) 1096.

4. Waiver of right under the act; when claim may be raised.

Supplementing note in 47 L.R.A.(N.S.) 76.

The courts are also in conflict as to when the question of the applicability of the Federal statute may be raised.

The Louisiana court has held that the applicability of the act may be raised at any time.²³⁶ On the other hand, the Oklahoma court takes the position that the applicability of the act cannot be raised for the first time on appeal,²³⁷ while the Vermont court holds that the question can be raised only on demurrer.²³⁸ It has been held that the applicability of the Federal

177 Mo. App. 155, 164 S. W. 144; Dungan v. St. Louis & S. F. R. Co. 178 Mo. App. 164, 165 S. W. 1116.

²³⁴ Chicago, R. I. & P. R. Co. v. Holliday, — Okla. —, 145 Pac. 786.

²³⁵ Texarkana & Ft. S. R. Co. Casey, — Tex. Civ. App. —, 172 S. W. 729.

Where a widow brings an action in her own name, which action proceeds to judgment rendered in her favor, an amendment substituting her as administratrix upon the granting of a new trial may be granted, and a recovery as such administratrix will not be denied merely because the amendment was made after the expiration of the two-year limitation fixed by the Federal act. Vaughan v. St. Louis & S. F. R. Co. 177 Mo. App. 155, 164 S. W. 144.

Where the action is brought by the widow in her own behalf and that of minor children and the parents of the employee, an amendment whereby the action is brought by the personal representative is not barred by the statute of limitations, if the original petition was filed in due time. Eastern R. Co. v. Ellis, — Tex. Civ. App. —, 153 S. W. 701.

A widow who has prosecuted an action in her own name to judgment in her favor may thereafter, and upon a remand of the case, be substituted as administratrix, and her right to subsequently prosecute the action is not barred by the fact that the two-year limitation has expired. Missouri, K. & T. R. Co. v. Lenahan, 39 Okla. 283, 135 Pac. 383.

In an action brought under the statute, the substitution of the personal representative of a deceased party for the widow, father, and mother of the deceased is not the beginning of a new cause of action, but it relates back to the filing of the original petition. St. Louis, S. F. & T. R. Co. v. Smith, — Tex. Civ. App. —, 171 S. W. 513.

Where the original complaint, filed within two years after the cause of action arose, L.R.A.1915C.

stated a cause of action, and the court in which the suit was brought had jurisdiction, an amendment to the complaint alleging the application of the Federal act may be filed more than two years after the cause of action arose, since the Federal statute does not create a cause of action, but simply goes to the defenses available to the defendant. Smith v. Atlantic Coast Line R. Co. 127 C. C. A. 311, 210 Fed. 761.

²³⁶ A total absence of a right of action under the state statute, because of the applicability of the Federal statute to the facts of the case, may be raised at any time. La Casse v. New Orleans, T. & M. R. Co. — La. —, 64 So. 1012.

²³⁷ Chicago, R. I. & P. R. Co. v. Holliday, — Okla. —, 145 Pac. 786.

A defendant will not be permitted for the first time in an appellate court, to invoke the protection of a Federal statute, where the matter was not, by the pleadings or the evidence, brought to the attention of the trial court. Chicago, R. I. & P. R. Co. v. McBee, — Okla. —, 145 Pac. 331. The court said: "Where, as in the instant case, neither the pleadings nor the evidence brings the cause [of action] within the purview of that [Federal] act, and the trial in the court below proceeded upon the theory that the state statute governed, this court is precluded from holding that the Federal statute should have controlled."

A judgment for the plaintiff under the Federal act was sustained in Southern R. Co. v. Howerton, — Ind. —, 105 N. E. 1025, rehearing denied in 106 N. E. 369, where the case was tried on the theory that the state law applied, and the applicability of the Federal act was first raised on appeal. But in this case it appeared that the instructions given were more favorable to the defendant than it was entitled to have under the Federal act.

²³⁸ Where the state of the facts is such that the Federal statute applies, a declara-

act cannot be raised for the first time in the United States Supreme Court. ²³⁹

In several cases where defendant's objection that the Federal act applied was raised in the trial court, it has been held that the objection was made in time. ²⁴⁰ But under the rules of practice in Missouri, the defendant waives any departure by the plaintiff in filing an amended petition based on the Federal statute, where the original petition was based on the common law, by answering to the amendment on its merits and going to trial thereon. ²⁴¹

In a Wisconsin case, it has been said that

tion at common law or under the state statute is a departure, but advantage thereof can be taken only by demurrer; otherwise it is waived. *White v. Central Vermont R. Co.* 87 Vt. 330, 89 Atl. 618; *Niles v. Central Vermont R. Co.* 87 Vt. 356, 89 Atl. 629.

²³⁹ It is there assigned as error that the court below erred in not holding that the Indiana statute had been superseded by the Federal employers' liability act of June 11, 1906 (34 Stat. at L. 232, chap. 3073, U. S. Comp. Stat. Supp. 1911, p. 1316). It does appear in one or more of the counts of the plaintiff's declaration that the railroad company was engaged in operating a railroad extending into two or more states, and such was the evidence. The first count might be said to declare upon the liability of the company under the act of 1906. Upon that ground the case was removed to the circuit court of the United States. But that court remanded it to the state court. Thereupon defendant demurred to the first count, and the demurrer was sustained. No exception was saved and no error assigned either in the state court or in this. In no other way was any claim set up or asserted under that Federal act, nor did the state court make any ruling as to the effect of that act upon the Indiana statute, and the judgment of the Illinois court was rested wholly upon the Indiana statute. Not having been specially set up in the state court and there passed upon, it is obvious that the point has not been saved. *Chicago, I. & L. R. Co. v. Hackett*, 228 U. S. 559, 57 L. ed. 966, 33 Sup. Ct. Rep. 581.

²⁴⁰ The applicability of the Federal act may be raised by special plea after the defendant has pleaded the general issue and assumption of risk. *Flanders v. Georgia S. & F. R. Co.* — Fla. —, 67 So. 68.

Where the petition was drawn under a superseded state law, and the evidence showed a case under the Federal statute only, the defendant's demurrer to the evidence presenting the objection that "under the pleadings and the evidence" a verdict could not be found against the defendant was sufficiently specific. *Moliter v. Wabash R. Co.* 180 Mo. App. 84, 168 S. W. 250.

The defendant is not estopped from urging his exception to the ruling of the court L.R.A.1915C.

the rights under the act may be waived expressly or impliedly. ²⁴²

As to the waiver of the right to object where the action is not brought by the personal representative, see XI. 1, supra.

XIV. Damages.

1. In general.

Supplementing note in 47 L.R.A.(N.S.) 80.

The damages recoverable in case of death are limited to the pecuniary loss of the beneficiaries. ²⁴³ And an instruction based

in submitting to the jury the question of its negligence under the Federal act, where the case had been tried upon the theory that the state act was applicable, by urging in support of an objection to the introduction in evidence of the state statute, and in support of the motion for a directed verdict, that the state law had been superseded by the Federal act. *Creteau v. Chicago & N. W. R. Co.* 113 Minn. 418, 129 N. W. 855.

A judgment in favor of a widow suing in her own behalf and as tutrix of minor children will be set aside and the action dismissed, although the defendant interposed no exception to the capacity of the widow and tutrix to prosecute the suit, and his only objection was to the first question propounded to the first witness for plaintiff, which question was comparatively unimportant, which objection was to the effect that he objected to any evidence on the part of the plaintiff on the ground that the state law had been superseded by the Federal law, and upon such objection being overruled he duly excepted. *Penny v. New Orleans G. N. R. Co.* — La. —, 66 So. 313.

²⁴¹ *McAdow v. Kansas City Western R. Co.* — Mo. App. —, 164 S. W. 188.

²⁴² In *Graber v. Duluth, S. S. & A. R. Co.* — Wis. —, 150 N. W. 489, Marshall, J., said that if the particular act, in any substantial part, is within the interstate field, the Federal law rules the situation. if either party sees fit to stand upon legal right in the matter; and that this may be done or waived expressly or impliedly.

²⁴³ *Flanders v. Georgia S. & F. R. Co.* — Fla. —, 67 So. 68.

The damages sustained by the widow and children are the benefit which might be reasonably expected from the husband and father in a pecuniary way had he lived. *Kansas City Southern R. Co. v. Leslie*, — Ark. —, 167 S. W. 83.

In an action for the benefit of the parents based on the death of an adult unmarried son, the damages recoverable are limited to such loss as results to them because they have been deprived of a reasonable expectation of pecuniary benefits. *Dooley v. Seaboard Air Line R. Co.* 163 N. C. 454, 79 S. E. 970.

And see *Thornton v. Seaboard Air Line R. Co.* 98 S. C. 348, 82 S. E. 433.

on the loss to the estate of deceased is erroneous.²⁴⁴ So, in an action for the benefit of the parents of an adult unmarried son, it is error to charge that the measure of damages is the present value of his net income.²⁴⁵

The damages recoverable are such as will reasonably compensate the dependent members of the family for the pecuniary loss sustained by them because of the employee's injury and death, and the amount awarded is not to be fixed by the jury at such a sum that, if placed at interest, it would be wholly consumed when the time of de-

pendency ceased.²⁴⁶ There can be no recovery for grief or mental anguish,²⁴⁷ nor for the loss of companionship and association.²⁴⁸ But in the case of a dependent widow and minor children, the courts are inclined to permit juries in estimating the pecuniary loss, to make liberal allowance for the peculiar obligations incident to the relationship of husband and father.²⁴⁹ So, evidence that the deceased was a church member is admissible as tending to show the moral training and influence which would have been received by his children, and may be considered by the jury in de-

²⁴⁴ In *Farley v. New York, N. H. & H. R. Co.* 87 Conn. 328, 87 Atl. 990, it was held that the trial court erred in instructing the jury to award such damages as would make good the loss sustained by the decedent's estate, as being substantially the same as compensation for pecuniary loss to the surviving beneficiaries. The court said: "The jury should not have been instructed to assess the damages upon the basis of the loss to the estate of the deceased, but upon that of the pecuniary loss to the beneficiaries predicated upon their having been deprived, by the death, of a reasonable expectation of pecuniary benefits."

It is error to instruct the jury that they may find such sum as will fairly and reasonably compensate the estate of the decedent for the destruction of his power to earn money. *Chesapeake & O. R. Co. v. Dwyer*, 157 Ky. 590, 163 S. W. 752. The court said: "The recovery should have been confined by the instruction on the measure of damages, in the event of a finding for the plaintiff, to such sum in damages as would reasonably compensate the widow and children of the decedent for such pecuniary benefits as the evidence showed they had a reasonable expectation of receiving from the decedent, if his death had not been caused by the negligence of the defendant."

In *Louisville & N. R. Co. v. Stewart*, 156 Ky. 550, 161 S. W. 557, the court held that an instruction was erroneous which told the jury that the plaintiff is permitted to recover such sum as will fairly compensate decedent's estate for his death. The court said that the true measure of damages is that sum that will compensate his estate for the destruction of his power to earn money. On a rehearing, however (157 Ky. 642, 163 S. W. 755), the court held that the true measure of damage was such as will compensate his surviving relatives for actual pecuniary loss from his death.

²⁴⁵ *Dooley v. Seaboard Air Line R. Co.* 163 N. C. 454, 79 S. E. 970; *Kenney v. Seaboard Air Line R. Co.* 165 N. C. 99, 80 S. E. 1078.

²⁴⁶ *Chesapeake & O. R. Co. v. Kelly*, 100 Ky. 296, 169 S. W. 736.

²⁴⁷ In *Farley v. New York, N. H. & H. R. Co.* 87 Conn. 328, 87 Atl. 990, the court took the position that, in the case of beneficiaries, it was their loss alone of which the stat-

ute takes cognizance, and the field of that loss is limited to what is termed the "pecuniary" as distinguished from sentimental, or to that which flows from grief or wounded feelings.

²⁴⁸ An instruction in an action for the death of an employee brought in behalf of the widow and two small children is erroneous where it disregards the distinction between loss of support and maintenance, and the loss of companionship and association. *New York, C. & St. L. R. Co. v. Niebel*, 214 Fed. 952. The court based its decision upon *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176, cited in the earlier note.

The court cannot cure the error of the trial court in failing to properly distinguish between the loss of support and maintenance of the widow caused by the death of her husband, and the loss of companionship and association, by permitting the plaintiff to remit a portion of the damages, especially where the jury had failed to apportion the damages between the widow and the children. *New York, C. & St. L. R. Co. v. Niebel*, supra.

²⁴⁹ In *Norfolk & W. R. Co. v. Holbrook*, 215 Fed. 687, affirmed in 215 Fed. 1007, it was held not error to charge as follows: "However, the court instructs you that where the persons suffering injury are the dependent widow and infant children of a deceased husband and father, the pecuniary injury suffered would be much greater than where the beneficiaries were all adults or dependents who were mere next of kin, so that the relation existing between deceased and the infant beneficiaries prior to his death is a factor in fixing the amount of the merely pecuniary damages." The court said: "Difference in the value of prospective support, and intellectual, moral, and physical training to be expected from a father or mother, and from any other benefactor, inheres in the nature of social relations. While no compensation can be given for the loss of love, yet in estimating the pecuniary value of expected maintenance and training, the fact cannot be ignored that it will be increased in proportion to the intelligent solicitude which prompts the service, and that therefore maintenance of a wife by her husband, and maintenance and

termining the pecuniary damage suffered by them. ²⁵⁰

In an action by the administrator there can be no recovery for funeral expenses. ²⁵¹

The jury should apportion the damages between the beneficiaries, ²⁵² but this will be deemed waived by the defendant where it asks no instruction to that effect, and makes no objection to the verdict for a gross amount. ²⁵³ So, the fact that the jury did not apportion the damages between the beneficiaries is not reversible error where the point is raised for the first time on certiorari in the supreme court. ²⁵⁴ But where the action is brought by the administrator and the jury has been instructed to apportion the verdict, it is reversible error to return a verdict unapportioned. ²⁵⁵

The measure of damages in favor of the first class of beneficiaries will be essentially different from that in favor of the second and third classes, and that in favor of the second class may be different from that in favor of the third. ²⁵⁶

training of children by their father, will, as a rule, be of greater value than like service from other kindred."

In *Farley v. New York, N. H. & H. R. Co.* 87 Conn. 328, 87 Atl. 990, the court said: "Such being the rule, it follows that the amount recoverable in given cases must be influenced by the nature of the relation between the beneficiaries and the deceased, the obligations, moral or legal, naturally incident to such relation, the extent of the recognition which the deceased made of that obligation, his financial ability to make such recognition, his disposition to do so, as shown by experience, and the thousand and one circumstances calculated to throw light in some substantial way upon the reasonable expectation of benefits, of which the beneficiaries were deprived by death."

²⁵⁰ *White v. Central Vermont R. Co.* 87 Vt. 330, 89 Atl. 618.

²⁵¹ *Collins v. Pennsylvania R. Co.* 163 App. Div. 452, 148 N. Y. Supp. 777.

²⁵² *New York, C. & St. L. R. Co. v. Niebel*, 214 Fed. 952; *Copper River & N. W. R. Co. v. Reed*, 128 C. C. A. 39, 211 Fed. 111.

In *Louisville & N. R. Co. v. Stewart*, 156 Ky. 550, 161 S. W. 557, after reversing a judgment for the plaintiff and granting a new trial, the court said that, upon the return of the case, the trial court should instruct the jury to apportion the ultimate recovery, if any, between the beneficiaries.

Upon this point the United States Supreme Court in *Gulf, C. & S. F. R. Co. v. McGinnis*, 228 U. S. 173, 57 L. ed. 785, 33 Sup. Ct. Rep. 426, 3 N. C. C. A. 806, said: "The statutory action of an administrator is not for the equal benefit of each of the surviving relatives for whose benefit the suit is brought. Though the judgment may be for a gross amount, the interest of each beneficiary must be measured by his or her individual pecuniary loss. That apportionment is for the jury to return. This will, of L.R.A.1915C.

It is error for the plaintiff's counsel to tell the jury that the verdict asked for was not a very serious matter to the railroad, but meant a great deal to the plaintiff. ²⁵⁷

2. Amount of damages.

Supplementing note in 47 L.R.A.(N.S.) 83.

The Federal act places no restriction on the amount of damages recovered except that of damages actually sustained, ²⁵⁸ and the amount of damages recoverable under Federal act is in nowise limited by any state statute on the question. ²⁵⁹

The defendant is not entitled to a reduction of damages because of a prospect that a surgical operation might relieve part of plaintiff's injury, where the plaintiff had already submitted to an amputation, which, according to the evidence, a great proportion of the men did not survive, and had also submitted to a number of lesser operations. ^{259a}

course, exclude any recovery in behalf of such as show no pecuniary loss."

²⁵³ The failure of the jury to apportion the recovery among the beneficiaries is not reversible error if the defendant does not see fit to ask an instruction on that point, since the judgment on a verdict in a gross sum will protect him from any future action. *Hardwick v. Wabash R. Co.* 181 Mo. App. 156, 168 S. W. 328.

The fact that the jury failed to apportion the damages among the beneficiaries is not reversible error where no exception was taken to the form of the verdict by either party. *Copper River & N. W. R. Co. v. Reed*, 128 C. C. A. 39, 211 Fed. 111.

²⁵⁴ *Devine v. Chicago, R. I. & P. R. Co.* — Ill. —, 107 N. E. 595.

²⁵⁵ *Collins v. Pennsylvania R. Co.* 163 App. Div. 452, 148 N. Y. Supp. 777.

²⁵⁶ *Farley v. New York, N. H. & H. R. Co.* 87 Conn. 328, 87 Atl. 990; *M'Coullough v. Chicago, R. I. & P. R. Co.* 160 Iowa, 524, 47 L.R.A.(N.S.) 23, 142 N. W. 67.

²⁵⁷ *Caverhill v. Boston & M. R. Co.* — N. H. —, 91 Atl. 917. The court said: "Whether it was easy or difficult for the defendants to pay, whether the amount claimed was to them mere loose pocket change, 'a few coppers,' or their entire estate, were matters foreign to the issues before the jury." The court further said that there was nothing in the Federal statute making the defendants' ability to pay material upon the question of liability or of amount.

²⁵⁸ *Devine v. Chicago, R. I. & P. R. Co.* — Ill. —, 107 N. E. 595.

²⁵⁹ *Thornbro v. Kansas City, M. & O. R. Co.* 91 Kan. 684, 139 Pac. 410; *South Covington & C. Street R. Co. v. Finan*, 153 Ky. 340, 155 S. W. 742.

^{259a} *Otos v. Great Northern R. Co.* — Minn. —, 150 N. W. 922.

In the note below will be found a number of cases dealing with the question of excessiveness of the verdict in the case of injured employees.²⁶⁰

In the case of the death of an employee, his age, condition of health, and the amount

he was earning, are all material in estimating the pecuniary loss of the beneficiaries. In the note below will be found a number of cases in which the size of the verdict was considered with reference to the question of excessiveness.²⁶¹

²⁶⁰ Where an employee, at the time of his injury, was earning from \$100 to \$145 per month, and at the trial, about one and one-half years after the injury, he had a permanently stiff knee, a curvature of the spine, and some paralysis, and was unable to walk without crutches, and was suffering from serious nervous disorders, and his earning capacity was wholly destroyed, a verdict of \$14,000, to which sum the trial court had reduced a verdict of \$20,000, will not be held excessive. *Pelton v. Illinois C. R. Co.* — Iowa, —, 150 N. W. 236.

A verdict of \$9,000, to which sum the court reduced a rendered verdict of \$12,000, is not excessive where the plaintiff, a freight conductor, thirty-eight years of age at the time of his injury, and earning from \$125 to \$130 per month, had, at the time of the trial, been idle for more than two years, and, aside from minor injuries, his height was reduced 2 inches, and he had a forward curvature and stiffness of the upper portions of the spine, resulting in a permanently stooped position, was unable to raise his right arm above a horizontal position, and these conditions were permanent, and his incapacity was probably permanent, and he would probably suffer more or less pain. *Peery v. Illinois C. R. Co.* — Minn. —, 150 N. W. 382.

A verdict for \$16,900 is not excessive where the employee's feet were both crushed and permanently injured, so as to require him to use crutches in order to walk, and he suffered great pain and was under the care of physician for several months. *St. Louis & S. F. R. Co. v. Brown*, — Okla. —, 144 Pac. 1075.

A verdict for \$15,000 is not excessive where the plaintiff was in a hospital for about nine and one-half months, being confined to his bed for about six months, and was obliged to remain at his home for two and one-half months thereafter, and suffered a fracture of the pelvis, which made the left side three quarters of an inch higher than the right, and a hole had been torn in his bladder, and he had become very neurasthenic, and there was also evidence of impairment of sexual power. *Wagner v. Chicago & A. R. Co.* 180 Ill. App. 196, affirmed in 265 Ill. 245, 106 N. E. 809.

A verdict of \$13,000 is not excessive where an experienced blacksmith lost a portion of his little finger and the third finger, and the middle finger was also injured. *Opsahl v. Northern P. R. Co.* 78 Wash. 197, 138 Pac. 681.

A verdict of \$30,000, to which sum the trial court reduced an award of \$35,000, made by the jury, is not excessive where the plaintiff was twenty-six years of age, earning from \$105 to \$115 a month, and the

left leg was amputated so near the hip as to make the use of an artificial leg impossible, and there was not sufficient skin to cover the stump, and four different operations had been performed for the purpose of ingrafting skin, and several more were performed to remove cinders or to open abscesses that had formed, and two nerve tumors had formed upon the stump caused by the ends of the nerves being embedded in the scar tissue, which caused intense spasms of pain on pressure or movement. *Otos v. Great Northern R. Co.* supra.

²⁶¹ A verdict of \$20,000 was upheld in *Southern Railway—Carolina Division v. Bennett*, 233 U. S. 80, 58 L. ed. 860, 34 Sup. Ct. Rep. 566, for the death of a fireman who had a life expectancy of thirty years, and was earning \$900 a year, and there was no evidence offered of any expected increase of wages.

Where the employee who was killed because of the employer's negligence was thirty-eight or thirty-nine years old, and was earning from \$75 to \$85 per month, and left a wife and two minor children, a verdict of \$12,000 is not so great as to show passion or prejudice. *Thornbro v. Kansas City, M. & O. R. Co.* 91 Kan. 684, 139 Pac. 410.

A verdict of \$16,000 is not excessive for the death of a locomotive engineer who was forty-five years of age, a sober and industrious man earning from \$150 to \$170 per month. *Chesapeake & O. R. Co. v. Dwyer*, — Ky. —, 172 S. W. 918. The court said: "The age of the appellee widow at the time of her husband's death was forty-three, two years younger than the husband, consequently, her expectancy of life was practically the same as his; and, the criterion of recovery being only the actual pecuniary loss resulting to the widow from the death of the husband, as the amount recovered is less than one half of what the gross earnings of the decedent would have been during the probable duration of his life, and not more than the widow would probably have received out of such earnings for her support, had he lived, there is, in our opinion, no ground for appellant's contention that the verdict is excessive."

Where the deceased was earning \$192 per month and had a life expectancy of twenty-two years, and his widow had a like expectancy and the minor children were aged, respectively, sixteen, twelve, ten, eight, and three, and the boy aged eight was physically afflicted, a verdict for \$19,011 is not excessive. *Chesapeake & O. R. Co. v. Kelly*, 160 Ky. 296, 169 S. W. 736.

A verdict of \$15,000 is not excessive for the death of an employee who was a man twenty-four years of age, mentally and

In Arkansas, in an action for the death of an employee, where the death was not instantaneous, a recovery is permitted for the pain and suffering of the employee, under the amendment of 1910. This element naturally tends to increase the amount of the verdict. ²⁶³

physically sound, earning \$65 a month. Chicago, R. I. & P. R. Co. v. McBee, — Okla. —, 145 Pac. 331.

A verdict of \$10,000, apportioned equally between the surviving wife and a child, is not excessive where the deceased was an engineer thirty-one years of age, in good health, and earning \$175, most of which went to the support of his family. Southern P. R. Co. v. Vaughn, — Tex. Civ. App. —, 165 S. W. 885.

An error in the instructions as to damages in permitting the jury to allow for probable gifts or inheritance is not reversible error where the deceased was contributing from \$90 to \$100 a month for the support of his family, and had a life expectancy of nineteen years, and the verdict was \$4,000 to the widow and \$1,000 to a dependent adult imbecile child, since the error would have the tendency only to increase the verdict and the award was scarcely equal to the value of the support and maintenance for five or six years, while he had a life expectancy of nineteen years. Sweet v. Chicago & N. W. R. Co. 167 Wis. 400, 147 N. W. 1054.

A verdict of \$10,000 for the death of a brakeman was considered by some of the judges in Graber v. Duluth, S. S. & A. R. Co. — Wis. —, 150 N. W. 489, to be excessive, but as the question was not presented in the brief nor on the oral argument, the verdict was permitted to stand.

A verdict of \$2,500 is not excessive where a freight conductor had lost time to the value of \$400 and had paid \$100 for medical services, and the injury complained of was a depression of the skull on the side of his head, and epileptic spells to which he was to a slight degree subject had greatly increased in severity, and he had become very nervous and lost weight, and his sight, hearing, and speech were impaired. Louisville & N. R. Co. v. Winkler, — Ky. —, 173 S. W. 151.

²⁶³ A verdict of \$18,000 was sustained where the deceased employee was twenty-five years old, and had an expectancy of thirty-five years, his wife was twenty-four years old, and their baby was only five weeks old, and there was proof to warrant a finding that his net earnings per annum would be \$720. Kansas City Southern R. Co. v. Leslie, — Ark. —, 167 S. W. 83. The court said: "According to annuity tables, it would require \$14,518 to purchase a life annuity of \$700 for one of Old's age. This amount deducted from the judgment would leave the sum of \$3,482 as the amount to be recovered for the pain and suffering which he endured. This calculation does not take into account the probable increase in earning power."

L.R.A.1915C.

A verdict of \$5,000 cannot be sustained in favor of the surviving parents where no pecuniary loss is proven. ²⁶³

In an action under the statute for the death of a car repairer about thirty-five years old, who, at the time of his death, was a big stout healthy man, industrious and moral, and was receiving 22½ cents an hour, a verdict of \$3,000 in favor of the estate, and \$12,000 for the widow and children, is not excessive. St. Louis, I. M. & S. R. Co. v. Sharp, — Ark. —, 171 S. W. 95.

²⁶³ A verdict of \$5,000 in favor of the surviving parents of a deceased employee cannot be sustained where the only evidence of pecuniary loss was that contributions had been made to the parents by the decedent during his lifetime, but there was not the slightest evidence disclosed as to the extent of such contributions. M'Coulough v. Chicago, R. I. & P. R. Co. 160 Iowa, 524, 47 L.R.A.(N.S.) 23, 142 N. W. 67.

W. M. G.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

RE GEORGE JULIUS et al., Bankrupts, Appts.

(— C. C. A. —, 217 Fed. 3.)

Judgment — res judicata — adjudication of bankruptcy — right to discharge.

1. A decree of bankruptcy upon a petition alleging two grounds, one of which would

Note. — Bankruptcy: refusal of discharge because of transfer of assets with a view to distribution of proceeds among creditors.

As "the only grounds upon which the court can refuse to discharge a bankrupt upon his application therefor are those prescribed in the bankruptcy act" (5 Cyc. 393), a fraudulent transfer of assets did not constitute a ground for such a refusal under the bankruptcy act of 1898 until the amendment to that act of February 5, 1903, when, among others, clause (4) was added to subdivision b of § 14. That clause provides that the applicant shall not be discharged if he, "at any time subsequent to the first day of the four months immediately preceding the filing of the petition, transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed, any of his property with intent to hinder, delay, or defraud his creditors." In the present instance, then, the question is whether a discharge may be refused because of a transfer by the bankrupt within the four-months period, of his assets, with a view to the distribution of the proceeds among his creditors. The answer to this seems to depend upon the intention with

prevent a discharge, without specifying the ground upon which it is based, is not *res judicata* against the right to a discharge upon a subsequent petition to secure it.

Bankruptcy — sale for full price — hindering creditors — refusal of discharge.

2. An insolvent who in good faith sells his property for a full price to a corporation organized to purchase it for the purpose of dividing the proceeds equally among his creditors cannot be denied his discharge in bankruptcy because he has actually hindered nonconsenting creditors in enforcing their claims.

(August 10, 1914.)

which the transfer was made, since, considering the history of the various provisions and the express provision as to fraud in § 14b (4), together with the judicial holdings upon analogous questions, it seems clear that a transfer for the benefit of creditors, if made in good faith, does not fall within §§ 14b (4). *RE JULIUS*, however, seems to be the only case to have passed upon this question since the enactment of the present bankruptcy law. However, the conclusion reached in that case is supported by *Loveland on Bankruptcy*, p. 1325, wherein the author said: "An assignment for the benefit of creditors is not in itself fraudulent, and will not bar a discharge. A preference is not made a bar to a discharge." But, on the other hand, *Collier in his work on Bankruptcy*, 8th ed. p. 289, is apparently inclined to the view that a general assignment, if within the interdicted period, is a sufficient objection to a discharge, and he seems to think that an authoritative holding to that effect would cure an otherwise defect in the bankruptcy law.

The bankruptcy act of 1867 was considerably broader in its terms than either the next preceding act or the present one, which succeeds it, § 29 thereof providing, among other things, that no discharge should be granted if the bankrupt had given any fraudulent preference, or had made any fraudulent transfer or assignment of any part of his property, or had, "in contemplation of becoming bankrupt, made any pledge, payment, transfer, assignment, or conveyance of any part of his property, directly or indirectly, absolutely or conditionally, for the purpose of preferring any creditor or person having a claim against him, . . . or for the purpose of preventing the property from coming into the hands of the assignee or of being distributed under this act in satisfaction of his debts." 14 Stat. at L. 532, chap. 176. Under these provisions it was held in *Re Goldschmidt*, 3 Ben. 379, 3 Nat. Bankr. Reg. 164, Fed. Cas. No. 5,520, that an assignment for the benefit of creditors, since it had the effect of hindering and delaying the creditors, was an act of bankruptcy which must be presumed to have been made "in contemplation of becoming bankrupt," notwithstanding *L.R.A.1915C*.

A PPEAL by petitioners from a decree of the District Court of the United States for the Southern District of New York denying them their discharge in bankruptcy. Reversed.

Statement by Rogers, Circuit Judge:

This is an appeal from an order and decree entered in the United States district court for the southern district of New York denying the petition of George Julius and Simon Julius trading as Julius Bros., bankrupts, for their discharge. This decree was entered on October 24, 1913.

The bankrupts are brothers, and were

ing the bankrupt testified that he had no intention of becoming a bankrupt, and therefore that the assignment constituted a bar to a discharge, and also was made for the purpose of preventing the property from being distributed under the bankruptcy act. And again in *Re Kasson*, 18 Nat. Bankr. Reg. 379, Fed. Cas. No. 7,617, it was held that a voluntary general assignment for the benefit of creditors bears conclusive evidence on its face of the intent of the assignor to prevent the property transferred by its being distributed under the bankruptcy act, and that such an assignment, although not fraudulent and without preference, was an act of bankruptcy which defeated a discharge. So, in *Re Croft*, 8 Biss. 188, 17 Nat. Bankr. Reg. 324, Fed. Cas. No. 3,404, it was held that a voluntary, general assignment for creditors was an act of bankruptcy which must be presumed to have been made in contemplation of bankruptcy, and a discharge was refused. But see *Re Pierce*, 3 Nat. Bankr. Reg. 258, Fed. Cas. No. 11,141, wherein the court expressly refused to follow *Re Goldschmidt*, supra, and held that an assignment for the benefit of creditors made shortly before the filing of the debtor's petition in bankruptcy, but without preference, did not, in the absence of fraud, preclude a discharge in bankruptcy even though it was an act of bankruptcy.

Under the bankruptcy act of 1841, § 4 of which merely provided that a bankrupt should not be discharged if he was guilty of any fraud or wilful concealment of his property, or if he preferred any of his creditors contrary to the provisions of the act, etc., it has been held that a general assignment for the benefit of creditors is not a fraudulent preference, and does not constitute a cause for denying the bankrupt a discharge. *Re Ely*, Fed. Cas. No. 4,429. But see *Aspinwall's Case*, Fed. Cas. No. 592, wherein it was held that creditors who executed releases pursuant to the terms of a voluntary assignment were preferred within the meaning of § 2 of the act of 1841, which prohibited the discharge of a petitioner who, by assignment, and in contemplation of the passage of a bankruptcy law, gave a preference, etc.

G. J. C.

engaged as copartners in the manufacturing of waists in the borough of Manhattan, in the city of New York, under the firm name of Julius Bros. On June 7, 1910, the entire stock in trade, machinery, fixtures, and accounts receivable were transferred by bill of sale to a corporation organized for the purpose by friends of the bankrupts, none of whom were creditors. The purchase price, \$1,550, was put into the hands of their counsel to distribute among such of the creditors as were willing to accept 25 per cent, and was paid over to all the creditors with the exception of the two protesting creditors. The nonassenting creditors thereafter obtained judgments against the bankrupts. On July 23, 1910, Peter Pressman obtained judgment for \$599.45. On July 27, 1910, Frank & Sons obtained judgment for \$405.71. Executions were returned unsatisfied. These creditors, in conjunction with one Herzog, on a claim for costs assigned to him, thereupon filed a petition in involuntary bankruptcy, on September 15, 1910, and adjudication was ordered on September 30, 1910. Schedules were filed January 13, 1911, setting out as sole liabilities the above judgments and no assets.

Argued before Lacombe, Coxe, and Rogers, Circuit Judges.

Mr. Malcolm Sundhelmer for appellants.

Mr. Harry L. Herzog for appellees.

Rogers, Circuit Judge, delivered the opinion of the court:

The discharge of the bankrupts has been refused, and we are asked to determine on this appeal whether error was committed in denying them their discharge. The granting of a discharge is not a matter which is optional or discretionary with the court. The statute provides that the judge shall hear the application for a discharge, and shall discharge the applicant unless statutory cause for refusing the discharge is shown. It is made the duty of the court to refuse to discharge a bankrupt if it appears that he has, "at any time subsequent to the first day of the four months immediately preceding the filing of the petition, transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed, any of his property with intent to hinder, delay, or defraud his creditors." Bankruptcy Act 1898, § 14b, as amended by Act Cong. Feb. 5, 1903, 32 Stat. at L. 797, chap. 487, Comp. Stat. 1913, § 9598.

It is necessary, therefore, to consider whether the bankrupts did, within four months of the filing of the petition in bankruptcy, make a transfer of their property

with intent to hinder, delay, or defraud their creditors within the meaning of the bankruptcy act. The special master thought they had, and his finding was confirmed by the district judge. We think both the special master and the district judge reached the conclusion with no little reluctance. The special master stated that he was "satisfied that these bankrupts made an honest failure and an honest attempt to settle, but the method of settlement adopted was at fault." And the district judge in his opinion said that the transfer was "fraudulent" within the meaning of the act, notwithstanding the fact that the bankrupts may have thought they had the right to make it, "because fraud is not synonymous with personal sin, and a man may honestly justify quite illegal purposes. Nor is it one's inward justification of his conduct which counts, for this is not a court of conscience. It is wholly a question of whether the things proposed did in fact result in depriving the creditors of their rights." [209 Fed. 372.]

In all that was done we have no reason to doubt the entire good faith of these bankrupts, and of their counsel, throughout the whole of this unfortunate difficulty. The bankrupts apparently made an honest failure, and acting under the advice of a committee of their creditors and a lawyer who represented them and the majority of the creditors jointly, they attempted, in order to save expense, to adjust their trouble through a common-law composition agreement. But unhappily a few of the creditors declined to agree to it. In all such cases a single creditor is in a position where he can make a good deal of trouble, if so disposed.

The other creditors, when they knew all the circumstances connected with the failure, were willing to accept 25 cents on the dollar and to settle their claims on that basis. The record shows that while the matter was pending Mr. Herzog, an attorney acting for certain creditors, went to see the attorney who was acting for the bankrupts, and stated to him that he would not consent to the proposed terms "unless he was going to get something in addition for his client,"—that "whenever he got into a bankruptcy matter, his client ought to be treated upon a separate basis or a better basis than anybody else, because when they represented creditors they were treated that way." He was informed that what he sought he could not obtain, that no one creditor would be given more than another, and that the settlement "was going through in the right way, or it was not going through at all." To this Herzog is said to have replied that "he had to make a show-

ing, and that the only showing he could make was to show dollars and cents, and by getting his clients a better settlement than anybody else." He was informed that there was money deposited for him "which would be available to him the same as anybody else." To this he replied that he would not take it, "but would fight the thing through the court, and made various threats." The record also discloses that one of the objecting creditors stated to the attorney for the creditors' committee that he would sign the composition agreement of 25 cents "cash extra on the side." The proposal was indignantly rejected.

Instead of coming into the bankruptcy court and offering a composition in the statutory manner, thereby avoiding any attempt of one creditor to secure an advantage over another, a plan had been conceived of forming a corporation to purchase the assets of this insolvent partnership for \$1,500.

The creditors' committee had reported that "everything was worth about \$1,250," but "they wanted to make it a round sum, and they thought if we could pay 25 cents on the dollar cash, all the creditors would come in, and that is how the sum of 25 cents cash was arrived at. That was the way that was arrived at, and that amounted to \$1,550." The consideration, therefore, amounted to a few hundred dollars in excess of what the creditors' committee thought the assets were worth at the time. Four individuals, none of them creditors, but each a friend of the bankrupts, furnished this money and received in return stock representing that amount in the new corporation.

The petition upon which Julius Bros. were adjudged bankrupts alleged two grounds for proceeding against them in involuntary bankruptcy:

(1) That these persons had transferred their property with intent to hinder, delay, or defraud their creditors.

(2) That while insolvent they transferred their property with intent to prefer creditors.

Julius Bros. did not appear or interpose any defense, and they were accordingly duly adjudicated bankrupts. From that decree no appeal was ever taken, and it must be taken as having conclusively established their status as bankrupts, the court having had jurisdiction. But the rule is that if the petition charges different acts of bankruptcy, as it did in this case, and the adjudication does not show upon which one of them it proceeded, and that is the case here, it does not render either charge *res judicata* in the further proceedings. *Re Letson*, 84 C. C. A. 582, 157 Fed. 78 (1907). L.R.A.1915C.

When the bankrupts subsequently and in due course asked for their discharge, it was refused on the ground that they had made a transfer of their property with intent to hinder, delay, and defraud creditors; and from this order the appeal has been taken, and that question is therefore properly before this court, and is now to be determined.

The courts make a distinction between a conveyance intended to hinder, delay, and defraud creditors, and one executed with an intent to prefer some creditors over others. The bankruptcy act recognizes such a distinction between the intent to defraud and the intent to prefer. See *Van Iderstine v. National Discount Co.* 227 U. S. 575, 582, 57 L. ed. 652, 654, 33 Sup. Ct. Rep. 343 (1913). There is no necessary connection between the two. The act provides that a bankrupt shall be denied his discharge if he has transferred his property with intent to hinder, delay, or defraud his creditors; but it does not refuse him his discharge if he has made a conveyance for the purpose of giving a preference. Under certain circumstances, if he has given a preference, the transfer may be avoided, and the fact that a preference has been given is in itself an act of bankruptcy. And the sole question now is, not whether the transfer gave a preference, but whether it was made with the intent to hinder, delay, or defraud creditors.

The words used in the act, "with intent to hinder, delay, or defraud his creditors," have been borrowed from the statute of 13 Eliz. chap. 5, relating to fraudulent conveyances, and have no doubt the same meaning in the bankruptcy act that the courts have given to them when used in the statute of Elizabeth. It is noteworthy that the old English statute, after enacting that transfers made with intent to hinder, delay, or defraud creditors should be "utterly void," went on to provide that this rule should not apply to bona fide transfers for a good consideration, and the courts have construed "a good consideration" in this connection to mean one founded on value. In the case at bar the transfer was made in entire good faith and for a valuable consideration.

The intent to defraud is something distinct from the mere intent to delay or hinder. But there is no distinction between delaying and hindering. The statute must be construed according to its reasonable intent and object, "and by a reasonable construction only such hindrance and delay as will operate as a fraud come within its operation." *Bump, Fraud. Conv.* 3d ed. p. 20. This author, after stating that the presence of intent is essential, goes on to

explain that "the transfer must also be devised and contrived of malice, fraud, covin, collusion, or guile." *Id.* p. 22.

There are two classes of transfers under the act:

(1) Those which have been entered into with actual fraudulent intent.

(2) Those where, from the terms of the agreement or the nature of the transaction itself, the fraudulent intent is presumed to exist as an inference of law.

In the one class the fraudulent intent is always a question of fact, and in the other it is a question of law. Thus, if one who is insolvent makes a voluntary transfer of his property, receiving no valuable consideration therefor, the law will infer the intent, even though he may have made the transfer with an honest motive. In such cases no evidence of intention can be received to change that presumption. Such a conveyance necessarily operates to hinder, delay, or defraud the creditors, and the grantor will in such a case be presumed to intend the natural and necessary consequences of his acts.

The law applicable to the facts of the case now before us may be found correctly laid down in the following statement: "One in debt may sell his property, although the effect of the sale is to hinder creditors, if the sale is not made for that purpose, and a debtor, although in failing circumstances or insolvent, may dispose of his property in good faith to obtain money to meet his obligations, although such sale may in fact hinder and delay his creditors." 20 Cyc. 464, 465, and cases cited.

We think this principle is decisive of this case. There was no intent to defraud, and no intent to hinder or delay, creditors. On the contrary, the intent was to sell the property for full value and use the entire proceeds to discharge as far as possible the obligations of the debtors, without a preference to anyone over another.

The supreme court of Massachusetts more than one hundred years ago had a case before it which in principle resembles that now before the court. In *Hatch v. Smith*, 5 Mass. 42 (1809), it appears that one Smith was insolvent, but desirous of satisfying his creditors as far as the circumstances permitted. He decided that, if there was a general assent on the part of his creditors, he would make an assignment of the bulk of his property probably all except his household furniture, to be equally paid *pro rata* to and among such creditors as should become parties to the agreement. The creditors were to release Smith from any further liability to them. The creditors generally assented, and the transfer of the property was made. One of the creditors, the plaintiff, Hatch, refused his assent. *L.R.A.1915C.*

The transaction was entered into with deliberation, apparent fairness, and no corrupt intention. There was no resulting trust of any kind for the benefit of Smith, the insolvent. There was an absolute conveyance of Smith's interest to the use of such creditors as were parties to the contract. The amount of the debts due from the insolvent greatly exceeded the value of the property conveyed for their satisfaction. It is not necessary to consider the various objections which were made to this arrangement by the objecting creditor. They were carefully considered by the court and all were regarded as untenable. The conclusion of the court was stated as follows: "We do not think that the contract between Smith and his creditors can be construed to have been made with an intent to defeat or delay his creditors." In the course of the opinion the court made the following statement, which we adopt and apply to the case now before us: "There was certainly nothing wrong, when Smith found himself in insolvent circumstances, to disclose his situation to his creditors, and to propose to pay them, in equal proportion, as far as his ability extended, and to obtain therefor a discharge from his debts. On the part of his creditors there was nothing iniquitous in acceding to such a proposal. And if there were any of Smith's creditors who disliked the terms which were offered, and preferred the chance of obtaining satisfaction by other means, it was competent and right for them to refuse. But there seems no good reason why such refusal should prevent Smith and the other creditors from executing an accommodation which appears so humane and just. Still, however, if any of the reasons offered on the part of the plaintiff are available to the purpose for which they were intended,—to show that the contract is void as it respects the creditors who are not parties to it,—the plaintiff must prevail, and the persons summoned as trustees adjudged to be so."

The learned district judge seems to have relied upon *South Danvers Nat. Bank v. Stevens*, 5 App. Div. 392, 39 N. Y. Supp. 298 (1896), where the appellate division of the supreme court of New York said: "In addition, we think, with the learned trial judge, that the assignment was fraudulent in fact. There is no doubt as to a debtor's right to go to creditors with a view of effecting an amicable settlement, and in the course thereof informing such creditors that a failure to compromise will necessitate an assignment. But this is quite another thing from doing what was done here, namely, formally executing an assignment and then using it as a weapon for the purpose of coercing a creditor into an agreement by

which he gives to the committee having charge of carrying out a composition the right to discharge the debt, and thus foregoing the right which the creditor has, not only to receive a distributive share of his debtor's property, but also to proceed for the balance against such debtor."

That statement must be construed in the light of the facts as they existed in the case then before the court. A partnership was insolvent, and in September, 1891, made an agreement in writing with its creditors that it would place its affairs in the hands of a committee of its creditors, who should realize upon its assets and divide the proceeds equitably among the creditors. One of the creditors declined to accede to the arrangement, and began an action against the parties on a note given by them. That action was commenced in March, 1892. Thereupon the committee of the creditors suggested that the firm make a general assignment, so that the creditor who had commenced the action might not secure a preference, and on June 16th the assignment was executed, and the attorney for the firm at once informed the plaintiff's attorney that the assignment had been made and would be used unless the plaintiff made a settlement. No agreement was reached, and the plaintiff recovered his judgment on July 7th, and on the next day the assignment was filed. It was perfectly evident that the purpose of the assignment was to force the plaintiff to make a settlement. Such an assignment, of course, could not be sustained. Its very purpose was to hinder and delay the creditor. But the facts in that case are so entirely unlike the facts in the case at bar that the decision is not applicable to the present case.

In *Sargent v. Blake*, 17 L.R.A.(N.S.) 1040, 1044, 87 C. C. A. 213, 217, 160 Fed. 57, 61, 15 Ann. Cas. 58 (1908), an insolvent partner conveyed his interest in the partnership property to his partner, and the latter immediately thereafter paid to the mother of the insolvent \$3,731.90 for the money which she had loaned to the son to put into the partnership business. There was no intent on the part of either partner to hinder, delay, or defraud creditors to any greater extent than the payment to the mother would necessarily hinder or prevent them from collecting their debts. The circuit court of appeals in the eighth circuit held that the transfer was not illegal as having been made with intent to hinder or defraud the creditors, and said, through Judge Sanborn: "The only evidence that Maxwell intended to hinder or defraud the creditors of the partnership is that, while the firm and the partners were insolvent, King conveyed his interest to Maxwell, and the latter paid his

mother in preference to his other creditors. The only way in which Maxwell could have made this payment in bad faith would have been to have made it, in whole or in part, in secret trust for himself, or with the actual intent to hinder or defraud the creditors of the company more than the mere payment of the debt to his mother out of the property of the former partnership, in preference to the claims of the partnership creditors, must necessarily have delayed or prevented their collection of their claims, and there was no evidence of any such trust or intent. The evidence was that he intended to pay his mother in preference to the partnership and to other creditors, that his mother had loaned him the money to engage in and conduct the partnership business, that he had purchased the interest of his partner, and that, as soon as the business and the property became his, he paid her the debt which he owed her. The facts that the payment to Mrs. Sargent had the inevitable effect to deprive the creditors of the partnership of an opportunity which they would otherwise have had to collect their claims in whole or in part, and that Maxwell knew that this would be its effect, and hence must have intended that result, do not establish the fact that he intended to hinder, delay, or defraud those creditors within the meaning of § 67e. It is every intent to hinder, delay, and defraud creditors unlawfully only, not every intent to hinder or delay them in collecting, or to prevent them from collecting, their claims, that avails to avoid a transfer under that section. An insolvent debtor has the *jus disponendi* of his property until the commencement of proceedings in bankruptcy against him. He has the legal right to secure and pay his debts with it, provided always the security or the payment is not violative of any of the acts of Congress or any of the laws of the land. A preference of one creditor over others by such a payment or by such security, which is free from actual or constructive fraud, and from any purpose to affect other creditors injuriously beyond the necessary effect of the security or preference, is valid and lawful, and it cannot evidence such an intent to hinder, delay, or defraud creditors as will make it void or voidable under § 67e. *Coder v. Arts*, 15 L.R.A.(N.S.) 372, 82 C. C. A. 91, 152 Fed. 943, 947; *Sabin v. Columbia River Lumber & Fuel Co.* 25 Or. 15, 42 Am. St. Rep. 756, 34 Pac. 692, 695, 35 Pac. 854; *Lampson v. Arnold*, 19 Iowa, 479, 484; *Stewart v. Dunham*, 115 U. S. 61, 66, 29 L. ed. 329, 331, 5 Sup. Ct. Rep. 1163."

So in the case at bar we regard it as a matter of no consequence, as far as the

precise question now under consideration is concerned, that the sale of the assets at their full value may have hindered or delayed the protesting creditors. There was no intention to defraud the creditors; neither was there any intention to hinder or delay them, or to force them to a settlement. If as a result they have been hindered and delayed, it is nothing more than the inevitable result which follows from the sale by an insolvent, where the proceeds are used to pay certain creditors in preference to others. Such sales under certain circumstances can be set aside on the ground of the preference, but in the absence of the fraudulent intent they do not warrant the court in refusing to discharge the bankrupts. The insolvents had the *jus disponendi* of the partnership property at the time, and they transferred it to pay partnership debts. The plan to form the corporation and to purchase the assets for \$1,550 and to pay all the creditors 25 cents on the dollar, including the two objecting creditors, was conceived before the interview with the attorney for the objecting creditors was held, at which the latter declined to consent to the settlement because his demands for a secret additional sum beyond that to be paid to the other creditors was refused, and a few days afterwards the corporation was organized in accordance with the previous understanding. The course the objecting creditors took had no influence whatever upon what was done by the insolvent partners, who were acting with the approval of the creditors' committee.

The decree below must be reversed, and the cause remanded, with directions to grant the bankrupts their discharge; and it is so ordered.

IOWA SUPREME COURT.

RE ESTATE OF HANNAH H. ADAMS,
Deceased.

W. W. MORROW, Treasurer of the State
of Iowa,

v.

ESTATE OF HANNAH H. ADAMS, De-
ceased, Appts.

(— Iowa —, 140 N. W. 531.)

**Tax — succession — securities of non-
resident.**

Notes belonging to a nonresident secured

Note. — For physical presence or absence of personal property, or evidence thereof, as affecting liability to succession or inheritance tax, see note to *Re Helena*, 46 L.R.A. (N.S.) 1167.
L.R.A.1915C.

by mortgage within the state, which were taken by a resident agent to whom money was intrusted for investment, may be subjected to collateral inheritance tax, upon the owner's death, although just prior thereto they were all removed from the state, if the agent retains control of them by virtue of his agency.

(Weaver, Evans, and Gaynor, JJ., dissent.)

(November 24, 1914.)

APPEAL by respondents from an order of the District Court for Allamakee County imposing a collateral inheritance tax upon part of the estate of Hannah H. Adams, deceased. Affirmed.

The facts are stated in the opinion.

Messrs. M. B. Hendrick, D. J. Murphy, and H. H. Stilwell for appellants.

Messrs. George Cosson, Attorney General, N. J. Lee, and H. E. Taylor, for appellee:

When intangible personal property belonging to a nonresident has been invested, controlled, and managed by an agent in this state, it has thus acquired a "business situs" here, and is property within the state and "under the jurisdiction of the state," and no longer has its situs at the residence of the owner.

Hutchinson v. Board of Equalization, 66 Iowa, 35, 23 N. W. 249; *Bristol v. Washington County*, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585; *Re Romaine*, 127 N. Y. 88, 12 L.R.A. 401, 27 N. E. 759; *Lewis's Estate*, 203 Pa. 211, 52 Atl. 205; *Re Stanton*, 142 Mich. 491, 105 N. W. 1122; *New Orleans v. Stempel*, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110; *Blackstone v. Miller*, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277; *Gilbertson v. Oliver*, 129 Iowa, 568, 4 L.R.A.(N.S.) 953, 105 N. W. 1002; *Callahan v. Woodbridge*, 171 Mass. 595, 51 N. E. 176; *Kingsbury v. Chapin*, 196 Mass. 533, 82 N. E. 700, 13 Ann. Cas. 738; *State v. Dalrymple*, 70 Md. 294, 3 L.R.A. 372, 17 Atl. 82.

The fact that the notes and mortgages held in this loaning business were taken outside of the state three days before the death of deceased does in no way change the situs of the property, nor deprive this state of its jurisdiction to collect the collateral tax.

Bristol v. Washington County, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585; *Hunter v. Board of Supers.* 33 Iowa, 376, 11 Am. Rep. 132; *Bradley v. Merriam*, 9 L.R.A.(N.S.) 1104, and note, 147 Mich. 630, 118 Am. St. Rep. 561, 111 N. W. 196, 11 Ann. Cas. 119; *Metropolitan L. Ins. Co. v. New Orleans*, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499; *Re Rogers*, 149 Mich.

305, 11 L.R.A.(N.S.) 1134, 119 Am. St. Rep. 677, 112 N. W. 931; Metropolitan L. Ins. Co. v. Board of Assessors, 115 La. 698, 9 L.R.A.(N.S.) 1240, 116 Am. St. Rep. 179, 39 So. 846.

Deemer, J., delivered the opinion of the court:

Hannah H. Adams died in the city of Chicago on August 6, 1904, without direct issue. She left a will whereby she disposed of her entire estate to collateral heirs. At the time of her death, and for many years prior thereto, she had been a resident of the state of Florida. Her will was probated in Orange county in said state, and M. B. Hendrick and J. N. Eddy, both residents of Allamakee county, this state, were appointed executors of the will, and as such they duly qualified and administered upon the estate, making distribution thereof among the several legatees and devisees. On November 1, 1909, the county attorney of Allamakee county made application to the probate court therein for the appointment of an executor or administrator in this state, and on the 9th day of that month what are called auxiliary (ancillary) letters of administration were issued to one J. M. Collins, commanding him to, among other things, take possession of all money and estate of Hannah H. Adams, deceased. On December 2, 1909, the county attorney filed in said estate an application for the taxing of a collateral inheritance tax upon certain notes and mortgages held by deceased at the time of her death. This was answered by Hendrick, executor, his co-executor at the time being dead, and by certain legatees and devisees under the will of Hannah H. Adams. In this resistance they pleaded that deceased was, at the time of her death, a nonresident; that none of the notes and mortgages were held in this state at the time of her death, by agent or otherwise; that they were in fact in possession of decedent outside of this state. On the issues thus joined, the trial court held that certain property described in the application, which consisted of certain notes, the most of which were secured by mortgages upon real estate in this state, was subject to a collateral inheritance tax, and the same were ordered appraised by the collateral inheritance tax appraisers. The respondents to the application appeal.

The property in question consisting of notes, nearly all of which are secured by mortgages upon real estate in this state, passed by the will of testatrix to collateral heirs, and, if it had a situs in this state at the time of testatrix' death, was subject to her collateral inheritance tax, although testatrix was a nonresident at the L.R.A.1915C.

time of her demise. The record shows that the property in question originally belonged to testatrix' husband, one D. W. Adams, who died a resident of Florida in the year 1897. Adams had for years carried on a loaning business at Waukon, in this state, through M. B. Hendrick, who was afterward appointed one of testatrix' executors. One L. A. Howe, an officer of the Waukon State Bank, also held a power of attorney authorizing him to cancel and release mortgages of record taken in Adams's name, and also a power of attorney for the same purpose from Hannah H. Adams. He acted in conjunction with Hendrick in the matter of making loans of Adams's money. Loans were made from time to time by Hendrick, and checks signed "D. W. Adams, by M. B. Hendrick," were paid by the bank to the persons borrowing money. The securities taken for the loan were held by the bank until paid, and were then delivered to the makers. Hannah H. Adams acquired title to all her husband's property by will or otherwise, but the loaning business was continued in Allamakee county just as it had been before her husband's death. No application for loans was sent to either Mr. or Mrs. Adams. They were made either to Hendrick or Howe and accepted by them, and checks were issued by Hendrick, as aforesaid when the loans were made. Payments upon loans were made to the bank, and the money placed to the credit of Adams, to be reloaned as occasion offered. All the notes and mortgages were deposited in the bank and remained there until August 3, 1904, when Hendrick, as is claimed, under the direction of Hannah H. Adams, obtained all the notes and mortgages from the bank, giving his receipt therefor, and took them to Chicago, where Mrs. Adams then was; and it is claimed that through her direction he took the said securities to Prairie du Chien, Wisconsin, and there deposited them in a bank, where it is said they remained until after the death of Mrs. Adams. The power of attorney issued to Howe was not revoked, save by the death of Mrs. Adams. The securities remained in the Prairie du Chien bank, where they were left for safe-keeping, until after the death of Mrs. Adams and the appointment of Hendrick as one of the executors of her estate, when they were received by said Hendrick and, as he claims, administered upon by him pursuant to his appointment as executor.

The question is: Are these securities liable to a collateral inheritance tax in this state? The general rule is that personal property follows the person, and that its situs, for the purpose of taxation, is the domicile of the owner. *Mobilia sequuntur*

personam is the principle usually applied. But it is well settled that the legislature may give a local situs to personal property quite distinct from that of the owner's domicile. *New Orleans v. Stempel*, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110; *Bristol v. Washington County*, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585; *State Assessors v. Comptoir National d'Escompte*, 191 U. S. 388, 48 L. ed. 232, 24 Sup. Ct. Rep. 109; *Goldgart v. People*, 106 Ill. 25; *Hutchinson v. Board of Equalization*, 66 Iowa, 35, 23 N. W. 249; *Re Jefferson*, 35 Minn. 215, 28 N. W. 256; *State v. London & N. W. American Mortg. Co.* 80 Minn. 277, 83 N. W. 339; *Finch v. York County*, 19 Neb. 50, 56 Am. Rep. 741, 28 N. W. 589; *Hubbard v. Brush*, 61 Ohio St. 252, 55 N. E. 829; *Billinghurst v. Spink County*, 5 S. D. 84, 58 N. W. 272; *Buck v. Miller*, 147 Ind. 586, 37 L.R.A. 384, 62 Am. St. Rep. 436, 45 N. E. 647, 47 N. E. 8; *Parker v. Strauss*, 49 La. Ann. 1173, 22 So. 329; *Liverpool & L. & G. Ins. Co. v. Board of Assessors*, 51 La. Ann. 1028, 45 L.R.A. 524, 72 Am. St. Rep. 483, 25 So. 970; *People v. Home Ins. Co.* 29 Cal. 534; *Buck v. Beach*, 164 Ind. 37, 108 Am. St. Rep. 272, 71 N. E. 963.

But it has been doubted if the legislature has power to fix the situs of securities at the residence of the debtor, if the creditor had a domicile elsewhere, and there is no agency within the state, or the securities are not there present. *State Tax on Foreign-held Bonds*, 15 Wall. 300, 21 L. ed. 179; *Detroit v. Lewis*, 109 Mich. 155, 32 L.R.A. 439, 66 N. W. 958. But see *contra* *Re Whiting*, 150 N. Y. 27, 34 L.R.A. 232, 55 Am. St. Rep. 640, 44 N. E. 715. Courts everywhere hold, however, that personal property may have a business situs either at the residence of the debtor or at some other point than that of the domicile of the creditor, and, as to succession taxes, personal property in the form of securities may have a situs either at the domicile of the debtor or at the place of their actual situs. *Gallup's Appeal*, 76 Conn. 617, 57 Atl. 699; *Detroit v. Lewis*, 109 Mich. 155, 32 L.R.A. 439, 66 N. W. 958; *Re Phipps*, 77 Hun, 325, 28 N. Y. Supp. 330, affirmed in 143 N. Y. 641, 37 N. E. 823; *Lewis's Estate*, 203 Pa. 211, 52 Atl. 205.

If the property sought to be charged had a business situs in this state, it was under our statute (Code Supp. § 1467) subject to our collateral inheritance tax; that it had such situs down to the time it was taken to Chicago, three days before testatrix' death, is very clear. The loaning business of both D. W. Adams and his wife had been given a local situs in this state, and the securities were kept here down to

their removal to Chicago and Prairie du Chien. It is well to state here that Prairie du Chien is just across the Mississippi river from Allamakee county, and is the nearest railway station to Waukon outside of the state. But it is beyond question that the securities were physically at Prairie du Chien in a bank for safe-keeping when testatrix died, and they are not therefore subject to the tax, unless constructively in this state at the place of their business situs, or by reason of the fact that they were practically all secured by mortgages upon real estate in this state. We must inquire then, first, how the securities came to be at Prairie du Chien. The record shows the following with reference to this matter; the only testimony being as follows:

My name is M. B. Hendrick. The securities listed in Exhibit 1 were given to me by the Waukon State Bank on August 3, 1904.

Q. How did you come to go to the bank and get these securities?

A. I was ordered to do so by Mrs. Adams. Mrs. Adams was in the city of Chicago, state of Illinois, when she directed me to get those securities, and she told me to take them to her where she was in Chicago, and I did so. After taking them to Mrs. Adams, they were deposited in a bank outside of the state of Iowa, and remained there until after the appointment of the executors of her estate; then they were brought here for collection after the appointment of the executors. I was appointed one of the executors in the state of Florida probate court of Orange county on the 15th day of August, 1904. Nearly all of the notes and securities described in exhibit 1 were collected and distributed under the orders of the probate court of Florida, and those not collected were ordered distributed in pursuance of an order of the Florida probate court by myself and my associate executor. . . . I think my business with Mr. Adams commenced before he left here. From that time up until the death of Mrs. Adams, I was well acquainted with her and familiar as to where her residence was. I saw her at Chicago, a short time before her death. I saw her a good many times after she went to Chicago to be treated. She was in the hospital for two or three weeks, and then was taken into the house of Mr. Charles Campbell, either on Seventy-second or Seventy-third street on the Illinois Central Suburban running to Fulton. She remained at the home of Mr. Campbell five or six weeks. She went there the last of June and died on the 6th day of August. She was under the doctor's care. She had

undergone a very severe operation. Mentally the woman never was brighter than up to a few days (ten or twelve days) of her death. I was told the operation was quite severe. She had no severe sickness. . . . I remember seeing Mrs. Eddy on the 4th day of August, 1904, just previous to her death. I don't know why she was called down. The character of the notes and mortgages and other securities taken from the Waukon State Bank in August, 1904, were not changed until they were inventoried in the estate, and none of them sold. I don't know of any change. I think the inventory was dated May 5, 1905, and was made as the assets were at the time of her death. I think quite likely that, between the 6th of August and the time of making the inventory, there were payments made on these notes. The payments were made to me at Waukon, Iowa. So far as I was connected with them, there was no change from August 3, 1904, until a day or two after the death of H. H. Adams. I think that, while I was in Florida being appointed as executor, there was some party went to the bank, and Mr. Howe received a payment of \$200 or \$300. This would be some time I think in August, 1904. I took possession of these notes and securities listed in Exhibit A after my appointment as such executor. I knew where they were prior to that time. They were where I had left them. I went and got them after my appointment as executor. There was no necessity for the notes and mortgages to be here until I was appointed executor. There was nothing to do with them. I was away from the 11th day of August, 1904, until about the 20th or 22d of August, when I brought the securities home with me, after my appointment as executor. I know these notes, mortgages, and securities listed in Exhibit 1 were outside of the state of Iowa on August 6, 1904, from my own personal knowledge. I had taken them out of the state. I took them on the 4th day of August, from Mrs. Adams. Then I placed them in a bank for safe-keeping. That bank was in the city of Prairie du Chien, state of Wisconsin. I placed them there on my return from Chicago, myself. And they remained in the bank at Prairie du Chien until I was appointed executor of the estate of H. H. Adams, deceased, in the state of Florida. . . . The city of Prairie du Chien is about 5 miles from the southeast corner of Allamakee county. I don't know the exact distance. It is the nearest railroad station from Waukon outside of the state of Iowa. . . . There was no necessity for the notes and mortgages to be here. There was nothing to do with them. I was away from the 11th of August, 1904, L.R.A.1915C.

until about the 20th or 22d of August, when I brought the securities home with me, after my appointment as executor.

Q. You had taken them yourself outside of the state, had you, Mr. Hendrick?

A. I had.

Q. And had them under your control when you took them outside of the state and left them outside of the state, were they, Mr. Hendricks?

A. I took them on the 4th day of August, from Mrs. Adams, and then I placed them in a bank for safe-keeping.

Q. And that bank was in the city of Chicago, was it, or where was it?

A. That bank was in the city of Prairie du Chien.

Q. Wisconsin?

A. Wisconsin. I placed them there on my return from Chicago.

Q. And you placed them there in that bank yourself, did you, Mr. Hendrick?

A. I did; yes sir.

The fair inference from this testimony is that Mrs. Adams, who was temporarily in Chicago, and was very sick, directed Hendrick to get the securities held by the Waukon Bank and take them to Chicago. This was done; Hendrick executing a receipt to the Waukon bank for the securities. Arriving at Chicago, he gave the securities to Mrs. Adams, and she handed them back to him, and upon his own motion he returned and placed them in the bank at Prairie du Chien for safe-keeping, still having power thereover in virtue of his original arrangement. There can be no doubt in our minds that this transaction was had to avoid our collateral inheritance tax laws, and that Hendrick still retained control over the securities and either received payments thereon or was authorized to do so until the revocation of his authority by the death of Mrs. Adams. The ultimate question then is: Did this removal of the securities by Hendrick, with the consent of Mrs. Adams, and the placing of the same in the Prairie du Chien bank, relieve the same from the collateral inheritance tax? The writer is of the opinion that it does not. True, the property was not physically present in this state at the time of Mrs. Adams's death, but this fact is not controlling in our opinion. Although not physically present, the loaning business established in this jurisdiction still continued. Mrs. Adams's agents still had power to collect, to get the securities which were simply left for safe-keeping in the bank at Prairie du Chien, and to deliver them to the makers. The fair inference from the record is that these securities were left in the Wisconsin bank by Hen-

drick and in his name, and that, although in Wisconsin, they were there simply for safe-keeping, and were in fact in the constructive possession of Hendrick in Iowa. If Hendrick had been the owner and had deposited the paper in the Prairie du Chien bank simply for safe-keeping, as the record shows he did in this case, there would be no doubt that the property would have been subject, not only to general taxation in this state, but also subject to the collateral inheritance tax. Instead of being the owner, he was in possession as an agent for the owner, who had such control over the paper that it was taxable here, and the securities at all times were constructively in Iowa. The following cases support this conclusion: *Re Merriam*, 147 Mich. 630, 9 L.R.A.(N.S.) 1104, 118 Am. St. Rep. 561, 111 N. W. 196, 11 Ann. Cas. 119; *Hunter v. Board of Supers.* 33 Iowa, 376, 11 Am. Rep. 132; *Bristol v. Washington County*, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585; *Metropolitan L. Ins. Co. v. New Orleans*, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499; *Morrow v. Gould*, 145 Iowa, 1, 25 L.R.A.(N.S.) 384, 123 N. W. 743; *Re Stanton*, 142 Mich. 491, 105 N. W. 1122; *Callahan v. Woodbridge*, 171 Mass. 595, 51 N. E. 176; *Hutchinson v. Board of Equalization*, 66 Iowa, 39, 23 N. W. 249; *Re Rogers*, 149 Mich. 305, 11 L.R.A.(N.S.) 1134, 119 Am. St. Rep. 677, 112 N. W. 931; *Heinz v. Board of Equalization*, 121 Iowa, 445, 96 N. W. 967; *State v. Dalrymple*, 70 Md. 294, 3 L.R.A. 372, 17 Atl. 82; *Re Houdayer*, 150 N. Y. 37, 34 L.R.A. 235, 55 Am. St. Rep. 642, 44 N. E. 718. This is the rule, although the securities may be temporarily absent from the state. See *Re Stanton*, 142 Mich. 491, 105 N. W. 1122; *Blackstone v. Miller*, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277; *Metropolitan L. Ins. Co. v. New Orleans*, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499; *Buck v. Beach*, 206 U. S. 392, 51 L. ed. 1106, 27 Sup. Ct. Rep. 712, 11 Ann. Cas. 732. The main cases relied upon in support of the contrary view are *Re Weaver*, 110 Iowa, 328, 81 N. W. 603; *Gilbertson v. Oliver*, 129 Iowa, 571, 4 L.R.A.(N.S.) 953, 105 N. W. 1002; *Re Stone*, 132 Iowa, 136, 109 N. W. 455, 10 Ann. Cas. 1033; *People v. Griffith*, 245 Ill. 532, 92 N. E. 313. In our opinion none of these cases are in point.

We borrowed our statute from the state of New York, and the interpretation thereof by the courts of that state is quite conclusive here. For this reason the New York cases already cited, and *Re Whiting*, 150 N. Y. 27, 34 L.R.A. 232, 55 Am. St. Rep. 640, 44 N. E. 715, are quite conclusive.

In *Bristol v. Washington County*, 177 U. L.R.A.1915C.

S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585, supra, the Supreme Court of the United States approved the following decision from a lower court: "For many purposes the domicile of the owner is deemed the situs of his personal property. This, however, is only a fiction, from motives of convenience, and is not of universal application, but yields to the actual situs of the property when justice requires that it should. It is not allowed to be controlling in matters of taxation. Thus, corporeal personal property is conceded to be taxable at the place where it is actually situated. A credit which cannot be regarded as situated in a place merely because the debtor resides there must usually be considered as having its situs where it is owned,—at the domicile of the creditor. The creditor, however, may give it a business situs elsewhere, as where he places it in the hands of an agent for collection or renewal, with a view to reloading the money and keeping it invested as a permanent business.' After citing *Catlin v. Hull*, 21 Vt. 152, *People ex rel. Jefferson v. Smith*, 88 N. Y. 576, *Wilcox v. Ellis*, 14 Kan. 588, 19 Am. Rep. 107, *Tazewell County v. Davenport*, 40 Ill. 197, and many other cases, the opinion continued thus: 'The obligation to pay taxes on property for the support of the government arises from the fact that it is under the protection of the government. Now, here was property within this state, not for a mere temporary purpose, but as permanently as though the owner resided here. It was employed here as a business by one who exercised over it the same control and management as over his own property, except that he did it in the name of an absent principal. It was exclusively under the protection of the laws of this state. It had to rely on those laws for the force and validity of the contracts on the loans and the preservation and enforcement of the securities. The laws of New York never operated on it. If credits can ever have an actual situs other than the domicile of the owner, can ever be regarded as property within any other state and as under obligation to contribute to its support in consideration of being under its protection, it must be so in this case.'"

See also *New Orleans v. Stempel*, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110; *Metropolitan L. Ins. Co. v. New Orleans*, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499; *Blackstone v. Miller*, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277; *United States v. Perkins*, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073; *Savings & L. Soc. v. Multnomah County*, 169 U. S. 421, 42 L. ed. 803, 18 Sup. Ct. Rep. 392;

Adams v. Batchelder, 173 Mass. 258, 73 Am. St. Rep. 282, 53 N. E. 824.

In *Hutchinson v. Board of Equalization*, 66 Iowa, 35, 23 N. W. 249, this court said: "The plaintiff has the money in question under his control and management, and loaned the same for pecuniary profit, and is therefore clearly within the letter and spirit of the statute; and counsel do not claim otherwise. Their contention is that the statute should not be so construed, for the reason, as we understand, that, whatever may be the rule as to tangible personal property, the situs of moneys and credits is where the owner resides; and, as the owners reside in England, such property cannot be taxed here, for the reason that it must be deemed to be in England. It is undoubtedly true that for some purposes, to prevent injustice, a legal fiction has been adopted in relation to the situs of personal property. But this fiction cannot be permitted to prevail in view of the facts in this case. Nor are we aware of any difference between different species of personal property. The fiction, when allowed to prevail at all, applies alike to all personal property. The property taxed is in the possession and under the control of the plaintiff. It in fact is in this state, within the meaning and intent of the statute; and can the courts, by the invocation of a fiction, defeat the plain meaning and intent of the general assembly? We think not, for it is the undoubted province of the general assembly to determine what property actually within the state is taxable, and unless the courts can say that the law is unconstitutional, or possibly that it conflicts with some fundamental law that is universally recognized, they are not only powerless, but it is their clear and undoubted duty to enforce the statute. This question was considered in this court in *Hunter v. Board of Supers*, 33 Iowa, 376, 11 Am. Rep. 132, and has been expressly determined in other states, under similar statutes, in accord with the views above expressed. *People v. Home Ins. Co.* 29 Cal. 533; *Tazewell County v. Davenport*, 40 Ill. 197; *Redmond v. Rutherford*, 87 N. C. 122. We base our conclusion on the fact that, not only is the money loaned and invested in this state, but it is under the exclusive control of the plaintiff, and therefore its situs is here, and not in England, where the owner resides. Some question is made as to the amount of the assessment, but, if assessable here at all, we are clearly of the opinion, for several reasons, that the amount is not greater than it should be. At some time prior to 1882 the plaintiff voluntarily executed his note to the parties in England from whom he obtained the money. This was L.R.A.1915C.

done for the sole purpose of thereby avoiding taxation. It may be that, under the statute, it would have this effect, if a bona fide indebtedness was thereby created. The plaintiff was a witness in his own behalf, and, without any apparent desire to conceal anything, has undoubtedly stated the whole transaction just as it is, and therefrom the satisfactory conclusion is reached that the execution of the notes did not create any indebtedness, and it was not so understood. The plaintiff did not borrow any money of persons in England, and he was in no manner indebted to them, but simply acted as their agent for a small compensation. He is possessed of ample funds belonging to his principals, to enable him to pay the taxes assessed on the moneys and credits under his exclusive control."

The case is quite analogous to the one now before us; the removal of the notes here being the equivalent of the making of the fictitious note in that case. It was a removal in form only, and there is no showing that the agent, Hendrick, parted with any control over the property. Moreover, it is provided in § 1487e of the Code Supplement that "whenever any property, real or personal, within this state belongs to a foreign estate, and said foreign estate passes in part exempt from the collateral inheritance tax, and in part subject to said collateral inheritance tax, and it is within the authority or discretion of the foreign executor, administrator, or trustee administering the estate to dispose of the property, not specifically devised to direct heirs or devisees in the payment of the debts owing by decedent at the time of his death, or in the satisfaction of legacies, devises, or trusts given to direct and collateral legatees or devisees, or in payment of the distributive shares of any direct and collateral heirs, then the property within the jurisdiction of this state, belonging to such foreign estate, shall be subject to the collateral inheritance tax imposed by chapter four (4) of title seven (7) of the Code, and the tax due thereon shall be assessed as provided in the next preceding section of this act, and with the same proviso respecting the deduction of the proportionate share of the indebtedness, as therein provided."

And § 1477c reads in this wise: "No safe deposit company, trust company, bank or other institution, person or persons holding securities or assets of the decedent shall deliver or transfer the same to the executor or administrator or legal representative of said decedent unless notice of the time and place of such intended transfer be served upon the state treasurer at least five days prior to the transfer thereof, or unless the tax for which such securities

or assets are liable under chapter four (4), title seven (7) of the Code shall be first paid. It shall be lawful for, and the duty, of the treasurer of state to personally, or by any person by him duly authorized, to examine such securities or assets at the time of such delivery or transfer. Failure to serve such notice upon the treasurer of state or to allow such examination on the delivery of such securities or assets to such executor, administrator or legal representative before said tax is paid shall render such safe deposit company, trust company, bank or other institution, person or persons liable for the payment of the taxes due upon such securities or assets as provided in said chapter four (4)."

These, to our minds, indicate that the property was taxable here.

As already suggested, if Mrs. Adams had been a resident of this state and had herself made the deposit of the notes in the Prairie du Chien bank, there could be no question of the right to impose a collateral inheritance tax upon the property. The property was in the hands of her agent, who did the same thing, and, but for the removal, all agree that the property was subject to the collateral inheritance tax. Should his removal of the property to the Wisconsin bank be given more force than if Mrs. Adams had removed it? So far as shown, Hendrick retained the same control over the securities after the deposit as before; the business was left in his hands; and the notes and mortgages were, so far as shown, subject to recall for business use at any time. We are of the opinion that they were subject to our collateral inheritance tax, and that the judgment below should be sustained.

The judgment must therefore be, and it is, affirmed.

Ladd, Ch. J., and Preston and Withrow, JJ., concur.

Weaver, Evans, and Gaynor, JJ., dissent.

TEXAS COURT OF CRIMINAL APPEALS.

GEORGE BARNES, Appt.,
v.
STATE OF TEXAS.

(— Tex. Crim. Rep. —, 170 S. W. 548.)

Intoxicating liquor — club manager — soliciting orders.

1. One who under a scheme by which an organization fits up a room in prohibition territory and places therein a locked box in L.R.A.1915C.

which members may place orders for intoxicating liquors, together with the money to pay therefor, acts as agent for the organization by taking the orders and money from the box, paying therefrom the expenses, ordering liquors, and distributing tickets for drinks among those placing orders to be filled by a porter in charge of the room, is within the operation of a statute placing a tax on all persons that pursue the business of selling or offering for sale any intoxicating liquors by soliciting or taking orders therefor in prohibition territory.

Same — cold storage — liability to tax.

2. One who under a scheme by which an organization fits up a room in prohibition territory and places therein a locked box in which members may place orders for intoxicating liquors, together with the money to pay therefor, acts for a week as agent for the organization by taking the orders and money from the box, paying therefrom the expenses, and ordering liquors, and placing them on ice, and distributing tickets for drinks among those who gave orders to be filled by a porter in charge of the room, in consideration that other members will act in a similar capacity in turn, is within the operation of a statute imposing a tax on whoever pursues in prohibition territory the business of keeping, maintaining, or operating what is commonly known as a cold storage, or any place by whatever name known, or whether named or not, where intoxicating liquors are kept on deposit for others, or where such liquors are kept for others under any kind or character of bailment.

On Petition for Rehearing.

Same — levying tax on business — effect as license.

3. The levying of a tax upon one who attempts to solicit orders for intoxicating liquors in prohibition territory does not permit the sale of liquors there so as to render the statute obnoxious to the provision of the Constitution forbidding such sales in prohibition territory; at least where the sale of liquor in prohibition territory is made a felony by another statute.

(Davidson, J., dissents.)

(March 11, 1914.)

Note. — License or tax as contrary to a constitutional provision prohibiting or restricting traffic in intoxicating liquor.

For the general subject of specific constitutional enactments relating to prohibition and acts of the legislature based thereon, see the note to State v. Durein, 15 L.R.A.(N.S.) 912.

For the validity of statutes under general constitutional provisions, see the said note in 15 L.R.A.(N.S.) at page 915.

For exception in constitutional prohibition as limitation upon legislative power, see the note to State v. Weiss, 36 L.R.A.

A PPEAL by defendant from a judgment of the Harrison County Court convicting him of soliciting and taking orders for intoxicating liquors and for keeping and maintaining a cold storage for such liquors. Affirmed.

The facts are stated in the opinion.

Messrs. S. P. Jones and Bibb & Scott, for appellant:

One who simply acts for the accommodation of others, without profit or compensation of any character, and orders liquor for them, not being interested with the seller, and not soliciting or asking for the orders for liquor, is not engaged in the business of selling liquor by soliciting orders therefor.

(N.S.) 73.

For the general subject of liability for privilege tax on illegal business or business illegally conducted, see the note to *Foster v. Speed*, 22 L.R.A. (N.S.) 949.

For the general subject of the effect of local option laws on general regulations, see the note to *Com. v. Barbour*, 3 L.R.A. (N.S.) 620.

For local option law as affecting existing power to regulate traffic under charter of municipality located within local option district, see the note to *Mix v. Nez Percé County*, 32 L.R.A. (N.S.) 534.

With a few exceptions the cases fall into two classes: (1) Where the question is whether taxes or regulations of traffic are opposed to a constitutional provision which forbids the grant of a license, but does not prohibit the traffic; (2) where the question is whether a general licensing or taxing law is in force in territory "closed" under a local option constitutional provision.

An argument in favor of the validity of the taxation of illegal traffic was made by *Cooley, J.*, in *Youngblood v. Sexton*, 32 Mich. 406, 20 Am. Rep. 654, *infra*, where he says: "The Federal laws give us illustration of the taxation of illegal traffic. A case in point was that of the taxation of the liquor traffic in this state previous to the repeal of the prohibitory law; the Federal law found a business in existence, and it taxed it without undertaking to give it any protection whatever. . . . What would have prevented the state from taxing the same traffic at the same time? Is it any more restricted in the selection of subjects of taxation than the general government is? If one may tax and at the same time refuse to protect, may not the other do the same? The only reason suggested for a negative reply to these questions is, that it was the state itself, not the United States, that made the business illegal, and it would be inconsistent and absurd to declare it illegal and at the same time tax it. But how the inconsistency would appear in one case rather than the other is not apparent. The illegality was declared by competent authority, and yet the Federal govern-

Jones v. State, 60 Tex. Crim. Rep. 611, 132 S. W. 934; *Dawson v. State*, 55 Tex. Crim. Rep. 315, 117 S. W. 136; *State v. Duke*, 104 Tex. 355, 137 S. W. 654, 138 S. W. 385; *Lafrantz v. State*, 57 Tex. Crim. Rep. 464, 29 L.R.A. (N.S.) 743, 125 S. W. 32; *Rigsby v. State*, 64 Tex. Crim. Rep. 504, 38 L.R.A. (N.S.) 1116, 142 S. W. 901; *Winslow v. State*, — Tex. Crim. Rep. —, 98 S. W. 241; *Seim v. State*, 55 Md. 566, 39 Am. Rep. 419; *Com. v. Smith*, 102 Mass. 147; *Graff v. Evans*, L. R. 8 Q. B. Div. 373, 51 L. J. Mag. Cas. N. S. 25, 46 L. T. N. S. 347, 30 Week. Rep. 381, 46 J. P. 262; *Piedmont Club v. Com.* 87 Va. 540, 12 S. E. 963; *State ex rel. Columbia Club v. McMaster*, 35 S. C. 1, 28 Am. St. Rep. 826, 14

ment taxed the trade, at the same time refusing, or being unable, to protect it. If protection because of the tax was due to the very thing upon which the tax was imposed, there would be an inconsistency in taxing a prohibited trade; but treating taxation, however and wherever it may fall, as the return for the general benefits of government,—for the protection of life, liberty, the social and family relations, as well as to business and property,—which is the only legal and proper idea of taxation, there is no inconsistency whatever in making a thing which is not protected one of the measures or standards by which to determine how much the party owning or supporting it ought to pay to the government."

Where the Constitution prohibits license, but not the traffic.

Cases of this kind have arisen in Michigan and Ohio, and it has been held in general that taxes upon and regulations of the traffic in intoxicating liquor were not necessarily opposed to the constitutional prohibition of license.

In Michigan these cases arose under a constitutional provision that "the legislature shall not pass any act authorizing the grant of a license for the sale of ardent spirits or other intoxicating liquors."

In *Langley v. Ergensinger*, 3 Mich. 314, it was held that this constitutional provision did not invalidate a statute which prohibited under a penalty the sale or giving away of spirituous liquor by any person until he should have given a bond conditioned to pay all penalties and forfeitures that might be incurred by reason of violating any provision of the law regarding the sale of spirituous liquors in less quantities than 28 gallons at any one time, and to pay all damages the community or individuals might sustain by reason of such traffic, sale, or disposal of intoxicating liquors by the person giving the bond. The court held that this statute did not grant a license, that it was not an enabling statute, that it did not in express terms affirm the right of a citizen to traffic in ardent spirits, but that it was based upon the concession that the traffic was one of those

S. E. 290; Tennessee Club v. Dwyer, 11 Lea, 452, 47 Am. Rep. 298; State v. Austin Club, 89 Tex. 20, 30 L.R.A. 500, 33 S. W. 113.

Nor is he guilty of engaging in the business of operating a cold storage, or place where intoxicating liquors are kept on deposit for others.

Jones v. State, 60 Tex. Crim. Rep. 611, 132 S. W. 934; Dawson v. State, 55 Tex. Crim. Rep. 315, 117 S. W. 136; State v. Duke, 104 Tex. 355, 137 S. W. 654, 138 S. W. 385; Lafrentz v. State, 57 Tex. Crim. Rep. 464, 29 L.R.A.(N.S.) 743, 125 S. W. 32; Rigby v. State, 84 Tex. Crim. Rep. 504, 38 L.R.A.(N.S.) 1116, 142 S. W. 901; Winslow v. State, — Tex. Crim. Rep. —, 98 S. W. 242.

rights common to all, and the statute simply sought to place it under such restrictions as should prevent tippling and drunkenness, and promote temperance and sobriety.

But in *People v. Collins*, 3 Mich. 343, where the act had a provision that the common council of every city or village should authorize some person therein to sell spirits, wines, and intoxicating liquors, the judges were equally divided upon the question of the validity of the act, and at least one of them observed that in his opinion, if necessary, this part of the act might be annulled and the rest allowed to stand.

After the enactment of a prohibition statute, it was held in *Kitson v. Ann Arbor*, 26 Mich. 325, that an ordinance requiring saloon-keepers to take out a license and pay a license tax did not violate the clause of the Constitution forbidding licenses for the sale of intoxicating liquors, as the sale of intoxicating liquors was in general absolutely forbidden by the statutes, and it must be assumed that the legislature had in mind some kind of saloons doing business otherwise than in dealing in intoxicating liquors.

In *Youngblood v. Sexton*, 32 Mich. 406, 20 Am. Rep. 654, it was held that the constitutional provision was not in itself a prohibition of the traffic, and that a tax on liquor dealers was not a license within the prohibition of the Constitution. The court, however, pointed out that it was not necessary to have passed upon this branch of the case, as the case arose upon a bill in equity to restrain the tax; and the court held that there was no jurisdiction in equity over the matter. (The act which imposed the tax repealed the previous law, which forbade the traffic and declared it illegal.) *Cooley, J.*, in a long opinion, said *inter alia* (besides what has been heretofore quoted): "There has undoubtedly been felt and expressed a strong sentimental objection to the doing of anything by the state that even seemed to be a lending of its countenance to a business which the objectors regarded as an evil in itself; especially to the state participating in the profits of a pernicious trade. But the objection never found expression in laws for-
L.R.A.1915C.

On rehearing.

Chapter 20 of the Acts of 1909, levying a tax upon the business of selling liquor by soliciting orders therefor in local option territory, and also levying a tax upon persons, firms, etc., pursuing the business of operating a cold storage in local option territory, is unconstitutional and void.

State v. Texas Brewing Co. — Tex. —, 157 S. W. 1166; *Edmanson v. State*, '04 Tex. Crim. Rep. 413, 142 S. W. 887.

The acts of the defendant did not come within the provisions of what is commonly known as the statute prohibiting the sale of liquors by soliciting orders therefor.

Jones v. State, 60 Tex. Crim. Rep. 611,

bidding the taxation of liquors or of the business of dealing in them. Indeed, in this state liquors have always been taxable as property; and so have been the implements by means of which forbidden games of chance have been carried on. Yet, when the keeper of billiard tables is compelled to pay a tax, it can be no defense to him, either in law or in morals, that he is compelled to do so from the profits of an illegal business. To refuse to receive the tax under such circumstances would tend to encourage the business, instead of restraining it; and would not only be unwise because of exempting one man from his fair share of taxation, but also because it would tend to defeat the state policy, which forbids games of chance and hazard.

... This state has never shown any disinclination to make things morally and legally wrong contribute to the public revenue when justice and good morals seemed to require it. If it were to act upon the idea of refusing to derive a revenue from such sources, it ought to decline to receive fines for criminal offenses with the same emphasis that it would refuse to collect a tax from an obnoxious business. If the tax is laid by way of discouragement or regulation, it has the same general object in view with the fine; not only as it affects the person taxed and the community, but also in the use to which the money is devoted. Yet the Constitution expressly provides for a library fund to be derived from the violations of the public law (Constitution, art. XIII, § 12), a provision that may as legitimately be said to be a license of crime, as a tax on a traffic may be said to be a license of the traffic."

In *People v. Walling*, 53 Mich. 264, 18 N. W. 807, it was held that a statute taxing the business of selling intoxicating liquor did not grant a license, and was therefore not prohibited by the clause of the Constitution above referred to (which clause was in force when the statute was enacted, but had since been repealed), citing *Youngblood v. Sexton* and *Kitson v. Ann Arbor*, supra.

In Ohio, where the Constitution provided that "no license to traffic in intoxicating

132 S. W. 934; Golightly v. State, 49 Tex. Crim. Rep. 44, 2 L.R.A.(N.S.) 383, 122 Am. St. Rep. 779, 90 S. W. 26, 13 Ann. Cas. 827; Rigsby v. State, 64 Tex. Crim. Rep. 504, 38 L.R.A.(N.S.) 1116, 142 S. W. 901; Clay v. State, — Tex. Crim. Rep. —, 144 S. W. 280; Jones v. State, — Tex. Crim. Rep. —, 147 S. W. 251; Lafrentz v. State, 57 Tex. Crim. Rep. 464, 29 L.R.A.(N.S.) 743, 125 S. W. 32; Short v. State, 49 Tex. Crim. Rep. 244, 91 S. W. 1087; Winslow v. State, — Tex. Crim. Rep. —, 98 S. W. 242; Hood v. State, 35 Tex. Crim. Rep. 585, 34 S. W. 935; Wright v. State, 35 Tex. Crim. Rep. 581, 34 S. W. 935; Rector v. State, — Tex. Crim. Rep. —, 90 S. W. 41; Crawford v. State, — Tex. Crim. Rep. —, 76 S. W. 576; Burrell v. State, — Tex. Crim.

Rep. —, 65 S. W. 914; Burnett v. State, 42 Tex. Crim. Rep. 600, 62 S. W. 1063; Crawford v. State, — Tex. Crim. Rep. —, 58 S. W. 1006.

Defendant was not guilty of pursuing the business of keeping, maintaining, or operating a cold storage.

Standford v. State, 16 Tex. App. 331; Haffin v. State, 18 Tex. App. 410; Wells v. State, 18 Tex. App. 417; Merritt v. State, 19 Tex. App. 435; Williams v. State, 23 Tex. App. 499, 5 S. W. 136; Jones v. State, 60 Tex. Crim. Rep. 611, 132 S. W. 934; Golightly v. State, 49 Tex. Crim. Rep. 44, 2 L.R.A.(N.S.) 383, 122 Am. St. Rep. 779, 90 S. W. 26, 13 Ann. Cas. 827; Rigsby v. State, 64 Tex. Crim. Rep. 504, 38 L.R.A.(N.S.) 1116, 142 S. W. 901; Clay v. State,

liquors shall hereafter be granted in this state, but the general assembly may, by law, provide against evils resulting therefrom," the earlier statutes were, after some dispute, declared unconstitutional, but a later statute was sustained.

In *State v. Hipp*, 38 Ohio St. 199, it was held that the constitutional provision was fatal to a statute which required as a prerequisite that every person engaging or continuing in the traffic of intoxicating liquors should annually pay a certain sum and file a bond, and that every person engaging or continuing in such traffic without having executed the bond, or after the bond had been forfeited, should be guilty of misdemeanor, as such a statute in effect, as to traffic already not prohibited, provides for a license, notwithstanding the provision in the statute that nothing in the act shall "be construed or held to authorize or license in any way the sale of intoxicating liquors."

In *State v. Frame*, 39 Ohio St. 399, (later overruled) the court sustained the validity of a later statute which assessed a yearly sum upon the business of trafficking in intoxicating liquors against every person engaged therein, and for each place where such business is carried on, making the assessment a lien upon the property, and making it a misdemeanor to carry on such business without the consent of the owner of the premises. The court distinguished the case of *State v. Hipp*; as here the right to traffic was not dependent upon any condition, that is, the right was not granted by the act, and so was not a special privilege. It was also held that the act would not apply to leases made prior to its passage or to land held under such leases, so far as to subject the freehold under such leases to the payment of the assessment. But in *Butzman v. Whitbeck*, 42 Ohio St. 223, this statute was held to be unconstitutional in so far as it created a lien upon the premises occupied by the tenant, as this made it a license law, inasmuch as the owner could give the tenant permission to carry on the business. And in *State v. Sinks*, 42 Ohio St. 345, it was L.R.A.1915C.

held that inasmuch as the statute was unconstitutional for the reasons stated in the *Butzman* Case, that it was unconstitutional entirely and was utterly void; and the court overruled the case of *State v. Frame*, supra.

But the court sustained a later statute, known as the Dow law, which laid an annual assessment upon the business of every person trafficking in intoxicating liquors and for each place where such business was carried on by him, making the assessment a lien upon the real property where the business was carried on. It was held that such an assessment was not a license, and that the act was valid although it legalized a certain detail, that is, that the liquor might be drunk on the premises where sold, which was illegal before; but this, said the court, was done, not by levying a tax, but by repealing the former law. *Adler v. Whitbeck*, 44 Ohio St. 539, 9 N. E. 672.

The same was held in *Anderson v. Brewster*, 44 Ohio St. 570, 9 N. E. 683, the court considering that the matter of the lien would not apply to property held under a lease before the passage of the statute.

The validity of the act was further upheld in *Senior v. Ratterman*, 44 Ohio St. 661, 11 N. E. 321, holding that the act applied to wholesale dealers. It was also upheld in *Stevenson v. Hunter*, 2 Ohio N. P. 300, and in *Conwell v. Sears*, 65 Ohio St. 49, 61 N. E. 135.

In *Bloomfield v. State*, 86 Ohio St. 253, 41 L.R.A.(N.S.) 726, 99 N. E. 309, Ann. Cas. 1913D, 629, the court reaffirmed the doctrine of *Adler v. Whitbeck*, supra, and sustained an Ohio statute which made it requisite for those conducting the business of trafficking in liquor and paying the tax to answer certain questions, and providing a penalty for a false answer; and considered that the act was not a license act, in that its purpose was to exclude the class of persons who could not answer the prescribed questions in the negative. The question which it was claimed was answered falsely was: "Have intoxicating liquors been sold at your place of business to-

— Tex. Crim. Rep. —, 144 S. W. 280; Jones v. State, — Tex. Crim. Rep. —, 147 S. W. 251; Lafrentz v. State, 57 Tex. Crim. Rep. 464, 29 L.R.A.(N.S.) 743, 125 S. W. 32; Short v. State, 49 Tex. Crim. Rep. 244, 91 S. W. 1087; Winslow v. State, — Tex. Crim. Rep. —, 98 S. W. 242; Hood v. State, 35 Tex. Crim. Rep. 585, 34 S. W. 935; Wright v. State, 35 Tex. Crim. Rep. 581. 34 S. W. 935; Rector v. State, — Tex. Crim. Rep. —, 90 S. W. 41; Crawford v. State, — Tex. Crim. Rep. —, 76 S. W. 576; Burrell v. State, — Tex. Crim. Rep. —, 65 S. W. 914; Burnett v. State, 42 Tex. Crim. Rep. 600, 62 S. W. 1063; Crawford v. State, —Tex. Crim. Rep. —, 58 S. W. 1006.

Mr. C. E. Lane, Assistant Attorney General, for the State.

Harper, J., delivered the opinion of the court:

Appellant was prosecuted under complaint and information containing two counts,— one charging him with soliciting and taking orders for intoxicating liquors, the other for keeping and maintaining a cold storage, a place where intoxicating liquors were kept for others. Appellant waived a jury and submitted his case to the court, and he was found guilty on both counts. The validity of both these laws* has heretofore been passed on by this court, and both have been sustained. *Edmanson v. State*, 64 Tex. Crim. Rep. 413, 142 S. W. 887, and *Ex parte Flake*, — Tex. Crim. Rep. —, 149 S. W. 146. After a careful review of this question, we see no reason to change our views as to the

*The first section of the statute referred to is set out in the opinion on rehearing.

The second section was as follows: "In all counties, justice precincts, towns, cities or other subdivisions of a county where the qualified voters thereof have by a majority vote determined that the sale of intoxicating liquors shall be prohibited therein, there is hereby levied upon all firms, persons, association of persons and corporations that pursue the business of keeping, maintaining or operating what is commonly known as a 'cold storage' or any place by whatever

name known or whether named or not, where intoxicating or nonintoxicating liquors or beverages are kept on deposit for others, or where any such liquors are kept for others under any kind of character of bailment, an annual state tax of two thousand (\$2,000) dollars. Counties, incorporated cities and towns, where such business is located, may each levy an annual tax of not exceeding one thousand (\$1,000) dollars upon each such place so kept, run, maintained or operated." Acts 1909, chap. 20, p. 53.

minors, except on the written order of their parents, guardians, or family physician, or to persons intoxicated, or in the habit of getting intoxicated, within the past twelve months, with your knowledge?"

In *Haas v. Remick*, 31 Ohio C. C. 591, it was held that the Dow act was superseded by a later local option statute, but, that it was unconstitutional in a dry county. The court distinguishes *Conwell v. Sears*, supra, as arising in relation to a prohibitory ordinance, but does not refer to *Stevenson v. Hunter*, supra, where the Dow act was upheld in a township which had voted for prohibition under the township local option act.

A general licensing or taxing law in territory where there is local prohibition.

This note is confined to cases where the local option law is under a constitutional provision therefor. For the general subject of the effect of local option laws on general regulations, see the note to *Com. v. Barbour*, 3 L.R.A.(N.S.) 620.

Generally speaking, after the selling of intoxicating liquor has been prohibited in a district, under a constitutional provision for local option, general laws taxing or licensing the selling of such liquor are not in force within such district.

Butler v. State, 25 Fla. 347, 6 So. 67; *Stringer v. State*, 32 Fla. 238, 13 So. 450; *Cason v. State*, 37 Fla. 331, 20 So. 547; *Robertson v. State*, 5 Tex. App. 155; *Boone v. State*, 12 Tex. App. 185 (holding that an offense committed before the adoption of the local option law could not be thereafter L.R.A.1915C.

punished); *Ex parte Lynn*, 19 Tex. App. 293 (perhaps not necessary to the decision).

It was held in *Butler v. State*, 25 Fla. 347, 6 So. 67, that when as provided by the Constitution local option has been put in force in a district, the general licensing laws of the district are suspended, and that an indictment would not lie for selling liquor without a license within the district, as under the local option law the indictment should have been for selling at all. The court observed: "It cannot be that a person can be indicted for not having obtained a license the issue of which in the territory of the alleged offense is interdicted by the operation of a constitutional provision."

In *Robertson v. State*, 5 Tex. App. 155, it was held that in a locality where the local option law was in force the prosecution should be under that law, and that one could not there be indicted for failure to pay the general occupation liquor tax under a general law.

It was held in *Rathburn v. State*, 88 Tex. 281, 31 S. W. 189, that as a general tax on the selling of liquor was suspended as to any locality by the operation in such locality of the local option law prohibiting all sales except for sacramental or medicinal purposes under regulations, that those selling for these purposes were not subject to the general tax. The court stated that this view was in accord with the ruling of the court of criminal appeals in *Gibson v. State*, 34 Tex. Crim. Rep. 218, 29 S. W. 1085, where the same result was reached.

validity of these laws. So the only question presented by this record is: Does the evidence show that appellant has been guilty of violating these laws?

The evidence would show that, when prohibition was adopted in Marshall, some members of the Elks lodge at that place organized an auxiliary society, the purpose of which was to obtain and keep for their own use intoxicating liquors. A plan was adopted which, it may be said in behalf of those joining this auxiliary society, they did not think would be in violation of the law, but their good faith in this matter cannot avail them, for, if they were mistaken, it would be a mistake of law, and not a mistake of fact. They employed attorneys to devise for them a scheme or plan whereby they could obtain and keep intoxicating liquors on hand to be used by them in such quantities and at such times as

they desired. But it appears to us that in an effort to evade the law, instead of doing so, a plan was devised that would be in violation of almost every law we have regulating and prohibiting the sale of intoxicating liquors, and, if this scheme could be lawfully carried out, our prohibitory laws, instead of being denominated prohibitory, should be labeled "laws to enable liquor to be sold without any regulation and without paying any tax."

The society was organized, a place rented, barroom fixtures installed, a porter employed, who was to fill the place of bartender in the ordinary saloon. No orders were solicited in words, but they agreed amongst themselves they would place a locked box on the end of the bar counter, and each member who desired intoxicating liquor should write his name on a slip of paper, place in an envelop the amount of

But in *Joliff v. State*, 53 Tex. Crim. Rep. 61, 109 S. W. 176, it was held that it was no objection to an indictment for keeping a disorderly house—by keeping a house in which intoxicating liquors were sold and kept for sale without having first obtained a license—that the house was in prohibited territory. The same was held in *Layton v. State*, 61 Tex. Crim. Rep. 507, 135 S. W. 557 (where, however, a conviction was reversed on other grounds). The *Joliff* Case was followed in *Tachini v. State*, 59 Tex. Crim. Rep. 55, 126 S. W. 1139 (holding an indictment sufficient which described the liquors as spirituous, etc., and not using the word "intoxicating").

In *Bonacker v. State*, 42 Fla. 348, 29 So. 321, it was held that a license cannot be granted in prohibited territory where the local option law is in force. See also *Young v. Com.* infra.

—contra.

In Kentucky the rule is otherwise. See *Com. v. Barbour*, 121 Ky. 463, 3 L.R.A. (N.S.) 620, 89 S. W. 479, and cases therein cited.

See also *Shehan v. Louisville & N. R. Co.* 125 Ky. 478, 101 S. W. 380, holding that a license is not ended by the subsequent adoption of a local prohibitory law.

But in *Young v. Com.* 14 Bush, 161, it was held that after a local option law has gone into effect the county court could not issue a license.

It may be noted that in *Brown v. Com.* 98 Ky. 652, 34 S. W. 12, it was held that the general assembly had the authority to fix the status of any precinct as to the sale of liquor until such time as the sense of the people should be taken as provided by general law on the question, the provision of the Constitution reading: "The general assembly shall, by general law, provide a means whereby the sense of the L.R.A.1915C.

people of any county, city, town, district, or precinct may be taken as to whether or not spirituous, vinous, or malt liquors shall be sold, bartered, or loaned therein, or the sale thereof regulated. But nothing herein shall be construed to interfere with or to repeal any law in force in relation to the sale or gift of such liquors."

Cases upon the statute which is construed in *BARNES v. STATE*.

In *Edmanson v. State*, 64 Tex. Crim. Rep. 413, 142 S. W. 887, cited in *BARNES v. STATE*, a conviction under the same statute was sustained for unlawfully engaging in and pursuing the business and occupation of offering for sale intoxicating liquors in a prohibited county by taking orders therefor in said county. It was distinctly claimed in that case that the act was unconstitutional in that it undertook to license a business and occupation which was expressly prohibited by the statute law of the state, and it would appear from the dissenting opinion, that it was also contended that the statute was in violation of the local option clause of the Constitution in that it undertook to authorize citizens to follow the business or occupation of selling intoxicating liquors in local option territory by paying the occupation tax specified in the statute. It seems to have been the reason of the decision that the local option law did not abrogate the general police power of the state, and that the statute provided in effect for a police regulation, and not a tax.

In *Ex parte Flake*, — Tex. Crim. Rep. —, 149 S. W. 146, cited in *BARNES v. STATE*, the court refused to discharge on habeas corpus one indicted under the cold storage section of the statute for unlawfully maintaining in prohibited territory a cold storage. It was held that the statute was not an exercise of the taxing power, but a police regulation, and not a tax for

money he desired to expend that week for liquors, and drop the envelop in the box. It was first stipulated that a secretary should be elected who would carry the key to this box, and would take out the name, money, etc., and order the liquors. When it was received by the society, the secretary would then issue to him a card entitling him to the amount of liquor he had ordered, to be drunk when he pleased during that week. The evidence would show that only beer has been ordered, and, if a man placed in a dollar, he would get a ticket entitling him to 20 glasses of beer, and so on; the beer always being calculated at 5 cents a glass, the same as the price at a regular saloon. The secretary was to take the money, figure the cost of rent, ice, etc., for one week, deduct this amount, and then order beer in bulk with the remainder of the money, and, when received, keep it on ice,

and have it dealt out to the holder of the ticket by the porter when called for. It is claimed, if the beer did not hold out, a man lost that much of his ticket, but, if there was more beer than the ticket called for, then it was drunk indiscriminately by the members of the society free. In this wise a regular beer saloon was maintained by the members of the society, and they could get their ice-cold beer on tap at any and all times. However, the evidence would show that no secretary was elected, and the first year it was operated Mr. Clark, who was an officer of the lodge, attended to all the duties supposed to be performed by the secretary of the society, carried the key to the box, once weekly took out the money, calculated the expense, and then ordered beer with the remainder, issued tickets to those contributing the money, and had the porter keep it on ice and serve the members.

revenue purposes. The opinion of the court seems to take the view that the statute was in the direction of assisting the enforcement of a local option statute.

State v. Texas Brewing Co. — Tex. — , 157 S. W. 1166, cited in *BARNES v. STATE*, was an action to recover taxes for the state and for Clay county for pursuing the business of selling and offering for sale intoxicating liquors by soliciting and taking orders therefor in Clay county, in which county the local option law was in force, and in which county, it was alleged, the commissioners' court had duly levied a tax upon persons that pursued the aforesaid business for that year. It was shown that the soliciting was done by means of mailing circulars from another county. It was held that the adoption in the locality of the local option law under the Constitution prevented the legislature from authorizing that there should be done there what had been already prohibited by the people under the local option law. That as a sale implies a delivery, the statute authorized a delivery in the county. (See the quotation from the opinion contained in the dissenting opinion in *STATE v. BARNES*.) That as the orders were filled in another county by shipping the goods from such county, that there were no sales made in Clay county, as under the law the sale took place in the other county, and that, therefore, there was no selling of intoxicating liquors in Clay county by such soliciting.

Miscellaneous.

It was held in *State v. Tonks*, 15 R. I. 385, 5 Atl. 636, that as the statutes in so far as they provided a general licensing system were invalidated by a constitutional amendment prohibiting the sale of liquor as a beverage, after such amendment there could not be a prosecution for a violation of the general licensing laws.

In *State ex rel. Ohlquist v. Swan*, 1 N. D. L.R.A.1915C.

5, 44 N. W. 492, it was held that a conviction under a licensing statute was proper until the legislature had provided for prohibition, although after the statute a constitutional provision was enacted ordering prohibition, and reading as follows: "No person, association, or corporation shall, within this state, manufacture, for sale or gift, any intoxicating liquors; and no person, association, or corporation shall import any of the same, for sale or gift, or keep or sell, or offer the same for sale or gift, barter or trade, as a beverage. The legislative assembly shall by law prescribe regulations for the enforcement of the provisions of this article, and shall thereby provide suitable penalties for the violation thereof."

In *Ex parte Townsend*, 64 Tex. Crim. Rep. 350, 144 S. W. 628, Ann. Cas. 1914C, 814, the court sustained a general statute requiring a license for the occupation of selling nonintoxicating malt liquors, in which it was stated in the brief of the attorney general, which was adopted as the opinion of the court, that the article of the state Constitution did not affect the question, as that article referred in express terms to intoxicating liquors.

It may be noted that in *Ex parte Woods*, 52 Tex. Crim. Rep. 575, 16 L.R.A.(N.S.) 450, 124 Am. St. Rep. 1107, 108 S. W. 1171, the court had under consideration the constitutionality of the statute providing in general effect for the taxation of retailing as a beverage nonintoxicating malt liquors; and that, among other things, it was claimed that the act was void as in conflict with the local option laws of the Constitution in that it attempted to delegate to the people the power to levy a tax on the liquor business; but the court, while holding the statute unconstitutional as contrary to the equality and uniformity of taxes provided for by the Constitution, did not seem to pass upon the other question.

B. B. B.

When he ceased to be an officer, appellant took over the business for one week and attended to it, and since then it has been understood and agreed that some member of the society should do so weekly. The only pay or consideration that he was to or would receive would be that, if he attended to it one week, some other member would voluntarily attend to the business the next week. But each and every one was informed that, if he desired intoxicating liquors, it was only necessary to place the money in the box, with his name, and it would be forthcoming the next week. The placing of this box on the bar counter, with the understanding that the beer would be ordered, was but an invitation to do so, as much as if express personal solicitation had been made. It was an attempted evasion of the law, while the very thing to be done was what the law prohibited. He took the orders for beer out of the box, ordered the beer, and had it delivered to the person giving the order. He violated not only the express letter of the law, but its spirit and intent as well.

Again, he says that taking a portion of the money they placed in the box, paying the rent and porter hire with it, buying the ice, etc., receiving the beer at the depot, having it hauled to the rented apartment, and there placed on ice, and kept for those contributing the money, would not render him guilty, under the cold-storage statute. He claims he did all this as an accommodation, but the facts show that he did so one week, with the understanding that some other member of the auxiliary society would do the same for him the next week, and another the week after, etc. We are of the opinion these acts violate both the spirit and letter of the cold-storage statute. Ray Clark testified in behalf of appellant that he was with appellant when he opened the box, and he and Mr. Barnes made out a list of those who had placed money in the box, and the amount each had placed in there; that there was \$26.50 taken out of the box by Mr. Barnes; that they took out \$5 for rent, \$1.80 for ice, \$3.25 for express, \$1 for gas, 35 cents for telephone, and 10 cents for exchange, leaving \$15, and with this appellant ordered 3 half barrels of beer, and gave to the men contributing the money, tickets calling for a glass of beer for each 5 cents contributed. The express agent testified:

"I am the agent for the Wells Fargo Express Company in the city of Marshall. This company does a general express business and brings liquor to Marshall, and this is the liquor book which I have with me. It contains a complete record of our ship-

ments. Yes, it shows shipments of liquor on the 1st day of April, 1913, and shows that Mr. George Barnes received a half barrel of beer from Palestine, Texas. On page 78 it shows that on the 2d day of April Mr. George Barnes received 2 half barrels of beer from Palestine, and Mr. Barnes signed for both of these shipments. Yes, there is a shipment to Mr. Barnes on page 99; that is, on April 4th. Two half barrels of beer from Palestine, Texas. On page 116 there is a shipment of 2 half barrels of beer from Palestine, Texas. It was signed for by Mr. Barnes. This was on April 5th."

When Mr. Clark was asked about the other shipments shown to have been received by Mr. Barnes during this week, he testified:

"No, the club did not order more than \$15 worth of beer. The other that was ordered the club had nothing whatever to do with, but it was dispensed with the same apparatus and the same porter. The first 3 half barrels cost us \$15, or \$5 per half barrel, and, after that was gone, the Elks lodge donated the \$5 and bought another half barrel. There wasn't any tickets issued or used for this half barrel, and Mr. Barnes or the porter signed for it for the express company. I don't remember what time it was ordered, but it was some time during the week. Yes, the half barrel that the express company's books show, under date April 1st, was the beer which was ordered by telephone. On Wednesday we received 2 more half barrels, and my recollection is that we wrote for this. We also received 2 more half barrels on Friday. I am pretty sure that was ordered by mail; that the 2 half barrels received on Saturday were ordered by mail also, but shipped at different times. Sometimes it was ordered shipped as we needed it, and sometimes it is not. Yes, we issued tickets to those parties who deposited the money that week, and after the 3 half barrels, or the \$15 worth, was used up by those parties who had tickets, then any one who came up there drank up the other beer that was ordered after that. It was on tap free to the members of the Elks lodge, as the lodge had contributed the \$5 to pay for it. The other 3 half barrels that were received that week was ordered by individual members of the Elks lodge, and the social club had nothing to do with that. I think that the club's beer had gave out, and some of the members wanted some more beer, and a crowd got together, and each contributed some money and ordered the other 3 half barrels. Mr. Barnes ordered it for them, and he received it there at the lodge rooms."

So it is seen that appellant not only or-

dered the beer for the society, but also 3 half barrels of beer, besides the amount the \$15 and \$5 rent paid for. The record also discloses that he had it carried to the apartment, had it there kept on ice, and dispensed by the porter.

Without going further into the facts, we think the court was justified in finding appellant guilty, and the judgment is affirmed.

Davidson, J., dissents.

A motion for rehearing having been filed **Harper, J.**, on May 20, 1914, handed down the following additional opinion:

Appellant has filed a motion for rehearing herein, and presented it in a way to deserve, and it has received, our most thoughtful consideration.

In his first assignment he raises a question not presented in his original brief, and not raised in the trial court; yet it is a fundamental question, and he is entitled to have it considered. He contends: "The court erred in affirming the judgment in this case, because chapter 20 of the Acts of 1909, levying a tax upon the business of selling liquor by soliciting and taking orders therefor in local option territory, and also levying a tax upon persons, firms, etc., pursuing the business of operating a cold storage in local option territory, is unconstitutional and void."

If the act in question is violative of any provision of the Constitution of this state, of course it is void, and no one should be punished thereunder, and this is a question that we think can be raised at any stage of the proceedings. Appellant states he is aware of the decisions of this court in the cases of *Edmanson v. State*, 64 Tex. Crim. Rep. 413, 142 S. W. 887, and *Ex parte Flake*, — Tex. Crim. Rep. —, 149 S. W. 146, in which we sustained the constitutionality of the act in question, but he says he does not understand that the statute was directly attacked on the ground of its invalidity by reason of the fact that it is an act, the effect of which is to license the sale of liquor in territory where it is prohibited. If this was the proper construction of the act, we would readily agree with appellant that the act in question was unconstitutional. Appellant cites us to the case of *State v. Texas Brewing Co.* — Tex. —, 157 S. W. 1166, a decision by our supreme court (Justice Hawkins at the time entering a dissent), as sustaining his contention; and we frankly admit if that court intended to hold that the act licensed the sale of liquor in prohibition territory, which construction is placed on the opinion in question by ap-

pellant, and such opinion is correct in so holding, then its conclusion would be unavoidable; but does the opinion so hold, and, if it does, did the supreme court properly construe the intent and purpose of the legislature in enacting that law?

The act in question reads:

"In all counties, justice precincts, towns, cities or other subdivisions of a county where the qualified voters thereof have by a majority vote determined that the sale of intoxicating liquors shall be prohibited therein, there is hereby levied upon all firms, persons, association of persons and corporations that pursue the business of selling or offering for sale any intoxicating liquors by soliciting or taking orders therefor in any quantities whatsoever, in any such county, justice precinct, town, city, or other subdivision of a county, an annual state tax of four thousand (\$4,000) dollars, and each county, and also each incorporated city or town may levy an annual tax not exceeding two thousand (\$2,000) dollars in any such county or incorporated city or town where such business is pursued."

It is a matter of common knowledge in this state that prior to the adoption of this act, in all territory where prohibition had been adopted, liquor dealers residing outside of such territory had adopted the method of sending their drummers and agents into such territory to "solicit orders for the sale of such liquors," and, when such persons were prosecuted for transacting such business, this court had held that the sale did not take place where the order was solicited, although it contemplated a delivery, but the sale took place where the order was received. In *Bruce v. State*, 36 Tex. Crim. Rep. 53, 35 S. W. 383, this court, in an opinion by Judge Hurt, approved the following rule of law announced in *Black on Intoxicating Liquors*: "It is . . . generally held that where a person living or doing business in one state sends his agent into another state to solicit orders for goods, and the agent there takes orders, and sends them to his principal's place of business, and the latter fills the orders, and, without any special arrangement as to the manner and place of delivery, delivers them to a carrier in his own state, to be transported at the expense of the purchaser to the latter's place, the place of sale is in the state where the agent's principal does business."

In the case of *Merriweather v. State*, 48 Tex. Crim. Rep. 82, 86 S. W. 332, in an opinion by Judge Davidson, this court held that, where an agent of a liquor dealer doing business in Waco, McLennan county, sent his agent into Hill county (a prohibi-

tion county), the agreed facts stated that "appellant approached the witness and personally solicited him to give him an order for some whisky to be sent from the liquor house of E. P. Gates at Waco to the witness at Hillsboro, for which liquor house appellant was then acting as agent in Hillsboro, Texas; that witness consented to give the order. The appellant handed witness a printed order to sign. He signed it, and handed it back to the appellant. Witness did not mail the order, and furnished no postage to send it, and the whisky so ordered was to be shipped to him at Hillsboro the next day, and it came accordingly.

. . . The evidence showed that on other occasions appellant solicited and took a number of similar orders from witness

. . . [and] various witnesses testified to similar transactions." Held, this constituted a sale in Waco, and not a sale in Hillsboro. And the opinion says: "Such has been the holding in this state in an unbroken line of decisions, and such is the holding of the Supreme Court of the United States."

In *Ex parte Massey*, 49 Tex. Crim. Rep. 60, 122 Am. St. Rep. 784, 92 S. W. 1087, this court held, speaking through Judge Davidson: "It is not the law, if the party solicits or takes the order in a local option district to deliver intoxicants in such district, that it constitutes a sale,"—citing *Weldon v. State*, 36 Tex. Crim. Rep. 34, 35 S. W. 176; *Keller v. State*, — Tex. Crim. Rep. —, 1 L.R.A. (N.S.) 489, 87 S. W. 669; *James v. State*, 45 Tex. Crim. Rep. 592, 78 S. W. 951; *Sedgwick v. State*, 47 Tex. Crim. Rep. 627, 85 S. W. 813; *Parker v. State*, 48 Tex. Crim. Rep. 69, 85 S. W. 1155; *Joseph v. State*, — Tex. Crim. Rep. —, 86 S. W. 326; *Luster v. State*, — Tex. Crim. Rep. —, 86 S. W. 326; *Dupree v. State*, — Tex. Crim. Rep. —, 91 S. W. 578; *Newbury v. State*, — Tex. Crim. Rep. —, 44 S. W. 843.

In *Keller's Case*, — Tex. Crim. Rep. —, 1 L.R.A. (N.S.) 489, 87 S. W. 669, this question is discussed at length in an opinion by Judge Davidson and the authorities collated. In that case the court was discussing the statute that had been passed by the legislature, which provided: "That in all contracts of sale and shipment of intoxicating liquor from any point in this state, . . . where the terms of said contract is . . . 'collect on delivery,' that the same is and shall be a sale . . . where said goods are delivered and paid for, and provided further that where orders are solicited, . . . and such order is subsequently filled, the sale shall be construed to have been L.R.A.1915C.

made at the place where such order was solicited."

In passing on that statute this court said:

"Now it will be noted that until the *Sinclair Case*, 45 Tex. Crim. Rep. 487, 77 S. W. 621, was decided in November, 1903, the Texas Reports, criminal and civil, so far as we have been able to ascertain, furnish no dissenting opinion from the rule announced in *Bruce*, *Freshman*, and that line of cases. So, until more than two years after this act of the legislature, it was unquestionably the law, without dissent, that the sale was at the point of shipment, and not at the point of destination, and appellate courts in this state had never questioned that rule. The passage by the legislature of the above act cannot but be regarded as an express recognition that the rule of law was so well and thoroughly settled and recognized that the sale was at the point of shipment that it required legislation to change it; else this act was totally unnecessary. By the passage of this act that body undertook to set aside the well-settled law, as understood from the beginning, in Texas. It is not only an express recognition by the legislative body that such was the law as to the place where the sale occurred generally, but it is further an express recognition of the fact that in passing the act they were culling from this general law, and making an exception thereto, sales of intoxicating liquor. They also thoroughly understood that they were leaving by this act the law as settled in regard to all other sales, except intoxicating liquors. Not only so, but that act is further an express recognition of the fact by that body that the sale of all intoxicants should be under the law as it had been always, except where that sale occurred by virtue of a c. o. d. contract or shipment. We have held this act unconstitutional, and, upon a review of the question, we have been confirmed in the correctness of that conclusion. The provision of the Constitution in regard to local option only authorizes the people of a county, a justice precinct, city, or town, etc., to prohibit the sale of the intoxicants 'within the prescribed limits;' that is, the limits of the territory in which the law has been voted into operation. They could vote on no other proposition, except the prohibition of the sale of the intoxicants 'within the prescribed limits' or given territory, because this is the extent of the constitutional authority. The inclusion of this matter is the exclusion of all others. This would prohibit the legislature or the people voting on local option prohibiting the sale outside the 'prescribed limits.' Therefore, if the sale occurs outside the local option territory, the legislature has no authority

to prohibit the purchaser from carrying such intoxicants into the prohibited territory. The question is one only of sale within the local option limits. The Constitution does not make or undertake to make contracts between individuals, nor does it interfere with the right of contract nor does it undertake to impair the obligation of contracts. It simply prohibited the sale within such territory."

It has thus seen that the legislature passed an act declaring that "where an order is solicited and subsequently filled that the sale shall be at the place where the order was taken," and this court, through Judge Davidson, in an exhaustive opinion, held such act unconstitutional and violative of both the state and Federal Constitutions, and yet our supreme court, in June, 1913, in the case cited by appellant (*State v. Texas Brewing Co.* — Tex. —, 157 S. W. 1166) if it is to be construed as contended for by appellant, says such an act is not unconstitutional, and that it is the law, even without the legislature so declaring; for it says this law, which levies an occupation tax on the business of "making of sale by soliciting and taking orders therefor," necessarily includes the right to deliver the liquor in the county where the order is taken, and therefore the sale is in the prohibition county, and the legislature is without authority to license the sale of liquor in prohibition territory.

To the proposition that the legislature is without authority to "license the sale of intoxicating liquors" in territory where prohibition has been adopted (except for the purposes the law authorizes), we readily agree, and do not think that anyone will question that this is the law. Yet we do not think this was the intent nor purpose of the legislature in passing the act levying a heavy tax on those who pursued the business of taking orders for the sale of liquor in prohibition territory. This court, in an unbroken line of decisions, has held, and still holds, that this is not a sale in the prohibition territory, but that the transfer of title takes place at the point where the order is accepted and filled, and delivered to the carrier for transportation to the person who gave the order. The legislature being confronted with the decisions of this court that they had no authority to declare that the sale was at the point where the order was taken and where it was contemplated the goods should be shipped; and being confronted with the known conditions that, so soon as prohibition was adopted, liquor dealers established agencies in the prohibition territory to solicit, take, and forward orders for intoxicating liquors, and by such L.R.A.1915C.

means effectively annulling, or at least impairing, the efficiency of the prohibition laws, and thereby thwarting the will of the people who adopted the law; and being further confronted with the proposition that soliciting and taking order establishments were often used as a cloak to cover up the illegal sales of intoxicating liquors,—sought to regulate and control, if not prohibit, the business of soliciting and taking orders for intoxicating liquors in prohibition territory. And as said by the Supreme Court of the United States in the case of *Delamater v. South Dakota*, 205 U. S. 93, 51 L. ed. 724, 27 Sup. Ct. Rep. 447, 10 Ann. Cas. 733, the soliciting and taking of orders for the sale of intoxicating liquors is an accessory business which the state has the right to control or prohibit in prohibition territory since the passage of the Wilson act by Congress. For a full discussion of this question, see the able opinion of Chief Justice White in that case.

The thirty-first legislature not only passed the act in question levying a \$4,000 license fee on the business of soliciting and taking orders; it also passed an act making it a felony to pursue the occupation of selling intoxicating liquors in prohibition territory, punishable by imprisonment in the penitentiary for not less than two nor more than five years, and making a single sale of intoxicating liquors a felony punishable by imprisonment in the penitentiary for not less than one nor more than three years. Session Acts 1909, pages 284 and 356.

To say that the legislature intended, in the statute licensing the soliciting and taking orders, to license the sale of liquors in the prohibited territory, and then say that one who does so do was guilty of a felony and should be imprisoned in the penitentiary, would be to attribute to them an absurdity of which no sane body of men would be guilty. Sutherland on Statutory Construction, § 218, says: "It is indispensable to a correct understanding of a statute to inquire first what is the subject of it, what object is intended to be accomplished by it. When the subject-matter is once clearly ascertained and its general intent, a key is found to all its intricacies; general words may be restrained to it; and those of narrower import may be expanded to embrace it to affectuate that intent."

Again, in § 238 he says: "Where enactments separately made are read *in pari materia*, they are treated as having formed in the minds of the enacting body parts of a connected whole, though considered by such body at different dates. . . . Such a principle is in harmony with the actual practice of legislative bodies, and is essen-

tial to give unity to the laws, and connect them in a symmetrical system . . . and the object is to carry into effect the intention. It is to be inferred that a Code of statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions. For the purpose of learning the intention, all statutes relating to the same subject are to be compared, and, so far as still in force, brought in harmony." 1 Kent, Com. 463, 464; *State v. Williams*, 13 S. C. 558; *State use of Washington County v. Baltimore & O. R. Co.* 12 Gill & J. 399, 433, 38 Am. Dec. 319; *Wakefield v. Phelps*, 37 N. H. 295; *Baltimore v. Howard*, 6 Harr. & J. 383; *Church v. Crocker*, 3 Mass. 21; *Holbrook v. Holbrook*, 1 Pick. 254; *Forqueran v. Donnally*, 7 W. Va. 114; *Ailesbury v. Pattison*, 1 Dougl. K. B. 28; *Harrison v. Walker*, 1 Ga. 32; *Coleman v. Davidson Academy, Cooke (Tenn.)* 258; *State v. Bell*, 25 N. C. (3 Ired. L.) 506; *Henry v. Tilson*, 17 Vt. 479; *Fort v. Burch*, 6 Barb. 60; *Ranoul v. Griffie*, 3 Md. 54.

Again, he says in § 292: "The object sought to be accomplished exercises a potent influence in determining the meaning of not only the principal, but also the minor, provisions of a statute. To ascertain it fully, the court will be greatly assisted by knowing, and it is permitted to consider, the mischief intended to be removed or suppressed, or the necessity of any kind which induced the enactment." *Ruggles v. Illinois*, 108 U. S. 526, 27 L. ed. 812, 2 Sup. Ct. Rep. 832; *Big Black Creek Improv. Co. v. Com.* 94 Pa. 450; *Dodge v. Gardiner*, 31 N. Y. 239; *Clark v. Janesville*, 10 Wis. 136.

In *Am. & Eng. Enc. Law*, 2d ed., vol. 26, p. 620, the rule is said to be: "In arriving at the intent of the legislature in enacting a statute, not only must the whole statute and every part of it be considered, but, where there are several statutes *in pari materia*, they are all, whether referred to or not, to be taken together, and one part compared with another, in the construction of any material provision. . . . Especially does this rule apply to statutes passed at the same session of the legislature. If such statutes are *in pari materia*, they must be construed together, and, if possible, all must be allowed to stand, and effect must be given to each of them, regard being had to the intention of the legislature. So, contemporaneous legislation, not precisely *in pari materia* with the statute to be construed, may be referred to on the question of intent. Not only may contemporaneous and prior statutes be considered in construing a given act, but a subsequent statute may

often aid in the interpretation of a prior one."

In Cyc. vol. 36, under title "Construction of Statutes," pp. 1110, 1147, it is said: "Every statute must be construed with reference to the object intended to be accomplished by it. In order to ascertain this object, it is proper to consider the occasion and necessity of its enactment, the defects or evils in the former law, and the remedy provided by the new one; and the statute should be given that construction which is best calculated to advance its object, by suppressing the mischief and securing the benefits intended. . . . In the construction of a particular statute, . . . all acts relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law. The endeavor should be made by tracing the history of legislation on the subject to ascertain the uniform and consistent purpose of the legislature. . . . With this purpose in view, therefore, it is proper to consider not only acts passed at the same session of the legislature, but also acts passed at prior and subsequent sessions."

When our supreme court was first organized, in the case of *Fowler v. Poor*, Dallah Dec. (Tex.) 401, Chief Justice Hemphill said: "It is our duty to construe all statutes, in relation to the same subject-matter, . . . in such a manner that they may all stand together and have concurrent efficacy."

In *Taylor v. Hall*, 71 Tex. 218, 9 S. W. 143, Chief Justice Gaines, speaking for our supreme court, said: "It is a rule, in the interpretation of statutes, that all acts relating to the same subject-matter may be considered. . . . We must read the act in question in the light of former legislation,"—citing *Fowler v. Poor*, supra, and a number of other cases by our supreme court; also *Sedgwick, Stat. Law*, 247; *Bishop, Stat. Crimes*, § 86, and cases cited.

In *Scoby v. Sweatt*, 28 Tex. 728, the supreme court held, speaking through Chief Justice Moore: "It is a universally admitted principle that statutes upon the same subject must be construed together and with reference to each other. If it can be done consistently with their provisions, effect shall be given to all the enactments on the subject. This legislative intention is to be ascertained and followed. Where there is apparent conflict, general intention is limited and controlled by special intention."

In *Hanrick v. Hanrick*, 54 Tex. 109, the supreme court held: "There is no doctrine in relation to the construction of statutes more certainly settled than this: That all

acts in relation to the same subject-matter are to be taken *in pari materia* and considered as one act,"—citing *Scoby v. Sweatt*, supra; *Neill v. Keese*, 5 Tex. 23, 51 Am. Dec. 746; *Cannon v. Vaughan*, 12 Tex. 402; *Street v. Com.* 6 Watts & S. 209; *Easton Bank v. Com.* 10 Pa. 448; *Brown v. Philadelphia County*, 21 Pa. 42; *Com. v. Herrick*, 6 Cush. 468; *Williams v. Potter*, 2 Barb. 316; *Potter's Dwarr. Stat.* 189.

See also *Bryan v. Sundberg*, 5 Tex. 424; *Selman v. Wolfe*, 27 Tex. 72; *Keenan v. Perry*, 24 Tex. 257; *Bonner v. Hearne*, 75 Tex. 252, 12 S. W. 38; *Lewis v. Aylott*, 45 Tex. 190; *Duncan v. Taylor*, 63 Tex. 649; *Kampman v. Tarver*, 87 Tex. 497, 29 S. W. 768; *Schendell v. Rogan*, 94 Tex. 596, 63 S. W. 1001.

These citations from our supreme court could be continued at length, but we deem it unnecessary, and will now refer to a few of those of our own court so holding.

In *Ex parte Schmidt*, 2 Tex. App. 202, this court held: "It is a well-settled rule of construction of statutes, and for the arriving at the legislative intention, that all laws *in pari materia*, or on the same subject-matter, are to be taken together, in order to arrive at the result. . . . 'All acts *in pari materia*,' said Lord Mansfield, 'are to be taken together as . . . one law.' . . . Our supreme court say that 'the same legislature is supposed to be actuated, in all that it does, by the same mind, and to have at all times had the same objects and policy, and that it will not change its mind from day to day during the same session; and nothing short of expressions so plain and positive as to force upon the mind an irresistible conviction will justify a court in presuming that it was the intention of the legislature that their acts passed at the same session should abrogate and annul one another. The decent respect due a co-ordinate department of the government would seem to forbid that such a presumption be indulged by the courts.' *Cain v. State*, 20 Tex. 360."

In *Mock v. State*, 11 Tex. App. 58, this court held: "In pursuance of the well-settled rule of construing statutes that, in order to determine the exact legislative intent, it is proper to consider all of the statutes *in pari materia*, we will look to all the laws in force on the subject . . . in order that we may arrive at a proper construction and application of those portions of the penal laws by which those who neglect or fail to perform the duties required of them by the general law become amenable to criminal prosecution."

In *Walker v. State*, 7 Tex. App. 258, 32 Am. Rep. 595, this court said: "The object, L.R.A.1915C.

and the only object, of judicial investigation in regard to the construction of doubtful provisions of statute law, is to ascertain the intention of the legislature which framed the statute. . . . Every interpretation that leads to an absurdity ought to be rejected. . . . Every legislative act must have a reasonable construction."

In *Ex parte Gregory*, 20 Tex. App. 217, 54 Am. Rep. 516, this court said: "It is provided in our statute that 'in all interpretations the court shall look diligently for the intention of the legislature, keeping in view, at all times, the old law, the evil, and the remedy.' (Rev. Stat. art. 3138, subdiv. 6.) And our Penal Code provides that 'every law upon the subject of crime shall be construed according to the plain import of the language in which it is written, without regard to the distinction usually made between the construction of penal laws and laws upon other subjects' (Penal Code, art. 9). It will be perceived, from the provisions of our statute above quoted, that they are in accord with the rules of construction applicable to ordinances. They contemplate a reasonable construction, that is, a construction which will give effect to the intention of the legislative power enacting the law; and in interpreting the law all reasonable intendments which help to sustain and make the law operative are to be indulged and weighed by the court."

These citations and excerpts might be continued on down to the present day, both from the decisions of this court and the supreme court, but they sufficiently demonstrate the rule of construction that has always and does now prevail in this state, and with those rules of construction before us, if it is intended by the supreme court in the case of *State v. Texas Brewing Co.* — Tex. —, 157 S. W. 1166, to hold, as contended by appellant, that the law levying a \$4,000 license fee on those making sales by soliciting and taking orders therefor in prohibition territory would authorize one to engage in the sale of such liquors in prohibition territory, we cannot concur in such construction, but think it wholly wrong. As said hereinbefore, in territory where local option was adopted, and the sale of liquor prohibited, dealers licensed in territory where the sale was permitted had adopted the policy of securing agents in prohibition territory, or by sending their agents in such territory to solicit orders for intoxicating liquors, and fill such orders by shipping to the one who gave the order. Our court, and the supreme court, in the cases above cited, hold that the sale is not where the order is solicited, but at the point where the order is filled and delivered to the carrier. This was

the evil confronting the legislature, and the evil for which they were seeking a remedy (the regulation, if not the prohibition, of soliciting and taking orders in prohibition territory to be filled where the sale of liquor was licensed), and the legislature had no thought of licensing the sale of liquor in prohibition territory; and to give such construction to their language would be doing violence to their intent and purpose and the language of the statute in question. To make it plain that such was not their intent and purpose, it is only necessary to note that the same legislature increased the punishment for making a single sale of intoxicating liquor in the prohibited territory (making it a felony and punishable by imprisonment in the penitentiary), and, to further emphasize that fact, it will be noticeable that this same legislature, for the first time, made it an offense to pursue the business of selling such liquors in the prohibited territory, punishing such offense more severely than for making a single sale. Taking these three acts and construing them together as one act, as all the authorities both in this state and out of it say should be done, we do not think that anyone can reasonably conclude that it was the intent and purpose of the legislature, in fixing a license fee on soliciting and taking orders for the sale of intoxicating liquors, to license the sale of such liquors in such territory. It was not the intent of the legislature to license the sale of such liquors in the prohibited territory, but, in addition to imprisoning one in the penitentiary if he did so, they decided to regulate and control the accessory business of soliciting and taking orders in such territory, if not prohibit it, by making the license fee so high that no one could afford to pay it, but, if anyone should take out the license, to require an application to be filed with the county clerk, that he might be known and the territory in which he would engage in soliciting orders, the better to enable those intrusted with the enforcement of the law to prohibit sales in such territory.

Not only under the well-known rules of statutory construction, above quoted, would it do violence to the intent and purpose of the legislature to hold that they by this act intended to license sales of liquor in the prohibited territory, and violence to the language by them used in the statute, but when we consider that this court and the supreme court, in an unbroken line of decisions, have held and still hold that, when one solicits an order for intoxicating liquor in prohibition territory, the sale takes place where the order is filled and delivered to the carrier, with which decisions the legislature was familiar, L.R.A.1915C.

to say that they intended by this act to license sales in prohibition territory, and for that reason the statute was unconstitutional, would be to attribute to them an unreasonable intention, and one which, in the light of the opinions of this court and the supreme court, as to the place of sale when an order is taken, would be an absurd intent.

The statute is not subject to such construction, and we can hardly think the supreme court intended to so hold, but, as such construction of their opinion is contended for by appellant, we have discussed it from that viewpoint, and must say, if it does so hold, we cannot follow it. And while we have the utmost respect for the ability and learning of the members of the supreme court, and rely upon and follow their opinions in matters of civil law, yet this court has final jurisdiction in criminal matters, and we must follow our judgment. That court is of equal dignity with this court, and their decisions are final in all matters of construing the civil statutes, yet the Constitution of this state has made this court a court of final and supreme jurisdiction in the construction of criminal statutes and the enforcement of the law against crime. The soliciting and taking of orders for the sale of intoxicating liquors in prohibition territory, without paying the fee therein fixed, was made a penal offense by the legislature in this act in § 5 thereof, and punishable as therein stated. As to the wisdom of enacting this law, it is not our province to discuss nor decide; for, in the exercise of the powers conferred on them by the Constitution, the legislature has seen proper to enact this law, and we cannot declare it unconstitutional by giving to the language of the statute a strained construction, and one it is not susceptible of, in the light of all the opinions of this court, that a sale did not take place in the prohibited territory by soliciting or taking an order for intoxicating liquors in such territory. It has been held by this court that, whenever a legislative act can be so construed as to avoid conflict with the Constitution, such construction will be adopted by the courts. *Ex parte Mabry*, 5 Tex. App. 98. Again it is held: In construing legislative acts, courts must so interpret them as to harmonize their provisions with the Constitution, if possible. *Ex parte Murphy*, 27 Tex. App. 494, 11 S. W. 487. And our supreme court has so held in *Pickle v. Finley*, 91 Tex. 487, 44 S. W. 480, wherein Chief Justice Gaines said: "It is a well-settled rule in the construction of statutes that if an act of the legislature be capable of two constructions, one of which conflicts with the Constitution and the other which does not, the latter must prevail. It is the duty

of the courts 'so to construe every act of the legislature as to make it consistent, if possible, with the provisions of the Constitution.' "

What evil was there which confronted the legislature at the time this act was passed? They had passed an act punishing those who made sales of liquor in prohibition territory, and the same legislature that passed this act increased the punishment for making such sales. The evil and only evil to which their mind was directed in the passage of this act was the one that had grown up wherever prohibition had been adopted,—the soliciting and taking of orders for liquors to be filled by licensed dealers elsewhere to be shipped into prohibition territory. They were seeking to regulate and control, if not prohibit, this evil, and this evil alone. Their intent and purpose is manifest by the language of this act alone, but, if not, then certainly it is made manifest by the other acts passed by the same legislature. To strike down this act would leave unregulated and unrestrained this evil, and any and all persons could pursue it without leave or license, and thus, in a measure at least, render ineffectual the will of those people who, in their wisdom, have seen proper to adopt the prohibition laws to get rid of the evils incident to the sale and use of intoxicating liquors. While we regret to do so, yet if the construction contended for by appellant is the proper construction to give the opinion of the supreme court in the case of *State v. Texas Brewing Co.* — Tex. —, 157 S. W. 1166, and is the one intended by the court, we think it erroneous and an improper construction of the act of the legislature; and this court will, as it deems it its duty, enforce its provisions against all who solicit or take orders for the sale of intoxicating liquors in prohibition territory, and we adhere to the opinions in *Edmanson v. State*, 64 Tex. Crim. Rep. 413, 142 S. W. 887, and *Ex parte Flake*, — Tex. Crim. Rep. —, 149 S. W. 146.

We did not hold in the original opinion, and we do not now hold, that appellant was guilty of selling intoxicating liquors in the prohibited territory, but only that the facts showed that he was guilty of soliciting and taking orders for the sale of intoxicating liquors in the prohibited territory, which orders, the facts show, when taken in the prohibition territory, were forwarded by appellant to a licensed dealer in Palestine, where the sale is licensed, and by the licensed dealer shipped to appellant at Marshall, which town was in prohibition territory. Appellant received the liquor so ordered by him and placed it on cold storage, where all

those who had given orders called and got it when they desired. We agree that the authorities cited by appellant hold that this did not constitute a sale by appellant, but he was not prosecuted for making a sale of liquor in prohibition territory, but was prosecuted and convicted for soliciting and taking orders therefor.

The other questions raised were discussed in the original opinion, and we do not deem it necessary to do so again.

The motion for rehearing is overruled.

Davidson, J., dissenting (November 4, 1914):

The same question is involved in this case, as I understand it, as in the *Edmanson Case*, 64 Tex. Crim. Rep. 413, 142 S. W. 887. The facts, however, are very different. The statement in the *Edmanson Case* shows that about twenty witnesses for the state testified they went to Edmanson's cold drink stand and gave him orders for intoxicating liquors. These orders were telephoned to Belton to a saloon, and the whisky would come usually upon the next train. In some instances the whisky would be shipped in the name of the party ordering it, and they would get it from the depot. In other instances appellant delivered the whisky at his place of business. Furness testified he was a member of the firm of Warren & Furness. They were in the saloon business, and appellant began ordering whisky from their firm in September, and continued this until the following January. In September, October, and November his orders averaged about \$10 a day. During the month of December he ordered between \$400 and \$500 worth of whisky. Edmanson collected the money from all the parties from whom he took orders and settled with the liquors dealers at Belton. Under the decisions, Edmanson was pursuing the business of selling whisky in Lampasas, where his cold drink stand was situated. When he took the orders and the money and sent for the whisky, or when he sent for the whisky, and took their money after the whisky reached him and he delivered it there, when ordered in his name, as I understand the decisions in Texas, this was a sale by Edmanson, and the *Edmanson Case* was decided upon that theory.

In the instant case, however, there was a club at Marshall, a subordinate club formed in connection with the Elks lodge. Quite a number of members of the Elks order desired to drink beer; others did not. So they organized this subordinate club, with by-laws, rules, and regulations governing it. Among other matters, they would agree

among themselves as to who was to order the whisky. Sometime one member would volunteer his services for a week or such matter, and then another. Sometime the club would select a member. To get their money together for sending for the beer, they placed a box in a room, and each member desiring beer would put his money in an envelop and place it in that box, with his name written upon the envelop. If the party desired 20 glasses of beer, he would put a dollar in the envelop. In other words, the amount of money placed in the envelop would indicate the number of glasses of beer the party would desire, rating it at 5 cents a glass. It was agreed among the parties that this box was put there for that purpose, and they would designate some member of the club to get that money and send it to the place from which the beer was to be shipped. Appellant, a member of this club, was attending to this matter for the club at the time which covers this prosecution.

Without going further into detail, my brethren hold that appellant was therefore soliciting orders from the members of the club. I do not understand the facts that way, nor do I believe it is a legitimate deduction or conclusion from the statement of the facts. Nor did he or any member contemplate purchasing from appellant. As a member of the club, at the instigation and request of other members of the club, he agreed, for the week covering this prosecution, to order beer for them. They were soliciting him, rather than he soliciting them. They placed the money in the box. He did not solicit them to do it. They appointed him as their agent to take that money and order the beer. Under no possible construction, fairly imposed, could he be charged with soliciting orders for the sale of beer. He did not sell a single glass of beer, nor offer one for sale, nor contemplate either selling or offering for sale; and no witness, as I understand it, undertook to testify that he did. For the beer a ticket was issued to the party for the number of glasses of beer covering the amount of the money he had deposited in the box. If it was a dollar, he got a ticket for 20 glasses of beer. When that was exhausted, he could get no more beer until the next order, when he would have to make another deposit. Appellant sold no beer, but simply gave the party a ticket indicating the number of glasses of beer he was entitled to have for the money that he had previously deposited. I do not care to make a further statement of the facts. It is also agreed that local option was in effect at Marshall, where all these matters occurred.

Appellant was prosecuted under the act of L.R.A.1915C.

the legislature authorizing any person who desired to sell intoxicants by taking orders to do so by paying the tax specified in the act of the legislature. He was charged with a violation of this statute. Had he paid the tax, then he could have sold all the intoxicants he pleased and take in all the orders he desired, under and by virtue of the terms of that legislative act, according to the opinion of the majority, but, because he did not pay this tax, this affirmation was ordered. See Acts of 1909, p. 53. That act by its terms clearly and definitely authorized a party to sell intoxicants in prohibition territory upon payment of the tax. So that there may be no mistake, I quote the legislative act:

"In all counties, justice precincts, towns, cities or other subdivisions of a county where the qualified voters thereof have by a majority vote determined that the sale of intoxicating liquors shall be prohibited therein, there is hereby levied upon all firms, persons, associations of persons and corporations that pursue the business of selling or offering for sale any intoxicating liquors by soliciting or taking orders therefor in any quantities whatsoever, in any such county, justice precinct, town, city or other subdivision of a county, an annual state tax of four thousand (\$4,000) dollars."

Then follows the clause authorizing incorporated cities or towns to levy a \$2,000 tax, which is one half of the state tax. No fair construction can be placed on this act except that it justifies and authorizes one, on payment of the required tax, to pursue the business of selling intoxicating liquors by soliciting or taking orders. That is the language of the statute. This is so understood and held in the Edmanson Case. In the Edmanson Case I entered my dissent for several reasons, which is shown in the dissenting opinion, as reported in 64 Tex. Crim. Rep. 413, 142 S. W. 887. Among other grounds of that dissent, I here notice and reiterate two: First, where local option is in effect, the legislature is powerless to authorize the sale of whisky or any intoxicant in local option territory; that it is so by the Constitution, and every decision, until the recent opinions by this court, so holds. The first case in Texas reviewing the effect of the local option law was *Robertson v. State*, 5 Tex. App. 155. The only question in that case was whether or not the state law, authorizing selling under saloon license, was paramount to the local option law after the local option law had been voted into effect. Upon that question the case came to the court of appeals, and the court held, in accordance with the terms of the Constitution, power had been vested in the

majority of the voting citizenship of the given territory to vote out the sale of whisky, and it at once became the controlling law. This is so by virtue of article 16, § 20, of the Constitution; and it also held, when the people had so voted, the saloon must cease its selling immediately upon the local option law going into effect; that the local option law was the paramount law, and this, as I understand, has not been questioned until recently. The Edmanson Case is in direct conflict with the Robertson Case and the Constitution. The Robertson Case was followed by a great number of cases, some of which I shall cite: *Boone v. State*, 12 Tex. App. 184; *Donaldson v. State*, 15 Tex. App. 25; *Ex parte Lynn*, 19 Tex. App. 293; *Robertson v. State*, 12 Tex. App. 541; *Gibson v. State*, 34 Tex. Crim. Rep. 218, 29 S. W. 1085; *Rathburn v. State*, 88 Tex. 281, 31 S. W. 189. Other courts of the Federal Union have followed the same construction. See *Rauch v. Com.* 78 Pa. 490; *State v. Yewell*, 63 Md. 120; *Com. v. Jarrell*, 9 Ky. L. Rep. 144, 5 S. W. 763; *Minnehaha County v. Champion*, 5 Dak. 433, 41 N. W. 754; *Butler v. State*, 25 Fla. 347, 6 So. 67; *Bagley v. State*, 103 Ga. 388, 29 S. E. 123, 32 S. E. 414; *Com. v. Mueller*, 81* Pa. 127; *Wheeler v. State*, 64 Miss. 462, 1 So. 632; *Young v. Com.* 14 Bush, 161; *State ex rel. Church v. Weeks*, 38 Mo. App. 506; *Black, Intoxicating Liquors*, 50-198.

The second proposition that I desire to here reiterate in that dissent was, at the same session of the legislature, at page 284, that body passed an act punishing a citizen for pursuing the business of selling intoxicants in local option territory by confinement in the penitentiary for a period of from two to five years. How these two acts can stand together is, to my mind, incomprehensible. It is not the law that the legislature can license the sale of intoxicating liquors in local option territory, because the people have voted it out, and by their vote, under the terms of the Constitution, that law became as sacred as the Constitution, and was inviolable until the people in the same territory had again voted on the question and repealed the law by their vote. The legislature could not repeal it, nor could they change the status of the local option law in the given territory. It requires the vote of the people to vote it in and vote it out. This is so by all the authorities, and so thoroughly that they need not be cited. For both reasons this law should be held invalid. I do not understand how it is possible for the legislature to license crime or authorize the pursuit of a business in violation of law. This act authorizes L.R.A.1915C.

ing the selling of whisky by taking orders in local option territory would be, if the sale occurred, in direct conflict with the local option law, and therefore, where the party is pursuing that business, he would necessarily be selling in violation of the local option law. Pursuing such business is a felony, and in many of the counties in Texas to-day it is a felony to make one sale in local option territory, without even pursuing the business of selling. To say that the legislature of Texas could license crime would be imputing to that body an act that, if directly made, would be to charge them with dereliction in office. No such motive ought to be imputed to that department of the government. If the legislature could license the crime of violating the felony statute under local option law, then that body could license crime for any other felony. If the legislature can authorize a license to a party to violate the local option law by selling intoxicants, the same power could authorize the party to pursue the business of committing robbery, arson, murder, horse stealing, etc. These are all felonies, as is the pursuit of the business or occupation of selling intoxicants in local option territory.

So we have the strange anomaly that an act of the legislature is upheld which authorizes the sale of whisky in local option territory by taking orders, and another act passed at the same session and by the same legislature, but subsequently enacted, which punishes the party by incarceration in the penitentiary for the same selling. It will be noticed that the act authorizing this manner of selling in local option territory became effective on the 24th day of February, 1900. The statute prohibiting the pursuing of this business and affixing a penitentiary punishment to it was approved on April 15, 1900, and became effective ninety days after adjournment of the legislature. So it was and is the later act. This latter act was in aid of local option, because it punished the party who pursued the business of violating the local option law with a heavier punishment than where he was only making one sale, and not pursuing the business. It is another singular anomaly to hold that the state of Texas could take this money of its citizenship, authorizing him or them to do that certain thing, and at the same time incarcerate him in the penitentiary for doing the particular act which that body had authorized him to do, and for which the state had demanded and accepted his money and authorized him to do. But this is one of the many incongruities growing out of this character of legislation in recent years. I might mention another one of these incongruities. The same legis-

lature, at page 51 (Acts 1909) enacted what is known as "Nonintoxicating Malt Liquor Law." Under that statute the legislature affixed a punishment, authorizing the license to the citizenship of Texas where they desired to sell nonintoxicating beer and malt drinks. This was upheld in *Ex parte Townsend*, 64 Tex. Crim. Rep. 350, 144 S. W. 623, Ann. Cas. 1914C, 814. In that case I also entered a dissent, showing the incongruities and incompatibilities of that act with other acts of the legislature and the decisions of this court. In *Moreno v. State*, 64 Tex. Crim. Rep. 660, 143 S. W. 156, Ann. Cas. 1914C, 863, my brethren, overruling a long line of cases, held that they judicially knew the term or word "beer" meant intoxicating liquors. With this view they were not satisfied, but went further and said they did not have to rest their opinion upon judicial knowledge, because the legislature of Texas had determined what it took to constitute an intoxicant, and had defined it. In support of this they quoted an article, from what is known as the Fitzhugh-Robertson saloon license law. The cited section is 34 of that act, and reads as follows: "The term 'intoxicating liquor,' as used in this act, shall be construed to mean fermented, vinous or spirituous liquors or any composition of which fermented, vinous or spirituous liquors is a part; and all of the provisions of this act shall be liberally construed as remedial in character." Acts 31st Leg. (1st Ex. Sess.) chap. 17.

It will be noticed that under the saloon law, when it comes to selling intoxicants, this provision authorizes the holder of the license to sell all of these different things, whatever may have been their compound or ingredients, under their saloon license, and especially confined the term "intoxicating liquors" to the saloon license act, for it uses the term "intoxicating liquors" in the quoted section. That it did not apply to local option territory cannot be gainsaid, or ought not to be. I cite § 27 of the same act, wherein it provides as follows: "This act, or any of the provisions thereof, shall not be construed to be in conflict with any local option law now or hereafter to be in force in this state, and no license to any retail liquor or retail malt dealer shall be issued or shall be effective at any place where local option law is in force and operation."

This expressly provides that this act shall not be operative in local option territory, and, not only so, the same provision of exclusion is made in § 18 and § 14 and § 9 and § 1 of this same Fitzhugh-Robertson act. But my brethren in the *Moreno* L.R.A.1915C.

Case transferred and applied the saloon license provisions in and to local option territory, in the face of the statute and the Constitution, which provide that the local option law shall prohibit sales of intoxicating liquors. The reasons for my dissent are stated in the *Moreno* Case, and I do not care here to review that matter, nor the reasoning for that dissent. I refer to it simply for this reason: That in another case in the same volume (*Ex parte Townsend*, supra) my brethren sustained the act of the legislature licensing sale of nonintoxicating liquors in same territory. In the *Moreno* Case they held there were no nonintoxicating liquors in Texas, quoting the definition of intoxicating liquors above cited. If § 34 of Fitzhugh-Robertson act is applied to intoxicants in local option territory, then it was a matter of impossibility that there should be any nonintoxicating malt, vinous, or spirituous liquors. They would all be intoxicating, without reference to amount of alcoholic body contained. So we have another incongruity,—the license act of nonintoxicating liquors upheld by my brethren, in the face of the *Moreno* Case, which held there was no such thing in Texas as nonintoxicating liquor. I do not care to follow this further.

Then we have another singular anomaly. The statute under which appellant was indicted for pursuing the business without paying the license tax, and under which he was convicted and the judgment affirmed, was, as before stated, enacted in 1909. What is known as the Allison bill was passed in 1913, found on page 125 of the acts of the Thirty-Third Legislature, and, as amended on page 62, first called session, of Thirty-Third Legislature. Under the terms of the latter act, no shipment of intoxicants could be made into local option territory, providing a heavy punishment if such shipment occurred. Under the terms of the Allison bill, the only way a party could get intoxicants would be to go into the wet territory, get the intoxicants, and carry same home in person. He could not ship it by common carriers. If this law is valid, and my brethren hold in the recent case of *Ex parte Muse*, — Tex. Crim. Rep. —, 168 S. W. 520, that it is constitutional, without specifying whether all of its provisions are or are not constitutional, but in a general way held it constitutional, then it repeals the act under which appellant was convicted. If this act is constitutional, which prohibits the shipment of whisky into local option territory, then it necessarily repealed the license law for selling by soliciting orders. The two laws are absolutely incongruous, incompatible, and flatly contradictory, and the Al-

lison bill is the later act, and of course would supersede any prior conflicting legislation, if valid. The Allison bill was in full force and effect for what it is worth at the time of the affirmance of the judgment. It is too well settled in Texas to be questioned now, both by statute and decision, that, where a law is repealed either at the time of the trial of a party or at the time of the decision of it in the appellate court, he is entitled to his discharge. It would be unnecessary, I think, to cite cases in support of this proposition at this late date.

I have mentioned these statutes to show the anomalous condition of legislation and decisions in regard to these various matters, and how incongruous and contradictory all this legislation is and has been for some time. These different acts place the law of Texas certainly in a very curiously absurd condition. In one act a citizen is authorized to sell whisky by paying the license, and in another act the same legislature provides that if he does so sell he shall go to the penitentiary as a felon. The saloon-license act of the legislature, which defines intoxicating liquors to include everything in which vinous, spirituous, or malt liquors enter as a compound or part, was held by the majority of this court to apply to local option territory in the face of the statute which expressly forbids, and then sustains the law licensing nonintoxicating liquors which does contain spirituous, vinous, and malt liquors. Then we have the Allison bill, which wipes out and punishes for all shipment, and the affirmance of the judgment in this case for failing to get his license to order and ship the ordered beer. These may be classed as the beatitudes of our jurisprudence on this subject. I cannot therefore concur with my brethren: First, because the legislature had no authority to license the sale of intoxicants in any form by soliciting orders or any other way in prohibition territory. It would be a violation of the local option law and punished as a felony to follow that character of business or occupation. Second, the legislature cannot tax or license crime. And, third, appellant did not solicit orders from anybody, therefore did not violate the soliciting order statute, even if it was in effect and a valid law, and did not sell or offer to sell through orders or otherwise. Fourth, if, as a matter of fact or law, the Allison bill is constitutional, it supplanted the other law, and appellant's case should have been reversed and the prosecution dismissed, because the law under which he was convicted was not in force at the time of the disposition of his appeal. I have not cited nor commented upon the recent decision of the supreme court reviewing this L.R.A.1915C.

soliciting order statute, but I call attention to it. It will be found in *State v. Texas Brewing Co.* — Tex. —, 157 S. W. 1160. Chief Justice Brown's opinion in the case is so clear and forceful that it may be said to be unanswerable. The views expressed in that opinion are in strict accord with what I have understood the law to be and decided since the first appeal reviewing the local option clause of the Constitution of Texas. Judge Harper admits, in his opinion on rehearing in this case, that, if the license authorized the sale of intoxicants in the given territory, the law would be unconstitutional, but the Edmanson Case does not so hold, because in that instance the party under the testimony of many of the witnesses was selling directly in violation of the local option law, and the judgment in that case was affirmed, not that he was violating the local option law, but that he failed to take out license to do so. I quote in this connection from Judge Brown's opinion: "Under such license, it could, by solicitation or taking orders, sell and deliver intoxicating liquors in Clay county, because a sale implies a delivery of possession of personal property. Authority to pursue the business of selling intoxicating liquors in a county includes authority to deliver the liquor in that county, because the business could not be pursued if no sales were made, and no sale could be without delivery, actual or constructive. The words, 'by soliciting or taking orders,' do not limit the effect of the sale to pass title, nor do they exclude the delivery of the thing sold at the place where the business is pursued. Those words are descriptive of the method of selling. The local option law and the Constitution prohibited the sale of intoxicating liquors in Clay county, and the legislature could not authorize the pursuit, by any method, of the business of selling such liquor there. The state cannot levy an occupation tax on a business that, being pursued, would be a violation of the law and Constitution. Such license would not protect the licensee against prosecution for sales made under it."

Of course that business would have to be pursued in the particular county where the prosecution was had, because the statute expressly provides that, before he can engage in that business, he must file with the county clerk of the county, in which the business is to be pursued, an application in writing for license to engage therein, and shall state the county or portion of the county in which the business is to be pursued, and, if within the corporate limits of any incorporated city or town, that fact shall be stated, etc. Judge Brown, commenting upon this phase of it, said: "It is beyond all question that

the license must have been issued by the clerk of the county in which the business was to be pursued, and the business of selling intoxicating liquors in Clay county, by any method, being unlawful, it was not the subject of taxation by the state or county."

I have written the above on the lines indicated in my dissent, largely for the purpose of calling the attention of the legislature to the condition of our laws and their incongruities, in obedience to the statute which requires the judges of the state to call the attention of the legislature to such defects, conflicts, and incongruities as appear to be in the way or render inefficient the enforcement of the laws.

The information includes another count against appellant, charging him with a violation of the cold storage act of the legislature of 1909, p. 53. But for the opinion written in the case by the majority, I would hardly think that to be a serious question, but it seems to have been included in the decision. Briefly stated, the substance of the facts disclose that the club, of which appellant was a member, provided suitable means for storing their beer on ice for the purpose of preserving it while they were using it. It excludes the idea that any person had access to what is termed the cold storage, except the club itself or its members. It was not kept for any purpose, except to store and keep on ice the property of the club. No one outside of the club ever placed any commodity on the ice, nor was anyone permitted to do so. Nothing was kept in the refrigerator, nor was any offer ever made to receive anything from outsiders to be kept for storage. It was limited in its purpose exclusively to the use of the members of the club or to the club itself. If this was a cold storage plant, within the meaning of the act of the legislature, then every refrigerator could and would be a cold storage plant, wherever kept in ordinary business houses or in private families. The act of the legislature of 1909, p. 53, provides that in all local option territory a party may pursue the business of keeping, etc., "what is commonly known as a 'cold storage' or any place by whatever name known or whether named or not, where intoxicating or nonintoxicating liquors or beverages are kept on deposit for others, or where any such liquors are kept for others under any kind or character of bailment [by paying] an annual state tax of \$2,000." As before stated, the club provided a place for the keeping on ice of their beer. It was the beer alluded to in the former part of the opinion that was shipped in for the use of the members of the club on the terms and under the plans already detailed. The L.R.A.1915C.

testimony excludes the idea that any outsider ever kept anything in storage on this ice. Our statute provides that words and phrases used in the Penal Code shall be taken and accepted in their commonly understood meaning, unless the legislature shall give it a special definition. So we have the general statute which provides that the term "cold storage" shall be used and understood in its common and ordinary acceptation, but the statute did not stop there. It emphasizes the fact that it must be what is "commonly known" as a cold storage, or place where these interdicted matters are kept on deposit for others. The testimony excludes a violation of the cold storage act quoted. It was not kept for anybody except the club members, where the club had provided for storing their beer. I do not purpose to follow this matter to any great length, and will cite the case of *Stewart v. Atlanta Beef Co.* which was a Georgia case, reported in 93 Ga. 12, 44 Am. St. Rep. 119, 18 S. E. 981, by Judge Lumpkin of the supreme court of Georgia. Quoting from that opinion the following language is used: "The obvious meaning of the phrase, 'doing a cold storage business,' is carrying on the business of storing commodities in a cool place for hire or reward. It would certainly not be contended that one who, for his own comfort or convenience, kept fruits, meats, or other perishable goods in a refrigerator, box, or room cooled artificially, would be carrying on a cold storage business. It would make no difference in principle if a person engaged in the sale of such articles kept them, for the purpose of preservation until sold, in such a room or other place. The real business thus conducted would be that of a dealer in such commodities and the method employed for storing and preserving them would be a mere incident to that business. The business of storing for hire the goods of other people is of an entirely distinct character. The difference between the two classes of business indicated is very plain, and the proposition that a dealer in goods of any kind, who merely uses a cold storage receptacle for preserving his wares until sold, is not engaged in carrying on a cold storage business, is so manifestly beyond contention that, to our minds, it does not admit of elaboration or discussion; and it is entirely immaterial what may be the size of the receptacle, room, or other place in which the goods are stored. We therefore are fully satisfied that the defendants in error were not liable to the tax imposed by the clause quoted in the first headnote, from the gen-

eral tax act passed in 1890; it appearing beyond dispute from the evidence that these parties used the cold storage process for no other purpose than to preserve their own commodities, and that they did not receive or store, for hire or otherwise, any goods whatever for other persons."

The statute under consideration in the quoted case imposed a tax upon all packing houses doing a cold storage business in that state, whether carried on by the owners thereof or by their agents. This was a provision in the Georgia statute.

The cold storage article enacted by the Texas legislature punishes only for a violation of the license act when the cold storage was kept for receiving deposits of others than the owners or interested parties in the cold storage. Neither appellant nor the club, or both combined, kept a "cold storage," within contemplation of the terms of the act of 1909. This is so obviously so that it would need no discussion. Cold storage, as "commonly known," means keeping such cold storage, as a matter of business for hire or reward, a receptacle for storing commodities and things of that sort belonging to others, and not to the owners of the cold storage.

For the reasons indicated, I have entered the above views as some of the reasons for dissenting from the majority opinion.

MISSOURI SUPREME COURT.
(Division No. 2.)

STATE OF MISSOURI, Respt.,
v.
EDWARD PARKER, Appt.
(— Mo. —, 170 S. W. 1121.)

Robbery — picking pockets.

1. Merely inserting one's hand into another's pocket and abstracting therefrom loose change with intent to steal it does not come within a statute making everyone guilty of robbery who feloniously takes the property of another from his person and against his will by violence to his person.

Indictment — robbery and larceny.

2. An indictment for robbery will support a conviction for larceny.

(November 24, 1914.)

APPEAL by defendant from a judgment of the Circuit Court for Marion County convicting him of robbery in the first degree. Reversed.

Note. — As to the force sufficient to constitute robbery, see notes to *Jones v. Com.* 57 L.R.A. 432, and *Monaghan v. State*, 46 L.R.A. (N.S.) 1149. L.R.A.1915C.

Statement by Faris, J.:

Defendant, convicted in the circuit court of Marion county of robbery in the first degree, after the usual motions for a new trial and in arrest, appeals. The punishment assessed upon conviction was imprisonment in the penitentiary for a term of five years.

The facts developed upon the trial, so far as they are pertinent to the matters it has become necessary for us to discuss in the opinion, were substantially as follows:

In the afternoon of the 15th of February, 1913, one Herman Buckhold, the man alleged to have been robbed, and who is the prosecuting witness herein, was in the city of Hannibal for the purpose of selling a load of corn and of cashing a check which he had received for a carload of hay. This check was for the sum of \$120 and a few odd cents. The proceeds were paid to said Buckhold in cash, which consisted, odd cents excepted, of twelve ten-dollar bills. Shortly after Buckhold obtained this money, defendant sold him a pair of eyeglasses for the sum of \$1. In the course of the sale of these eyeglasses to Buckhold, and while paying defendant therefor, the money in the possession of Buckhold was seen by defendant. Some little time thereafter, on the same afternoon, and about 3 o'clock, Buckhold left Hannibal and started upon his return to his residence; the same being some 10 or 11 miles in a northwesterly direction from Hannibal. While Buckhold was in Hannibal and between the time of his arrival there, which was about noon, and the time of his departure therefrom, which was about 3 o'clock, he had drunk some four glasses of whisky, all of which glasses he ingenuously admits were full ones. On leaving Hannibal he purchased a pint of whisky, from which, however, prior to the events hereinafter detailed, he swears he did not drink.

Shortly after Buckhold left Hannibal the defendant Parker and one Henry Settle hired a horse and buggy and left Hannibal, ostensibly, and as they stated to the liveryman, for the purpose of going to the Oakwood Fair Ground; the same being some 2 miles from Hannibal, but in a different direction from that taken by Buckhold in going home.

At about the hour of 5 o'clock, defendant and said Settle caught up with Buckhold on the public road, at a point some 7 miles distant from Hannibal, and engaged in conversation with him with reference to the sort of land to be found in the neighborhood, leaving upon the mind of Buckhold, without (so far as the record discloses) saying so in direct or explicit language, the impression that they were land buyers.

Buckhold stopped his wagon. The defendant and Settle drove in front of his team and stopped their buggy, leaving the buggy across the road in such wise as to obstruct the passage of Buckhold's wagon. After some other conversation as to the soil, the country, and the scenery within view, defendant and Settle asked Buckhold to drink a bottle of beer with them. Buckhold at first demurred, but subsequently partially acquiesced; but upon defendant and Settle being unable, as they said, to find a bottle opener, Buckhold invited them to have a drink with him from the pint bottle of whisky which he had theretofore purchased in Hannibal, and which he tells us had not up to that time been opened. Both defendant and Settle took a small drink of whisky from Buckhold's bottle. Thereafter defendant came up on one side of Buckhold's wagon and Settle upon the other. Settle engaged Buckhold in a conversation relative to changing a \$20 bill for him, and while Buckhold was engaged in this conversation with Settle, and somewhat engrossed therein, and while he was leaning over toward Settle, who was on the left-hand side of the wagon, the defendant climbed upon the front right wheel of the wagon, placed his hand in Buckhold's right-hand pantaloons pocket, and abstracted therefrom the sum of \$2.25 in silver coin. Upon becoming aware of the actions of defendant, Buckhold struck with his whip at defendant and at his team. The team thereupon started very rapidly, and defendant was thrown or stepped from the wheel.

Since the facts which transpired at the immediate moment of the alleged robbery are pertinent and decisive, and since Buckhold is the only witness who testifies touching them, we in fairness set out below from his testimony what he said, and all he said as to the manner in which defendant committed the alleged robbery:

Q. In your own way tell the jury just how it happened.

A. You see, while I was talking to Mr. Settle, Mr. Parker got up on the wheel unbeknown to me, and got his hand in my pocket, and I never had any idea, until I felt his hand in my pocket and felt the money jingle, that he was upon the wheel at all. Well, I had the whip in my hand, and I just gave him a punch, and the team started moving, and the wheel turned, and Mr. Parker was off. I guess I was scared. I didn't get scared until I got away.

On cross-examination, touching this same matter the prosecuting witness said: "They brought the bottle back, and one wanted me to change the money, and the other ran

his hand in my pocket. I was leaning over when I felt someone's hand in my pocket. While I was talking to Settle, I felt what I thought was a man's hand in my pocket. My hair began to get 'curly,' and I got frightened after the horses started to run. I didn't think there was anything wrong until he got his hand into my pocket; then I thought it was time for me to get away from him. That was the time when I noticed danger, when he got his hand in my pocket and took my money. That is all I can say. That is the time when I got scared and dug out. I got scared right then. I didn't see him when he put his hand in my pocket."

Many objections are raised by the defendant, but the above statement and the above excerpts from the testimony of the prosecuting witness illustrate the only one of the alleged errors urged upon us by defendant which we regard as pertinent. Mention of other matters complained of would do no good. Such mention would be utterly useless, either as an aid to illumination of this case or as an aid to the science of jurisprudence, and would but serve to obscure the one decisive point in the case which we discuss in the opinion. If other facts, however illustrative of this point, shall become necessary, we will advert to them and set them out in the discussion of the legal phase involved.

Messrs. Nelson & Bigger and Whitecotton & Wight, for appellant:

Robbery in the first degree involves an intentional putting in fear, or the use of violence by the defendant.

State v. Sommers, 12 Mo. App. 375; State v. Smith, 119 Mo. 439, 24 S. W. 1000; State v. Jenkins, 36 Mo. 372; State v. Howerton, 59 Mo. 91.

It is of the very essence of robbery in the first degree, that the violence shall be present and immediate, and without it so being there is no case made.

State v. Smith, 119 Mo. 439, 24 S. W. 1000.

It is not robbery to obtain property from another without violence to the person, by "artifice and tricking."

Thomas v. State, 91 Ala. 34, 9 So. 81; Doyle v. State, 77 Ga. 513.

It is not robbery to obtain property from another by the use of only sufficient force to remove property from the pocket of the owner.

Fanning v. State, 66 Ga. 167, 4 Am. Crim. Rep. 561; Territory v. McKern, 3 Idaho, 15, 26 Pac. 123; State v. Sommers, 12 Mo. App. 374.

Messrs. John T. Barker, Attorney General, and Ernest A. Green, Assistant Attorney General, for the State:

Defendant was guilty of robbery in the first degree.

State v. Broderick, 59 Mo. 319; State v. Weinhardt, 253 Mo. 629, 161 S. W. 1151; 34 Cyc. 1799; State v. Montgomery, 109 Mo. 645, 32 Am. St. Rep. 684, 19 S. W. 221; Colbey v. State, 46 Fla. 112, 110 Am. St. Rep. 87, 35 So. 189; Mahoney v. People, 3 Hun, 202; Com. v. Davis, 23 Ky. L. Rep. 1717, 66 S. W. 27; Klein v. People, 113 Ill. 596; Smith v. State, 117 Ga. 320, 97 Am. St. Rep. 165, 43 S. E. 736; People v. Campbell, 234 Ill. 391, 123 Am. St. Rep. 107, 84 N. E. 1035, 14 Ann. Cas. 186; State v. McCune, 5 R. I. 60, 70 Am. Dec. 176; Evans v. State, 80 Ala. 4; Snyder v. Com. 21 Ky. L. Rep. 1538, 55 S. W. 679; Davis v. Com. 21 Ky. L. Rep. 1295, 54 S. W. 959; State v. Nicholson, 124 N. C. 820, 32 S. E. 813; Com. v. Tisworth, 30 Ky. L. Rep. 402, 98 S. W. 1028; State v. Carr, 43 Iowa, 418; Jones v. Com. 112 Ky. 689, 99 Am. St. Rep. 330, 57 L.R.A. 432, 66 S. W. 633; Stockton v. Com. 125 Ky. 268, 101 S. W. 298; State v. Sanders, 14 N. D. 203, 103 N. W. 419; Britt v. State, 7 Humph. 45; Coffelt v. State, 27 Tex. App. 608, 11 Am. St. Rep. 205, 11 S. W. 639.

Faris, J., delivered the opinion of the court:

The chief contention made by the defendant is that the proof does not show that he is guilty of robbery in the first degree, with which crime he was charged in the information, and of which he was convicted. At the close of the state's case, and again at the close of all of the evidence, defendant prayed the court to so instruct the jury, and the court refused to do so. We set out in the statement all of the testimony bearing upon this contention.

The crime of robbery in the first degree is defined by our statute thus: "Sec. 4530. Every person who shall be convicted of feloniously taking the property of another from his person, or in his presence, and against his will, by violence to his person, or by putting him in fear of some immediate injury to his person; . . . shall be adjudged guilty of robbery in the first degree."

In passing, though not pertinent, except as throwing light upon the cases which we cite which were adjudged at common law, we may say that at common law the elements of robbery were practically the same as under the statute above quoted. State v. Lawler, 130 Mo. loc. cit. 371, 51 Am. St. Rep. 575, 32 S. W. 979. Our statute denounces but one offense, which, however, L.R.A.1915C.

may be committed, as to the phase here in question, in the instant case, in two ways: By the felonious taking of the property of another from his person (a) by violence, or (b) by putting him in fear of some immediate injury to his person. State v. Smith, 119 Mo. loc. cit. 446, 24 S. W. 1000.

Manifestly no lengthy or involved argument is necessary to prove, under the facts in the instant case, that Buckhold was not, at or prior to the taking of the silver coins from his pocket, put in fear by defendant, or by his accomplice Settle, of any immediate injury to his person. The fright of him who is robbed must be under the law an objective fright, as contradistinguished from subjective fright; it must have been due, in short, to some act on the part of the accused, and not arise from the mere temperamental timidity of the person whose property happens to be stolen from his person or presence. State v. Weinhardt, 253 Mo. 629, 161 S. W. 1151. Here defendant merely put his hand into the pocket of Buckhold while his accomplice Settle engaged him in conversation. The act of theft was wholly accomplished before Buckhold got frightened. No blow was struck or threatened; no weapon was used or shown; or was any threat of injury, either immediate or remote, uttered by defendant. Robbery by putting in fear, then, clearly falls out of the case. In fact, learned counsel for the state do not urge this phase of robbery.

The state does contend, however, that the force used by defendant in inserting his hand into the pocket of Buckhold, and in drawing from such pocket the stolen silver coins, was and constituted such violence, under our statute, to make out robbery in the first degree. In this contention we cannot agree. Here the coins stolen were lying loose in Buckhold's pocket. No force or violence was necessary to separate them from Buckhold.

Our attention is called to the case of State v. Broderick, 59 Mo. 318, but in that case the watch chain of the prosecuting witness was larcenously taken by defendant Broderick by forcibly tearing it from the vest and from the watch, to both of which it was attached. When the prosecuting witness attempted to recover the chain, the defendant struck him and ran. It is fairly clear from the reported case that the striking of the prosecuting witness by the defendant Broderick was after the breaking loose of the chain from the person, and after the legal asportation of the chain was consummated. We are not aided at all, then, by this latter phase of force and violence, since force to prevent arrest, or to prevent recovery of the stolen property

after the asportation of the property is complete and after detachment from the person of the owner of the property is consummated, is not a necessary element of robbery in the first degree. *Kelly*, *Crim. Law*, 629; *Thomas v. State*, 91 Ala. 34, 9 So. 81; *Rouff v. State*, 61 Ark. 594, 34 S. W. 262; *People v. Stevens*, 141 Cal. 488, 75 Pac. 62; *Dawson v. Com.* 25 Ky. L. Rep. 5, 74 S. W. 701. In other words, the violence used in the robbery must precede, or be contemporaneous with, the taking of the property. 34 Cyc. 1799. The presence of force or violence of the latter sort will not serve to make that act of larceny robbery, which without such belated act of force would have been but ordinary larceny. *Thomas v. State*, 91 Ala. 34, 9 So. 81; *Kelly*, *Crim. Law*, 629, *supra*; 34 Cyc. and cases cited, *supra*.

Our court held in the *Broderick Case*, *supra*, that defendant therein was properly convicted of robbery. The distinction between the facts in that case and those in the instant case is obvious. In the *Broderick Case* the chain was attached to the clothing of the prosecutor and to a watch, inferably in a pocket of the latter's clothing. In order to remove this chain, the thief had to use sufficient force to break it loose both from prosecutor's buttonhole and from his watch. Here the coins stolen were merely stealthily lifted from Buckhold's pocket, where they were lying unattached to his person.

Such filching of loose property from the pocket with no more force than is necessary to lift and remove the property from the pocket is not robbery, but larceny. *Colbey v. State*, 46 Fla. 112, 110 Am. St. Rep. 87, 35 So. 189; *Spencer v. State*, 106 Ga. 692, 32 S. E. 849, 11 Am. *Crim. Rep.* 674; *Fanning v. State*, 66 Ga. 167, 4 Am. *Crim. Rep.* 561; *Woodward v. State*, 9 Tex. App. 412; *Johnson v. Com.* 24 Gratt. 555; *Reg. v. Walls*, 2 Car. & K. 214; *Rev. Stat.* 1909, §§ 4538, 4539. The difference between robbery and theft from the person of another, which our legislature has formally and fully recognized by the enactment of said §§ 4538 and 4539, *Rev. Stat.* 1909 (amended *Laws* 1911, pp. 193 and 194), lies in the force used or fear induced, or in the lack thereof. *People v. Campbell*, 234 Ill. 391, 123 Am. St. Rep. 107, 84 N. E. 1035, 14 Ann. Cas. 186; *Hall v. People*, 171 Ill. 540, 49 N. E. 495; *Rex v. Gray*, 2 East, P. C. 708; *Rex v. Steward*, 2 East, P. C. 702; *Rex v. MacCauley*, 1 Leach, C. L. 287; *Rex v. Gnosil*, 1 Car. & P. 304; *People v. Church*, 116 Cal. 300, 48 Pac. 125; *Jackson v. State*, 69 Ala. 249; *Fanning v. State*, 66 Ga. 167, 4 Am. *Crim. Rep.* 561; *Shinn v. State*, 64 Ind. 13, 31 Am. Rep. 110, 3 Am. L.R.A.1915C.

Crim. Rep. 396; *Com. v. Ordway*, 12 Cush. 270. Larceny committed by snatching or jerking the property of another person from such owner's person, where such property is so attached to the person or clothing as to afford resistance, or where there is an antecedent or contemporaneous struggle over the taking of the property, and asportation from the owner is accomplished by superior force, is robbery (*State v. Moore*, 106 Mo. 480, 17 S. W. 658; *State v. Broderick*, 59 Mo. 318; *Rex v. Moore*, 1 Leach, C. L. 335; *Rex v. Lapier*, 1 Leach, C. L. 320, 2 East, P. C. 557, 708; *Rex v. Mason*, Russ. & R. C. C. 419; *Usom v. State*, 97 Ga. 194, 22 S. E. 399; *Smith v. State*, 117 Ga. 320, 97 Am. St. Rep. 165, 43 S. E. 736; *State v. McCune*, 5 R. I. 60, 70 Am. Dec. 176; *Jackson v. State*, 114 Ga. 826, 88 Am. St. Rep. 60, 40 S. E. 1001, 14 Am. *Crim. Rep.* 586; *State v. Donohue*, — N. J. L. —, 59 Atl. 12; *People v. Stevens*, 141 Cal. 488, 75 Pac. 62; *Colbey v. State*, 46 Fla. 112, 110 Am. St. Rep. 87, 35 So. 189; *McDow v. State*, 110 Ga. 293, 34 S. E. 1019; *Klein v. People*, 113 Ill. 596; *State v. Miller*, 53 Kan. 324, 36 Pac. 751; *Brown v. Com.* 135 Ky. 635, 135 Am. St. Rep. 471, 117 S. W. 281, 21 Ann. Cas. 672); but where the property is taken from the person by merely lifting it from the person or pocket, then it is larceny merely, and the prosecution should be had under either § 4538 or § 4539, as amended, according as the property stolen may or may not exceed the value of \$30. If the act of defendant in this case be robbery, then the legislature did a vain and futile thing in enacting so much of §§ 4538 and 4539, *supra*, as denounces thefts from the person.

It follows that, since upon the facts shown defendant was not guilty of robbery, the instruction prayed by defendant in the nature of a demurrer to the evidence should have been given. This view renders a reversal of the case necessary. We shall not reverse the same and discharge the defendant, however, since it has been held that, under an indictment for robbery, the accused may properly, in a proper case, be convicted of larceny. *State v. Brannon*, 55 Mo. 63, 17 Am. Rep. 643; 25 Cyc. 103, and cases cited; *State v. Keeland*, 90 Mo. 337, 2 S. W. 442. Pursuant to the prayer in the appellant's brief, we will reverse and remand the case for such action as the state may be, upon the law and the facts, advised to take. Other errors alleged we need not now notice, as they are such as will not necessarily happen again.

In passing, and in view of the attack made below upon the goodness of the information, but which attack seems to have been practically abandoned here by defend-

ant, we may add that in our opinion the information is sufficient. *State v. Montgomery*, 109 Mo. 645, 32 Am. Rep. 684, 19 S. W. 221; *State v. Calvert*, 209 Mo. 280, 107 S. W. 1078; *State v. Kennedy*, 154 Mo. 268, 55 S. W. 293. It contains, it may be, words of surplusage added by learned counsel who drew it, out of the abundance of caution, but it is nevertheless good. *State v. Flynn*, 258 Mo. 211, 167 S. W. 516; *Kelly*, Crim. Law, 625.

Let the case be reversed and remanded.

Walker, P. J., and Brown, J., concur.

NEBRASKA SUPREME COURT.

ARTHUR B. WOOD, Treasurer of the County of Red Willow,
v.

MCCOOK WATERWORKS COMPANY,
Appt.

(— Neb. —, 149 N. W. 417.)

Tax — assessment of personalty — time.

1. The revenue law as to the assessment

Headnotes by FAWCETT, J.

Note. — *Taxes: acquisition of exempt character after tax day.*

As to assessability of property brought into tax district after tax day, see the note to *Hammond Lumber Co. v. Smart*, 38 L.R.A.(N.S.) 856; and for the subject of personal property acquiring a taxable nature after tax day, see the note to *Citizens' Bank & T. Co. v. Board of Assessors*, 38 L.R.A.(N.S.) 1157.

As to effect of acquisition of title by eminent domain to cut off tax lien, see note to *Gasaway v. Seattle*, 21 L.R.A.(N.S.) 68.

For the acquisition of property by the public as affecting tax proceeding previously instituted, or previously existing tax lien, see the note to *Foster v. Duluth*, 48 L.R.A.(N.S.) 707.

It will be observed that in *Wood v. McCook Waterworks Co.* the question was as to the personal liability of the waterworks company for the tax, and it is thus distinguished from the cases discussed in the note last referred to, as there the question was not as to personal liability, but as to the liability of the property itself, as distinguished from a personal liability of the owner.

The difficulty of this subject is that, as the question usually arises, there is no definite tax day. It is variously held that the crucial day is the day of opening the assessment books, the day of closing them, the time of completing the assessment, the day when the lien attaches, and the day when the taxes become due and payable.

The cases in general are of one of two L.R.A.1915C.

of personal property examined, as set out in the opinion, and construed to mean that such property shall be listed and assessed with reference to the quantity held or owned on the 1st day of April in the year for which the property is required to be listed.

Same — change in use of property — effect.

2. One who owns personal property subject to taxation at the time when it is returnable for assessment and taxation for any year cannot escape liability for the tax for such year by subsequently devoting the property to a purpose which would thereafter render it not subject to taxation, nor by a sale of such property to a municipal or other corporation, in whose hands such property thereafter would not be subject to taxation.

(November 12, 1914.)

APPEAL by defendant from a judgment of the District Court for Red Willow County, overruling a demurrer to a petition filed to recover taxes assessed against defendant upon personal property. Affirmed.

The facts are stated in the opinion.

Messrs. Frank E. Bishop, John E. Kelley, and C. E. Eldred, for appellant:

The property having been transferred into

classes: (1) When an exempting statute comes into effect during the year, or (2) when the property is acquired during the year by an owner exempt from taxes.

The reader will remember that "an alleged grant of exemption from taxation will be strictly construed" (37 Cyc. 802). It is the general rule that property will not be relieved from the taxes of the current year where such taxes are due and payable at the time the property is acquired by an exempt owner, or at the time that an exempting statute takes effect; and the same is generally true where the lien has attached at the time of such change in ownership or in the law.

Where, at the time of the change, the tax is neither due nor a lien, it is hardly worth while to formulate rules on the subject in view of the variety of systems of taxation.

Exempting statute or constitutional provision coming into force during the year.

Cases where the statute expressly provides as to its effect on current taxes are excluded, as are cases where the new act does not exempt, but substitutes a new method of taxation (see *M'Quilkin v. Doe*, 8 Blackf. 581, and *San Francisco v. Pacific Teleph. & Teleg. Co.* 166 Cal. 244, 135 Pac. 971). For Louisiana and New York Cases, see those headings *infra*.

—taxes due at time of new law.

An exempting statute will not release taxes which are due at the time when it

the hands of the city of McCook, where it was exempt from taxation, prior to the time the assessment was completed and levy of tax made, and prior to the time when the tax would become a lien upon the property, the attempted taxation was void.

Hacker v. Howe, 72 Neb. 385, 100 N. W. 1127, 101 N. W. 255; State ex rel. Mickey v. Drexel, 75 Neb. 751, 107 N. W. 110; *Ætna Ins. Co. v. New York*, 153 N. Y. 331, 47 N. E. 593; Gachet v. New Orleans, 52 La. Ann. 813, 27 So. 348; Prytania Street Market Co. v. New Orleans, 110 La. 835, 34 So. 797; Louisville Water Co. v. Kentucky, 170 U. S. 127, 132, 42 L. ed. 975, 977, 18 Sup. Ct. Rep. 571; Public Schools v. O'Connor, 143 Mich. 35, 108 N. W. 426.

takes effect, and as to which it is silent. State v. Certain Lands, 40 Ark. 35; Louisville Water Co. v. Hamilton, 81 Ky. 517; Appeal Tax Ct. v. Baltimore Academy, 50 Md. 437. See also Henderson v. Stisted Twp. 17 Ont. Rep. 673, *infra* "law passed after completion of assessment."

Thus, in Louisville Water Co. v. Hamilton, 81 Ky. 517, it was held that the water company was not relieved from the payment of taxes "due or imposed before the act was passed," such act providing that "the Louisville Water Company is hereby exempted from the payment of taxes of all kinds, of whatever character,—state, municipal, and special," the court stating that it was only intended to relieve the company from the burden that might thereafter be imposed, and that a statute would not be considered to be retrospective unless such was the plain legislative intent. (See also Louisville Water Co. v. Com. 5 Ky. L. Rep. 519, abstract.)

It was held, however, in State ex rel. Hudson v. Academy of Science, 13 Mo. App. 213, that an exempting statute taking effect after the assessment would bar collection proceedings against the property, but whether the taxes were due at the time the statute took effect does not appear. In that case the taxes of 1877 had been assessed in August, 1876, and it was held that the collector might not commence proceedings to subject the property to such taxes of 1877 after July 30, 1877, when an exempting statute went into force, which statute in effect repealed the enactment under which the assessment was made. The court said: "We are of opinion that where the legislature exempts from taxation a certain class of property which had been subject to taxation, and makes no provision as to the collection of taxes already assessed against such property, its intention must be that proceedings should not afterwards be inaugurated to subject the exempted property to the tax which had been removed, although the assessment was made before the repeal of the tax."

The court in the last case cited Mitchell v. Craven County, 71 N. C. 400, holding that L.R.A.1915C.

Mr. W. M. Somerville, for appellee:

The sale of its property by the McCook Waterworks Company between the time of the assessment and the making of the levy by the state and county authorities did not operate to discharge its obligations to pay the amount of this tax.

Foster & S. Lumber Co. v. Leisure, 3 Neb. (Unof.) 237, 91 N. W. 556; People ex rel. Twenty-Third Street R. Co. v. Tax & A. Comrs. 91 N. Y. 593; Association for Benefit of Colored Orphans v. New York, 104 N. Y. 581, 12 N. E. 279; Re American Fine Arts Soc. 151 N. Y. 621, 45 N. E. 1131; *Ætna Ins. Co. v. New York*, 153 N. Y. 331, 47 N. E. 593; Howell v. Scott, 44 Kan. 247, 24 Pac. 481; Home Missions v. New York, 91 Hun, 642, 37 N. Y. Supp. 96; Sisters of

taxes levied by a township board of trustees for a certain purpose authorized by law could not be collected where, after such taxes had been "levied," a statute was passed which repealed the old law, and forbade the board to levy and collect taxes for said purpose.

While without the scope of this note, reference may be made in this connection to Oakland v. Whipple, 44 Cal. 303, holding that a pending action by a city for delinquent taxes of the preceding year will not be affected by the passage of a new statute repealing all prior acts so far as they conflict with the new statute, and providing for a new method of collection of delinquent taxes, where, at the time of the passage of this statute, the proceeding required therein could not be taken in respect to the taxes of the preceding year, as it was then too late. The court considered that the statute did not repeal the existing law so far as concerned taxes due at the time of its passage, as such a remission of taxes would not be inferred.

—taxes a lien at time of new law.

An exempting statute will not release taxes which are a lien at the time the statute takes effect, and as to which the statute is silent. People ex rel. McCullough v. Deutsche Gemeinde, 249 Ill. 132, 94 N. E. 162; People ex rel. McCullough v. Logan Square Presby. Church, 249 Ill. 9, 94 N. E. 155; McHenry Baptist Church v. McNeal, 86 Miss. 22, 38 So. 195.

Thus, an exemption by statute, taking effect July 1, will not relieve real property from the taxes of that year where the revenue statute fixes the 1st day of April as the day determining the status of property for taxation, and provides that the taxes upon real property shall be a lien on that day. People ex rel. McCullough v. Deutsche Gemeinde, 249 Ill. 132, 94 N. E. 162.

So, it was held in McHenry Baptist Church v. McNeal, 86 Miss. 22, 38 So. 195, that where by statute the lien for taxes attached from February 1, a statute passed later in the year, exempting a corporation

the Poor v. New York, 51 Hun, 355, 3 N. Y. Supp. 433; State v. Ewing, 11 Lea, 172; Hennepin County v. St. Paul, M. & M. R. Co. 33 Minn. 534, 24 N. W. 196; First Cong. Church v. Linn County, 70 Iowa, 396, 30 N. W. 650; Independent School Dist. v. Hewitt, 105 Iowa, 663, 75 N. W. 497; Clearwater Timber Co. v. Nez Perce County, 155 Fed. 633; New York v. Tax & A. Comrs. 104 U. S. 466, 26 L. ed. 632; Public Schools v. O'Connor, 143 Mich. 35, 108 N. W. 426.

Mr. C. D. Ritchie also for appellee.

Fawcett, J., delivered the opinion of the court:

This action was brought by plaintiff in his official capacity, in the district court for

which bought the property in August, did not relieve the property from the taxes of the current year. The court stated that the exempting statute was not intended to have any retroactive effect, and as it did not expressly exempt property from taxation for the year in question, its terms could not be extended by strained construction, and that "exemptions by implication are not countenanced."

—law passed after completion of assessment.

In Henderson v. Stisted Twp. 17 Ont. Rep. 673, it was held that an exempting statute taking effect on the 1st of August did not exempt the taxes of the current year where, by statute, the council might each year, after the final revision of the roll, pass a by-law levying a rate, and this was done on the 11th of August, and the revision of the assessment roll was final on the 16th of June, and the law also provided that "the taxes or rates imposed or levied for any year shall be considered to have been imposed, and to be due on and from the 1st day of January of the then current year, and end with the 31st of December thereof, unless otherwise expressly provided for by the enactment or by-law under which the same are directed to be levied."

—effect of particular statutes.

Litigation over taxes arising under a certain statute will not be affected by the passage of another statute *pendente lite*, declaring the intent and "true construction" of the prior statute, the effect of such a construction being to reduce the amount of the tax. People ex rel. Mutual L. Ins. Co. v. New York, 16 N. Y. 424.

Where, after the passage of a statute authorizing taxation of property which had been omitted in previous years, property was so assessed and a warrant issued for collection of taxes, such taxes must be paid, although thereafter a statute is passed, showing it to be the intent of the legislature no longer to tax property for such omitted years, the court giving its judgment L.R.A.1915C.

Red Willow county, to recover taxes upon personal property assessed against the defendant for the year 1911. A general demurrer to the petition was overruled, and, defendant declining to plead further, judgment was entered for plaintiff for the amount of the tax. Defendant appeals.

The petition alleges substantially: That on April 1, 1911, defendant was a corporation, with its principal office and place of business and all of its property, upon which the tax was assessed, located in the city of McCook, and also in school district No. 17; that on that date defendant was engaged in selling water to the city of McCook and its inhabitants, and was the owner of a valuable plant and of a franchise permitting it to engage in such business in that city:

on general grounds, and also because the Constitution provided that the legislature should have no power to release or distinguish indebtedness, liabilities, or obligations of any corporation or individuals of the state, county, or any other municipal corporation thereof. McNeal v. Ritterbusch, 29 Okla. 223, 116 Pac. 778.

Property cannot escape the payment of a special improvement assessment where a statute passed the 31st of March exempted the property from any and all special taxes and assessments for the year 1891, and on the 8th of January, 1891, an improvement affecting the property had been completed and the certificate delivered to the contractor, who thus had acquired special rights, and the right to have the assessment collected through the usual instrumentalities. Yates v. Milwaukee, 92 Wis. 352, 66 N. W. 248.

Where the question was when a ten-year statute of exemption had begun, and by the statute it was provided that the land, etc., "shall be exempt from taxation by the city and county for the period of ten years, from and after the 1st day of December, 1850," and the taxes of 1859 were payable some time before the 1st of December, it was held that the exemption began as to the taxes payable in 1860, although the assessment for the taxes of 1860 had been begun prior to said 1st of December. The court said: "The law had no reference to assessments which preceded the levy of taxes. That these assessments would create a lien from their date is another question, no more involved in the construction of this act of 1860. We attach no importance to the date of the assessments. The question is whether the property has had an exemption from payment of county and city taxes for ten years." Southern Hotel Co. v. County Ct. 62 Mo. 134.

Exempt owner acquiring the property during the year.

For Louisiana and New York cases see those headings, *infra*.

that on or about May 20, 1911, defendant, for the purpose of listing its franchise and personal property for taxation, made out a sworn statement and delivered the same to the assessor; that by such statement the company listed and valued all tangible personal property owned by it on the 1st day of April, 1911, at the sum of \$43,550; that thereupon the assessor duly fixed and made a valuation of such property on the 1st day of April, 1911, at the sum named and fixed, and made the assessed valuation thereof at the sum of \$8,710; that on or about the 27th day of July, 1911, there was levied against the property a tax of 6.5 mills for state purposes, and on the 3d day of August, 1911, there was levied a tax for county, state, and school district purposes aggregating 41.1 mills; that by reason of such listing, assessing, and levying of taxes there became due and owing from defendant to plaintiff, as treasurer, the sum of \$811.77 personal tax, no part of which has been paid; that on October 30th the said assessments were duly transcribed into the tax list of the county clerk, and on or about that date the county clerk attached a warrant to such tax list, commanding the treasurer to collect the same; that on the 1st day of July, 1911, the defendant sold and delivered its waterworks plant and all property connected therewith to the city of McCook, for the sum of \$65,000; that on February 1, 1912, plaintiff issued a distress warrant directed against defendant for the amount of the tax and interest, and on Feb-

gating 41.1 mills; that by reason of such listing, assessing, and levying of taxes there became due and owing from defendant to plaintiff, as treasurer, the sum of \$811.77 personal tax, no part of which has been paid; that on October 30th the said assessments were duly transcribed into the tax list of the county clerk, and on or about that date the county clerk attached a warrant to such tax list, commanding the treasurer to collect the same; that on the 1st day of July, 1911, the defendant sold and delivered its waterworks plant and all property connected therewith to the city of McCook, for the sum of \$65,000; that on February 1, 1912, plaintiff issued a distress warrant directed against defendant for the amount of the tax and interest, and on Feb-

—taxes a lien when property acquired by exempt owner.

The acquisition of property by an exempt owner will not release taxes which are already a lien. *Manly v. Gibson*, 14 Ill. 136; *People ex rel. Thompson v. St. Francis Xavier Female Academy*, 233 Ill. 26, 84 N. E. 55; *People ex rel. McCullough v. Ladies of Loreto*, 246 Ill. 403, 92 N. E. 908; *German Bank v. Louisville*, 108 Ky. 377, 56 S. W. 504; *State v. Northwestern Teleph. Exch. Co.* 80 Minn. 17, 82 N. W. 1090; *Philadelphia v. Pennsylvania Co.* 214 Pa. 138, 63 Atl. 420, 6 Ann. Cas. 637; *State v. Ewing*, 11 Lea, 172. See also as the same in effect, *People ex rel. McCullough v. Logan Square Presby. Church*, 249 Ill. 9, 94 N. E. 155. See also in this connection, *McHenry Baptist Church v. McNeal*, 86 Miss. 22, 38 So. 195, "—taxes a lien at time of new law."

Thus, taxes for the year must be paid on property purchased by a bank after the 1st day of January, and after the taxes had become a lien on the property, although the bank is required by law on the 1st day of January to pay a certain amount of tax in lieu of all taxes whatever. *Manly v. Gibson*, 14 Ill. 136.

Where the statutory tax lien attaches on the 1st day of May, a purchase of the property thereafter by a corporation which commuted all its taxes on a certain basis did not divest the lien of taxes of the current year from the property, the statute providing that "the taxes assessed upon real property shall be a lien thereon from and including the 1st day of May, in the year in which they are levied, until the same are paid, but as between grantor and grantee, such lien shall not attach until the 1st day of January of the next year thereafter." *State v. Northwestern Teleph. Exch. Co.* 80 Minn. 17, 82 N. W. 1090, overruling *Hennepin County v. St. Paul, M. & M. R. Co.* 33 Minn. 534, 24 N. W. 196, the court considering that the earlier case had been already overruled by *Martin County v. Drake*, 40 Minn. 137, 41 N. W. 942, which, however, had to do with property sold by the railroad, instead of property bought by it. L.R.A.1915C.

In *German Bank v. Louisville*, 108 Ky. 377, 56 S. W. 504, where a bank purchased at a judicial sale a lot of land on the 4th of August, 1890, and on November 19, 1890, the sale was confirmed, and under the charter of the city, all lands therein were subject from September 1st to a lien for the city tax to be assessed thereon, and such assessment might be either against the owner or holder, it was held that the bank (was not the owner and holder until the sale was confirmed, and that therefore it) was not the owner and holder at the time that the assessment was to be made, and that therefore it could not claim that there was no lien upon the property for taxes, on the ground that the property, if held by the bank at the time of the assessment, would have been exempt.

Where, after the tax became a lien, the property was acquired by an exempt charity, the court declined to sustain such charity's claim that it should only pay a proportional part of the tax for the year up to the time when it acquired the property, holding that the tax must be paid for the entire year. *Philadelphia v. Pennsylvania Co.* 214 Pa. 138, 63 Atl. 420, 6 Ann. Cas. 437.

(It may be noted that it is stated in the headnote to *Humphreys v. Little Sisters of the Poor*, 7 Ohio Dec. Reprint, 194, that if an exempt corporation acquired property which was already subject to the lien of the state for the taxes of that year, such taxes must be paid. Taxes for such current year were however not involved in the case, and the judgment exempting the property provided that it should not affect them or any right to taxation in regard to the property.)

—miscellaneous.

In *First Cong. Church v. Lynn County*, 70 Iowa, 396, 30 N. W. 650, it was held that the property was liable for the whole of the taxes of 1880, where it was assessed in January, 1880, and sold to the church in August, 1880, although the taxes were not levied until September. The court stated that it was not necessary to inquire whether the tax was a lien from the assessment, it

ruary 8th the warrant was returned unsatisfied. Wherefore the plaintiff prays judgment for \$811.77, with interest at the rate of 10 per cent per annum from the 1st day of December, 1911.

The assignments of error are that the court erred in overruling the demurrer and in rendering judgment against defendant. The contention of defendant is that the sale and delivery by defendant of its property to the city of McCook on July 1st was prior to the completion of the assessment for 1911, and prior to the levy of any tax for that year; that the property was exempt from taxation as soon as it became the property of the city; that the assessment was not completed and did not become final until after the value, as found by the local

assessor, had been corrected by the county assessor and equalized by the county and state boards of equalization; that the levy of tax was not made and did not become a lien until after the property had been transferred to the city; that "the principal question involved, then, is: The property having been transferred into the hands of the city of McCook, where it was exempt from taxation, prior to the time the assessment was completed, and levy of tax made, and prior to the time when the tax would become a lien upon the property, was the attempted taxation void?"

The district court answered this question in the negative.

In a typewritten memorandum, submitted by counsel for defendant by leave of

was sufficient to know that for seven months of the year it was subject to taxation, and that during all that time it was subject to assessments and other proceedings preliminary to the levy of the whole year, and that, as there was no statutory method of apportionment of the taxes, the property must pay the tax for the whole year.

It will be noticed that in *Wood v. McCook Waterworks Co.* the court considered that it was not essential, in fixing the liability upon the seller, that a lien should attach before the property was sold, and that in various subdivisions of this note there are a number of cases in which the property has been held liable to the taxes of the year, although no lien had attached at the time of the sale.

Where a church acquired property March 1st, it was held that the most that it could claim by way of exemption would be a proportion of the tax due for the remaining part of the year; but the court observed that whether the tax could be thus apportioned they did not decide, and that, in general, taxes are assessed and payable early in the year for the entire year. *Philadelphia v. Barber*, 160 Pa. 123, 28 Atl. 644.

In *State ex rel. Hayes v. Snyder*, 139 Mo. 549, 41 S. W. 216, it was held that as the state had not provided any means for a personal judgment against the owner, no personal judgment could be recovered against one who sold land to the United States on the 30th day of July, where the tax was levied in April of the following year, and was not payable until December of such following year, although the statute provided that "every person owning or holding property on the 1st day of June, including all such property purchased on that day, shall be liable for taxes thereon for the ensuing year."

In *Sherwin v. Wigglesworth*, 129 Mass. 64, it was held that taxes assessed against property, and an assessment thereon for a betterment subsequent to the filing of a petition for the taking of the property by the United States, but before the final judgment of condemnation, were not recoverable against the owner, notwithstanding the provisions of the statutes of the United States, L.R.A.1915C.

under which the land was taken, stated that the title did not vest in the United States until the assessment and payment of the damages thereby occasioned to the owners of the land. It appears that the petition was filed in 1873, that the verdict was rendered on it and accepted and recorded by the court on April 6th, 1875, that final judgment was rendered on August 16th, 1876, on the day that the owner was paid the amount of the judgment; that the taxes were assessed by the city of Boston May 1, 1875, and May 1, 1876, and that in February, 1875, assessments were made for a betterment in respect to the widening of certain streets under orders approved April 18, 1873. The court stated that the title which was purchased by and vested in the United States was the title as it existed when the petition was filed; that the value to be paid for was the value of the land at that time, that both the compensation paid and the title acquired had relation back to the inception of the proceeding, and that it would be most unjust to charge the owners with betterments or other taxes imposed on the property after it had been designated and set apart for the public use, while they could not enjoy or improve it, or obtain compensation for any increase in its value.

Louisiana—purchases.

Where, before the assessment was in a completed state, and therefore before any taxes were due, the city purchased the property, it was held that the state taxes on the property for that year could not be collected, and that the city, by assuming in its deed the payment of the state and city taxes for that year, was not estopped to claim the exemption. *Gachet v. New Orleans*, 52 La. Ann. 813, 27 So. 348.

But where, under the statute, the assessment must be closed and completed by the 31st of March, and property was sold to the city in July, it was held that the taxes for the year had attached. The court distinguished the case of *Gachet v. New Orleans*, supra, in that, in the latter case, the assessment had not been closed when the sale to the city was made, whereas in the instant

court after the arguments at the bar, it is claimed that the statute does not fix any definite date when personal property shall be assessed either as to valuation or ownership; that the whole matter of assessment is progressive, and is not concluded until the work of the assessor, the county board, and the state board is completed in the final levy made after all their work is done, which was August 3d in this case. Prior to 1903, § 6, art. 1, chap. 77, Comp. Stat. 1901, of the revenue law, provided: "Personal property shall be listed between the 1st day of April and the 1st day of June of each year, when required by the assessor, with reference to the quantity held or owned on the 1st day of April in the year for which the property is required to be listed."

case it had, the statutes as to assessments having been changed meantime. *Prytania Street Market Co. v. New Orleans*, 110 La. 835, 34 So. 797.

—changes in the law.

It seems to have been held in *Havana American Co. v. Board of Assessors*, 105 La. 471, 29 So. 938, and in *Hernsheim Bros. v. Board of Assessors*, 105 La. 473, 29 So. 939, that in so far as taxes owing to the state of Louisiana were concerned, an exemption in the Constitution operative upon or before the 1st day of January, 1880, applied to the taxes of 1880, but the court does not refer to nor distinguish the decisions in the following New Orleans cases, which (while without the scope of this note) may be referred to in this connection:

An ordinance of the city of New Orleans which went into effect on the 23d of December, 1879, and provided for the regular levying of licenses for the ensuing year, was not repealed by the Constitution which went into effect on the 1st day of January, 1880, and which provided: "The general assembly may levy a license tax, and in such case shall graduate the amount of such tax to be collected from persons pursuing the several trades, professions, vocations and callings. No political corporation shall impose a greater license tax than is imposed by the general assembly for state purposes," as this was not retrospective, and its effect as to the city was suspended until the state, through its legislative department, had adopted a system of state licenses. *New Orleans v. Vergnole*, 33 La. Ann. 35.

So it was held in *Depuy's Succession*, 33 La. Ann. 258, and in *New Orleans v. L' Hote*, 35 La. Ann. 1177, that taxes imposed by the city in December, 1879, for the year 1880, were not disturbed by the Constitution nor subsequent statutes.

Where the statute required the assessment to be completed by the 31st of March, and fixed the dates by which copies of the rolls must be filed respectively with the city and the state auditor as May 1, and July 1, it was held that the tax could have been collected any day after the 31st of March L.R.A.1915C.

By an act approved April 4, 1903 (Laws 1903, chap. 73), the legislature provided a system of public revenues, and repealed all of article 1, chapter 77, as it had existed prior thereto. In the new act, § 6, art. 1, of the prior act, above quoted, seems to have been omitted; but that the legislature did not intend to change the rule that assessments of personal property are based upon the amount of property owned by the taxpayer on April 1st is shown by the oath which the taxpayer is required to make to the schedule furnished him by the assessor, which is: "I, ———, being duly sworn, say that the foregoing statement and schedule is true and contains a full and complete list of all property held by or belonging to me on the 1st day of April. . . .

had the rolls been filed on any day after that date, the court stating that the tax was due, that is, that the property assessed owed the tax from the completion of the assessment on the 31st of March, and that the promulgation of an exempting constitutional amendment upon the 12th of May was not retroactive, and did not apply to the taxes of that year. *Louisiana & N. O. Ice Co. v. Parker*, 42 La. Ann. 669, 7 So. 898.

New York.

Most of the New York cases have arisen in construction of the taxing provisions applicable in the city of New York, where, before the amendment of 1911, the tax books were opened on the 2d Monday in January, and remained open until the 1st of May.

—change after tax books close.

It has been held that the taxes of the year will not be released after the books are closed, either by subsequent acquisition of the property by an exempt owner, or by subsequent taking effect of an exempting statute.

Thus, it was held that any exemptions contained in an act which went into effect on the 1st day of June could not affect the taxes for that year, where the assessment was completed before the 1st day of May, and the statute conferred no power upon the commissioner to change the record of assessments after the 1st of May (except, perhaps, in case of an application made to them before that time). *People ex rel. Twenty-Third Street R. Co. v. Tax & A. Comrs.* 91 N. Y. 593.

So, where the assessment for the year is completed upon the 1st day of May, an exemption contained in a statute passed on the 15th of June will not relate to the taxes of that year. *Aetna Ins. Co. v. New York*, 153 N. Y. 331, 47 N. E. 593, affirming 7 App. Div. 145, 40 N. Y. Supp. 120, which affirms 14 Misc. 145, 35 N. Y. Supp. 857.

So, in *Re American Fine Arts Soc.* 6 App. Div. 496, 39 N. Y. Supp. 564, affirmed in 151 N. Y. 621, 45 N. E. 1131, it was held that property must bear the taxes for the year where, by statute, taking effect on the

I further swear that, since the 1st day of April of last year I have not directly or indirectly converted or exchanged any of my property temporarily, for the purpose of evading the assessment thereof for taxes, into nontaxable property or securities of any kind." Laws 1903, chap. 73, § 52.

This oath has ever since been required of all taxpayers, and is now provided for in § 6339, Rev. Stat. 1913. That the revenue law as to the assessment of personal property has been so construed by all taxing officers and taxpayers of the state since the act of 1903, the same as prior thereto, is a matter of common knowledge. Such being the fact, the courts will so construe it until the legislature has further spoken on the subject. The petition alleges that, after

defendant made and delivered its schedule to the assessor on or about May 20th, the assessor thereupon "duly fixed and made a valuation of all the tangible personal property belonging to said corporation on the 1st day of April, 1911." If the assessor "duly" fixed and made his valuation, he did so on or before the 1st day of June, 1911. Comp. Stat. 1909, § 116, art. 1, chap. 77. It appears, therefore, from the allegations in the petition that at the time defendant sold the property covered by the schedule which it filed May 20th, such property had been duly assessed by the county assessor a full month prior to the time of such sale. Conceding the defendant's contention that the assessment did not become final until after it had been acted upon by

3d of May, the legislature exempted the owner's real and personal property from taxation, and on May 1st the assessment for the tax became complete and the books closed, the court considering that the case of the Association for Benefit of Colored Orphans v. New York, 104 N. Y. 590, 12 N. E. 279, *infra*, was decisive of the question.

In Association for Benefit of Colored Orphans v. New York, *supra*, it was held that the purchase of property by an exempt institution by deed dated July 31, 1877, would not release the property from the taxes of that year, although they had not become a lien upon the property at that time, the proceedings for assessment and collection of the taxes of 1877 having begun in September, 1876, and the books having closed on the 1st of May, 1877.

So, in People ex rel. American Geographical Soc. v. Tax & A. Comrs. 11 Hun, 505, it was held, where an exempt corporation purchased property in the city of New York in June, that the property was not exempt from the taxes of that year.

Where the fitting up of a building for school purposes took place before the year 1892, it was held that it was not subject to the taxes of 1892, as the school was a church school, although the pastor did not take the deed until February. The court observed that the character of the property on the 1st of May was decisive for the purposes of taxation. Church of St. Monica v. New York, 23 Jones & S. 160.

Where a corporation, exempt as to its real estate from which no rents, profits, or income were derived, acquired the real estate in the year 1893, subject to leases expiring at noon on May 1st, 1894, it was held that such corporation must pay the tax for 1894, the court apparently considering that the status was fixed on the 2d Monday of January, but stated that even if this were not so, and if the view more favorable to the corporation was taken, the status was fixed at the time of the closing of the books, and as they remained open only till the 1st of May, the leases would be still in existence when they closed. Home Missions v. New York, 91 Hun, 642, 37 N. Y. Supp. 96.

There is a contrary decision which seems L.R.A.1915C.

to misapprehend the effect of the earlier cases,—St. James Church v. New York, 41 Hun, 309, where an exempt corporation purchased property in the city of New York in June, and the taxes of the year were confirmed in August, and did not become till then a lien or charge on the property, and it was held that the property was exempt from the taxes of that year. The court distinguished Association for Benefit of Colored Orphans v. New York, 38 Hun, 593, affirmed in 104 N. Y. 581, 12 N. E. 279, *supra*, and said: "It was there assumed as the facts were presented, that the tax required to be paid had been imposed and confirmed prior to the time when the plaintiff obtained its title to the property; and the case of People ex rel. American Geographical Soc. v. Tax & A. Comrs. *supra*, was decided upon a similar presumption, and so evidently was that of People ex rel. Twenty-Third Street R. Co. v. Tax & A. Comrs. 91 N. Y. 593.

. . . But in the present case it appears from the complaint, and the fact was admitted by the demurrer, that the tax was not confirmed against his property until upwards of one month after its title had been acquired by the plaintiff, and it had commenced the improvement of the property by the erection of a church edifice. The tax was consequently not a lien or charge against the property at the time when the title to it was received by the plaintiff.

. . . The complaint was similar in its facts to the case of Washington Heights M. E. Church v. New York, 20 Hun, 297, where it was held that a tax so imposed was unlawful. That decision is controlling over the disposition which should be made of this appeal." It will be seen that the Washington Heights Church Case, while taking a similar view, also held that the exemption took effect before the beginning of the year, at the time the church entered, although it had not then received its deed. It was held in that case that the church corporation was entitled to have vacated a sale of their property for taxes levied in 1869, where they commenced the erection of a church on the premises in December 1868. The premises were conveyed to them in June, 1869, the preliminaries for the taxes of 1869

the state and county boards of equalization, we do not see how that can aid it. It knew that it had been assessed by the county assessor in the sum of \$8,710, and that any tax levied upon that assessment would impose upon it a personal liability therefor. If any change in conditions had occurred after it had returned its schedule and an assessment had been made thereon by the assessor, which would have authorized the county board of equalization to give it any relief, it should have applied to that board when it met on or about July 27th, and if the board had denied any relief to which it

were taken in the early part of the year, but the taxes were not confirmed so as to become a lien until the 17th of December, and the court considered that the taxes were not imposed upon the property until after the church had taken title, because no lien or encumbrance is created by the tax until after the list containing it is confirmed. But the court also considered that as it appeared that the church corporation was in possession and had been, prior to December, 1868, when the corner stone was laid, before which time the foundation walls had been constructed, the exemption took effect before the beginning of the year, as it did not depend upon the corporation's ownership in fee.

—change after tax books open.

It was the matured theory that the status before the amendment of 1911 was fixed on the 2d Monday of January, and that it is not affected by subsequent changes.

Thus, the acquisition by an exempt corporation of real estate in the city of New York subsequent to the 2d Monday of January, and before the closing of the books, which remained open until the 1st of May, would not exonerate the property from the taxes for that year. *People ex rel. Barnard College v. Wells*, 46 Misc. 13, 89 N. Y. Supp. 847, affirmed in 92 App. Div. 622, 87 N. Y. Supp. 1143, which is affirmed in 179 N. Y. 524, 71 N. E. 1136.

So, in *Sisters of the Poor v. New York*, 51 Hun. 355, 3 N. Y. Supp. 433, affirmed in 112 N. Y. 677, 20 N. E. 417, it was held that where an exempt corporation acquired real estate in February in the city of New York, such real estate must pay the taxes of that year, as the situation should be taken as of the 2d Monday in January, when the books were opened, although they were not closed until the 1st of May, and the tax did not become a lien until the latter part of August or 1st of September, and that the case of *Association for Benet of Colored Orphans v. New York*, 104 N. Y. 590, 12 N. E. 279, was not a decision to the contrary.

While it was decided upon the language of a particular statute, the decision is not entirely convincing in *People ex rel. American Bible Soc. v. New York*, 142 N. Y. 348, 37 N. E. 116, which held that where the assessable character of property is fixed as of the 2d Monday of January, but the books

was entitled, the statutes provided a plain and adequate remedy by appeal to the district court.

Did the sale of the property on July 1st to the city cancel defendant's liability upon the assessment because of the fact that after the property passed to the ownership of the city it thereafter would not be liable to taxation? We think the answer to this question must be adverse to defendant. The case is not different from what it would be if, after defendant had filed its schedule and the assessor had made the assessment, and while still owning the property, it had

of the assessors remain open until the 1st of May, an exempting statute which became a law on the 29th day of April, and provided that "this act shall take effect immediately," withdrew the property affected from all liability to taxation for the year. The court stated that they felt constrained to hold that the act having been given immediate operation at a time when the tax books were directed by law to be open, its language, which was imperative as to the time for its provisions to take effect, must be considered with reference to the existing condition of the proceedings for the imposition of a tax.

The foregoing cases arose before the amendment of 1911 changing the law.

—condemnation proceedings.

(For effect on lien, etc., see notes referred to at beginning of this note.)

In *Re New York*, 40 App. Div. 281, 58 N. Y. Supp. 58, where commissioners appointed in condemnation of lands for a parkway or park decided on a certain date to take all the lands described in the statute, and the proceedings were continued for four years before the final award was confirmed, it was held that it was proper for the lands to be valued as of the day when the commissioners decided to take them, and that taxes since that time, with interest, should be paid by the condemning party, as against which there should be allowed the use and occupation.

This decision was followed in *Re Riverside Park*, 59 App. Div. 603, 69 N. Y. Supp. 742, affirmed on opinion below in 167 N. Y. 627, 60 N. E. 1116.

There is an exception to the general rule, however, where the property is income-producing, and the owner receives enough meantime to pay the taxes and assessments, as was stated by the court in *Re Board of Education*, 169 N. Y. 456, 62 N. E. 566.

In *Re Board of Education*, supra, the court followed the foregoing cases of in *Re New York* and in *Re Riverside Park*, and held that where the board of education had by resolution appropriated a certain tract before the taxes became a lien, such board might not deduct from the award the amount of the taxes for the current year although such taxes had become a lien since such appropriation.

changed the use of it to a purpose which would relieve it from taxation. Such a change would not relieve it from liability. *New York v. Tax & A. Comrs.* 104 U. S. 466, 26 L. ed. 632. In that case the relator was assessed for taxation as of January 1, 1876, upon his personal estate, to the amount of \$60,000. He made application, supported by affidavit, for a reduction or remission of his assessment upon the ground that the value of all his personal estate on January 1st did not exceed \$125,000, and that as to all except \$5,500 it consisted of money which—

“was continuously employed in the business of exporting cotton from the United States of America to foreign countries, through the customs department of the United States aforesaid, and that said employment consists in purchasing and paying for the cotton in different states of the United States, and actually exported by deponent in said business, and for the payment of all the expenses of shipping the same as such exports.”

The reduction and remission were both denied. Upon writ of certiorari the proceedings of the tax commissioners were af-

Where the authorities took the initial steps to condemn land in November, 1896, and commissioners of estimate and assessment were appointed in December of that year, and the board of street opening, as authorized by statute, passed a resolution in February, 1897, that the title to the land should vest in the city on the 6th of July, and on the 23d of December, 1897, the award was confirmed, it was held that the owner was not liable for the tax of the year 1897, the assessment having been made as of the 2d Monday of January, the books being open until the 1st of May, and the taxes would have become a lien upon the 24th of August if it had not been for the acquisition of the title by the city. *Buckhout v. New York*, 176 N. Y. 363, 68 N. E. 659, the court distinguishing the case of voluntary transfer, and considering that the city could not tax and condemn at the same time, and placing the matter on the basis of the time of attachment of lien.

Miscellaneous.

The rule that an exempting statute is to be construed against the taxpayer does not apply where, before the books are closed, a new statute goes into force which is a substitute for the former law, and is partly a statute of exemption and partly a taxing statute, and there will be double taxation for the year unless the new law is construed to annul the old tax. *Binghamton Trust Co. v. Binghamton*, 72 App. Div. 341, 76 N. Y. Supp. 517.

In *Principal Secretary v. London*, 23 U. C. Q. B. 476, it was held that the Crown was not liable for taxes where, when the property was leased to it, the premises were assessed in the names of the owners, but the rates and taxes had not been actually imposed; the court expressly excludes the question whether this would affect the owner in whose legal or actual possession premises were assessed with a view to taxation.

In *Principal Secretary v. Toronto*, 22 U. C. Q. B. 551, where, during the year, property was leased to the Crown, it seems that the only point decided is that the Crown, having paid the taxes under protest, must recover them back, as the Crown cannot be distrained upon. The court stated that L.R.A.1915C.

if the assessment was still inchoate when the property was leased to the Crown, it could not become affected afterwards; but that if the time for appealing had gone by before the demise to the Crown, there would seem to be no reason why the owner, who was rightly assessed, and the land, so far as he is concerned, should not be bound for the assessment.

It may be noted that in *Corporation de Notre Dame de Quebec v. Le Roi*, Rap. Jud. Quebec, 25 C. S. 195, it seems to have been held that the purchase by the government of property, and its use for a normal school, did not thereby render the property exempt from taxation, and the government having agreed in its purchase of property that it would pay the taxes which should be imposed, taxes becoming payable after the purchase ought to be borne by the government. It would appear that in this case the tax was an assessment extending over a number of years, and the court held that it did not become a charge as to each year until the assessment for that year had been completed.

Com. v. Atlantic Ref. Co. 2 Pa. Co. Ct 62, is of little value because it does not disclose the steps necessary to assess and collect taxes under the former law. It was there held that when a statute passed on the 30th of June, 1885, abolished a certain state tax on corporations, reserving to the commonwealth “the right to collect any taxes accrued under the laws repealed by this act,” the tax for the year must be apportioned; that is to say, that corporations must pay the old tax for the eight months from November, 1884, to the time of the passage of the new statute. It was stated that no tax at the time of the passage of this act had accrued or was due in the usual meaning of these words under the former statute, but that the tax was accruing.

A person is liable to a tax levied on the 22d of June where he is not mustered into the service of the United States as a soldier until the 13th of October, and the taxes had been demanded of him several times before that date by the collector. *Tobin v. Morgan*, 70 Pa. 229.

New York v. Tax & A. Comrs. 104 U. S. 466, 26 L. ed. 632, is sufficiently referred to in *WOOD v. MCCOOK WATERWORKS CO.*

B. B. B.

firmed in the supreme court of the state of New York, and its judgment was affirmed by the court of appeals, whereupon relator prosecuted error in the Supreme Court of the United States. In the opinion by Mr. Justice Harlan it is said: "The plaintiff in error was assessed upon his personal property as of January 1, 1876. If the capital, which he claims was uniformly and continuously employed in the business of purchasing cotton for exportation from the United States to foreign countries, through the customs department, was, in fact, in money on the 1st day of January, 1876, he could not escape a subsequent assessment of that money upon the ground that, at the time the assessment was made, it was invested in cotton for exportation to foreign countries." (If it had been so invested on the 1st day of January, it would not have been subject to taxation.)

It will be observed that the court expressly holds that one who owns property subject to taxation at the time when it is returnable for assessment and taxation cannot escape liability for the tax by subsequently changing the character of his property by investing it in other property which would render it not subject to taxation. Suppose defendant, on July 1st, had sold its property which had been assessed, and with the money obtained from the sale had purchased United States bonds: Could it have escaped the payment of taxes? Clearly not. The fact that the assessment and the tax subsequently levied thereon had not become a lien upon the property, so as to make a purchaser thereof liable for the tax, is entirely immaterial. The city, of course, took the property free from any lien of the tax; but this did not relieve the defendant of its liability therefor.

The demurrer was properly overruled.
Affirmed.

Letton, Rose, and Sedgwick, JJ., not sitting.

NEW YORK COURT OF APPEALS.

NELLIE BUCKLEY, Admr., etc., of Patrick Buckley, Deceased, Appt.,
v.
HUDSON VALLEY RAILWAY COMPANY,
Respt.

(212 N. Y. 440, 106 N. E. 121.)

Proximate cause — expulsion of passenger — question for jury.

1. The expulsion of a sick and helpless passenger in the night from an electric car on a rural highway, contrary to the rules of the carrier, may be found to be the proximate cause of his being run over and killed by another car near the place of his expulsion, which passed a short time after his expulsion.

mate cause of his being run over and killed by another car near the place of his expulsion, which passed a short time after his expulsion.

Carrier — expulsion of sick passenger — liability.

2. A statute authorizing the expulsion of passengers who do not pay their fares does not apply in case of a passenger whose effort to pay is ineffectual because of illness, in view of a rule of the carrier that a passenger must not be ejected who is in such feeble or helpless condition as to be unable to take care of himself at the point of ejection.

(July 14, 1914.)

APPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, Third Department, affirming a judgment of a Trial Term for Warren County in defendant's favor in an action brought to recover damages for the death of plaintiff's intestate, for which defendant was alleged to be responsible. Reversed.

The facts are stated in the opinion.

Mr. H. A. Howard, for appellant:

It was the duty of the conductor to know, and he must have known, the condition of the deceased when he entered the car, and he should have protected and cared for him.

Sheridan v. Brooklyn City & N. R. Co. 36 N. Y. 39, 93 Am. Dec. 490, 9 Am. Neg. Cas. 619.

Deceased was sick and unable to take care of himself, and defendant is liable for all injuries that resulted from the wrongful ejection of deceased from the car.

Feldman v. New York C. & H. R. R. Co. 142 App. Div. 339, 127 N. Y. Supp. 390, affirmed in 205 N. Y. 553, 98 N. E. 1102; Gill v. Rochester & P. R. Co. 37 Hun, 110;

Note. — Carriers: ejection of sick or intoxicated passenger.

- I. Right to eject.
 - a. Sick passenger, 135.
 - b. Intoxicated passenger, 135.
- II. Duty to eject; liability to other passengers for failure to eject, 137.
- III. Time, place, and manner of ejection.
 - a. Sick passenger, 139.
 - b. Intoxicated passenger, 139.
- IV. Ejection as proximate cause of subsequent injury or death.
 - a. Sick passenger, 142.
 - b. Intoxicated passenger, 143.
- V. Recovery in action by ejected passenger.
 - a. Elements of recovery.
 - (1) Ejection of sick passenger, 146.
 - (2) Ejection of intoxicated passenger, 146.
 - b. Right to exemplary damages, 146.
 - c. Damages held excessive, 146.
 - d. Damages held not excessive, 147.
- VI. Questions for jury, 147.

Sanford v. 8th Ave. R. Co. 23 N. Y. 343, 80 Am. Dec. 286, 8 Am. Neg. Cas. 520; Higgins v. Watervliet Turnp. & R. Co. 46 N. Y. 23, 7 Am. Rep. 293; Louisville & N. R. Co. v. Johnson, 108 Ala. 62, 31 L.R.A. 372, 19 So. 51; Fagg v. Louisville & N. R. Co. 111 Ky. 30, 54 L.R.A. 919, 63 S. W. 580, 10 Am. Neg. Rep. 60; Regner v. Glens Falls, S. H. & Ft. E. Street R. Co. 74 Hun, 202, 26 N. Y. Supp. 625; Burch v. Baltimore & P. R. Co. 3 App. D. C. 346, 26 L.R.A. 134; Hanley v. Brooklyn Heights R. Co. 110 App. Div. 430, 96 N. Y. Supp. 249; Railway Co. v. Valleley, 32 Ohio St. 349, 30 Am. Rep. 601, 8 Am. Neg. Cas. 567; Atchison, T. & S. F. R. Co. v. Weber, 33 Kan. 543, 52 Am. Rep. 543, 6 Pac. 877; Conolly v. Crescent City R. Co. 41 La. Ann.

61, 3 L.R.A. 133, 17 Am. St. Rep. 389, 5 So. 259, 6 So. 526, 8 Am. Neg. Cas. 309; Indianapolis, P. & C. R. Co. v. Pitzer, 109 Ind. 186, 58 Am. Rep. 387, 6 N. E. 310, 10 N. E. 70; Roseman v. Carolina C. R. Co. 112 N. C. 716, 19 L.R.A. 327, 34 Am. St. Rep. 524, 16 S. E. 766; Elliott, Railroads, § 1637; Isbell v. New York & N. H. R. Co. 27 Conn. 393, 71 Am. Dec. 78.

The case should have been submitted to the jury.

Loomis v. Lake Shore & M. S. R. Co. 182 N. Y. 380, 75 N. E. 228, 19 Am. Neg. Rep. 31; Pratt v. Dwelling House Mut. F. Ins. Co. 130 N. Y. 212, 29 N. E. 117; Guy v. New York, O. & W. R. Co. 30 Hun, 399; Hayes v. New York C. & H. R. R. Co. 34 Hun, 627, 20 N. Y. Week. Dig. 238; Huba

This note considers the right and the duty of a carrier to eject a passenger because of sickness or intoxication, and also the right to eject for some other cause, as refusal to pay fare, a passenger who is sick or intoxicated, considering, in connection with such right where it exists, the care to be exercised by the carrier as to time, place, and manner in making the ejection.

Also, the liability of the carriers is considered, both to another passenger for injury occasioned by an intoxicated passenger not ejected, and to an ejected passenger either as for breach of contract, or for injuries occurring subsequently to the ejection.

As to duty of carrier to accept as a passenger one physically or mentally disabled, see note to Connors v. Cunard S. S. Co. 26 L.R.A.(N.S.) 171.

I. Right to eject.

a. Sick passenger.

A passenger sick to vomiting has no right to subject other passengers to annoyance by his offensive conduct, and he may be expelled though his misconduct is not wilful or voluntary. *Lemont v. Washington & G. R. Co.* 1 Mackey, 180, 47 Am. Rep. 238.

And a carrier has a right to remove from a train a passenger who breaks out with eruptions which, on the best medical advice that can be obtained, are believed to be smallpox, although such belief may afterward turn out to be erroneous. *Paddock v. Atchison, T. & S. F. R. Co.* 4 L.R.A. 231, 37 Fed. 841.

Also, where a carrier has become chargeable through its employees with notice of the insane condition of a passenger, it has the right, and it might be its duty, to place such passenger under guard or restraint, or to remove him from the car, if such an action is required for the protection of other passengers from possible harm. *Meyer v. St. Louis, I. M. & S. R. Co.* 4 C. C. A. 221, 10 U. S. App. 677, 54 Fed. 120.

A street railway company will be liable for the forcible ejection of a passenger suf-

fering from St. Vitus's dance, but not acting disorderly, under the belief that the passenger was intoxicated; and a rule requiring conductors not to allow intoxicated persons on the car will not protect it, the court stating that it was within the power of the conductor to ascertain the real cause of the passenger's appearance, and thus to have avoided a mistake, if it was a mistake. *Regner v. Glenn Falls, S. H. & Ft. E. Street R. Co.* 74 Hun, 202, 26 N. Y. Supp. 625.

And where a passenger in the last stages of consumption, bound for a point quarantined against yellow fever, but having a health certificate showing freedom from such disease, is ejected by a quarantine officer without protest from the conductor, such passenger being too weak to protest or explain that he had a health certificate, the carrier is liable in damages for breach of contract of carriage. *St. Louis & S. F. R. Co. v. Roane*, 93 Miss. 7, 46 So. 711.

But that a conductor is decided, and rough and rude in his speech, in informing a man and his wife that they will have to get off the car as their tickets will not be accepted, will not make the carrier liable in damages, although the wife is apparently unwell. *Rose v. Wilmington & W. R. Co.* 106 N. C. 168, 11 S. E. 526, 8 Am. Neg. Cas. 563.

b. Intoxicated passenger.

A passenger may be removed where he is so intoxicated as to be offensive to other passengers. *Murphy v. Union R. Co.* 118 Mass. 228, 8 Am. Neg. Cas. 405.

Or if there is reasonable and probable cause to believe that he will violate decency and good order. *Lemont v. Washington & G. R. Co.* 1 Mackey, 180, 47 Am. Rep. 238; *Hudson v. Lynn & B. R. Co.* 178 Mass. 64, 59 N. E. 647, 9 Am. Neg. Rep. 493; *Vinton v. Middlesex R. Co.* 11 Allen, 306, 87 Am. Dec. 714, 8 Am. Neg. Cas. 369; *Edgerly v. Union Street R. Co.* 67 N. H. 312, 36 Atl. 558.

Nor is it necessary to wait until an overt act is committed before there is justification

v. Schenectady R. Co. 85 App. Div. 199, 83 N. Y. Supp. 157, 14 Am. Neg. Rep. 602; 2 Thomp. Neg. 1236-1240; Smith v. British & N. A. Royal Mail Steam Packet Co. 86 N. Y. 408.

Mr. Lewis E. Carr, with Mr. James McPhillips, for respondent:

Plaintiff's intestate having boarded one of defendant's cars, and having failed to pay his fare after repeated requests to do so, the defendant's conductor was entirely justified in ejecting him from the car.

Nelson v. Long Island R. Co. 7 Hun, 140; Northern R. Co. v. Page, 22 Barb. 130; O'Brien v. Boston & W. R. Co. 15 Gray, 20, 77 Am. Dec. 347; People v. Jillson, 3 Park. Crim. Rep. 234; Hibbard v. New York

& E. R. Co. 15 N. Y. 455; Pease v. Delaware, L. & W. R. Co. 101 N. Y. 367, 54 Am. Rep. 699, 5 N. E. 37; Swan v. Manchester & L. R. Co. 132 Mass. 116, 42 Am. Rep. 432; Coleman v. New York & N. H. R. Co. 106 Mass. 160, 8 Am. Neg. Cas. 375; Huba v. Schenectady R. Co. 85 App. Div. 199, 83 N. Y. Supp. 157, 14 Am. Neg. Rep. 602; Montgomery v. Buffalo R. Co. 165 N. Y. 139, 58 N. E. 770, 9 Am. Neg. Rep. 124; Monnier v. New York C. & H. R. R. Co. 175 N. Y. 281, 62 L.R.A. 357, 96 Am. St. Rep. 619, 67 N. E. 569, 14 Am. Neg. Cas. 423; Hanley v. Brooklyn Heights R. Co. 110 App. Div. 429, 96 N. Y. Supp. 249.

Having a right to eject the plaintiff's intestate from the car, the evidence utterly

for the expulsion. Hillman v. Georgia R. & Pkg. Co. 126 Ga. 814, 56 S. E. 68, 8 Ann. Cas. 222; Magill v. Seaboard Air Line R. Co. 84 S. C. 416, 66 S. E. 561; Hudson v. Lynn & B. R. Co. 178 Mass. 64, 59 N. E. 647, 9 Am. Neg. Rep. 493; Edgerly v. Union Street R. Co. 67 N. H. 312, 36 Atl. 558; Vinton v. Middlesex R. Co. 11 Allen, 306, 87 Am. Dec. 714, 8 Am. Neg. Cas. 369.

To justify an ejection of a passenger under a statute (Miss. Laws 1910, chap. 211) providing for the ejection of an intoxicated passenger, it is not necessary for such passenger to be so much under the influence of intoxicating liquor as to be mentally and physically incapable of taking care of himself. Yazoo & M. Valley R. Co. v. Davidson, — Miss. —, 63 So. 340. The court said that the statute was designed for the protection not of the person intoxicated, but of the passengers on the train, and a person intoxicated to the extent that he is mentally and physically incapable of taking care of himself is very much less liable to annoy and endanger the other passengers than one who is intoxicated in a less degree.

So, also, in St. Louis, I. M. & S. R. Co. v. Waters, 105 Ark. 619, 152 S. W. 137, action for wrongful ejection because of alleged drunkenness, the following instruction was held erroneous: "For one to be in a drunken and intoxicated condition as defined by the law, he must be under the influence of intoxicating liquors to such an extent as to have lost the normal control of his bodily and mental faculties, and to evince a disposition to violence, quarrelsomeness, and bestiality." The court said: "A person might be drunk and still not evince a disposition of violence, quarrelsomeness and bestiality. . . . Some men become quarrelsome when they are drunk, while others become stupefied and inactive, and still others do not give any outward and visible signs except a pleasurable excitement. A man may be said to be drunk whenever he is under the influence of intoxicating liquors to the extent that they affect his acts or conduct so that persons coming in contact with him could readily see and know that the intoxicating liquors were affecting him in that respect." L.R.A.1915C.

And an instruction that vomiting from intoxication is the only form of that evil which will authorize the conductor to expel a passenger is erroneous, as it is withdrawing from the consideration of the jury all other forms of evil which might excuse the conduct of the conductor in the proper management of the car. Lemont v. Washington & G. R. Co. 1 Mackey, 180, 47 Am. Rep. 238.

Trainmen have the right to remove from the train a person who has boarded it after the conductor has refused, because of his intoxicated condition, to receive him as a passenger, although he has a ticket entitling him to transportation. Chesapeake & O. R. Co. v. Selsor, 142 Ky. 163, 33 L.R.A. (N.S.) 165, 134 S. W. 143.

Permitting a passenger to enter a train when known to be intoxicated does not deprive the carrier of a right to eject him when he becomes boisterous and obnoxious during the journey. Louisville & N. R. Co. v. Logan, 88 Ky. 232, 3 L.R.A. 80, 21 Am. St. Rep. 332, 10 S. W. 655, 8 Am. Neg. Cas. 294.

Nor is a conductor bound to act upon the volunteered opinion of a passenger as to the physical or mental state of drunken man who has been expelled from the train, where he has no reasonable ground to believe that the man is unable to find a place where he will be safe. Roseman v. Carolina C. R. Co. 112 N. C. 709, 19 L.R.A. 327, 34 Am. St. Rep. 524, 16 S. E. 766.

And so it has been held that, having reasonable regard for the safety and welfare of an intoxicated person, ejection is justifiable,

—where an intoxicated passenger persistently refuses to pay his fare, and his language is obscene and insulting, Louisville & N. R. Co. v. Johnson, 92 Ala. 204, 25 Am. St. Rep. 35, 9 So. 269, 8 Am. Neg. Cas. 13; Johnson v. Louisville & N. R. Co. 104 Ala. 241, 53 Am. St. Rep. 30, 16 So. 75; —where a passenger is drunk and uses profane and insulting language, Stringfield v. Louisville R. Co. 32 Ky. L. Rep. 578, 105 S. W. 1190;

—where an intoxicated passenger is staggering around, is boisterous, and is using obscene language, Nash v. Southern R. Co.

failed to establish anything wrongful or unlawful on the part of the defendant in the manner of his ejection or in the place where he was ejected.

No duty rested upon the defendant under the circumstances of this case other than what was performed, and there is no evidence that the ejection was the proximate cause of the death of plaintiff's intestate.

Burch v. Baltimore & P. R. Co. 3 App. D. C. 346, 26 L.R.A. 134; *Edgerly v. Union Street R. Co.* 67 N. H. 312, 36 Atl. 558; *Hudson v. Lynn & B. R. Co.* 185 Mass. 510, 71 N. E. 66, 16 Am. Neg. Rep. 366; *Ring v. Cohoes*, 77 N. Y. 83, 33 Am. Rep. 574; *Laidlaw v. Sage*, 158 N. Y. 73, 44 L.R.A. 216, 52 N. E. 679.

136 Ala. 177, 96 Am. St. Rep. 19, 33 So. 932 (*dictum*);

—where an intoxicated passenger is abusive, profane, creating a disturbance and annoying other passengers, *Edgerly v. Union Street R. Co.* 67 N. H. 312, 36 Atl. 558;

—where a passenger is so intoxicated as to be unable to tender his fare or his ticket, which the jury from the evidence could find he had purchased, even though he is unable to take suitable precautions to avoid physical injury, *Murphy v. Boston & M. R. Co.* 216 Mass. 178, 103 N. E. 291;

—where a passenger got on the train intoxicated and advised other passenger not to pay their fares, *Baltimore, P. & C. R. Co. v. McDonald*, 68 Ind. 316;

—where a drunken passenger has reached the station where his ticket expires and is acting in a boisterous manner, *Chesapeake & O. R. Co. v. Saulsberry*, 112 Ky. 915, 56 L.R.A. 580, 66 S. W. 1051, 11 Am. Neg. Rep. 587;

—where a passenger had delirium tremens, and by his conduct annoyed and frightened other passengers, and at time of removal had fallen from his feet and was lying in the aisle of the coach in an unconscious condition, *Atchison, T. & S. F. R. Co. v. Weber*, 33 Kan. 543, 52 Am. Rep. 543, 6 Pac. 877;

—where an intoxicated passenger in a crowded car, with women and children, is fighting, flourishing a knife, and threatening to shoot, *Railway Co. v. Valleley*, 32 Ohio St. 345, 30 Am. Rep. 601, 8 Am. Neg. Cas. 567;

—where a drunken passenger with an open knife in his hand abuses the conductor in a loud and angry tone, so as to frighten other passengers, and, upon being taken out of the ladies' car and locked out, pulled the bell rope, thus causing the train to be stopped, *Louisville & N. R. Co. v. Logan*, 9 Ky. L. Rep. 893, later appeal in 88 Ky. 232, 3 L.R.A. 80, 21 Am. St. Rep. 332, 10 S. W. 655, 6 Am. Neg. Cas. 294;

—where an intoxicated person vomits in the car, *Converse v. Washington & G. R. Co.* 2 MacArth. 504, 8 Am. Neg. Cas. 110;

—where one is sick and vomiting, whether from drunkenness or otherwise, *Lemont L.R.A.* 1915C.

Hogan, J., delivered the opinion of the court:

The plaintiff, as administratrix of Patrick Buckley, deceased, brought this action to recover damages for his death, claimed to have been caused by defendant under the following circumstances:

On April 24, 1911, the defendant owned and operated a street surface railroad, among other places, between Hudson Falls and Glens Falls in this state. About or after 9 o'clock on the evening of that day, plaintiff's intestate, who resided at Glens Falls, boarded one of defendant's north-bound cars at or near the Hotel Cunningham in Hudson Falls, intending to go to Glens Falls.

v. Washington & G. R. Co. 1 Mackey, 180, 47 Am. Rep. 238;

—where one failed to respond to three efforts by the conductor to arouse him from sleep due to intoxicants and loss of sleep, to secure his fare, and made no response until he had been pushed out onto the platform in the process of ejection, *Chesapeake & O. R. Co. v. Friend*, post, 148.

And a railroad company cannot, in the absence of wilfulness or wantonness, be held liable for ejecting from its train, at a station, a passenger intoxicated, but not helpless, who refuses to pay fare, where the statute expressly authorizes it to do so. *Adams v. Chicago G. W. R. Co.* 156 Iowa, 31, 42 L.R.A. (N.S.) 373, 135 N. W. 21.

But it has been held that so long as an intoxicated passenger remains quietly by the driver on the platform, neither entering the car nor molesting or annoying the passengers in any way, there is no occasion for removing him, and the conductor will not be justified in refusing to permit him to remain as a passenger. *Putnam v. Broadway & S. Ave. R. Co.* 55 N. Y. 108, 14 Am. Rep. 190. The court stated that the fact that the individual may have drunk to excess will not in every case justify his expulsion from a public conveyance; it is rather the degree of intoxication and its effect upon the individual, and the fact that by reason of the intoxication he is dangerous or annoying to other passengers, that give the right and impose the duty of expulsion.

And in *Thomson v. Manhattan R. Co.* 75 Hun, 548, 27 N. Y. Supp. 608, 5 Am. Neg. Cas. 577, it was held that so long as an intoxicated passenger remains quiet and molests no one, he cannot be legally expelled.

II. Duty to eject; liability to other passengers for failure to eject.

As to carrier's liability for assault by fellow passenger, see notes in 16 L.R.A. 627; 2 L.R.A. (N.S.) 105; and 32 L.R.A. (N.S.) 1206.

As to liability of carrier for contraction of contagious disease by passenger, see note in 36 L.R.A. (N.S.) 337.

Generally, as to liability for injuries to

The evidence adduced by plaintiff upon the trial would justify a finding by a jury that the intestate, immediately after entering the car of defendant, occupied the third or fourth seat from the rear end of the car; that he looked very pale and white; his eyes were glaring; that he was sitting in a lifeless manner in the seat occupied by him; that after the car started the conductor asked the intestate for his fare, and he dropped his hand and attempted to put it into his pocket; that the conductor passed along and returned a second and third time and again asked him for his fare, and plaintiff's intestate again put his hand to his pocket, but could not raise his hand, but fell asleep with his hand in his pocket, and was unable to answer the

conductor. The conductor, upon the second demand for fare, said to Buckley, "If you do not pay your fare I will put you off the car," and thereafter, when he again demanded fare, the intestate dropped as if unconscious, but the conductor took hold of him, dragged him along the aisle of the car and into the vestibule, signaled the car to stop, and put Buckley off the car on a highway on the easterly side of the north-bound track, at or near a point known as La Pan's curve, near to but not at a regular stopping place in its route, and thereupon the conductor by signal ordered the car to go on, which it did, leaving Buckley in the roadway; that the night was dark, but there was a light on the highway and some dwelling houses along the same near to the

passenger resulting from attempted ejection by carrier of fellow passenger, see *Thayer v. Old Colony Street R. Co.* 44 L.R.A. (N. S.) 1125, and note thereto.

It is the duty of a carrier to exclude or expel from his vehicle any person whose conduct or condition is such as to endanger the safety of other passengers, or to create inconvenience and disturbance or cause discomfort and annoyance to them. And if this duty is neglected without good cause, and a passenger receives injury which might have been reasonably anticipated or naturally expected from one who is improperly received or permitted to continue as a passenger, the carrier is responsible. *Edgerly v. Union Street R. Co.* 67 N. H. 312, 36 Atl. 558.

So, a carrier owes a duty, for the protection of other passengers, to eject one who is visibly intoxicated. *Podespik v. Worcester Consol. Street R. Co.* 216 Mass. 213, 103 N. E. 638.

Also, it has the duty to eject a drunken passenger who is so riotous and disorderly as to frighten other passengers. *Louisville & N. R. Co. v. Logan*, 9 Ky. L. Rep. 893.

Or a man furiously drunk who in a crowded car, with women and children, is fighting, flourishing a knife, and threatening to shoot, upon the plainest principles of self-defense, if nothing else. *Railway Co. v. Valleley*, 32 Ohio St. 345, 30 Am. Rep. 601, 8 Am. Neg. Cas. 567.

And it is the duty of railway companies to remove an unattended passenger who becomes insane upon the train, where the comfort and safety of other passengers on the train require it. *St. Louis, I. M. & S. R. Co. v. Woodruff*, 89 Ark. 9, 115 S. W. 953, 21 Am. Neg. Rep. 22.

But where a drunken passenger is otherwise entirely inoffensive, it is not the duty of a conductor to eject him until after he has commenced his vile abuse of a fellow passenger, and the conductor has learned of it, or in the exercise of a proper degree of care should have learned of it. *Lucy v. Chicago G. W. R. Co.* 64 Minn. 7, 31 L.R.A. 551, 65 N. W. 944.

And while it is the duty of the conductor

to quell a drunken fight on a car, and expel the disorderly passengers where necessary, yet the carrier will be liable if the conductor makes a mistake and expels one who is not intoxicated. *Maryland & P. R. Co. v. Knight*, 122 Md. 576, 89 Atl. 1091.

Failure of employees of a street railway company to overpower or remove from the car a drunken passenger whose conduct is such as to indicate danger to other passengers if he is permitted to ride unrestrained is negligence which will render the company liable for injuries which he inflicts upon a passenger, although there is nothing to indicate that the one injured is in special peril. *United R. & Electric Co. v. State*, 93 Md. 619, 54 L.R.A. 942, 86 Am. St. Rep. 453, 49 Atl. 923, 10 Am. Neg. Rep. 71.

So, also, failure of a conductor to remove an intoxicated passenger is negligence which will make the carrier liable for an assault committed upon another passenger, where the conductor knew that a drunken and disorderly passenger was on the train, that he had cursed and abused the assaulted passenger and made threatening gestures indicating that he might use a deadly weapon, and at the time the assault was made apprehended that such passenger was still in danger at the hands of the intoxicated passenger. *Ft. Worth & R. G. R. Co. v. Stewart*, — Tex. Civ. App. —, 146 S. W. 355.

Where the conductor of a traction company permits an intoxicated passenger weighing about 225 pounds to attempt to walk up and down the aisle of the car while it is in motion, instead of requiring him to be seated, or in the event of his refusal, ejecting him from his car, it is an act of negligence in the discharge of the duty which is owed to other passengers. *Montgomery Traction Co. v. Whatley*, 152 Ala. 101, 126 Am. St. Rep. 17, 44 So. 538 (action for personal injuries to passenger due to intoxicated passenger falling).

And in *Kline v. Milwaukee Electric R. & Light Co.* 146 Wis. 134, 131 N. W. 427, Ann. Cas. 1912C, 276, negligence of conductor in not expelling a quarrelsome drunken passenger was held to be the proximate cause of injury inflicted by such drunken pas-

point where Buckley was ejected from the car; that Buckley was not intoxicated, and his breath and person were free from any odor indicating that he had been drinking.

After the intestate was ejected from the car, he was seen by a passenger on the car standing near the track. A south-bound car of defendant left Glens Falls about 9:40 P. M. and about twenty minutes later reached La Pan's curve about the place where Buckley was ejected from the north-bound car, and that car ran over and killed Buckley. His body was found curled up against the rail with both feet cut off lying inside the rail. The car was running at a moderate rate of speed and carried a head-light and fender on the forward part of the same.

senger on another passenger, where the conductor knew or ought to have known that trouble would occur if such drunken passenger were permitted to remain on the car.

No, also, negligence in permitting to remain in the car a drunken passenger who had insulted a female passenger and had an altercation with her companion, who had complained to the conductor, was held to be the proximate cause of injury to a third person who was hit by a bullet fired in self-defense by the passenger who had made such complaint, at the drunken passenger, who began a quarrel as soon as the conductor left. *Galveston, H. & S. A. R. Co. v. Bell*, — Tex. Civ. App. —, 165 S. W. 1.

Also, permitting a drunken passenger who has been removed from a street car for turbulence and assault upon a fellow passenger, to return and remain upon the car without further effort to remove him, although his turbulence continues, is negligence which will render the street car company liable for injuries inflicted by him upon such passenger. *United R. & Electric Co. v. Deane*, 93 Md. 619, 54 L.R.A. 942, 86 Am. St. Rep. 453, 49 Atl. 923, 10 Am. Neg. Rep. 71.

And where an intoxicated white passenger is permitted to remain in a coach assigned to negroes, the carrier is liable in damages to a colored woman for any maltreatment of her, and for obscene and profane language used. *Quinn v. Louisville & N. R. Co.* 98 Ky. 231, 32 S. W. 742.

But if the employees of a carrier, in the exercise of the high degree of care demanded of them, could not have reasonably anticipated that the failure to eject or restrain an insane passenger might result in his doing injury to his fellow passengers, then the nonaction of the company is not negligence. *Meyer v. St. Louis, I. M. & S. R. Co.* 4 C. C. A. 225, 10 U. S. App. 677, 54 Fed. 120.

And in *Putnam v. Broadway & S. Ave. R. Co.* 55 N. Y. 103, 14 Am. Rep. 190, it was held that failure of a conductor to remove an intoxicated passenger was not the proximate cause of injury inflicted on another passenger resulting in the latter's L.R.A.1915C.

At the time of his death Buckley was a married man, earning about \$14 a week. He was a steady man and permanently employed.

The defendant had adopted rules for the guidance of its employees which were placed in evidence, and the rule bearing on this case is as follows: "If any person shall refuse to produce proper ticket or pass, or pay fare, cause the train to be brought to a stop at a regular station, or near some dwelling house, and request such person to leave the train. In case of refusal remove such person therefrom. It should not be in such a place, in such weather, or such unseasonable hour as might ordinarily endanger the health or safety of the person ejected. The person ejected must not be a

death, where the facts were that the intoxicated passenger, who was riding on the platform, opened the door and directed insulting remarks at two ladies, and deceased complained to the conductor, who ordered such intoxicated passenger to remain quiet; that thereafter the intoxicated passenger entered the car and sat by deceased, annoyed him, directing at him abusive and threatening language, but in a low tone so as not to be audible to the conductor; that after remaining in the car a short time he returned to the front platform and remained there quietly until deceased left the car, when he also left the car and assaulted him, causing his death. The court stated that the conductor was under no obligation to expel such intoxicated passenger so long as he was not disorderly, and that there was no evidence that the conductor was aware that he was acting in an offensive manner, and that assault could not have been foreseen.

Also, a carrier is not liable for injuries sustained by a passenger whose foot was stepped on by an intoxicated passenger standing in front of her, where such intoxicated passenger was able to keep his feet and was not disorderly, and so could not legally be expelled. *Thomson v. Manhattan R. Co.* 75 Hun, 548, 27 N. Y. Supp. 608, 5 Am. Neg. Cas. 577.

III. Time, place, and manner of ejection.

a. Sick passenger.

Although a common carrier of passengers owes obligations to all its passengers as well as to those who are sick, and is bound to protect the rights of both, and although when the condition of one passenger from sickness or otherwise is such as to be inconsistent with the safety and health or even reasonable comfort of his fellow passengers, regard for the rights of the latter will authorize the carrier to terminate the carriage by excluding him, yet this right cannot be exercised arbitrarily and inhumanely, or without due care and provi-

child, a person of unsound mind, or in such feeble or helpless condition as to be unable to take care of himself or herself at the point of ejection."

The claim of the plaintiff is that, upon the evidence thus adduced by her, it was for the jury to determine whether or not there was negligence on the part of the defendant in ejecting Buckley, the intestate, from the car when he was in the physical condition described, and at a point in the roadway which was not a regular stopping point, in the nighttime, and leave him at such point while it was apparent to the conductor that he was unable to take care of himself; that the conductor failed to ascertain the real cause of intestate's appearance and conduct, though at least one pas-

senger on the car was acquainted with him; also that it was a question for the jury whether or not the defendant was guilty of negligence in the operation of the south-bound car in running over Buckley.

All inferences in this case are to be drawn in favor of the plaintiff, and the evidence produced by her must be regarded in the light most favorable to her. We think that the expulsion of the intestate from the car of the defendant under the circumstances narrated, in view of the rule promulgated by the defendant, was a question which a jury might determine to be the proximate cause of the death of Buckley. Consideration of the evidence appearing in the record in this case would authorize a jury to find that the intestate was in a

sion for the safety and well-being of the ejected passenger. *Conolly v. Crescent City R. Co.* 41 La. Ann. 57, 3 L.R.A. 133, 5 So. 250, 6 So. 526, 8 Am. Neg. Cas. 309.

So, a high degree of care should be exercised before a passenger ill and without money is expelled from a train at a way station hundreds of miles from his destination. *Forrester v. Southern P. Co.* 36 Nev. 247, 48 L.R.A.(N.S.) 1, 134 Pac. 753, 136 Pac. 705.

And the ejection of an insane passenger must be done in a reasonable manner, due regard being had to the time, place, and circumstances, so as to provide for the temporary protection and comfort of such passenger. *St. Louis, I. M. & S. R. Co. v. Woodruff*, 89 Ark. 9, 115 S. W. 953, 21 Am. Neg. Rep. 22.

Therefore, a carrier is not relieved from liability for injuries to an ejected insane passenger who is left in charge of the company's night operator, by the fact that the sheriff looked after her wants, where such assistance was in his individual capacity, and not in his official capacity. *Ibid.*

Also, it is the duty of a carrier, on removing from a train a passenger with a contagious disease, to put him off at some place where he can find accommodations and medical attendance, or where there is reasonable ground to believe he can do so. *Paddock v. Atchison, T. & S. F. R. Co.* 4 L.R.A. 231, 37 Fed. 841.

And a mistake of the driver in supposing that a passenger was drunk when the latter had ridden a considerable distance without misbehavior, and had been guilty of nothing except vomiting occasioned by illness, cannot excuse the company for ejecting him and leaving him uncared for on the street in inclement weather. *Conolly v. Crescent City R. Co.* supra.

b. Intoxicated passenger.

The fact that one ejected from a train is drunk makes it more incumbent upon the servants of the company to see that he has a safe place to leave the train. *Louisville, L.R.A.*1915C.

St. L. & T. R. Co. v. Gatewood, 14 Ky. L. Rep. 108.

The intoxication and misbehavior of a passenger which will authorize his expulsion from the train will not justify his expulsion without exercising due care for his safety, having reference to time, place, and surroundings. *Louisville & N. R. Co. v. Johnson*, 108 Ala. 62, 31 L.R.A. 272, 19 So. 51.

And the care required of a carrier is that which would be exercised by men of ordinary care and prudence in the enforcement of a legal right in a similar situation, and the similar situation would have reference, of course, to the time, the place, and the man's condition. *Donovan v. Greenfield & T. F. Street R. Co.* 106 C. C. A. 72, 183 Fed. 526.

In determining whether reasonable and ordinary care has been exercised, all the circumstances should be considered,—as the physical condition of the person ejected; the time, whether in daytime or late at night; the condition of the country, whether thickly or sparsely settled; the place of ejection, whether near to or remote from a dwelling of any character, including a station; the character of the weather, whether pleasant or inclement, etc. The rules of law, as well as the dictates of humanity, require that the ejection shall occur at such place, and be conducted in such manner, as not unreasonably to expose the party to danger. *Brown v. Chicago, R. I. & P. R. Co.* 51 Iowa, 238, 1 N. W. 487.

The servants of the carrier should use due care not to expel a passenger or even a trespasser at a time or place which is dangerous, and the carrier will be liable for negligence in that regard not only for injuries directly suffered in connection with such expulsion, but also for subsequent injuries proximately due thereto, such as an injury from other cars which the ejected passenger could not reasonably avoid, the probable consequences of improper exposure, and the like. And it will be no answer that the person was injured by reason of helplessness due to intoxication or like causes, if his condition was known to the servants

helpless condition and incapacitated from taking care of himself; that such helpless condition of the intestate was known to the conductor; that Buckley was not visibly intoxicated or boisterous, but, on the contrary, sick, pallid, and in a drowsy condition; that he made an attempt to pay his fare each time the same was demanded of him, but was physically unable to do so; that by reason of such condition no voluntary act on his part would be the cause of the final result. *Smith v. British & N. A. Royal Mail Steam Packet Co.* 86 N. Y. 408.

Section 40 of the railroad law (General Laws, chap. 39) provides: "If any passenger shall refuse to pay his fare the conductor of the train, and the servants of the corporation, may put him and his bag-

gage out of the cars, using no unnecessary force, on stopping the train, at any usual stopping place, or near any dwelling house, as the conductor may elect."

But the same cannot receive the broad construction claimed for it by the defendant. While the right to eject a person refusing to pay fare is granted by this section of the railroad law, it could scarcely be asserted that the expulsion of a helpless paralytic of advanced years from a train of cars in the nighttime, even near a dwelling house, and especially at a point where more or less danger might be apprehended, would be justifiable under this provision of the statute.

A sick or aged person, a cripple, or a child is entitled to more attention at the

of the carrier, and the consequent injury resulting from such expulsion could have reasonably been anticipated. *McCoy v. Millville Traction Co.* 83 N. J. L. 508, 85 Atl. 358.

So, when the carrier discovers that one helpless from intoxication is upon its train without right, it must, in selecting a place to put him off, have regard to his actual condition, physical and mental, without any reference to his responsibility for such condition. The law declares to the carrier that it shall not expose him to great peril even in exercising its undoubted right to eject him; and in declaring whether he will be subjected to peril not only must climatic conditions, the propinquity of shelter, and other matters, be taken into account, but also the actual state of his mind and bodily health and strength if known to the agent of the carrier. *Haug v. Great Northern R. Co.* 8 N. D. 23, 42 L.R.A. 609, 73 Am. St. Rep. 727, 77 N. W. 97, 5 Am. Neg. Rep. 467.

And that an intoxicated person had refused to pay his fare, and so was not entitled to ride on the train, will not authorize the railroad company to eject him under such circumstances and at such place as would necessarily expose him to danger. *Macon, D. & S. R. Co. v. Moore*, 125 Ga. 810, 54 S. E. 700.

Nor should a drunken passenger who refuses to pay his fare, and who may be legally ejected as a trespasser, be needlessly exposed to known peril or danger, which ought reasonably to be anticipated, where it is known that he is in such a helpless condition as to be unable to protect himself from danger. *Atlantic Coast Line R. Co. v. Barton*, 14 Ga. App 160, 80 S. E. 530.

It is not the due care required of a carrier in the exercise of its right to eject a passenger who is intoxicated and whose conduct is improper, or who has not paid his fare upon demand, and who, when taken from the car, is in a stupor or sleep, unable to take cognizance of surrounding objects, with no power to stand upright or to walk, and no control of his own body, to place and leave him in such a condition, in a dark road, on a wet night, at a spot distant from L.R.A.1915C.

human habitation, near the path of cars and other vehicles, and near marshes which adjoined the road on both sides, with no one to care for or protect him. *Hudson v. Lynn & B. R. Co.* 178 Mass. 64, 59 N. E. 647, 9 Am. Neg. Rep. 493.

And there is evidence of negligence where it is shown that trainmen put a passenger off in the dark with knowledge that he was helplessly drunk, and that there was no one there to render him assistance, and left him near the track exposed to the danger of a train which would necessarily pass in a short time. *St. Louis, I. M. & S. R. Co. v. Dallas*, 93 Ark. 209, 124 S. W. 247.

Also it is negligence for a conductor to eject a passenger for nonpayment of fare, and leave him lying in snow 8 or 10 inches deep, with the weather 8 to 10 degrees below zero, when he knew at the time that he put the passenger off that he was intoxicated and in such a helpless condition that he was incapable of taking care of himself. *Louisville, C. & L. R. Co. v. Sullivan*, 81 Ky. 624, 50 Am. Rep. 186, 8 Am. Neg. Cas. 286.

And where a drunken passenger is ejected while the train is on a trestle, and he is injured, the company is liable for the injuries, although its servants, by reason of the darkness, may not have been aware of the danger. *Louisville, St. L. & T. R. Co. v. Gatewood*, 14 Ky. L. Rep. 108.

In removing a drunken passenger from a street car for refusal to pay fare, it is the duty of the conductor to act in a prudent manner, using no more force than is necessary, and if he fail to do so and the passenger is injured thereby, the company will be liable for the injury. *Central R. Co. v. Mackey*, 103 Ill. App. 15.

And although a drunken passenger has been refused admission to a train, if, in violation of the conductor's orders, he boards the train, the carrier will be responsible if he is pushed off while the train is moving and is injured. *Louisville & E. R. Co. v. McNally*, 31 Ky. L. Rep. 1357, 105 S. W. 124.

So, although there may be occasions when a drunken passenger will be so dangerous

hands of the servants of a railroad company than an adult in good health and under no disability. When Buckley was removed from the car he was in a stupor and evidently unable to take cognizance of surrounding objects or to realize where he was. He was seemingly without control of his body, yet he was left in the highway subject to being run down by passing vehicles or to be struck by a car or to fall and sustain serious injuries. It is evident that he wandered in some manner onto the track where his body was found, and either lay down or fell across the rails and met his death.

We are of opinion that the rule of the defendant is the more humane policy to adopt, and is in keeping with the rule laid down by Elliott on Railroads: "If . . . [the party] is so . . . feeble as not to be able to take care of himself, or look out for his own safety, the company should exercise reasonable care to see to it that he is not expelled and abandoned in such a place, and under such circumstances, that he will be exposed to unnecessary peril." § 1637.

that the conductor will be warranted in removing him from the train while it is in rapid motion, yet an instruction in a particular case that a drunken passenger may be removed while the car is in motion is erroneous, where there is nothing in the evidence to show that the passenger was objectionable except that he was drunk and used profane and insulting language. *Stringfield v. Louisville R. Co.* 32 Ky. L. Rep. 578, 105 S. W. 1190.

But a somewhat intoxicated passenger who gets off safely without assistance when told that he must pay his fare or leave the train, whom the conductor has seen a few minutes before in an eating house demanding food and acting somewhat boisterously, may be reasonably supposed to be capable of reaching a place of safety, where he is left in the evening, when it is neither raining or freezing, within 200 yards from a dwelling house, and not far from the railroad station. *Roseman v. Carolina C. R. Co.* 112 N. C. 709, 19 L.R.A. 327, 34 Am. St. Rep. 524, 16 S. E. 766.

And in *Baltimore, P. & C. R. Co. v. McDonald*, 68 Ind. 316, an action to recover for the expulsion at nighttime, at a place other than the regular station, of a drunken passenger who refused to pay his fare to the place of destination, and advised other passengers not to pay fare, the court, in holding that such expulsion at such place was authorized under a statute providing: "If any passenger shall refuse to pay his fare or toll, the conductor of the train and the servants of the corporation may put him out of the cars at any usual stopping place," said: "Is it meant by this provision of the statute that a man may get on a train at one station and refuse to pay any fare, and L.R.A.1915C.

This rule has received approval in many cases in other jurisdictions (*Fagg v. Louisville & N. R. Co.* 111 Ky. 30, 54 L.R.A. 919, 63 S. W. 580, 10 Am. Neg. Rep. 60; *Louisville, C. & L. Co. v. Sullivan*, 81 Ky. 624, 50 Am. Rep. 186, 8 Am. Neg. Cas. 286; *Conolly v. Crescent City R. Co.* 41 La. Ann. 57, 3 L.R.A. 133, 17 Am. St. Rep. 389, 5 So. 259, 6 So. 526, 8 Am. Neg. Cas. 309; *Indianapolis, P. & C. R. Co. v. Pitzer*, 109 Ind. 179, 58 Am. Rep. 387, 6 N. E. 310, 10 N. E. 70); and the principle has been applied in some degree at least in this state (*Regner v. Glens Falls, S. H. & Ft. E. Street R. Co.* 74 Hun, 202, 26 N. Y. Supp. 625; *Sanford v. 8th Ave. R. Co.* 23 N. Y. 343, 80 Am. Dec. 286, 8 Am. Neg. Cas. 520).

These views lead to a reversal of the judgment and a new trial.

The judgment of the Appellate Division should be reversed, and a new trial ordered; costs to abide the event.

Willard Bartlett, Ch. J., and Werner, Hiscock, Collin, Miller, and Cardozo, JJ., concur.

compel the railroad company to carry him to the next station before he can be put off? And that he can then get on the train when it is moving out, and again refuse to pay fare and compel the company to carry him to the next station, and so on to the end of the road? Such a construction and interpretation of the statute would, to say the least, make it very inconvenient for railroad corporations in many instances to collect any fare whatever. A better and more rational interpretation of the statute is that it was intended by the legislature to be a police regulation for the purpose of protecting the public from the dangers of frequent and unnecessary stopping of trains between stations or the peril to the traveling public consequent upon the increase of speed necessary to regain time thus lost. But if a passenger refuse to pay the fare, he has no right to complain for being put off the train, for the reason that such refusal to pay fare on the proper request makes him an intruder and wrongdoer from the beginning."

IV. Ejection as proximate cause of subsequent injury or death.

a. Sick passenger.

Generally, as to duty of carrier to passengers taken ill during journey, see notes in 31 L.R.A. 261, and 31 L.R.A.(N.S.) 813. As to liability of carrier for forcing sick or intoxicated person onto platform, see note in 16 L.R.A.(N.S.) 197.

A passenger stricken with apoplexy while riding on a street car, although attended with severe vomiting to the inconvenience and great discomfort of other passengers,

cannot be removed while in a speechless and helpless condition and laid in the open street on a bleak, drizzling December day, and there abandoned with no effort to procure him attention, without gross violation by the carrier of its duty as such, and liability for resulting damages. *Conolly v. Crescent City R. Co.* 41 La. Ann. 57, 3 L.R.A. 133, 17 Am. St. Rep. 389, 5 So. 259, 6 So. 526, 8 Am. Neg. Cas. 309.

So, also, a peremptory charge for defendant was held to be manifest error in *Eidson v. Southern R. Co.* — Miss. —, 23 So. 369, where a sick passenger was ejected on a dark cold night at a place where there was no depot and no light, and the next morning was found lying across the track where he was left by the conductor, dead.

But wrongful ejection of a sick passenger is not the proximate cause of injuries sustained as a result of a walk of several miles through rain and darkness, where he could have obtained shelter near the place of his ejection. *Galveston, H. & S. A. R. Co. v. Turner*, — Tex. Civ. App. —, 23 S. W. 83.

And in *Briggs v. Minneapolis Street R. Co.* 52 Minn. 36, 53 N. W. 1019, a street railway company was held not liable for the death of one who, during an attack of heart disease, was rudely and roughly removed from the car by the driver under the mistaken impression that he was drunk, and placed on the sidewalk, where he soon after died, where there was nothing to show that the driver's wrongful act in any manner produced or hastened his death.

b. Intoxicated passenger.

A carrier's liability for ejection of an intoxicated passenger who is mentally and physically incapacitated from being able to care for and protect himself from danger depends upon whether or not the place of ejection is such a one as a prudent person would have considered safe under the circumstances. *Texas C. R. Co. v. Rose*, — Tex. Civ. App. —, 161 S. W. 387.

So, the ejection from a train at night, of a passenger known to be drunk and irresponsible, at a place from which he can escape only by following the roughly ballasted railroad track, and crossing cattle guards on one side and a bridge over a creek on the other, renders the railroad company liable where he is killed by another train soon thereafter. *Louisville & N. R. Co. v. Johnson*, 108 Ala. 62, 31 L.R.A. 272, 19 So. 51.

And the wrongful ejection of a helplessly intoxicated person, and leaving him in such a condition beside a track in a cut 20 feet deep, were held in *Guy v. New York, O. & W. R. Co.* 30 Hun, 399, to be the proximate cause of his death by being run over by a subsequent train.

And ejection of passenger in a railroad cut over a mile from the nearest station, and 115 rods from the nearest accessible dwelling, at half-past 7 in the evening, in winter, on a dark, cold, and stormy night, L.R.A.1915C.

must be regarded as the proximate cause of his death, where he was incapacitated for caring for himself because of intoxication, and wandered to the opposite side of the track from that on which he was put off, and was found lying in partially frozen mud and water. *Gill v. Rochester & P. R. Co.* 37 Hun, 107.

So, also, where a passenger known to be in a helpless condition because of intoxication is ejected and left at a distance from any depot, in a cut in a dangerous part of the road, at such a time and place as would necessarily or probably expose him to danger of death or great bodily harm by passing trains, and he is shortly afterward run over and killed by a second train, the wrongful ejection is the proximate cause of the killing. *Louisville & N. R. Co. v. Ellis*, 97 Ky. 330, 30 S. W. 979. The court distinguished the *Logan Case*, 88 Ky. 232, 3 L.R.A. 80, 21 Am. St. Rep. 332, 10 S. W. 655, 8 Am. Neg. Cas. 294, as one where the condition of the ejected passenger was not such as indicated to the officers and agents in charge of the train that he was incapable of taking care of himself.

And ejection of a passenger from a train in zero weather, while in a helpless condition resulting from intoxication, was the proximate result of freezing such passenger's feet and hands and other parts of his body. *Louisville, C. & L. R. Co. v. Sullivan*, 81 Ky. 624, 50 Am. Rep. 186, 8 Am. Neg. Cas. 286.

Also, a railroad company is liable to one who, without right and while in a drunken and helpless condition, at night, boards a freight train standing in a cut, and is immediately ejected from the train with knowledge on the part of the trainman that a passenger train will soon pass through the cut, for injuries by the latter train which its superintendent and nearest station agent, who have been informed of his peril, make no effort to avoid. *Fagg v. Louisville & N. R. Co.* 111 Ky. 30, 54 L.R.A. 919, 63 S. W. 580, 10 Am. Neg. Rep. 60.

In *Louisville & N. R. Co. v. Tuggle*, 151 Ky. 409, 152 S. W. 270, distinguishing *Brown v. Louisville & N. R. Co.* 103 Ky. 211, 44 S. W. 648, where a passenger in a helpless condition due to intoxication was ejected at 11 o'clock at night, at a small station which was not open because not a night station, and at which there was no one, it was held to be negligence for the carrier's employees, knowing the passenger's drunken and helpless condition, to eject him at that late hour in a strange place upon the railroad track, without anyone to care for him.

Also, ejection of an intoxicated passenger unable to properly care for himself, at a small station about 700 feet from the international bridge over the Niagara river, at half-past 10 at night, was held in *Delahanty v. Michigan C. R. Co.* 7 Ont. L. Rep. 690, to be the proximate cause of such ejected passenger's death, where he followed the train down the track onto the bridge, fell into the river and was drowned. The court stated that upon the evidence it thought that deceased should not have been

compelled as he was to leave the train; that he was not in a condition to be left on the track, and that it might be fairly inferred that a person in the condition in which he was, with the lights of the city in front of him, would follow the train and attempt to cross the bridge thinking, so far as he was capable of consecutive thought, that to be the only way of reaching his destination, and getting his baggage which was left on the train. The court further said that from all that appears, there would have been no difficulty in taking care of the deceased, and of preventing his interfering with or annoying the passengers; that the deceased could have gone into the smoking room or buffet car or baggage car; that the train was only five minutes run from the city of Black Rock, and only twenty minutes to Buffalo, its destination, and to have taken care of deceased would have been a prudent and humane thing to do under the circumstances.

But to permit recovery where a helplessly drunken passenger was ejected from a train and killed by a subsequent train, it must appear to the satisfaction of the jury that the death was a natural and proximate result of a negligent ejection, and so, where it appears from the evidence that the death occurred some half mile distant from the place where the passenger was left, and some six hours later, and that at least two trains passed before the one which ran over him, these facts are material for the determination of the question, and should be called to the attention of the jury. *Haley v. Chicago & N. W. R. Co.* 21 Iowa, 15, 8 Am. Neg. Cas. 230.

And there was no negligence in the ejection of an intoxicated passenger, not because of intoxication nor because of refusing to pay fare, but solely because he had gone past his destination, which will warrant recovery for his death, where such ejected passenger was not demented nor drunk to stupefaction, but was aware of his condition and able to hire a guide to walk over a railroad bridge and a mile of its tracks, where he was killed by another train; the ejection being at 9 o'clock at night, at a flag station where there were four or five houses, but no ticket office. *Hamilton v. Kansas City Southern R. Co.* 250 Mo. 714, 157 S. W. 622.

And wanton and reckless negligence on the part of the carrier in ejecting an intoxicated passenger is not shown where he was placed in the station in a position of security from the danger of passing trains, from which he subsequently wandered, and his lifeless body was found on the railroad track,—the court stating that the carrier's servants, while bound, because of his obvious disability, to leave him within a place within the station where, if he had remained, his personal safety would not have been in danger, were under no obligation to escort him from the premises to the public ways, or to take further measures for his protection. *Murphy v. Boston & M. R. Co.* 216 Mass. 178, 103 N. E. 291.

So, also, a railroad company which, with L.R.A.1915C.

no more force than is reasonably necessary, ejects from its cars at the station where his ticket expires, a drunken passenger acting in a boisterous manner, is not liable for any injury which may result to him from his effort to pursue and re-enter the train. *Chesapeake & O. R. Co. v. Saulsberry*, 112 Ky. 915, 56 L.R.A. 580, 66 S. W. 1051, 11 Am. Neg. Rep. 587.

And there is no obligation to stop the train to ascertain the extent of his injuries in case he falls in attempting to pursue and re-enter the train. *Ibid.*

A conductor is not negligent in ejecting from a train a short distance from a station within the yard limits, and near dwellings, a man who, although apparently intoxicated, was able to walk and carry on an intelligent conversation, although he had been informed at the station that the man was not fit to travel, where the man, when asked for his fare, refused to pay it or tell his destination. *Korn v. Chesapeake & O. R. Co.* 63 L.R.A. 872, 62 C. C. A. 417, 125 Fed. 897.

Nor is a carrier liable for injuries due to exposure, where it expels an intoxicated passenger for refusal to pay fare, in a public highway near a regular stopping place, although the night is very cold, the thermometer registering 24 degrees below zero, the removal not being done with excessive force. *Podespik v. Worcester Consol. Street R. Co.* 216 Mass. 218, 103 N. E. 638.

The court said: "The plaintiff's expulsion was on a bitterly cold night; but his original exposure to the inclemency of the weather was a voluntary one, and the defendant did nothing to increase the discomforts or the perils of his position. It did not appear that, short of his ultimate destination, there was any place where his removal from the car would have involved less danger than where it was done. Under the circumstances in evidence, there was no duty on the defendant to keep him in its car. It had a right to remove him because he did not pay his fare; it was under a duty to do so because he was drunk. It cannot be held liable for having exercised this right and complied with this duty."

And the conductor's requiring an intoxicated man to leave the car for nonpayment of fare does not render the carrier liable for the death of the man from exposure, where the conductor did not have reasonable grounds to believe that the man was unable to find his way or walk to the nearest house or to the railroad station, or even to his own father's house, which was not far away. *Roseman v. Carolina C. R. Co.* 112 N. C. 709, 19 L.R.A. 327, 34 Am. St. Rep. 524, 16 S. E. 766.

Negligence, if any, in the ejection of an intoxicated person, ceases as a factor in an action for personal injuries, where such person has left the railroad premises and reaches a place of safety, although he may thereafter wander back onto the track. *Gaukler v. Detroit, G. H. & M. R. Co.* 130 Mich. 666, 90 N. W. 660.

And so a railroad company is not liable for injury to an intoxicated person who af-

ter ejection wanders back onto the railroad track, and is run into by another train, where, when the carrier's employees left him, he was 25 feet from the track and in the presence of two police officers. *Ibid.*

And where a drunken passenger, because riotous and disorderly, is ejected on a warm bright night and placed beyond danger, the company will not be held liable if he afterwards goes upon the track and is run over by another train, unless the employees of the latter train saw his danger in time to have avoided injuring him, and failed to use the means at their command to prevent doing so. *Louisville & N. R. Co. v. Logan*, 9 Ky. L. Rep. 893.

So, also, in *McClelland v. Louisville, N. A. & C. R. Co.* 94 Ind. 276, where a passenger in a helpless and stupefied condition because of drink was carried past his destination, failed to pay a further fare when demanded because of his inability to comprehend his liability therefor owing to his drunken condition, and so was ejected from the train and placed a few feet from the track and left there in a sitting position, and subsequently wandered onto the track and was killed by another train, in holding that the railroad company was not liable for his death the court said: "Under the circumstances the conductor of the passenger train had the right to put deceased off the train, and place him far enough to one side so as to be out of danger from passing trains without some intervening agency. The conductor could not be expected or required to place a guard over him to prevent his getting upon the track; and his afterwards getting upon the track, and lying down there, could not be the natural and necessary or usual result of his having been left by the side of the road, or his death the proximate result of his having been so left. He was bound to be left on one side or the other of the road, and if he afterwards wandered upon the track it was his own folly resulting from his unfortunate condition, for which the defendant ought not to be held responsible."

An allegation that a drunken passenger was expelled at a place where there was no shelter, and left in a place where he was exposed to unnecessary perils, in such condition, on account of cold and storm, does not show a connection between the alleged wrongful act of expulsion and an injury due to walking or falling off of a trestle into the river. *Keeshan v. Elgin, A. & S. Traction Co.* 229 Ill. 533, 82 N. E. 360.

So, also, the ejection of an intoxicated passenger from a train within the limits of a village, and near dwelling houses, at a time when the temperature was near the freezing point, cannot be said to be the cause of his death when his body was afterwards found with cocaine in fatal quantities upon it near the track, in a composed attitude, showing plainly that he had invited death and awaited its coming, although the evidence is conflicting whether the death was caused by exposure or poisoning, where neither the time, place, or circumstances

of ejection were dangerous, and the death was not caused by any danger which the conductor could have foreseen. *Korn v. Chesapeake & O. R. Co.* 63 L.R.A. 872, 82 C. C. A. 417, 125 Fed. 897.

So, ejection of a drunken passenger from a train was held not to be the proximate cause of injury due to his being struck by a subsequent train,

—where he was able to walk 3 or 4 miles down the track before he was struck, *Seaboard Air-Line R. Co. v. Smith*, 3 Ga. App. 1, 59 S. E. 199;

—where he was ejected in the afternoon, the weather being mild, and after his ejection he continued to drink whisky, and lay out all night, and in the morning wandered onto the track, lay down, and was injured by a passing train, *Tuttle v. Cincinnati, N. O. & T. P. R. Co.* 26 Ky. L. Rep. 152, 80 S. W. 802;

—where there was no reason to believe that he could not take care of himself, and the ejection took place shortly after sunset, and the place was near dwellings and upon a public highway, *Edgerly v. Union Street R. Co.* 67 N. H. 312, 36 Atl. 558;

—where, although too intoxicated to take proper care of himself, he was ejected at a regular station, other persons being on the platform at the time, and he was killed by another train 200 yards from the station, to reach which point he had either crossed or gone around a trestle, *St. Louis & S. F. R. Co. v. Williams*, — Tex. Civ. App. —, 37 S. W. 992;

—where he was in a helpless state and wandered onto the track and was killed by a subsequent train, it being shown that he was ejected at 1 A. M., at a regular passenger station, other passengers getting off at the same time, there also being two hotel porters at the station at the time, *Brown v. Louisville & N. R. Co.* 103 Ky. 211, 44 S. W. 648. The court said that the reasonable presumption was that there would be no danger of his suffering from cold, and that the company could not reasonably suppose that he would go upon the railroad track, but that the reasonable inference and supposition would be that he would go to some hotel or be cared for by some of the citizens;

—where the undisputed evidence showed that he was able to care for himself, that he walked out of the car and got off without assistance, and proceeded to walk along the right of way to a point 2,000 feet distant, the ejection being at a junction point in close proximity to a highway and a hotel, *Habeck v. Chicago & N. W. R. Co.* 146 Wis. 645, 132 N. W. 618, Ann. Cas. 1912A, 485;

—where the evidence was that, although fighting drunk, he had quite sense enough to take care of himself, *Railway Co. v. Valleley*, 32 Ohio St. 345, 30 Am. Rep. 601, 8 Am. Neg. Cas. 567.

In *Central R. Co. v. Glass*, 80 Ga. 441, distinguished in *Seaboard Air-Line R. Co. v. Smith*, 3 Ga. App. 1, 59 S. E. 199, where a drunken passenger was ejected because of refusal to pay fare, and after walking down the track about a mile lay down on the

track and was run over by a subsequent train, the recovery was predicated not on negligence in the manner of ejection, but on negligence of the subsequent train in not keeping a diligent lookout for him, they having been notified of the ejection and of his condition.

V. Recovery in action by ejected passenger.

a. Elements of recovery.

(1) Ejection of sick passenger.

Recovery for wrongful ejection of a sick passenger may include damages for injuries resulting from his weakened physical condition, also for humiliation and indignity, and for the expense and inconvenience to which he is put. *Birmingham R. Light & P. Co. v. Turner*, 154 Ala. 542, 45 So. 671.

Recovery for wrongful ejection of an infirm passenger may include, if the natural and probable consequence of the wrongful act, such sum as will reasonably and fully compensate him for such physical pain as he suffered, also such sum as will reasonably and fairly compensate him for loss of earning capacity, and loss of ability to carry on and attend to his business or profession. *Pennsylvania R. Co. v. Palmer*, 62 C. C. A. 588, 127 Fed. 956.

A sick passenger wrongfully expelled from a train under mistaken belief that he has smallpox is entitled to recover not only the money he pays out necessarily in expenses thereby caused, but the value of the time lost, and compensation for the pain and suffering consequent upon his removal, and any permanent or continuous injury occasioned thereby. *Paddock v. Atchison, T. & S. F. R. Co.* 4 L.R.A. 231, 37 Fed. 841.

In *St. Louis & S. F. R. Co. v. Roane*, 93 Miss. 7, 46 So. 711, where a passenger in the last stages of consumption, bound for a point quarantined against yellow fever, was ejected by a quarantine officer without protest from the conductor, although such passenger had a health certificate showing freedom from yellow fever, such passenger dying within two or three days thereafter, the court said that, "in view of the enfeebled condition of the deceased, then being in the last stages of consumption, easily exhausted, and almost too weak to stand, not being able because of this condition to speak above a whisper, we feel bound to take into consideration these facts in measuring the liability of the company for their breach of duty towards this passenger."

(2) Ejection of intoxicated passenger.

Recovery for injuries sustained by a drunken person ejected from a moving train should include reasonable compensation for mental or physical suffering, if any, and for impairment of power to earn money, if any, directly due to the injury. *Louisville & E. R. Co. v. McNally*, 31 Ky. L. Rep. 1357, 105 S. W. 124.

In *St. Louis, I. M. & S. R. Co. v. Dallas*, L.R.A.1915C.

93 Ark. 209, 124 S. W. 247, an action for injuries alleged to have been received by one wrongfully ejected from the train while in a drunken condition, and left in an unconscious condition near the track, whereby his leg was cut off by another train, the court said that, while it is difficult to fix a measure of damages for pain and suffering, for the reason that no amount would be an acceptable inducement therefor, yet, in determining the amount of compensation, the jury must be governed by the evidence in the case, and so it is error to give an instruction in effect that the jury should render a verdict for any amount they deemed right for the pain and suffering, regardless of the evidence.

In an action to recover for the death of a son negligently ejected from a train while intoxicated, an instruction that "another item of damages which the jury have the right to consider and determine is the benefit that would be likely to result to the parents of the deceased from the counsel and advice they might have received from their son during life" is erroneous where the person killed was a minor, and there is no evidence justifying the conclusion that if the child had lived it might reasonably be expected that the parents would have received from him advice and counsel of such a nature as to have a pecuniary value. *Gill v. Rochester & P. R. Co.* 37 Hun, 107.

b. Right to exemplary damages.

Where the conduct of the conductor in ejecting a drunken passenger from a car indicates wantonness or recklessness as to the passenger's safety, exemplary damages may be awarded. *Louisville & E. R. Co. v. McNally*, 31 Ky. L. Rep. 1357, 105 S. W. 124.

And exemplary damages may be awarded for wanton and oppressive expulsion of a sick passenger from a railroad train, in violation of contract rights. *Forrester v. Southern P. Co.* 36 Nev. 247, 48 L.R.A. (N.S.) 1, 134 Pac. 753, 136 Pac. 705 (expelled passenger sick).

But where there is nothing to evince any wantonness or wilful disregard of the right of a sick and enfeebled passenger who is ejected, punitive damages cannot be recovered. *St. Louis & S. F. R. Co. v. Roane*, 93 Miss. 7, 46 So. 711.

c. Damages held excessive.

In the following instances the amounts recovered were held to be excessive:

—\$7,500, *St. Louis & S. F. R. Co. v. Roane*, 93 Miss. 7, 46 So. 711 (wrongful ejection of passenger in last stages of consumption; reduced to \$2,500 and affirmed);

—\$2,500, *Conolly v. Crescent City R. Co.* 41 La. Ann. 57, 3 L.R.A. 133, 17 Am. St. Rep. 389, 5 So. 259, 6 So. 526, 8 Am. Neg. Cas. 309 (passenger stricken with apoplexy, ejected from car in helpless condition, and left to lie in the street; judgment reduced to \$1,500 and affirmed);

—\$1,000, *St. Louis, I. M. & S. R. Co. v. Woodruff*, 89 Ark. 9, 115 S. W. 953, 21 Am.

Neg. Rep. 22 (wrongful ejection of insane passenger; compensatory damages only being asked, \$100 was considered sufficient, the evidence showing that the passenger had bruises on her body from which she was confined to bed two days, no permanent injuries being shown).

d. Damages held not excessive.

In the following instances the amounts recovered were held not to be excessive:

—\$11,115, *Forrester v. Southern P. Co.* 36 Nev. 247, 48 L.R.A. (N.S.) 1, 134 Pac. 753, 136 Pac. 705 (passenger put off train while sick, without money, at a way station hundreds of miles from friends, and left to make his way as best he could by walking and riding on freight trains and cars, by reason of which he contracted a fatal illness, after he had been insulted, his baggage searched, and his tickets wrongfully taken away from him by an agent who received a commission for doing so, and who gloated over the fact that he had put other passengers off);

—\$9,000, *Louisville & N. R. Co. v. Tugle*, 151 Ky. 409, 152 S. W. 270 (ejection of helplessly drunken passenger who was subsequently killed by a passing train, who was thirty-two years of age, healthy, and earning \$50 a month, and had expectancy of life of nearly thirty years);

—\$2,500, *Texas & P. R. Co. v. Casey*, 52 Tex. 112 (the ejection of pregnant woman who, as result of being forced to walk 2 or 3 miles, suffered miscarriage);

—\$1,500, *St. Louis, I. M. & S. R. Co. v. Day*, 86 Ark. 104, 110 S. W. 220 (rough and brutal ejection of partially paralyzed passenger carried beyond station, who, in attempting to walk back to destination, fell into mudhole and lay there for several hours, the weather being cold, and, in consequence of exposure, contracted a fever and was sick in bed for two months);

—\$1,150, *Illinois C. R. Co. v. Sutton*, 53 Ill. 397 (ejection of sick passenger from freight train because he had no ticket; the effort in his weak condition to walk back to the station aggravating the disease from which he was suffering, confining him to his bed, compelling him, when partially restored, to leave his business and take special treatments, which resulted in great pecuniary loss to him);

—\$1,125, *Louisville, St. L. & T. R. Co. v. Gateway*, 14 Ky. L. Rep. 103 (passenger while drunk was ejected from train while on trestle and received injuries which were permanent);

—\$1,000, *Pennsylvania R. Co. v. Palmer*, 62 C. C. A. 588, 127 Fed. 956 (infirm passenger wrongfully ejected on cold wet day contracted rheumatism which permanently settled in the stump of his leg; also loss of earning capacity);

—\$1,000, *Chesapeake & O. R. Co. v. Robinett*, 32 Ky. L. Rep. 1077, 107 S. W. 763 (excessive force and violent assault in ejection of drunken passenger);

—\$1,000, *Southern Kansas R. Co. v. Wal-* L.R.A.1915C.

lace, — *Tex. Civ. App.* —, 152 S.W. 873 (wrongful ejection of woman with three children, one sick, child's illness aggravated, and mother and two children under doctor's care for two weeks);

—\$750, *Ft. Worth & R. G. R. Co. v. Duhose*, — *Tex. Civ. App.* —, 171 S. W. 1090 (aged, weak, and infirm woman ejected with five children, two of whom were sick, on a lonely prairie 5 miles from a station, and hardship suffered caused her to be sick over a month);

—\$400, *Regner v. Glens Falls, S. H. & Ft. E. Street R. Co.* 74 Hun, 202, 26 N. Y. Sup. 625 (forcible ejection of passenger afflicted with St. Vitus's dance, under a belief that he was intoxicated);

—\$287, *Birmingham R. Light & P. Co. v. Turner*, 154 Ala. 542, 45 So. 671 (wrongful ejection of passenger weakened by typhoid fever, who was compelled to walk home);

—\$250, *Lucy v. Chicago G. W. R. Co.* 64 Minn. 7, 31 L.R.A. 551, 65 N. W. 944 (recovery for abuse and insult of female passenger by drunken passenger. Although the court thought the verdict large, it stated that it was not so excessive as should be set aside after the court below had decided that it was not excessive).

VI. Questions for jury.

The extent of intoxication of a passenger, the conductor's knowledge of his condition, and the safety of the place at which he was ejected, are questions for the jury. *Louisville & N. R. Co. v. Johnson*, 108 Ala. 62, 31 L.R.A. 272, 19 So. 51.

Also, negligence in ejecting a passenger who is so drunk as to be unable to stand without assistance, or to care for himself, is a question for the jury. *McCoy v. Millville Traction Co.* 83 N. J. L. 508, 85 Atl. 358.

And negligence of carrier in expelling an intoxicated passenger in the nighttime, at a point where snow on either side of the track was banked 2 feet deep, which point is distanced 20 yards from a shelter shed on the opposite side, and abutting the track. *Ibid.*

Reasonableness of the ejection of a known intoxicated person at a point where there was no shelter or accommodation except a waiting shed open on two sides, three quarters of a mile from any habitation, and where the snow was 2½ feet deep, is a question for the jury. *Donovan v. Greenfield & T. F. Street R. Co.* 106 C. C. A. 72, 183 Fed. 526.

So, also, whether negligence in expelling a drunken passenger from a train was the proximate cause of injury due to his being struck by a subsequent train. *Atlantic Coast Line R. Co. v. Barton*, 14 Ga. App. 160, 80 S. E. 530.

And whether a conductor acts with due care and in a proper exercise of the right to eject a drunken passenger, in ejecting him while the car is moving. *Murphy v. Union R. Co.* 118 Mass. 228, 8 Am. Neg. Cas. 405.

J. H. B.

KENTUCKY COURT OF APPEALS.

CHESAPEAKE & OHIO RAILWAY COMPANY, Appt.,
v.

C. E. FRIEND.

(159 Ky. 778, 169 S. W. 509.)

Carrier — sleeping passenger — duty with respect to collecting fare.

A carrier is not liable for ejecting a passenger for nonpayment of fare where he failed to respond to three efforts by the conductor to arouse him from sleep due to intoxicants and loss of sleep, to secure his fare, and made no response until he had been pushed out onto the platform in the process of ejection.

(September 29, 1914.)

A PPEAL by defendant from a judgment of the Circuit Court for Floyd County

Note. — Carrier: effort that must be made to collect fares before ejecting passengers for nonpayment of same.

Aside from CHESAPEAKE & O. R. Co. v. FRIEND, no reported case, which has considered the question under annotation, has been found where the facts were similar to the reported case.

As to whether a sufficient effort has been made to collect a fare would seem to be governed by the circumstances of each particular case.

Thus, in *Texas & P. R. Co. v. Bond*, 62 Tex. 442, 50 Am. Rep. 532, action to recover for wrongful ejection for a failure or refusal to pay the additional amount required when fare is paid on the train, the court, in affirming the judgment for plaintiff on the ground that he did not enter the car with the intention to defraud the company, or resist its demand for full pay, said: "He went aboard of it expecting that he would be taken to Terrell for 20 cents, paid to the conductor as usual. He tendered that amount to the conductor in charge, with whom he had never traveled before, and upon being required to pay 10 cents more, told the conductor that he had never been required to pay this additional amount, and when informed that the charge was 4 cents per mile when paid on the train, objected to paying it, and told the conductor good-humoredly if he would stop the train, he would get off. This was a mere discussion between the parties, in which Bond was endeavoring to persuade the conductor to allow him to make the journey for 20 cents, and the conductor was attempting to convince Bond that he could not do so, but must have the full fare required when paid on the train. It was just such a discussion as is liable to take place frequently between a conductor and a passenger. It may arise as to the validity of a ticket, or the time when it expired, or L.R.A.1916C.

in plaintiff's favor in an action brought to recover damages for alleged wrongful expulsion of plaintiff from defendant's train. Reversed.

The facts are stated in the opinion.

Messrs. **Worthington, Cochran, & Browning and Harkins & Harkins** for appellant.

Messrs. **May & May** for appellee.

Hannah, J., delivered the opinion of the court:

C. E. Friend sued the Chesapeake & Ohio Railway Company in the Floyd circuit court to recover damages for an alleged wrongful expulsion of plaintiff from one of defendant company's passenger trains. The jury returned a verdict in his favor in the sum of \$1,000. The railroad company appeals.

Friend testified that he was a resident of Prestonsburg, in Floyd county; that his

upon like subjects in which the conductor is expected to see and know the difference between an attempt to impose upon him and a mere mistake of facts on the part of a passenger. The present conductor should have known from the character of his discussion with Bond the false impression as to what he would have to pay under which the latter boarded the train, and the good-humored manner in which he asked to be put off, and the small amount in controversy, and the great distance which Bond would have to walk if expelled from the car, that he was no trespasser, and that he did not wilfully and would not persistently object to paying the fare exacted of him. He should have allowed him a reasonable time to consider as to paying the additional money, and not acted so hastily in pulling the bell and taking steps to eject appellee from the cars."

In *Fordyce v. Beecher*, 2 Tex. Civ. App. 29, 21 S. W. 179, the evidence showed that one at a station called "Pollock" got onto the platform of the baggage car next to the tender and rode there without the knowledge of the conductor until the train reached a station known as "Baker's Mill:" that there he was discovered by the conductor, and then went into the smoking car. This was done openly and without concealment, and he was sitting quietly in the car when he was approached by the conductor and assaulted without any demand having been made for his fare, or any opportunity having been offered him after entering the car to pay it. After the conductor had struck him several times, he demanded the fare, and the passenger either paid or was in the act of paying it, when the assault was continued, and he was beaten, and cut with a knife, and thrown from the train while it was in full motion. The court, in stating that the conductor would be liable if a passenger is assaulted and ejected before a demand of fare is

age was thirty-four years; that on December 21, 1911, he went from Prestonsburg to Catlettsburg on one of defendant company's passenger trains; that he bought a round-trip ticket, and the return portion thereof he produced upon the trial of this action. He arrived in Catlettsburg about 11 o'clock A. M., and spent the afternoon of the 21st and all of the 22d, in Catlettsburg and Huntington, a nearby city, taking a few drinks of intoxicants from time to time. On the afternoon of the 22d of December, he returned to Catlettsburg, where he encountered an acquaintance, and they remained together until about 3 o'clock on the morning of the 23d, taking, as plaintiff testified, "a few drinks along through the day and along that night." Between 2 and 3 o'clock on the morning of the 23d, plaintiff lay down for a short nap, but arose in time to obtain another drink and get to the passenger depot at 7 o'clock that

morning, where he boarded one of the defendant company's passenger trains enroute to his home, with 7 or 8 quarts of whiskey in his grip, intended, plaintiff says, "for some other parties, and some for myself, and some for my wife, and I don't remember whether there was 7 or 8 quarts in my grip." After he boarded the train, and just after the train had left Catlettsburg, Friend became engaged in a conversation with a Reverend Mr. Ackman, district superintendent of the M. E. Church. This conversation was of such character as to attract the attention of Rev. O. F. Williams, a presiding elder of the M. E. Church, South, who was also a passenger thereon. The latter testified that Friend was quite talkative and acted like most folks do when under the influence of intoxicants; that he didn't seem to be a bit out of humor; on the contrary, he seemed to be in a mighty good humor, good-natured.

made, said: "Appellee went in the car at Baker's Mills, a regular passenger station, it is to be inferred from the evidence, and was assaulted before his fare had been demanded. It is not shown that his fare for riding on the platform of the car had been demanded and refused, and, for all the record disclosed, he may have been ready to pay his fare from Pollock to his destination. We cannot hold that the mere fact that he rode from Pollock to Baker's Mill on the platform of the car to escape paying his fare, if such be the case, would deprive him of the right to become a passenger at a regular station, when no demand had been made for his fare, and no disturbance of breach of the peace had been committed by him. . . . The uncontradicted evidence shows that the conductor began his expulsion with an assault, followed that with a demand for his fare from appellee, and upon that being paid or offered, continued the use of violence, striking and cutting appellee, and finally threw him from the cars, and left him, dangerously wounded and senseless. In this he was exercising his functions as conductor, and acted as a servant of appellants; and, whether the relation of carrier and passenger existed or not, the master would be liable."

In *McGraw v. Southern R. Co.* 135 N. C. 264, 47 S. E. 758, plaintiff, on being found by the conductor on a blind baggage car, was ejected; his explanation of his being in such place was that while the train was standing at the station he went across the street for the purpose of making a purchase, and the train starting off, he ran to catch it, and got upon the platform of the first car that he reached, it being the blind baggage car; he claimed to have informed the conductor that he had a ticket, but this was denied by the conductor. The court, in granting a new trial upon judgment for plaintiff, stated: "The general rule is that

a person can take passage on such trains only and only in such places, as the rules of the company provide that passengers shall be carried; and one who does not conform to such rules is ordinarily to be regarded as an intruder or trespasser, and an intruder or trespasser cannot impose upon a railroad company the high duty which a carrier owes to its passengers? . . . It was the duty of the plaintiff, when found upon the platform of the baggage car, to promptly inform the conductor that he had a ticket, so that he could be given an opportunity to go into the car provided for passengers. He says that he did so. The conductor says that he did not do so; that he said nothing about having a ticket, and that he (conductor) saw no ticket. The truth of the matter should have been ascertained by the jury. If the plaintiff's version of the transaction is true, he is entitled to maintain his action. If the conductor's version is correct, he is not entitled, as a passenger, to recover."

A second demand for fare need not be made by a street car conductor before ejecting from the car a person who, in response to his first demand, tendered a worthless ticket, and was informed that it was insufficient. *United R. & Electric Co. v. Hardesty*, 94 Md. 661, 57 L.R.A. 275, 51 Atl. 406.

And although not specially considered, the question under annotation may inferentially be said to have been decided in *Buckley v. Hudson Valley R. Co.* ante, 134, *Clark v. Harrisburg Traction Co.* 20 Pa. Super. Ct. 76; *McClelland v. Louisville, N. A. & C. R. Co.* 94 Ind. 276; *Hudson v. Lynn & B. R. Co.* 178 Mass. 64, 59 N. E. 647, 9 Am. Neg. Rep. 493; *Murphy v. Boston & M. R. Co.* 216 Mass. 178, 103 N. E. 291, cited in the note to *Buckley v. Hudson Valley R. Co.* ante, 134, where a sick or intoxicated person was ejected because of refusal or failure to tender his ticket or pay fare. *J. H. B.*

talkative, and liberal, and in fact was what the witness would call drunk. This witness, in answer to a question as to the subject-matter of the conversation which drew his attention, said: "I think Mr. Ackman and Mr. Friend were going to build churches; in two or three instances Mr. Friend was making very liberal subscriptions, telling him how nice it was to build churches and how to go about it."

Plaintiff testified that he was not drunk; that after having some conversation with friends, he sat down in a seat, pulled his hat down over his face, leaned his head over in the window, and was soon asleep; that he remained asleep until the train reached a station called Walbridge, about 30 miles from Catlettsburg, and that when he awoke, the conductor had him out on the platform of the coach; that he supposed the "outside air" caused him to awake. He testified that he said to the conductor, "Gentlemen, you are making a mistake; I don't want off here; I am going to Prestonsburg;" that the conductor then said to him (as near as he could remember; he would not say positively), "By God, we want you off;" that he then stepped off and looked back at the conductor and said to him, "By God, I am off." He further testified that after the train passed on, he looked up the track and saw some ladies and gentlemen standing there, and that he walked up to them and asked them if they knew why he had been put off of the train; that they said they did not know he had been put off; that he then asked them how far it was to Louisa, and they said it was 3 miles; that he then walked to Louisa, remained there until the evening train and then took passage to his home in Prestonsburg. In answer to an inquiry as to whether he at any time offered to give the conductor his ticket, he testified that he did not recall; that his expulsion was so quickly done, and he was trying to explain, and they would not give him time, saying, "I doubt whether I ever thought of the ticket."

Plaintiff also introduced a fellow passenger, who testified that he sat in the same seat with plaintiff until after the train left Louisa, about 3 miles below Walbridge, where plaintiff was ejected; that plaintiff was asleep all the time the witness sat with him; that if the conductor attempted to take up plaintiff's ticket, the witness did not remember it, nor did he recall whether he had left his seat for any length of time until they arrived at Louisa. This witness also testified that about the time the train left Louisa he moved across the aisle one seat ahead of plaintiff, and was sitting there when the conductor took hold of plaintiff to remove him, but the witness did not

notice the conductor take hold of him, or hear the conductor say anything; that the first he noticed of the trouble, the "conductor had awakened Mr. Friend and had him on his feet in the aisle and was pushing him toward the front door of the car." So this evidence is of but little importance affecting the main issue.

The conductor testified that he made an effort to obtain plaintiff's ticket three times; his testimony on that point being as follows: "I went to him for his ticket somewhere between Big Sandy Junction and Buchanan. The train was pretty well crowded. He seemed to be asleep, and apparently to me was intoxicated, and I shook him, and he didn't give any response. He was sitting with his hand down this way, sleeping; and there was a right smart crowd, and I didn't have much time to contend with him. I thought he was drinking, and I thought I would fetch him to Louisa and have him taken off for being drunk. I went on and worked the train, and after I passed Fullers I went back again and shook him and got no response. When I come to Louisa, I got off and looked for the marshal and couldn't see anything of him, and I had the orders to get, and everything was heavy that day, so when I got the orders, the thing slipped my memory to have him taken off. I didn't see anybody to take him off. It slipped my memory. I worked the train leaving there, and found him still sitting there asleep before I got to Walbridge; and when I got there I picked him up and carried him and pushed him ahead of me to the door and put him off; shook him at first to get his ticket and see where he was going."

In his testimony as to his having made efforts to obtain plaintiff's ticket, the conductor is contradicted by no one, and is corroborated by Rev. O. F. Williams, the presiding elder above mentioned, as to the first or second time the conductor went through the train after leaving Catlettsburg. The plaintiff himself does not deny this testimony, but says if the conductor ever tried to rouse him, he did not know of it.

At the close of all the evidence the defendant moved the court to instruct the jury to find a verdict for it, and of the court's refusal to grant this motion it now complains, insisting that the weight of the evidence authorized an instructed verdict; but the question is whether, taking the evidence for plaintiff as true, he was entitled to a recovery under the law.

It was said by this court in *McKinley v. Louisville & N. R. Co.* 137 Ky. 845, 28 L.R.A. (N.S.) 611, 127 S. W. 483: "This court has frequently upheld the right of carriers

to eject passengers where they failed to produce a ticket or pay their fare. As said in the case *Flood v. Chesapeake & O. R. Co.* 25 Ky. L. Rep. 2135, 80 S. W. 84: 'One who enters a passenger train and refuses to pay fare becomes a trespasser, and may be ejected by the conductor.' Of course, if, in putting the passenger off of the train, the conductor uses any unnecessary force, or offers to the passenger any insult or indignity, . . . or ejects him from the train at a time and place when serious injury would likely result to him, . . . the company would be liable,—not for putting him off, but for the manner in which it was done."

And the general rule is that where a passenger has refused to tender a ticket or to pay fare, and has been in part ejected from the train, as where the carrier's servants have signaled for the stopping of the train for the purpose of ejecting the passenger, the passenger cannot then tender a ticket or offer to pay fare, and thus entitle himself to transportation, and thereby render his ejection from the train a wrongful act. *Louisville & N. R. Co. v. Breckinridge*, 99 Ky. 1, 34 S. W. 702; 6 Cyc. 554; 31 L.R.A. (N.S.) 992, note.

It is apparent, therefore, that if appellee failed to tender a ticket or to pay fare after a proper demand therefor by the conductor, the conductor had a right to eject him, and appellee cannot recover, for the conductor used no more force than was necessary, offered to appellee no insult or indignity, and did not eject him at a time and place likely to result in serious injury to him. So the question is, Did appellee, within the meaning of the rule stated, fail to produce a ticket or to pay fare after proper demand made therefor? In considering this question, it is necessary to determine what is required of a conductor to constitute proper demand for the ticket or fare of a sleeping passenger. That he should make a reasonable, and, under unusual circumstances, an extraordinary, effort to rouse the passenger, must be conceded. But to hold an ejection wrongful where a person has boarded a train and gone to sleep and permitted the conductor to make a reasonable effort on at least three occasions to rouse the passenger, and has then suffered himself to be raised out of his seat and to be pushed almost the entire length of a passenger coach and out onto the platform, without tender of ticket or offer to pay fare, as was done in this case, would be an invitation to the unscrupulous to impose upon carriers, and an assurance of reward for such imposition. There might be circumstances requiring unusual or extraordinary efforts upon the part of the conductor to arouse a sleeping passenger; as under conditions where a

passenger is suffering from a malady of such nature that the person is not easily roused, or has been without sleep for an unusual length of time, or is exceptionally difficult to wake, or conditions of like nature. In such cases the failure to respond to the effort of the conductor may be explained. But no excuse is offered or explanation is given of the plaintiff's exceptionally deep sleep, except that he had had "a few drinks along through the day and along the night before," and had been up until between 2 and 3 o'clock of that morning, and that it required "outside air" to wake him. The court is therefore of the opinion that the demand made upon plaintiff by the conductor for his fare was a proper and sufficient demand; and plaintiff, having failed to tender his ticket or offer to pay fare, was lawfully ejected from the train. The trial court should have granted the motion to instruct the jury to find a verdict for the defendant.

It was also insisted by appellant company that the damages awarded were excessive. In view of the holding of the court as to plaintiff's want of right to recover in any sum, this question is immaterial; but in the following somewhat similar cases, the amounts indicated were held excessive: In *Cincinnati, N. O. & T. P. R. Co. v. Carson*, 145 Ky. 81, 140 S. W. 71, \$400; in *Southern R. Co. v. Hawkins*, 121 Ky. 415, 89 S. W. 258, \$1,000; in *Louisville & N. R. Co. v. Breckenridge*, 99 Ky. 1, 34 S. W. 702, \$500; in *Lexington & E. R. Co. v. Lyons*, 104 Ky. 23, 46 S. W. 209, \$260; in *Louisville & N. R. Co. v. Fish*, — Ky. —, 43 L.R.A. (N.S.) 584, 127 S. W. 519, \$500; and in *Camden Interstate R. Co. v. Frazier*, 30 Ky. L. Rep. 186, 97 S. W. 776, \$500.

Judgment reversed.

PENNSYLVANIA SUPREME COURT.

JOHN GREEN, Appt.,

v.

WEST PENN RAILWAYS COMPANY.

(246 Pa. 340, 92 Atl. 341.)

Electricity — uninsulated wire — liability for injury.

One maintaining, some distance from the ground, an uninsulated wire carrying a heavy current of electricity, is not liable in case boys throw a piece of wire which they

Note. — As to duty in stringing electric wires to guard against danger to children, see notes to *Temple v. McComb City Electric Light & P. Co.* 11 L.R.A. (N.S.) 449;

find on the road, over the one carrying the current, for injuries to another boy who takes hold of the one so thrown to recover it, since there was no obligation to anticipate such an occurrence.

(Mestrezat, J., dissents.)

(July 1, 1914.)

APPEAL by plaintiff from a judgment of the Court of Common Pleas for Fayette County refusing to take off a nonsuit in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. A. E. Jones and Reppert, Sturgis, & Morrow for appellant.

Mr. E. C. Higbee, with Messrs. L. B. Brownfield, and Sterling, Higbee, & Matthews, for appellee:

Even if the failure of defendant to insulate the cable was negligence, plaintiff cannot recover on this account, unless such negligence was the proximate cause of the injuries sustained by him.

Trout v. Philadelphia Electric Co. 236 Pa. 506, 42 L.R.A. (N.S.) 713, 84 Atl. 967; Stark v. Muskegon Traction & Lighting Co. 141 Mich. 575, 1 L.R.A. (N.S.) 822, 104 N. W. 1100; Sullivan v. Boston & A. R. Co. 156 Mass. 378, 31 N. E. 128; Keefe v. Narragansett Electric Lighting Co. 21 R. I. 575, 43 Atl. 542, 4 Am. Neg. Rep. 218; Denver Consol. Electric Co. v. Walters, 39 Colo. 301, 89 Pac. 815; Mullen v. Wilkes-Barre Gas & Electric Co. 229 Pa. 54, 77 Atl. 1108; Everett v. Citizens' Gas & Electric Co. 228 Pa. 241, 77 Atl. 460; Rumovitz v. Scranton Electric Co. 44 Pa. Super. Ct. 582; Carpenter v. Miller, 232 Pa. 362, 36 L.R.A. (N.S.) 932, 81 Atl. 439; Marsh v. Giles, 211 Pa. 17, 60 Atl. 315; Stephenson v. Corder, 71 Kan. 475, 69 L.R.A. 246, 114 Am. St. Rep. 500, 80 Pac. 938, 18 Am. Neg. Rep. 97; Berman v. Schultz, 40 Misc. 212, 81 N. Y. Supp. 647; Shotwell v. Reading, 5 Ohio N. P. 241, 4 Ohio S. & C. P. Dec. 326; Wood v. Pennsylvania R. Co. 177 Pa. 306, 35 L.R.A. 199, 55 Am. St. Rep. 728, 35 Atl. 699; Hoag v. Lake Shore & M. S. R. Co. 85 Pa. 293, 27 Am. Rep. 653; Philadelphia & R. R. Co. v. Hummell, 44 Pa. 375, 84 Am. Dec. 457; Gillespie v. McGowan, 100 Pa. 144, 45 Am. Rep. 365; Bannon v. Pennsylvania R. Co. 29 Pa. Super. Ct. 231.

Wetherby v. Twin State Gas & Electric Co. 25 L.R.A. (N.S.) 1220; and Meyer v. Union Light, Heat, & P. Co. 43 L.R.A. (N.S.) 136; and see also later case Harris v. Eastern Wisconsin R. & Light Co. 45 L.R.A. (N.S.) 1058.

Generally, as to whether the intervening act of a child will break the causal connection between defendant's negligence and the injury, see various notes cited in the note to Trout v. Philadelphia Electric Co. 42 L.R.A. (N.S.) 713.

Stewart, J., delivered the opinion of the court:

In brief the facts of the case are as follows: Two boys, each about nine years of age, while at play in a public street, found a spool of fine copper wire at the foot of a telephone pole. In sport they attached a stone to one end of the wire and threw it across the defendant company's feed wire. This left the other end of the copper wire dangling in the air about 3 feet from the ground. The boys withdrew, and one of them meeting with the boy subsequently injured, who was about the same age, told him of the suspended wire, and that he could have it if he wanted it. Thereupon the latter boy proceeded to the place indicated by the other, found the wire so suspended, and took hold of it, with the result that he was fearfully burned and crippled for life.

For present purposes let it be conceded that the defendant company, in maintaining and using an uninsulated feed wire at the elevation and under the condition we have here, came short of exercising that high degree of care which the law in such cases requires. Let it be further conceded, as it must be, that, had the feed wire been properly insulated, the accident to the plaintiff would not have occurred. These facts appearing, we would then have a case establishing liability on part of the defendant company, except as an independent intervening agency or cause was shown, without which the accident would not have occurred, and for which the defendant company was in nowise responsible, and which could not reasonably have been anticipated as likely to occur. In the present case we have a direct intervening agency without which the accident could not have happened, for the condition and relation of things, so far as created by this company was concerned, were safe and harmless as to this boy, except as interfered with. This interference was an act of trespass, and was the direct and immediate cause of the accident. Nevertheless, though the act of the boys in suspending the copper wire from the feed wire was the proximate cause of the accident, yet if it were such an act of interference as the defendant company could have reasonably anticipated, the company was bound to guard against it, and for any result following in consequence of its failure

tion between defendant's negligence and the injury, see various notes cited in the note to Trout v. Philadelphia Electric Co. 42 L.R.A. (N.S.) 713.

As to duty to prevent contact of wires carrying electric current, see note to Paducah Light & P. Co. v. Parkman, 52 L.R.A. (N.S.) 587.

to do so, it would be liable. So, then, the learned trial judge, as the case was presented, had but the one question to consider: Was failure on part of defendant company to anticipate such an occurrence as this, and make provision against it, negligence? It is settled law that no liability results from failure to anticipate wrongful acts by others; but, waiving this, for the reason that in this case we are dealing with a trespass committed by boys of tender years, a fact which under certain conditions changes the rule, and regarding the copper wire incident simply as an interference not participated in by the defendant company, and done without its knowledge, how stands the case? Without the wire present the accident could not have occurred. By merest chance the boys found it at the foot of a telephone pole and in sport they threw it over the feed wire. Could such a concurrence of fortuitous circumstances have been reasonably foreseen by the defendant company? Considering that defendant company stood in no relation to the wire, was not responsible for it being where it was, and had no knowledge of it being there, to hold it responsible for the injury to the boy on the ground that it should have anticipated such consequence from the fact that it maintained an uninsulated feed wire at an elevation which would admit of a stone attached to a wire being thrown over it, would be to substitute for injury within reasonable anticipation any possible injury which might result. There is no case that goes to such extreme length.

Of course, a company employing electricity is bound to the highest care practicable to avoid injury to any liable to come accidentally or otherwise in contact with charged wires; and it is bound to know that children, in their ignorance and playfulness, are apt to expose themselves to danger in connection with such wires which the prudent adult would avoid, and provide against injury liable to result in consequence of such disposition; but it is under no obligation to so safeguard its wires that by no possibility can injury result therefrom. Liability to accident suggests probability, in greater or less degree, and it is against such conditions that a party using this dangerous element must provide; while possibility of accident, including as it does everything capable of happening or being done, suggests a measure of care utterly impracticable and which the law therefore does not exact. Not only have we here an independent intervening cause, but one which the defendant was not bound to anticipate and against which it was therefore under no duty to guard. The nonsuit was properly L.R.A.1915C.

ordered and there was therefore no error in refusing to take it off.

Judgment affirmed.

Mestrezat, J., dissents.

TENNESSEE SUPREME COURT.

HAL S. HARRIS, Exr., etc., of Jesse L. Rogers, Deceased, Plff. in Err.,
v.
SECURITY MUTUAL LIFE INSURANCE COMPANY.

(130 Tenn. 325, 170 S. W. 474.)

Insurance — facts learned after application — duty to notify insurer.

An applicant for life insurance who has answered "No" to an inquiry whether or not he had ever had renal colic is bound, under penalty of forfeiting his policy, to notify the insurer in case he subsequently has such an attack before the policy is issued.

(November 14, 1914.)

ERROR to the Court of Civil Appeals to review a judgment affirming a judgment of the Circuit Court for Knox County in defendant's favor in a suit to recover the amount alleged to be due on a life insurance policy. Affirmed.

The facts are stated in the opinion.

Messrs. Montgomery & Montgomery, Jouroldmon & Welcker, and L. D. Smith, for plaintiff in error:

The mere fact that a man may have had a disease which he did not disclose, or may have been rejected for insurance which he did not disclose, does not conclusively show that the representation was made fraudulently and with the intent to deceive. Under the evidence in this case the question was for the determination of the jury.

Penn Mut. L. Ins. Co. v. Mechanics' Sav.

Note. — As to duty to notify insurer of facts which develop after submission of application, but before delivery of policy or certificate, see notes to Merriman v. Grand Lodge, D. H. 8 L.R.A.(N.S.) 983, and Carleton v. Patrons' Androskoggin Mut. F. Ins. Co. 39 L.R.A.(N.S.) 951; and see later case of Smith v. Prudential Ins. Co. 43 L.R.A.(N.S.) 431.

As to effect of stipulation in application or policy of life insurance, that it shall not become binding unless delivered to assured while in good health, see notes to Roe v. National L. Ins. Asso. 17 L.R.A.(N.S.) 1144, and Connecticut General L. Ins. Co. v. Mullen, 43 L.R.A.(N.S.) 725; and see also later case of Unterharnscheidt v. Missouri State L. Ins. Co. 45 L.R.A.(N.S.) 743.

Bank & T. Co. 38 L.R.A. 70, 19 C. C. A. 316, 43 U. S. App. 75, 73 Fed. 653.

The provision that the policy will not take effect unless delivered while the insured is in good health is not a warranty, but a representation and provision falling within the statute which provides that before such a condition will avoid the policy, the matter represented must either increase the risk of loss, or be fraudulently made with the actual intent to deceive.

Piedmont & A. L. Ins. Co. v. Ewing, 92 U. S. 377, 23 L. ed. 610; *Penn Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co. supra*; *Brown v. Greenfield Life Asso.* 172 Mass. 498, 53 N. E. 129; *Endowment Rank, K. P. v. Cogbill*, 99 Tenn. 36, 41 S. W. 340; *Continental F. Ins. Co. v. Whitaker*, 112 Tenn. 154, 64 L.R.A. 451, 105 Am. St. Rep. 916, 79 S. W. 119.

The policy cannot be avoided unless plaintiff's failure to report the attack of renal colic occurring after the application can be attributed to actual intent and purpose to deceive, and that question, under the evidence of this case, must be a question for the jury to decide.

Merriman v. Grand Lodge Degree of Honor, A. O. U. W. 77 Neb. 544, 8 L.R.A. (N.S.) 983, 124 Am. St. Rep. 867, 110 N. W. 302, 15 Ann. Cas. 124; *Cooley, Briefs on Ins.* p. 1195.

Messrs. Shields & Cates and Green. Webb, & Tate, for defendant in error:

Application for an insurance policy containing representations in regard to the health of the applicant speaks from the date of the delivery of the policy, and if, after the statement is made, a material change occurs in the condition of the applicant covered by such statement, before the contract is consummated, an absolute duty rests upon the applicant to make disclosure of the fact.

Cable v. United States L. Ins. Co. 49 C. C. A. 216, 111 Fed. 19; *Equitable Life Assur. Soc. v. McElroy*, 28 C. C. A. 365, 49 U. S. App. 548, 83 Fed. 631; *Whitley v. Piedmont & A. L. Ins. Co.* 71 N. C. 480; *Knights of Pythias v. Rosenfeld*, 92 Tenn. 508, 22 S. W. 204; *Prudential Ins. Co. v. Moore*, 231 U. S. 560, 58 L. ed. 367, 34 Sup. Ct. Rep. 191; *Ætna L. Ins. Co. v. Moore*, 231 U. S. 543, 58 L. ed. 356, 34 Sup. Ct. Rep. 186.

Williams, J., delivered the opinion of the court:

This suit is by the plaintiff, as executor, to recover of defendant life insurance company upon a policy of life insurance in the sum of \$10,000 issued to one Rogers.

It appears that application was made by the insured under date of August 21, 1909; L.R.A.1915C.

that the application was received at the home office of the company in Binghamton, New York, about the 1st of September; that the policy was dated September 17th; that the same was delivered through the agency of one of the banks of Knoxville, the home of the insured, within a few days after this date. In the application for insurance signed by the insured, questions were put as to whether or not the insured had ever been afflicted with renal colic, gravel, or calculus, to which the applicant responded, "No." It appears in the proof, however, that prior to the date of the application, the insured had suffered from one or more attacks of renal colic, and that between the date of the application and the date of the delivery of the policy, the insured, Rogers, was seized with an attack of renal colic which persisted through several days. His attending physician states that renal colic is primarily a constitutional disease; that he attended the insured from August 30 to September 9, 1909, for the attack of renal colic above mentioned, which was a typical case; that there was a passage of renal calculus on August 30th, though this physician could not recall that any stone was discovered; that the urine of the insured was in a very murky condition, almost black, for a short period; that, when the insured insisted upon being told, he was informed by the physician that he had renal colic.

It further appears that the defendant insurance company had no local agent in Knoxville, either at the date of the application or at the date of the delivery of the policy, and no claim is advanced that any of its agents had information of this last attack: the policy being delivered in ignorance thereof. It appears that the insured made no effort to disclose to the company the fact of this seizure.

The company defends upon the ground that it was the duty of the insured to make such disclosure, and that the failure to do so was such a fraud on the insurer as to vitiate the policy.

The authorities, almost without exception, are in agreement upon the doctrine that an applicant for such a policy must use due diligence to communicate to the proposing insurer facts materially affecting the risk, which arise after his application has been made and before the contract has been consummated by delivery.

The Federal courts hold to this doctrine. *Piedmont & A. L. Ins. Co. v. Ewing*, 92 U. S. 377, 23 L. ed. 610; *Cable v. United States L. Ins. Co.* 49 C. C. A. 216, 111 Fed. 19. In *Equitable Life Assur. Soc. v. McElroy*, 28 C. C. A. 365, 49 U. S. App. 548, 83 Fed. 631, the United States circuit court of ap-

peals said: "They [the proposals and the ultimate contract] are all made in reliance upon the continued truth of the representation and certificate, and in the belief that there has been no material change in the health or the probability of the continued life of the subject. The nature of this contract, the insurance of a man's life, the perfect familiarity of the man himself with the condition of its subject-matter, his own life, the ignorance of the insurance company concerning it, and its necessary reliance in making the contract upon his good faith, honesty, and truthfulness, impose upon him the duty of disclosing to the [insurance] company every fact material to the risk which comes to his knowledge at any time before the contract is finally closed. An intentional omission to discharge that duty perpetrates a plain fraud upon the company, which necessarily avoids the contract."

A decided majority of the state courts announce the same rule. See note to *Merriman v. Grand Lodge*, D. H. in 8 L.R.A. (N.S.) 983, and in 15 Ann. Cas. 126; *Carleton v. Patrons' Androscoggin Mut. F. Ins. Co.* 109 Me. 79, 39 L.R.A. (N.S.) 951, 82 Atl. 649.

The courts of England are in accord. *Traill v. Baring*, 4 De G. J. & S. 318, 10 L. T. N. S. 215, 33 L. J. Ch. N. S. 521, 10 Jur. N. S. 377, 12 Week. Rep. 678; *British Equitable Ins. Co. v. Great Western R. Co.* 38 L. J. Ch. N. S. 314, 20 L. T. N. S. 422, 17 Week. Rep. 561; *Canning v. Farquhar*, L. R. 16 Q. B. Div. 727. In the last-named case Lord Esher, M. R., said that in insurance law the material time was not the date of application, but that of the contract's consummation. "If there has been a material change, there ought to be an alteration of the representation, and the ground for entering into the contract is altered."

In the pending case, the applicant for insurance knew that a specific inquiry as to renal colic had been made of him, and replied to by him in the application lodged with and being considered by the company, and that his attack intermediate the application and the delivery of the policy was a pronounced one. As has been noted, that seizure evidenced a material impairment of the applicant's constitution. We hold that the duty to make disclosure to the company was incumbent on him, and that failure to make same constituted a fraud which avoids the policy at the option of the company.

The circuit judge sustained a motion of the insurance company for peremptory instructions to the jury, and his action has been sustained by the court of civil appeals.

Affirmed.

L.R.A.1915C.

WASHINGTON SUPREME COURT.
(Department No. 2.)

MAY CREEK LOGGING COMPANY,
Appt.,
v.

PACIFIC COAST CASUALTY COMPANY,
Resp't.

(— Wash. —, 144 Pac. 67.)

Insurance — employer's liability — malpractice of physician.

Insurance of an employer against loss arising from claims on account of bodily injury accidentally suffered by an employee of insured by reason of the prosecution of the work in which the employer was engaged, and the various departments thereof, and dependent and connected operations and parts thereof, does not cover a claim for malpractice of a physician furnished by the employer according to custom and contract, to treat an employee injured in the business, from whose wages a fee has been deducted to cover medical attention.

(November 17, 1914.)

APPEAL by plaintiff from a judgment of the Superior Court for King County in defendant's favor in an action brought to hold defendant liable as indemnitor for a judgment obtained against plaintiff by an injured employee for malpractice of the surgeon furnished him by plaintiff. Affirmed.

The facts are stated in the opinion.

Mr. George D. Emery, for appellant.

The injury complained of was "accidental" within the ordinary meaning of that word as used in the policy.

Paul v. Travelers' Ins. Co. 112 N. Y. 472, 3 L.R.A. 443, 8 Am. St. Rep. 758, 20 N. E. 347; *Richards v. Travelers' Ins. Co.* 89 Cal. 170, 23 Am. St. Rep. 455, 26 Pac. 762; *Fidelity & C. Co. v. Johnson*, 72 Miss. 333, 30 L.R.A. 206, 17 So. 2; *Warner v. United States Acci. Asso.* 8 Utah, 431, 32 Pac. 696; *Accident Ins. Co. v. Bennett*, 90 Tenn. 256,

Note. — Injuries covered by employers' indemnity policy.

This note covers the decisions which have passed upon the question under consideration since the writing of the note to *H. P. Hood & Sons v. Maryland Casualty Co.* 30 L.R.A. (N.S.) 1192, where the earlier cases are treated.

As to what employees are covered by an indemnity policy, see note to *Employers' Indemnity Co. v. Kelly Coal Co.* 41 L.R.A. (N.S.) 963.

It has been held that a policy insuring a company described as engaged in operating a "sawmill, planing mill, mill yards, kilns, sheds, woodsmen, and teamsters" against injuries to employees, sustained by them while actually engaged in the occupa-

25 Am. St. Rep. 685, 16 S. W. 723; *Lovell v. Travelers' Protective Assn.* 126 Mo. 104, 30 L.R.A. 206, 47 Am. St. Rep. 638, 28 S. W. 877.

The insurer had notice of the commencement of the suit, and a copy of the pleadings was served upon it, and it refused to contest the case; the plaintiff thereupon made the defense, and the judgment is binding upon both the insurer and the insured.

Anoka Lumber Co. v. Fidelity & C. Co. 63 Minn. 286, 30 L.R.A. 692, 65 N. W. 353.

The expense incurred by the assured in making the defense is recoverable in addition to the amount of liability for damages.

New Amsterdam Casualty Co. v. Cumberland Teleph. & Teleg. Co. 12 L.R.A.(N.S.) 478, 82 C. C. A. 315, 152 Fed. 961; *Travelers' Ins. Co. v. Henderson Cotton Mills*, 120 Ky. 218, 117 Am. St. Rep. 585, 85 S. W. 1090, 9 Ann. Cas. 162.

Negligence of the employer is immaterial if liability arises from the employment. The intention is to afford full protection to the employer.

tion mentioned, and stating that the operations carried on are those usual to the kind of trade or business described, does not cover an injury to an employee while engaged in boring an artesian well to obtain a further supply of water. *Rust Lumber Co. v. General Acci. Fire & Life Assur. Corp.* 134 La. 310, 64 So. 122. The court remarked: "It is true that the business so described presupposes the use of water and the necessity for obtaining it, but so it presupposes the use of fuel wherewith to convert the water into steam, and yet it would hardly be argued that the policy, as written, was intended to insure against the risk of mining for coal, or boring for fuel oil."

In *Kinston Cotton Mills v. Liability Assur. Corp.* 161 N. C. 562, 77 S. E. 682, where an indemnity policy insured against "damages on account of bodily injuries, including death resulting therefrom, accidentally suffered by any employee of the assured while within or upon the premises or ways adjacent thereto, by reason of the operation of the trade or business described in the schedule, including the making of repairs and such ordinary alterations as are necessary to the care of the premises and plant and their maintenance in good condition," and excluded liability for injury or death caused by "any person in connection with the making of additions to or structural alterations in, or the construction of, any building or plant," it was held that the "structural alterations" which were excepted by the policy meant such alterations as would change the physical structure of the building and plant.

And where an employee of the insured's mill was killed while digging sand upon the insured premises, to be used in the con-

Travelers' Ins. Co. v. Wild River Lumber Co. 28 C. C. A. 128, 50 U. S. App. 256, 83 Fed. 977; *H. P. Hood & Sons v. Maryland Casualty Co.* 30 L.R.A.(N.S.) 1194, and note, 206 Mass. 223, 138 Am. St. Rep. 379, 92 N. E. 329; *Hoven v. Employers' Liability Assur. Corp.* (*Hoven v. West Superior Iron & Steel Co.*) 93 Wis. 201, 32 L.R.A. 390, 67 N. W. 46.

Costs and expenses of suit are recoverable.

Anoka Lumber Co. v. Fidelity & C. Co. and *Travelers' Ins. Co. v. Henderson Cotton Mills*, *supra*; *New Amsterdam Casualty Co. v. Cumberland Teleph. & Teleg. Co.* 12 L.R.A.(N.S.) 479, and note, 82 C. C. A. 315, 152 Fed. 961.

Messrs. Peters & Powell, for respondent:

The proximate cause and the efficient cause of the injury to Klodek, the employee, was the inattention or negligence of the hospital surgeon. The result of this did not follow in such unbroken sequence or even logical sequence from the injury received by Klodek in the logging operation,

struction of a brick chimney which was being erected to replace two iron ones, under a contract by which the insured was to furnish sand and bricks, the court stated that they did not think that the deceased employee was engaged in the making of an addition to or structural alteration in the premises, but that he was employed in digging sand to be used in the making of repairs and for ordinary alterations, but held that as there was a controversy as to whether the work was a structural alteration or an ordinary alteration or repair, this question should have been left to the jury. *Ibid.*

Under an employers' indemnity policy providing that it does not cover loss or expense arising on account of or resulting from injuries or death to, or if caused by, any person employed in violation of law, it is immaterial whether the accident resulting in an injury was caused by or contributed to by the fact that the injured person was employed, or was working on a dangerous machine, in violation of law. *Buffalo Steel Co. v. Aetna L. Ins. Co.* 136 N. Y. Supp. 977, affirmed in 156 App. Div. 453, 141 N. Y. Supp. 1027.

The Massachusetts workmen's compensation act contained in Stat. 1911, chap. 751, Stat. 1912, chaps. 571, 666, makes no special provision for indemnity for injuries occurring outside the commonwealth, and although an insurer has been paid by the employer for insuring against injuries received by employees, whether within or without the commonwealth, no recovery can be had for an injury to an employee which occurred in another state, where the policy provides only for the payment of the compensation designated in the act referred to. *Gould's Case*, 215 Mass. 480, 102 N. E. 693, Ann. Cas. 1914D, 372. J. T. W.

as would connect the two together as proximate cause and effect.

Akin v. Bradley Engineering & Machinery Co. 48 Wash. 97, 14 L.R.A.(N.S.) 586, 92 Pac. 903; Pierson v. Northern P. R. Co. 52 Wash. 595, 100 Pac. 999; Olson v. Gill Home Invest. Co. 58 Wash. 151, 27 L.R.A.(N.S.) 884, 108 Pac. 140; Seale v. Gulf, C. & S. F. R. Co. 65 Tex. 274, 57 Am. Rep. 602; Bothell v. National Casualty Co. 59 Wash. 209, 109 Pac. 590.

Fullerton, J., delivered the opinion of the court:

The appellant, a logging company engaged in the general logging business, brought this action against the respondent, a surety company, to recover upon a policy of insurance issued to it by the respondent, indemnifying it against certain defined losses. A demurrer to the appellant's complaint was interposed by the surety company, which the trial court sustained. The appellant elected to stand on the complaint, and a judgment of dismissal with prejudice was entered against it. This appeal followed.

In the complaint it is alleged that the respondent, for value received, executed its certain policy of insurance to the appellant, wherein and whereby it insured the appellant against loss and expense arising from claims or damages on account of bodily injury accidentally suffered, or alleged to have been suffered, during the period of such policy, by any employee of the insured, by reason of the prosecution of the work described in the policy, to wit, the general logging operations of the appellant, "and the various departments thereof, and dependent and connected operations and parts thereof;" that it was generally customary and usual for all logging companies and persons engaged in the logging business to collect from each of their employees a fee of \$1 per month, and in consideration thereof to furnish and provide medicines and suitable medical and surgical treatment, hospital attendance and care, for a period not exceeding six months to any such employee who should become sick or injured while in the course of his employment, all of which the respondent well knew when it issued its policy of insurance to the appellant; that the appellant had in its employ one Klodek, from whom it had collected such fee; that Klodek was injured while in the course of his employment, and by reason thereof required medical and surgical treatment and hospital attention and care; that the appellant at once furnished him with surgical attention and hospital attention, as was its duty, employing a certain named physician and sur-

geon for that purpose, and that such surgeon undertook the treatment of the injury, but treated it so unskillfully and negligently that Klodek was permanently crippled and injured to his damage; that Klodek commenced an action against the appellant for damages arising out of such unskillful treatment; that the appellant tendered the defense of the action to the respondent in accordance with the provisions of the policy; that the respondent refused to undertake the defense of the action; that the appellant thereupon defended the action itself, but unsuccessfully, and judgment went against it therein for the sum of \$4,500, with costs; that it appealed from the judgment to the supreme court of the state of Washington, where the judgment was affirmed; that it afterwards satisfied the judgment, paying thereon the sum of \$4,856.85; that it expended in attorneys' fees, witness fees, and other necessary expense in defending the action the sum of \$1,000. The prayer of the complaint is for the sums so paid, with interest. Attached to the complaint is a copy of the complaint in the action brought by Klodek against the appellant. In that complaint Klodek alleged a specific agreement, entered into between himself and the appellant at the time he was employed by the appellant, by which the appellant agreed, in consideration of the fee deducted, and without further expense to him, to furnish him, in case he should be injured, "with the services of a suitable surgeon and skilled physician and surgeon to attend and treat him until his recovery therefrom, and likewise provide for him, without further or other cost to him, a suitable and proper hospital, wherein he should be kept and cared for until his recovery from such injuries. . . ." A reference to the opinion of this court on the appeal shows also that the recovery was had on special contract to furnish medical and surgical services.

The trial court sustained the demurrer on the ground that the loss suffered by the appellant was not a loss covered by the conditions of the policy. This conclusion, we think, is the only conclusion that can be properly drawn from the facts shown by the record. The respondent's liability, of course, depends upon the conditions of its policy. If it has thereby undertaken to answer for losses arising from claims of damages on account of the negligent failure of the appellant to perform a special contract wherein it undertook to furnish an employee with hospital, medical, and surgical services, then it is liable to answer to the suit of the appellant; otherwise not. We cannot think the policy bears this interpretation. It purports to

cover only losses arising from claims of damages by the appellant's employees on account of accidental injuries suffered by the employees while in the prosecution of the appellant's logging business, and the departments dependent upon and the operations connected therewith. Hospital, medical, and surgical services are no part of the logging operations, and the injured employee while in the hospital was performing no service connected with the appellant's logging business. And while the appellant alleges that it is the custom of logging companies to deduct a hospital fee from the wages of each of its several employees, and use the fee in the payment of services to be rendered such employees as become sick or injured, and that the respondent knew of this custom, we cannot think the facts in any way alter or modify the terms of the insurance. Aside from the fact that the recovery was had upon a specific contract, and not upon the custom, the insurance is only against losses arising from negligence in the logging operations, not from losses arising from negligence in the maintenance of the hospital.

But argument can hardly make the point more plain. We are clear that the judgment is right and should be affirmed. It is so ordered.

Crow, Ch. J., and Parker, Mount, and Morris, JJ., concur.

Petition for rehearing denied.

ARKANSAS SUPREME COURT.

O. G. PRICE, Appt.,
v.

H. L. GUNN et al.

(— Ark. —, 170 S. W. 247.)

Judgment — tax sale — publication of notice — collateral attack.

1. A recital of due publication of notice in a judgment directing the sale of land for

nonpayment of taxes cannot be collaterally attacked, although the affidavit in proof of the publication shows a less number of publications than the statute requires.

Tax — request for bills — omission — validity of sale.

2. A request for tax bills on a list of property is not a sufficient attempt to pay the taxes to render a sale for nonpayment upon certain parcels included in the list, for which no bills were received, void.

(October 26, 1914.)

A PPEAL by plaintiff from a decree of the Chancery Court for Clay County dismissing the complaint and canceling plaintiff's deeds in a suit to recover possession of certain real estate. Reversed.

Statement by Kirby, J.:

O. G. Price brought this suit to recover possession of two lots in the town of Rector, claimed by virtue of a commissioner's sale under a judgment for the collection of delinquent taxes in drainage district No. 1 in Clay county. The defendant filed an answer and cross complaint, admitting the sale by the commissioner, and that the land had thereafter been conveyed to appellant as alleged, but denied his ownership and title. He alleged that he was the owner of the lands and deraigned his title thereto, and that the commissioner's sale and deed under which plaintiff claimed title were void, because, in proper time, he had attempted to pay the drainage tax on the lots in the year 1909, making application therefor to the collector, and failed to do so because of the collector's mistake, and because the notice of the pendency of the suit was insufficient, not having been published the number of times required by law, and asked that the commissioner's deed to E. C. Price and Price's deed to plaintiff be canceled as clouds upon his title. The cause was transferred to equity, and the court rendered a decree dismissing it for want of equity and canceling the commissioner's deed conveying the land to E. C. Price and his deed to appellant as clouds upon the title.

Note. — Validity of tax sales where nonpayment is due to mistake or negligence of tax officers.

- I. Scope, 158.
 - II. Effect of payment, 159.
 - III. Misapplication of payments, 159.
 - IV. Failure to pay.
 - a. In general, 160.
 - b. Character of inquiry, 163.
 - c. Officers whose statements are binding, 163.
 - d. Care required of owner, 163.
 - V. Failure to redeem, 165.
- L.R.A.1915C.

I. Scope.

The earlier cases on this question are discussed in the note to Gould v. Sullivan, 20 L.R.A. 487.

The present note and that which is supplemented hereby discuss the effect of the mistake or negligence of tax officers upon the validity of a tax sale only so far as such mistake or negligence prevents payment of the taxes or results in an erroneous credit which leaves the tax books not showing the tax to have been paid. The numerous mistakes in procedure, or those that

Mr. O. G. Price *in propria persona*.
Mr. R. H. Dudley for appellees.

Kirby, J., delivered the opinion of the court:

It is contended that the decree of foreclosure of the lien and the sale thereunder of the land for delinquent taxes are void, because an affidavit in proof of the publication of the notice of the pendency of the suit shows it was published twice only instead of four times, as the law requires, and because of appellee's attempt to pay the taxes in proper time and failure to do so by reason of the collector's mistake. The decree in the foreclosure proceeding recites: "Upon call of this clause, it appearing that all persons and corporations having or claiming

interest in any of the lands hereinafter described have been duly and constructively summoned as required by law, and that said interested persons and corporations come not, but make default."

The commissioner's sale for the collection of delinquent taxes in the drainage district under which appellant claims title was made under act No. 111 of the acts of 1907, § 7 of which provides: "Notice of the pendency of such suit" for the foreclosure of the lien "shall be given . . . by publication weekly for four weeks prior to the day of the term of court, on which final judgment may be entered, for the sale of the land, in some newspaper published in the county where such suit may be pending."

The court acquired jurisdiction under

may affect the validity of the assessment, which are urged to invalidate tax sales, are excluded. So, the effect of fraud is excluded. This is illustrated in *Mangold v. Bacon*, 237 Mo. 496, 141 S. W. 650, where the tax was paid to the taxing official pending a suit by such officer to recover the same, but such officer nevertheless, through carelessness or design, took a false judgment on behalf of the state for the taxes thus paid, and the judgment and a deed issued in pursuance thereof were avoided for fraud.

Cases of tender and refusal of taxes where there is a dispute as to the amount due have been excluded.

II. Effect of payment.

No attempt has been made to collect the cases on the effect of payment generally, but it is intended to include merely a statement of what the effect of payment of taxes is, as a basis for the discussion of the cases which come within the scope of the note.

It is well settled that where taxes on a particular parcel of real estate have once been paid, a subsequent sale of the land for those taxes is void. *Black, Tax Titles*, § 156; *Cooley, Tax*, 3d ed. p. 810; 37 Cyc. 1169.

So, the sale of land which the state has purchased at a tax sale, after the taxes have been paid and a certificate of redemption issued, is void. *Lisso v. Giddens*, 117 La. 507, 41 So. 1029.

Where the owner of land sent the treasurer an amount of money more than sufficient to pay the taxes, and requested him to return the balance together with receipts for the taxes, and the treasurer made and signed receipts showing full payment of taxes upon all lands of the owner, including the land involved in the case, but subsequently, through mistake, issued what purported to be a certificate of delinquency and sold the property without actual notice to the owner, of the tax, foreclosure proceedings, or the delivery of the deed, such L.R.A.1915C.

sale is void. *Loving v. McPhail*, 48 Wash. 113, 92 Pac. 944.

In *Knauff v. National Cooperage & Woodenware Co.* 90 Ark. 137, 137 S. W. 823, the owner of the lands in controversy inclosed a list of lands, including those in controversy, in a letter to its agent requesting him to pay the taxes thereon. The lands, including those in controversy, were entered by the agent on a list that he paid taxes on for the year in question. It is stated on these facts that this is a showing that the agent intended to pay the taxes on the particular tract in controversy, and when he did afterward pay the taxes on the lands included in his list, he must have necessarily paid on the tract in controversy, and that this avoided the sale.

Under the Missouri statute requiring a suit to be brought for the recovery of delinquent taxes, a judgment in such a suit finding the tax was delinquent and ordering a sale cannot be attacked collaterally by showing that the tax was in fact paid. *Evarts v. Missouri Lumber & Min. Co.* 193 Mo. 433, 92 S. W. 372.

III. Misapplication of payments.

A tax sale of property upon which the taxes have in fact been paid, but, through a mistake of the officials in crediting the tax, this fact does not so appear, is invalid.

Where the owner of land notified the tax collector of the land on which he desired to pay taxes, and handed him a deed in which was described land which belonged to and was assessed in the name of another party, and the collector credited the payment to the land as described in the deed without calling the attention of the owner to the discrepancy, a sale of the land thereafter is void. *Gunn v. Thompson*, 70 Ark. 500, 69 S. W. 261. It is stated that the mere fact that the owner, who could not read, handed the officer a deed in which the lot was incorrectly described, did not justify the officer in applying the money to the payment of taxes on a lot different from that upon which the owner had offered to pay, which was assessed to another person; that

the law for enforcing the payment of the delinquent levee taxes by foreclosure of the lien upon the publication of the notice of the pendency of the suit as provided in said act, and its decree recites that all parties interested in the lands described and proceeded against "have been duly and constructively summoned as required by law" This was a fact necessary to be found by the court in order to its jurisdiction, and its finding and the recital of the decree that all parties "have been duly and constructively summoned as required by law" is conclusive of the fact upon a collateral attack. *McLain v. Duncan*, 57 Ark. 49, 20 S. W. 597; *McConnell v. Day*, 61 Ark. 464, 33 S. W. 731; *Porter v. Dooley*, 66 Ark. 1, 49 S. W. 1083; *Porter v. Tallman*, 68 Ark. 211,

56 S. W. 1071; *Palmer v. Ozark Land Co.* 74 Ark. 253, 85 S. W. 408; *Pattison v. Smith*, 94 Ark. 588, 127 S. W. 983.

Appellee attempts to show in this, an entirely different proceeding, that the judgment of the court condemning the lands to sale for payment of the delinquent taxes was without jurisdiction for failure to give notice of the pendency of the suit by publication as the law requires, notwithstanding the recitals of the decree that such notice had been duly given, by introducing what purported to be an affidavit in proof of the publication of such notice, showing only that it was published two times instead of four, as the statute provides. The decree attacked makes no mention of this affidavit or proof of publication of notice, and its

he should have called the owner's attention to the fact that the lot described in the deed was not the lot upon which he had offered to pay, and allowed him to make the change if he desired to do so.

Apparently, the tax paid in *Nickum v. Gaston*, 28 Or. 322, 42 Pac. 130, was credited in the wrong quarter section. From the report of the case it appears that a receipt had been given upon the payment of the taxes, and this, when introduced in evidence, appeared to have been altered; the alteration was held sufficiently explained so as to render the receipt admissible in evidence, and it was found in favor of the owner that the taxes had been paid. On the question of mistakes of the taxing official, it is stated that the taxpayer is not responsible for errors or mistakes of the taxing officer, or the manner in which he keeps his records or accounts. If he in fact pays the tax, the demands of the government are discharged; it no longer has the right to sell the property, and it is immaterial whether a subsequent sale transpires through the mistake of the officer or in positive disregard of the fact of payment. In either case the purchaser takes no title.

A sale of land for taxes which had been paid, but which, owing to a clerical error of the assessor, were credited to land in a section other than that in which actually located, is void. *Page v. Kidd*, 121 La. 1, 46 So. 35.

That a sale after the payment of taxes is void has been held where the taxes were paid upon the lands under the description applicable before the filing of a plat, and the lands were sold under the description contained in the plat. *LaSalle Varnish Co. v. Glos*, 254 Ill. 326, 98 N. E. 538.

A similar holding appears in *Rath v. Martin*, 93 Iowa, 499, 61 N. W. 941, where lots once platted were included in a new plat and the taxes paid by the owners of the property according to the new description. It is stated that it is the duty of the proper authorities to assess and tax all property within the state not exempt from taxation, once for each year, and that when the tax is once paid, a sale for taxes on the

same land, even under a different description, is void.

So, where an owner of a lot in a town has rendered his property for taxation designating it by lot and block, but omitting the addition, and has paid taxes thereon, but the land has been assessed by the assessor by the description including the addition, and has been by him declared delinquent and sold for taxes, such sale is void under the statute providing that real estate doubly assessed, the taxes upon which have been paid on one assessment, shall not be subject to the provisions for the collection of delinquent taxes. *Hollywood v. Wellhausen*, 28 Tex. Civ. App. 541, 68 S. W. 329.

This case was approved in *Mote v. Thompson*, — Tex. Civ. App. —, 156 S. W. 1105, a case of double assessment.

Payment of taxes on a certain section of land, although it may be under an assessment erroneous in description, will defeat any sale thereafter made for taxes on the land on which the taxes have thus been paid. *Kellogg v. McFatter*, 111 La. 1037, 36 So. 112.

In *Burchardt v. Scofield*, 141 Iowa, 336, 133 Am. St. Rep. 173, 117 N. W. 1061, *infra*, V., the owner, at the time of calling the attention of the treasurer to the fact that the taxes had been paid, informed him that he was ready and willing to pay the taxes if any were required to clear the land from the claim under the tax sale, but was informed by the treasurer that no payment was necessary. Issuing a deed after the notation had been made as described, *infra*, V., was held void.

IV. Failure to pay.

a. In general.

An attempt made in good faith to pay taxes, which fails through the mistake or negligence of the taxing officer, is equivalent to payment of the taxes, so as to invalidate a tax sale thereafter had. *Bullock v. Wallace*, 47 Wash. 690, 92 Pac. 675; *Blinn v. Grindle*, 58 Wash. 679, 109 Pac. 122;

recitals relative to the publication are conclusive, and cannot be impeached in this proceeding. This is but a collateral attack upon a judgment of a domestic court of general jurisdiction and "it is well settled that every presumption will be indulged in favor of the jurisdiction of such court, and the validity of the judgment which it enters. Unless it affirmatively appears from the record itself that the facts essential to the jurisdiction of such court do not exist, such collateral attack against the judgment rendered by it will not prevail. A judgment or decree entered upon constructive service by publication will be given the same conclusive effect, and will be entitled to the same favorable presumptions, as judgments on personal service." Crittenden Lumber

Co. v. McDougal, 101 Ark. 395, 142 S. W. 837.

It is true that a judgment may be attacked collaterally, where, "by the record, it is shown that there was want of jurisdiction by the court rendering it, either of the subject-matter or of the person of the defendant." The affidavit in proof of the publication of the notice of the pendency of the suit is not a part of the record, however, from which it can be shown that there was want of jurisdiction by the court rendering the decree; no mention or recital of such proof of publication being found therein. Another affidavit or other proof of the publication than the one presented here could have been filed in the other case, and it is conclusively presumed as against this collateral attack,

Nelson v. Churchill, 117 Wis. 10, 93 N. W. 799.

A sale of land for taxes after the county treasurer had assured the owner, at the time he was paying the state and county taxes against the land, that there were no other taxes against the same, is void. Hayward v. O'Connor, 145 Mich. 52, 108 N. W. 366.

Where the owner of land tenders the full amount of taxes to the tax collector, who refuses the same, telling him that the taxes have been paid already by another, and hands him a written list of lands, on which his land is shown to have been paid by another, a sale thereafter for such taxes is void. Brannan v. Lyon, 86 Miss. 401, 38 So. 609.

A tax sale for taxes on land is void where the owner has received a certificate from the treasurer that no taxes are due. Carpenter v. Jones, 117 Mich. 91, 75 N. W. 292. The sale was canceled in this case on the payment by the owner of the taxes with interest. The inquiry was made by the owner in this case at a time when he was about to make a loan and give a mortgage upon the property, and nothing is said about his intention to pay the taxes.

So, where the owner, upon inquiring for all the taxes due against his land, paid what was demanded of him, there can be no sale for taxes which were omitted by the official. Harness v. Cravens, 126 Mo. 233, 28 S. W. 971; Gleason v. Owens, 53 Wash. 483, 132 Am. St. Rep. 1087, 102 Pac. 425, 17 Ann. Cas. 819.

Where an owner went to the treasurer's office for the express purpose of paying all overdue taxes on his property, and thus preventing a sale, and, after explaining his business, requested a statement of such taxes and paid all taxes demanded from him by the treasurer, there can be no valid sale thereafter for taxes which the treasurer failed to demand. Pottsville Lumber Co. v. Wells, 157 Pa. 5, 27 Atl. 408, approved in Africa v. Trexler, 232 Pa. 493, 81 Atl. 706.

Where the treasurer failed to state the entire amount due upon inquiry, omitting therefrom a tax entered for previous years because of the omission of the land from L.R.A.1915C.

taxation in such years, and gave the owner a receipt on which there was a heading "Taxes unpaid previous years," but no entry thereunder, the place having been left blank, a sale thereafter for such taxes is void. Bray & C. Land Co. v. Newman, 92 Wis. 271, 65 N. W. 494.

A sale made for delinquent state and county taxes which had not been paid because, upon inquiry being made of the city treasurer, he did not include these taxes in his statement of the amount due, was held void in Hough v. Auditor General, 116 Mich. 663, 74 N. W. 1045. It was found as a fact that the mortgagee, the one attempting to pay the taxes, in good faith intended and attempted to pay all taxes standing against the land on the date of inquiry and that he was deceived and misled by the statement of the city treasurer as to the state and county taxes.

A tax sale for taxes remaining unpaid after the owner applied to the comptroller of the state for a statement of the unpaid taxes upon the property, and the comptroller rendered one which purported to contain a statement of all taxes due on said property, but which in fact did not contain a statement of a road tax, for which the property was sold, is void. Wallace v. McEchron, 176 N. Y. 424, 68 N. E. 663.

In Loving v. McPhail, 48 Wash. 113, 92 Pac. 944, the owner sent a check for more than sufficient to cover his taxes, with instructions to treasurer to return any balance with receipt for taxes. The treasurer sent receipts purporting to be receipts for all taxes, including those on the lands involved.

In Puget Sound Nat. Bank v. Biswanger, 59 Wash. 134, 109 Pac. 327, the owner of land had delivered to the treasurer a check with the amount left blank, instructing him to pay the taxes on a list of lands then delivered to the treasurer, and fill in the amount in the check necessary to make such payment. The treasurer failed to take payment for the taxes on certain of the lands, and subsequently these were sold, and the sale held invalid.

The refusal of the auditor general to

that the notice was published, and that all persons interested were, as the decree recites, "duly and constructively summoned as required by law."

The evidence is not sufficient to show such an attempt to pay the taxes levied against the property as would prevent a forfeiture or its being returned delinquent and sold for the failure to pay.

Appellee Gunn testified that he lived in Rector, and, desiring not to go to Piggott for

the purpose of paying his taxes, asked C. A. Cargill, the county treasurer, to see the collector and have him make out the receipt for his taxes and send it to the Bank of Rector for collection. That he mailed him a list containing the numbers of his property, and the receipt came to the Bank of Rector, and he paid it and did not examine it nor know that the lots in controversy were not included in the receipt till this suit was brought. He produced a slip of paper

issue a deed, under a statute authorizing him to withhold a conveyance in case the proper officer had given a certificate that no taxes were charged against the land, was sustained in *Hand v. Auditor General*, 112 Mich. 597, 71 N. W. 160, where, several months before the sale took place, the owner had written the county treasurer asking for a statement of the taxes due upon all his property in the city in which the land was located, and was furnished with a statement purporting to cover all the land, and this amount was paid.

So, if a part of a tract is omitted by mistake of the taxing officer, where the owner correctly describes the land and desires to pay the entire tax, and does pay the amount claimed to be due, the attempt to pay the tax is equivalent to actual payment, and the sale is void. *Scroggin v. Ridling*, 92 Ark. 630, 121 S. W. 1053.

Where the owner of two tracts of land, one in a city, the other in the township in which the city is located, but outside the city, applied to the sheriff for the taxes due on his land, paid the amount required, and took a receipt covering lands generally in the township, a sale thereafter had for taxes due on the land in the township outside the city conveys no title. *State ex rel. Wooten v. White*, 125 N. C. 403, 34 S. E. 508.

The rule that an attempt in good faith to pay taxes, which fails because of a mistake of the taxing officer, is equivalent to payment in so far as to invalidate a subsequent sale, was applied in *Smith v. Davidson*, 23 Idaho, 555, 130 Pac. 1071, Ann. Cas. 1914D, 1053, where a resident widow, upon the listing of her land, was advised by the deputy assessor that she would not have to pay any taxes on the property, and, relying upon said statement, did not make any attempt to pay the taxes before they became delinquent; but upon their becoming delinquent, she called at the office of the assessor and *ex officio* tax collector of the county for the purpose of paying the delinquent taxes if any were due, and, after stating to the assessor the facts and conditions concerning said assessment, was informed that the land was not liable for taxes, and that he would secure a rebate from the county commissioners to the tax collector for said taxes, and thereby was prevented from paying them.

In *Hurd v. Melrose*, 191 Mass. 576, 78 N. E. 302, the assessors, in making entries L.R.A.1915C.

upon their book of assessment, had transposed the numbers of two adjacent lots. Upon inquiry as to the taxes due upon one of these lots, the taxes in fact due upon the other were given and paid. A taking of the property in regard to which inquiry was made, and upon which the taxes were intended to be paid, on the theory that the whole tax was due, was held void. It is stated that the payment made, which was less than the tax due, must be regarded as a payment toward the tax upon this lot, but that there was a balance still unpaid at the time of the taking of the lot, and that, as the proceedings were based upon the theory that the whole tax was due, they were therefore void.

Without asserting the broad doctrine that a bona fide offer by the owner to pay all taxes due on the land to the collector operates to discharge the state's lien, so as to render void all proceedings afterward taken by the collector to enforce the same, it was held in *Hampton v. McClanahan*, 143 Mo. 501, 45 S. W. 297, that where the one purchasing the lands at the tax sale was guilty of fraud in connection therewith, the owner had the right to redeem upon payment of the full amount of the expenditure of such purchaser.

In order to have the sale set aside, however, the owner must comply with statutory requisites.

Thus, under a statute providing that the owner of such land which had been sold for taxes may move the court at any time within one year after he shall have notice of such sale, to set the same aside, and providing further that if the auditor general shall discover before a conveyance of said land is executed, either that the land was not subject to taxation, or that the taxes had been paid to the proper officer before sale, or that a certificate that no taxes were charged against the land had been given to the owner, he shall withhold a conveyance, and that if such a discovery be made after conveyance a certificate of error shall be given,—the owner is confined to one of the remedies provided by statute, and he cannot, without resorting to either, defeat the title of the purchaser under the tax decree. *Kneeland v. Wood*, 117 Mich. 174, 75 N. W. 461.

So, where the owner had not presented the certificate of the proper taxing official that no taxes were charged against such land to the auditor general, he cannot in-

containing the correct numbers of these lots, with others, and said it was pinned to the tax receipt when he paid the money and got it from the bank. Cargill testified that a list was mailed to him that looked like the one produced, but he could not say if it was, and that he turned it over to the collector, with directions to issue the receipt and mail to the Bank of Rector for collection. The collector did not testify. There was nothing to prevent appellee from examining and com-

paring his tax receipt to ascertain if it contained all his lands, and the negligence or carelessness of others who were accommodating him in the matter will not relieve against his own in failing to do so.

It follows that the Chancellor erred in dismissing the complaint and canceling appellant's deeds, and the decree is reversed, and the cause remanded, with directions to enter a decree awarding the possession of the lands described to appellant.

sist upon the sale being set aside. *Bullock v. Auditor General*, 142 Mich. 122, 105 N. W. 542.

Or where he had not moved the court within the required time after he had notice of such sale, he is not entitled to have it set aside. *Hayward v. O'Connor*, 145 Mich. 52, 108 N. W. 366.

b. Character of inquiry.

It has been held that the one inquiring of the taxing officer in regard to the taxes must be intending in good faith to pay his taxes in order to be protected by this rule; consequently, where the inquiries were made for the purpose of avoiding the payment of the taxes, the rule does not apply. *Bullock v. Auditor General*, 142 Mich. 122, 105 N. W. 542. In this case the inquiry was made by an attorney for the owner, and, not much reliance being placed upon the answer of the treasurer, the attorney wrote to the auditor of state and erroneously inquired about land in another township, and was informed that there were no delinquent taxes upon such land.

See *Carpenter v. Jones*, *supra*, IV. a.

The failure of the county treasurer, upon an inquiry by an owner for all delinquent taxes due on his land, and the payment of the amount required, to notify the owner of a sale that had previously taken place, does not invalidate the sale, since no inquiry was made in regard to sales. *Conklin v. Cullen*, 29 Mont. 38, 74 Pac. 72.

c. Officers whose statements are binding.

A limitation has been placed upon the rule in some cases, by requiring the officer furnishing the statement to be one whose duty it is to furnish such statements.

It is stated to be the duty of the officers involved in *Harness v. Cravens*, 126 Mo. 233, 28 S. W. 971, and *Wallace v. McEchron*, 176 N. Y. 424, 68 N. E. 663, to furnish tax statements.

A statute of Michigan authorizes the auditor general to issue a certificate of error when a certificate that no taxes were charged against certain land had been given by the proper officer within the time limited by law for the payment or redemption thereof. A deputy county treasurer who was conducting a sale of tax interests was held in *Hoffman v. Auditor General*, 136 Mich. 689, 100 N. W. 180, to be a proper L.R.A.1916C.

officer to state whether there were any other taxes due upon the land.

In *O'Connor v. Gottschalk*, 148 Mich. 450, 111 N. W. 1048, the register in chancery to whom the returns of the sheriff upon tax proceedings must be made, and who is the custodian of the papers showing the required to be paid and who receives the money from the original owner for the tax title owner, was held to be an officer whose mistake in naming the amount due entitled to owner to redeem.

Under a statute authorizing the auditor general to issue a certificate of error and cancel a deed given in pursuance of a tax sale, where a certificate that no taxes were charged against the property has been given by the proper officer, it was held in *Schulte v. Auditor General*, 131 Mich. 676, 92 N. W. 417, that, after the land has been sold, the right to pay the tax to the county treasurer ended, and therefore the county treasurer could not give a certificate that no taxes were due, so as to bring this statute into operation.

It has been held that the officer must be one who has power to receive the money for the taxes upon a tender. *Edwards v. Upham*, 93 Wis. 455, 67 N. W. 728. It was accordingly held in this case that where the landowner inquired of the county treasurer at a time when there was a tax sale to be redeemed from, and redemption was his only remedy, the land could not possibly be redeemed except by paying to the county clerk; the erroneous information given by the county treasurer could not render the sale erroneous.

d. Care required of owner.

The question of the owner's care in detecting a mistake has not been raised in many cases. In the cases in which the attempt at payment has been held equivalent to payment, in so far as to invalidate a subsequent tax sale, the owner is usually stated to have been acting in good faith.

The owner was held entitled to redeem in *Scroggin v. Ridling*, 92 Ark. 630, 121 S. W. 1053, where he correctly described the land to the collector, and in good faith paid him the amount of taxes claimed to be due. He testified that he could not tell from examining the tax receipt whether or not it correctly described the land, and that he did not have sufficient education to discover the mistake by comparing the tax

receipt with his deed; but that he supposed his tax receipt was correct, and paid taxes on the land during the ten subsequent years, until the bringing of the suit to eject him, not knowing that the land had been sold for taxes. There was an omission in this case of a part of the tract on which the owner desired to pay taxes.

An owner of land who has bid in the land for taxes for certain years, upon a tax sale thereof for those years, and then applied to the deputy county treasurer who was conducting the sale to pay, redeem, and purchase all the taxes then remaining a lien on the land, and who is informed by such official that said lands were not held for any other years, is entitled to have a deed subsequently issued to another for taxes for other years set aside. *Hoffman v. Auditor General*, 136 Mich. 689, 100 N. W. 180. "It follows," says the court, "that relator had a right to pay and redeem from these taxes at the time he was prevented from acquiring them by the officer who denied their existence, and that said officer was charged with the duty of making a sale to him which would effectuate that redemption. It is true, relator's right to pay and redeem, under this reasoning, had just come into existence, and the time limited by law to redeem from the original sale had expired. But we should be giving this statute a very narrow construction if we should say it did not apply to all cases where one has a right by law to pay and redeem."

An owner who was governed by former plats in giving to the assessor his land, and did not know and should not have known that the assessor would deal with it as designated by a later plat in which part of the land was designated by a different description, should not lose his land upon a tax sale; but if it may be inferred from the fact of his residence in the vicinity of the land, and the recognition by citizens and officials of the new map, that he was aware of it, and knew that the assessor was governed by it in assessing, he cannot defeat the assessment and sale by his secret understanding or purpose to use the old map. *Richter v. Beaumont*, 67 Miss. 285, 7 So. 357.

This case was approved and the sale held invalid in *Lewis v. Monson*, 151 U. S. 545, 38 L. ed. 265, 14 Sup. Ct. Rep. 424, where it was found that the owner in good faith intended to pay all the taxes on his land, but by mistake relied on the old plat.

In *Blinn v. Grindle*, 58 Wash. 679, 109 Pac. 122, land had been platted and was known part of the time by the description contained in the plat and at other times by the governmental subdivision. In speaking of an inquiry by the owner for the taxes on the land, it is stated that it is not important whether the list furnished the treasurer described the property by governmental subdivision, or as it had been platted and was then carried upon the official books; that the failure of the treasurer to

correctly state the amount of taxes was the cause of the failure to pay the taxes.

In *Puget Sound Nat. Bank v. Biswanger*, 59 Wash. 134, 109 Pac. 327, the owner of land had sent a check with the amount left blank to the treasurer, instructing him to pay the taxes on a list of lands which was then delivered to him, and fill in the amount in the check necessary to make such payment. The treasurer failed to take payment for a certain part of the land, and delivered receipts to the owner with notations thereon in very close lettering and written in indelible pencil, as follows: "less pt. to O. I. Co.," and in some instances, "less pt. to Og. Im. Co." It was urged that this was notice to the owners that the taxes had not been paid on a portion of the land; it is stated that money sufficient to pay the taxes on all the land had been sent to the treasurer, accompanied by a list of the property with instructions to pay the taxes on the property listed, and that this would be a good payment if the receipt had never been issued at all; that the essential thing is the actual payment of the taxes, and the receipt is only evidence of such payment, and is only important here to the extent that it sustains the contention that it gave notice to the owners that all the taxes had not been paid. Continuing the court states: "Having paid the taxes as a matter of fact, there is no legal obligation on the part of the payor to even look at the receipt. That is purely precautionary. But, even if it did, we think the annotations in this receipt, if they can be so denominated, were so obscure and uncertain that they would not convey definite notice to the payor."

In *PRICE v. GUNN*, the owner was regarded as negligent in failing to examine his tax receipt.

But if the owner is guilty of negligence in failing to discover the mistake, he cannot rely upon the mistake of the official so as to prevent a valid tax sale thereafter. *Ibid*.

An owner of property which had been sold for taxes, who went to the treasurer's office to redeem the same, and was misled by certain facts in respect to the street on which it was situated and by a similarity in the names of the owners, and therefore redeemed the wrong land, taking a certificate of redemption describing the wrong land, must be held to have directed the application of the money to the redemption of the lot which was actually redeemed, and which did not belong to him, and by his directions and suggestions in respect to the description of the property he desired to redeem to have caused the mistake to be made, or to have been so far instrumental therein that he must be charged with the consequences and bear the blame and results, rather than the county as represented by its treasurer. *Browne v. Finley*, 51 Neb. 465, 71 N. W. 34.

In *Menasha Wooden Ware Co. v. Harmon*, 128 Wis. 177, 107 N. W. 299, an agent of the owner procured an abstract of the title

which showed the statement of a tax sale of 1880, and the issuance of a tax deed thereon. In his request to the clerk for a statement of the amount due for unpaid taxes he included the description of the lands in question with others, without specifying the year for which the land had been sold for taxes. The statement furnished by the clerk included no sale prior to 1883. The agent made no examination of this statement nor comparison of it with the abstract in his possession, to ascertain whether it covered and included all unpaid taxes and sales, and likewise omitted to examine and compare the redemption receipts issued after payment of the amount specified in the clerk's statement; and he at no time, until the time for redemption had expired, specifically brought to the attention of the county clerk the fact that there had been a sale of this land for taxes in 1880. Under these circumstances it is held that the failure to redeem from the sale of 1880 was due fully as much to the fault and neglect of the agent as of the county clerk, and it cannot be said that such failure is wholly attributable to the mistake and negligence of the clerk, the court stating that under such circumstances the consequences of such neglect are to be borne by the owner.

While the court in the subsequent case of *Menasha Wooden Ware Co. v. Thayer*, 150 Wis. 611, 137 N. W. 750, employs language apparently in conflict with the last case, the facts in the Thayer Case, as the court points out, make a somewhat stronger showing for the owner. In the later case the owner knew that the lands had been sold for taxes, and upon inquiry was advised by the county clerk of the amount necessary to redeem. Without communicating this information to an agent, the owner sent the agent money with instructions to pay all delinquent taxes on the property. The agent, who had the list of lands, inquired of the clerk as to the taxes and was informed there were none. This was held to amount to a constructive redemption, the court stating: "The situation shown is certainly more favorable to the owner than it would have been if McDonnell, upon receipt of the letter from the county notifying him of the amount required to redeem, had personally gone to the clerk's office and offered to redeem, and had then been told by the clerk, after an inspection by the latter of the records, that there were no delinquent taxes. In such case, it cannot be doubted that the owner would have a right to rely upon the last information given him by the clerk. Here the agent of the owner had no personal knowledge of the fact that the clerk had even claimed there were any taxes due, and he did not report to his principal till after the sale was made, and the latter never learned that the taxes were not paid. The facts show that the owner of the lands through his agent offered to redeem, was told by the county clerk that there were no delinquent taxes, and by reason of such misinformation they were not paid. Previous L.R.A.1915C.

information to the effect that there are delinquent taxes does not preclude an owner from relying upon the county clerk's statement that there are none when he personally or by agent offers to pay or to redeem them." The action was by the purchaser, but the redemption is treated from the standpoint of the one who was owner at the time thereof. In the earlier case, the statement of the clerk did not purport to give tax sales earlier than a stated year, while the tax sale of which the owner's agent had knowledge was had before that year. In the later case it is stated that the list of lands was read through for each tax sale inquired about. No distinction, however, is based on the difference in facts in the opinion.

V. Failure to redeem.

An attempted redemption which has failed through a mistake in the taxing officer nevertheless effects a redemption and prevents further proceedings.

In *Burchardt v. Scofield*, 141 Iowa, 336, 133 Am. St. Rep. 173, 117 N. W. 1061, the owner of land applied in due time and in good faith to the county treasurer to pay taxes on his land, and paid the taxes demanded of him, and was given by the treasurer a receipt covering an indefinite, ambiguous description which did not include his land; it appearing on the books that the tax was not paid, a sale was had, and after the sale had been made, but before the time for redemption had expired, the attention of the treasurer was called to the confusion of the record and to the owner's claim that the tax had been paid, and conceded the claim. Accordingly, following the direction of the statute, he made an entry upon the record designating this sale as erroneous, and presenting a proper case for a refund by the county to the purchaser. Relying upon this, the owner took no further action, but subsequently the treasurer erased the notation thus made, and issued a deed to the purchaser without notice or opportunity to the owner to redeem or otherwise protect his rights in the premises. The deed was accordingly held void.

It was urged in *Hoffman v. Auditor General*, 136 Mich. 689, 100 N. W. 180, that the relator was not misled by what the deputy county treasurer told him, because he was informed by his deed that the taxes were unpaid. In answer to this argument it is stated that, while the relator's deed did not covenant that the taxes were paid, it certainly did not inform him that they were unpaid, and, notwithstanding the exception in the deed, the averment of the petition that relator believed the information communicated by the deputy county treasurer must be accepted. The deed by which the relator had obtained title excepted the taxes for a stated year and subsequent years and all claims arising therefrom; the year so stated was that in which the taxes began to be delinquent and for

which the deed was issued to the person holding tax title.

Under a statute authorizing the register in chancery to receive the money from the original owner for the tax title owner, and requiring the register to notify the original owner of the deposit of the money with him, where the owners of the original title act in good faith in going to the register asking for the amount due and paying that amount in reliance upon his statement, they are entitled to redeem from the tax sale, notwithstanding the register has made a mistake in the amount. *O'Connor v. Gottschalk*, 148 Mich. 450, 111 N. W. 1048.

The failure of the landowner to pay the entire amount required to redeem his land which has been sold for taxes, because of a mistake of the sheriff in the calculation, does not defeat the attempted redemption. *Beck v. Meroney*, 135 N. C. 532, 47 S. E. 613.

Although an owner of land knows that the taxes for a certain year are unpaid, and that the lands were sold therefor at a tax sale, and he is advised upon inquiry by letter of the amount necessary to redeem, where he has given an agent money to pay all delinquent taxes on the land, and the agent is informed upon inquiry that there are no delinquent taxes, and by reason of such erroneous information the taxes are not paid, there is a constructive redemption preventing the issue of a valid tax deed thereafter. *Menasha Wooden Ware Co. v. Thayer*, 150 Wis. 611, 137 N. W. 750. It is stated by the court that "previous information to the effect that there are delinquent taxes does not preclude an owner from relying upon the county clerk's statement that there are not, when he personally or by agent offers to pay or to redeem them." There seems to be little distinction between this case and the *Menasha Wooden Ware Co. v. Harmon*, 128 Wis. 177, 107 N. W. 299, although directly opposite conclusions were arrived at in the two cases. See discussion supra, IV. d.

Where the owner has been negligent in making inquiry, he must suffer the consequences of his error. In *Browne v. Finley*, 51 Neb. 465, 71 N. W. 34, the owner by letter inquired of the county treasurer for the taxes due "on lot 5 and 6 of Hillside No. 1, corner Burt and Thirtieth streets." This should have been Hillside No. 2, and not No. 1, but the county treasurer prepared and delivered to the owner a statement of the amount of taxes due against the property therein described, including lots 5 and 6 of Hillside No. 1, which were not at the corner of Burt and Thirtieth streets; and it was urged that if the treasurer had looked at a plat or map of the city, it would have been discovered that an error had been made. It was held, however, that it was not wholly the mistake of the official that the correct property was not ascertained; that the description furnished by the owner was well calculated to mislead the official; hence he cannot be held blame-
L.R.A.1915C.

less and must suffer the consequences of his own error.

See *Conklin v. Cullen*, 29 Mont. 38, 74 Pac. 72, supra, IV. b.

See *Edwards v. Upham*, 93 Wis. 455, 67 N. W. 728, supra, IV. c. W. A. E.

IOWA SUPREME COURT.

F. A. HOYT, Appt.,

v.

WILL CLEMANS et al.

C. M. ROBERTS et al., Garnishees.

(— Iowa, —, 149 N. W. 442.)

Lien — consent to sale of property — waiver.

A landlord with claim for unpaid rent and a mortgagee of the tenant's chattels do not waive their liens on the tenant's property by consenting to its sale on condition that a certain person act as clerk of the sale and apply the proceeds on their claims, so as to subject the proceeds to garnishment in the hands of the clerk at the suit of a judgment creditor of the tenant.

(November 21, 1914.)

APPEAL by plaintiff from a judgment of the District Court of Buchanan County discharging the garnishees in a garnishment proceeding for the satisfaction of a judgment held by plaintiff against defendants. Affirmed.

Note. — Right of lienor to proceeds where property is sold with his consent under agreement that proceeds shall be applied toward payment of the debt.

Generally, as to consent to sale of property by chattel mortgagor after the mortgage is given, as waiver of the lien, see note to *Carr v. Brawley*, 43 L.R.A.(N.S.) 302.

As to waiver of lien of chattel mortgage by attachment or execution, see notes to *Kansas City Livestock Commission Co. v. Bank of Hamlin*, 24 L.R.A.(N.S.) 490, and *Ex parte Logan*, 51 L.R.A.(N.S.) 1068. And, generally, as to waiver of lien by attachment or execution, see note to *Dix v. Smith*, 50 L.R.A. 714.

As appears from the note in 43 L.R.A.(N.S.) 302, the general rule is that consent by a chattel mortgagee that the mortgagor may sell the whole or a part of the mortgaged property is to that extent a waiver of the mortgage lien so far as the title of the purchaser is concerned. In several cases the question has arisen as to whether the lien was transferred from the property to the proceeds, or whether a trust in the proceeds was created in favor of the lienor, by his consent that the property should be sold and the proceeds applied on the debt. And,

Statement by Deemer, J.:

Garnishment proceedings against Roberts and the People's National Bank of Independence, Iowa, garnishees, to satisfy a judgment held by plaintiff against Will Clemans and Estella Clemans. A mortgagee of certain chattel property, and the landlord on whose land the property was kept, appeared and made claim to the property. Plaintiff moved for judgment against the garnishees, and this motion was overruled, the garnishees were discharged, and plaintiff appeals. Affirmed.

Messrs. Cook & Cook, for appellant:

The lien of a mortgagee of chattel property and of a landlord for rent does not

follow the proceeds of a sale at public auction consented to by the landlord and the mortgagee, so as to make their claims to the proceeds superior to that of a judgment creditor reaching the proceeds by garnishment.

Smith v. Crawford County State Bank, 99 Iowa, 282, 61 N. W. 378, 68 N. W. 690; Hartwig v. Iles, 131 Iowa, 501, 109 N. W. 18; Waters v. Cass County Bank, 65 Iowa, 234, 21 N. W. 582; Smith v. Clark, 100 Iowa, 605, 69 N. W. 1011.

Mr. R. J. O'Brien, for appellees:

The claim of R. H. Jamison as mortgagee, and Mrs. Carmody as landlord, are prior to the claim of plaintiff.

Bergman v. Guthrie, 89 Iowa, 290, 56 N. W. 502.

as indicated in HOYT v. CLEMANS, it has generally been held that such consent constitutes a waiver of the lien, rather than a transfer thereof to the proceeds, and that the promise of the mortgagor to apply the proceeds on the debt is merely personal.

For example, in *White Mountain Bank v. West*, 46 Me. 15, it was held that a written consent by a chattel mortgagee to a sale of the property by the mortgagor, and to payment of the proceeds on the debt, did not give the mortgagee a lien on the proceeds in the hands of the purchasers, and that this was true whether the consent was or was not sufficient to protect the mortgagor under a statute forbidding, under penalty, the selling of mortgaged personal property by the mortgagor without the consent in writing of the mortgagee upon the back of the mortgage and on the margin of the record thereof. The agreement by the mortgagor to pay the proceeds on the debt was regarded as personal only. It was said that whether the consent was sufficient to protect the mortgagor or not, the mortgagee was thereby estopped from setting up any claim of title against the purchasers; and that, having lost his title, the mortgagee gave him no right to the proceeds; that "from the time of sale, the lien of the mortgagee was extinguished, and the mortgagee was left with no security but the personal promise of the mortgagor to pay the proceeds to him. And if he wished to reach the proceeds in the hands of the purchasers, he, like other creditors, should have resorted to a trustee process under the statute."

A similar case, reaching the same result, is *Maier v. Freeman*, 112 Cal. 8, 53 Am. St. Rep. 151, 44 Pac. 357, in which the court said that it agreed with the views expressed in *White Mountain Bank v. West*, supra, that from the time of the sale the lien of the mortgage was extinguished, and the mortgagee was left with no security but the personal promise of the mortgagor to pay the proceeds to him. In this case also the proceeds had not been paid to the mortgagor, and it was said that the lien was not transferred to the proceeds in the hands

of the purchaser; that while there were many decisions that a mortgagee of chattels might authorize the mortgagor to sell the property and apply the proceeds upon the debt, and that such an agreement did not render the mortgage fraudulent in law nor affect a lien thereof prior to the sale, no case had been found in which the lien was held to attach to the proceeds unpaid by the purchaser.

In *Maier v. Freeman*, supra, the agreement as to the sale was that the mortgagees appointed the mortgagor as agent to sell the property and to turn over the proceeds to be applied on the mortgage, and that the mortgagor should deposit the proceeds of the sale in a bank to the credit of the mortgagees; and it was contended that this agreement operated to create a trust in favor of the mortgagees in the sum to be derived from the sale, or an equitable assignment of such fund to them. But the court said: "It seems to us there might be more color for this contention, or some part of it, if the mortgage had vested the title to the sheep [the mortgaged property] in the mortgagees, as was the rule of the common law; but under our law, . . . the title remains in [the mortgagor]. . . . He being the owner and possessed of the sheep, to say that his agreement created, as against creditors, a trust in or an assignment of the proceeds of a sale which he had not then made, or, so far as shown, contracted to make, is to say that he could create a secret trust in the sheep or a pledge thereof and yet retain possession of them,—contrary to the statutes." It was said also that the retention by the mortgagor of the authority to collect the proceeds was inconsistent with the idea of an equitable assignment thereof.

In *Smith v. Clark*, 100 Iowa, 605, 69 N. W. 1011, a chattel mortgagee permitted the mortgagor to sell the property under an agreement to account to the mortgagee for the proceeds. Notes were taken for the proceeds in the name of the mortgagor, and while in his possession execution was levied on the notes by a judgment creditor of the mortgagor, the creditor having no knowl-

Deemer, J., delivered the opinion of the court:

Clemans and wife were tenants of a farm owned by one Mrs. Carmody, and kept thereon certain property upon which the landlord had a lien for rent due and to become due. One Jamison had a chattel mortgage upon this property, which was superior to the lien of the landlord. Clemans concluded to quit farming, and determined to have a public sale of his property. Before announcing this sale, he secured the consent of the landlord and the mortgagee, upon condition that the garnishee Roberts should act as clerk of the sale, and that the proceeds received by him from the sale should be turned over to the mortgagee and the landlord to satisfy the indebtedness due them. Pursuant to this arrangement, a public sale was had, and Roberts received, as proceeds from the sale, about \$1,300. The indebtedness secured by the mortgage was approximately \$1,000, and the rent amount-

ed to about \$400, so that there was not enough to take care of these two debts.

Plaintiff held a judgment against the Clemans amounting, with costs, to something over \$200, and he sued out an execution thereon, which was served by garnishing Roberts and the People's National Bank, of which he (Roberts) was cashier, on January 21, 1913. The sale was held on the 20th of that month, and, at the time of garnishment, Roberts had the funds arising from the sale in his bank. Both the cashier and his bank were garnished, and they each answered that they did not owe the judgment defendants anything, and that they had no money or property of theirs in their possession. They admitted the facts already stated, however, and further the garnishee Roberts said:

No money was to be paid to Mr. Clemans until after the expense of the sale was taken out first; then Mr. Jamison's claim

edge of the claims of the mortgagee. It was held that the execution creditor obtained a valid lien upon the notes superior to the interest of the mortgagee.

But where the proceeds are to be paid directly to the lienor, it has been held that they are not subject to garnishment in the hands of the purchaser by a creditor of the owner. Thus, in *Bergman v. Guthrie*, 89 Iowa, 290, 56 N. W. 502, where a father leased land to a son, and agreed with the latter that certain property covered by the landlord's lien should be sold at public auction and the proceeds paid to the father in satisfaction of the lien, it was held that the proceeds in the hands of the purchasers were not subject to garnishment by creditors of the son, the proceeds not being more than enough to pay the balance due the lienor. It appears that the agreement was that the father should receive the proceeds, and that in fact he attended the sale for this purpose and did receive all the proceeds except that garnished in the action, and it was said that the effect of the arrangement between the father and son was not to release the liens, but to recognize and enforce them by a sale of the property and an application of the proceeds to the payment of the debts; that the father alone was entitled to the proceeds, and could have compelled the purchasers to settle with him for the amount of their bids; that the son had no right to the money which the garnishees were owing for their purchases, and the execution creditors acquired nothing by the garnishment.

And in *McIntyre v. Hauser*, 131 Cal. 11, 63 Pac. 69, it was held that the proceeds from the sale of mortgaged property were not subject to garnishment by a creditor of the mortgagor, in the hands of the purchaser, because in this case there was either a novation by an agreement between the mortgagor, the mortgagee, and the pur-

chaser, that the property should be sold and the proceeds paid to the mortgagee by the purchaser, or there was an equitable assignment by the mortgagor to the mortgagee of the proceeds. At the time of the contract of sale, the mortgagee consented to the sale provided the proceeds were paid to him, and the agreement was construed as meaning that the proceeds should be paid by the purchaser to the mortgagee. Whether the purchaser knew of the agreement was regarded as immaterial, so far as affected the rights of the mortgagee and of the creditor of the mortgagor to the proceeds in the hands of the purchaser. This case was distinguished from *Maier v. Freeman*, supra, on the ground that in the latter case the property had not been sold at the time of the agreement between the mortgagor and the mortgagee, and the mortgagor was to receive the proceeds from the sale, whereas in the *McIntyre* Case the consent of the mortgagee was given at the time of the contract for the sale of the property, and the proceeds were to be paid directly to the mortgagee by the purchaser.

Assuming that there was an arrangement between a first mortgagee and the owner of personal property for a sale thereof, not, however, in the mortgagee's name, and for payment of the proceeds to a bank to be applied on the mortgage debt, the court in *Smith v. Crawford County State Bank*, 99 Iowa, 282, 61 N. W. 378, 68 N. W. 690, held that such an arrangement would not impress upon the proceeds the character of a trust fund, or make the owner an agent of the mortgagee for a sale of the property, where the same was sold in the name of the owner and the proceeds were by his direction remitted to the bank and placed to his own credit. Therefore, it was held that a trust would not be declared in favor of the first mortgagee as to the proceeds in the hands of the bank,

was to be satisfied as far as the mortgaged property would go; and the balance was to be applied on Mrs. Carmody's notes. At no time did I have any money in my possession that I would pay to Mr. Clemans after having had instructions from him to pay the money to other parties. The notes of Mr. Jamison and Mrs. Carmody were left with me at that time. At no time did I have any money in my possession belonging to Mr. Clemans, according to this understanding. I mean that if this money from the sale of the property mortgaged to Mr. Jamison is to be paid to Mr. Jamison, and sufficient of the other property not subject to Jamison's mortgage be paid to Mrs. Carmody, that exhausts the money. I have money in my hands, the proceeds of that sale, and had at the time I was garnished, sufficient to pay the claim of Mr. Hoyt from either the mortgaged property or from the other property. I had money, at the time I was garnished, sufficient to pay Mr.

Hoyt's claim from either class. I had no money in my hands belonging to Mr. Clemans at the time I was garnished, because he (Clemans) had given me absolute instructions to pay it to other parties.

Q. Was there anything said relative to whether or not Mr. Jamison and Mrs. Carmody would allow the sale to go on unless Mr. Clemans should make this arrangement?

A. Well, the matter was talked over at the bank, at the time I mentioned, that they would have to be assured that their claims would be taken care of before they allowed the sale to be made; that is, a public sale.

Q. The agreement that you were to take the money?

A. Yes.

Q. Before they would let the sale go on?

A. Yes. These parties, after having told Mr. Clemans before me that they wouldn't let the sale go on unless certain terms were complied with, did allow the sale to go on,

which was a second mortgagee of the property, where the latter, without notice of the alleged agreement, by the direction of the owner, had applied the proceeds to the payment of its own debt. It was said that the lien of the first mortgagee ceased when the sale was consummated, and that, so far as third persons were concerned, he must look either to the purchaser, or to the owner personally in case he failed to apply the proceeds of sale as agreed; and that the failure of the owner to carry out the agreement would not affect the right of the bank to the proceeds, especially where, as in this case, it had no notice of the alleged arrangement.

But a trust was held in *Re Maxwell*, 83 Iowa, 590, 50 N. W. 56, to have been created in favor of a mortgagee of real estate in the proceeds from the sale thereof deposited in a bank by the mortgagor in his own name, where, after selling the property, the mortgagor requested the mortgagee to release the mortgage and retain the note, which she did, proposing that he would reinvest the proceeds for her in her name, and part of the proceeds were in fact withdrawn from the bank and invested in other real estate in the name of the mortgagee, the balance remaining on deposit in the bank at the time of the mortgagor's death. The facts were regarded as showing the existence of a trust under which the intestate held the proceeds at the time of his death; but it was said that "a mortgage released to permit a sale of the property free from its lien would not bind the money received in payment for the property."

In *Evans-Snider-Buel Co. v. Bank of Atchison County*, 76 Mo. App. 449, it was held that a mortgagee of cattle had waived his rights under the mortgage by receiving the cattle for sale on commission and delivering over the proceeds to the mortgagor. L.R.A.1915C.

The action was by the mortgagee against a bank in which the mortgagor had deposited the proceeds, and which had paid out the money to the mortgagor; and it was said that even if the bank had notice of the mortgage and knew that the money deposited with it came from the sale of the cattle, it could not be held liable to the mortgagee, for, while he had the right to make the sale and appropriate the proceeds to the payment of the mortgage, yet he waived his right under the mortgage by delivering the proceeds to the mortgagor.

Where mules on which the plaintiff held a chattel mortgage were, with his consent, traded for horses, and the horses were sold by the mortgagor to the defendant, it was said that, the mortgaged property having been sold with the consent of the mortgagee, the lien of the mortgage on the property was discharged; and that in such a case it would be only by virtue of some agreement between the mortgagor and the mortgagee that the property should be sold in the name of the latter, or that the property or money received in exchange should be the mortgagee's, or be applied on the mortgage debt, or subjected to the lien of the mortgage as a substitute for the property sold, that the mortgagee would have any lien upon or right to it. *Fairweather v. Nelson*, 76 Minn. 510, 79 N. W. 506.

That a chattel mortgagee by consenting to a sale of the property by the mortgagor, and application of the proceeds to the latter's own use (the proceeds being deposited in a bank in the name of bondsmen of the mortgagor in a replevin action by a prior mortgagee of the property), waives his lien, so that the balance of the proceeds in the bank after satisfying the prior mortgage is subject to garnishment by a creditor of the mortgagor, see *Carr v. Brawley*, 34 Okla. 500, 43 L.R.A.(N.S.) 302, 125 Pac. 1131.

R. E. H.

with the verbal understanding between Mr. Jamison, Mr. Troy, and myself that the proceeds were to be applied as I stated. I am cashier of the People's National Bank.

On this record appellant insists that he was entitled to judgment against the garnishee condemning the entire proceeds in his hands, or at least all over the amount of the mortgage indebtedness, on the ground that, by consenting to the sale, both the mortgagee and the landlord waived their liens, and that the garnishment became superior to the liens of either.

It is doubtless true that an unconditional consent by either a chattel mortgagee or a landlord to the sale by the owner of the property covered by their liens amounts to a waiver thereof, even though he (the owner) promises to turn the proceeds over to the lien holders. See *Smith v. Clark*, 100 Iowa, 605, 69 N. W. 1011; *Smith v. Crawford County State Bank*, 99 Iowa, 282, 61 N. W. 378, 68 N. W. 690; *Waters v. Cass County Bank*, 65 Iowa, 234, 21 N. W. 582; *Hartwig v. Iles*, 131 Iowa, 501, 109 N. W. 18. This is upon the theory that the lien does not follow the purchase price, and the mortgagor simply becomes liable on his promise to pay over the proceeds, upon which there is no lien or trust. It is true that in the case at bar the lien holders consented to the sale, but it was agreed that the proceeds should be received by Roberts, who was agreed upon as the clerk of the sale, and that he should hold and apply the same upon the indebtedness secured by the chattel mortgage and the landlord's lien. The evidences of these items of indebtedness were turned over to him before the sale, and he received the proceeds of the sale, not as the agent of the mortgagor, but as trustee for the lien holders. As soon as they reached his hands, they became subject to this trust, and he was under no obligation to pay them over to the original owners, nor could they have collected the same from him. His only duty to Clemans was to hold and faithfully apply the funds.

The original owners of the property could not have recovered the funds from him, nor could they have brought any action against him save for a breach of trust. The money was never in the hands of the mortgagors or lessees, and the proceeds of the property has at all times been in the possession of the trustee, Roberts, pursuant to the agreement made at the time consent was given to the sale of the property. In this respect the case differs from those relied upon by appellant's counsel. *Bergman v. Guthrie*, 89 Iowa, 290, 56 N. W. 502, announces the principles which should govern this controversy.
L.R.A.1915C.

It is elementary that, as a general rule, a garnishing creditor acquires no greater rights against the garnishee than the judgment debtor would have had against him, had he sought to recover from the garnishee, and it is manifest, under the facts above stated, that the Clemans could not have recovered anything from Roberts save as for a breach of trust. What was done amounted to little, if anything, more than a foreclosure of the mortgage and landlord's lien by notice and sale, and in such case consent of all parties to the sale does not discharge the lien. But, if it does, the proceeds in either case are impressed with a trust by agreement of the parties. The trustee has at all times been in possession of the proceeds, and his claim thereto, under the trust reposed in him, is superior to a garnishment by a judgment creditor of the original owner of the property. No amount of argument can make this plainer. If authorities be needed, we cite the following as sufficient for the purposes of the case: *Perego v. Wheeler*, 88 Iowa, 732, 55 N. W. 462; *Jones v. Turck*, 33 Iowa, 246.

We find no error, and the judgment must be, and it is, affirmed.

Ladd, Ch. J., and Gaynor and Withrow, JJ., concur.

KANSAS SUPREME COURT.

YOUNG MEN'S CHRISTIAN ASSOCIATION OF SALINA, KANSAS, et al.,

v.

UNITED STATES FIDELITY & GUARANTY COMPANY, Appt.

(90 Kan. 332, 133 Pac. 894.)

Building contract — advances — final payment.

1. A contract for the erection of a building contained a clause which, after reciting the whole sum to be paid for work and materials, provided "that such sum shall be paid by the owners to the contractors in current funds and only upon the certificates

Headnotes by PORTER, J.

Note. — For release of surety on building contractor's bond by making payments not authorized by contract, see notes to *First Nat. Bank v. Fidelity & D. Co.* 5 L.R.A.(N.S.) 418, and *Morgan v. Salmon*, L.R.A.1915B, 407.

As to character of and rules governing contracts by corporations engaged for profit in the business of guarantying the fidelity or contracts of other persons, see note to *George A. Hormel & Co. v. American Bonding Co.* 33 L.R.A.(N.S.) 513.

of the architects, as follows: On or before the first of every month the architects shall make written estimates of all work and material furnished on the contract during the preceding thirty days, and 80 per cent of same shall be paid the contractors by the owners when presented. The final payment shall be made within ten days after the completion of the work included in this contract, and all payments shall be due when certificates for the same are issued." Held, that "the final payment" referred to the 20 per cent of the amount of the estimates after the 80 per cent had been paid.

Principal and surety — contractor's bond — failure to retain stipulated sum.

2. A bond of indemnity was executed by a surety company against pecuniary loss resulting from the failure of a contractor to comply with the terms of a building contract. The bond referred to the contract and contained a condition that no liability should attach to the surety unless the owner should give notice to and obtain the consent of the surety before making the final payment provided for in the contract. Held, that the failure to retain the required percentage discharged the surety to the extent of the premature payments.

(Johnston, Ch. J., and Burch and Benson, JJ., dissent.)

(July 5, 1913.)

APPEAL by defendant from a judgment of the District Court for Saline County in plaintiffs' favor in an action brought to recover damages for breach of the conditions of a bond guarantying the faithful performance of a contract for the erection of a building. Reversed.

The facts are stated in the opinion.

Mr. Z. C. Millikin, for appellant:

The required percentage of money earned by the contractor was not retained by the owner as required by the bond, and the violation of this condition discharged the surety.

First Nat. Bank v. Fidelity & D. Co. 145 Ala. 335, 5 L.R.A.(N.S.) 423, 117 Am. St. Rep. 45, 40 So. 415, 8 Ann. Cas. 241; Leien-decker v. Aetna Indemnity Co. 52 Wash. 609, 101 Pac. 220; Electric Appliance Co. v. United States Fidelity & G. Co. 110 Wis. 434, 53 L.R.A. 609, 85 N. W. 650; Long v. American Surety Co. 23 N. D. 492, 137 N. W. 41; Lonergan v. San Antonio Loan & T. Co. 101 Tex. 63, 22 L.R.A.(N.S.) 364, 130 Am. St. Rep. 803, 104 S. W. 1061, 106 S. W. 876; Harris v. Taylor, 150 Mo. App. 291, 129 S. W. 995; Alcatraz Masonic Hall Asso. v. United States Fidelity & G. Co. 3 Cal. App. 338, 85 Pac. 156; Cowdery v. Hahn, 105 Wis. 455, 76 Am. St. Rep. 921, 81 N. W. 882; Eager v. Seeds, 21 Okla. 524, 96 Pac. 646; Granite Bldg. Co. v. Saville, L.R.A.1915C.

101 Va. 217, 43 S. E. 351; Beech Grove Improv. Co. v. Title Guaranty & S. Co. 50 Ind. App. 377, 98 N. E. 373; Moore v. Title Guaranty & T. Co. 151 Mo. App. 256, 131 S. W. 477; Chester v. Leonard, 68 Conn. 495, 37 Atl. 397; Fels & Co. v. Massachusetts Bonding & T. Co. 48 Pa. Super. Ct. 27; Knight & J. Co. v. Castle, 172 Ind. 97, 27 L.R.A.(N.S.) 573, 87 N. E. 976; Backus v. Archer, 109 Mich. 666, 67 N. W. 913; Fidelity & D. Co. v. Agnew, 82 C. C. A. 103, 152 Fed. 955; Museum of Fine Arts v. American Bonding Co. 211 Mass. 124, 97 N. E. 633; O'Neill v. Title Guaranty & T. Co. 113 C. C. A. 211, 191 Fed. 570; National Surety Co. v. Long, 60 C. C. A. 623, 125 Fed. 887; Simonson v. Grant, 36 Minn. 439, 31 N. W. 861; Bell v. Trimby, — Tenn. —, 38 S. W. 100; 22 Cyc. 93; O'Connell v. New York & N. H. R. Co. 187 Mass. 272, 72 N. E. 979.

Messrs. C. W. Burch and B. I. Litowich, for appellees:

The right, under the terms of the contract, to retain 20 per cent of the contract price, was a right exclusive to the owners, which they might exercise or not as they saw fit, and their failure to retain 20 per cent would not release the surety upon the bond.

Meyers v. Wood, 26 Tex. Civ. App. 591, 65 S. W. 671.

The surety was not relieved by the payments made.

Chapman v. Eneberg, 95 Mo. App. 127, 68 S. W. 974; United States Fidelity & G. Co. v. Baptist Church, 31 Ky. L. Rep. 520, 102 S. W. 325; Wolf v. Aetna Indemnity Co. 163 Cal. 597, 126 Pac. 470; St. John's College v. Aetna Indemnity Co. 135 App. Div. 480, 120 N. Y. Supp. 496; Fidelity & D. Co. v. Robertson, 136 Ala. 379, 34 So. 933; American Surety Co. v. Scott, 18 Okla. 264, 90 Pac. 7; Blauvelt v. Kemon, 196 Pa. 128, 46 Atl. 416; Aetna Indemnity Co. v. Waters, 110 Md. 673, 73 Atl. 713; People's Lumber Co. v. Gillard, 136 Cal. 55, 68 Pac. 576; Illinois Surety Co. v. Garrard Hotel Co. — Ky. —, 118 S. W. 967; New Haven v. National Steam Economizer Co. 79 Conn. 482, 65 Atl. 959; Allen County v. United States Fidelity & G. Co. 122 Ky. 825, 93 S. W. 44; De Mattos v. Jordan, 15 Wash. 378, 46 Pac. 402; Drumheller v. American Surety Co. 30 Wash. 530, 71 Pac. 25; Lakeside Land Co. v. Empire State Surety Co. 105 Minn. 213, 117 N. W. 431.

Messrs. McOllintock & Quant, Thomas L. Bond, and David Ritchie also for appellees.

Porter, J., delivered the opinion of the court:

The question to be determined in this

case is whether a bond given by a surety company guarantying the faithful performance of a contract for the erection of a building is discharged by the failure of the owner to retain the final payment provided for in the contract until the completion of the building and until the bonding company has consented thereto.

The defendant is a corporation engaged in writing surety bonds for compensation. In November, 1909, A. H. Ritter & Son, builders, entered into a written contract with the Young Men's Christian Association of Salina (herein referred to as the "association") for the construction of an association building at a cost of \$34,600. The contract was executed in duplicate, and a copy with exhibits showing the plans and specifications was submitted to the bonding company, and in December, 1909, the company executed its bond, for which it was paid a premium. The building was finally completed except as to a few minor details in the fall of 1910. The contractor defaulted in payment of certain claims for material and labor, and some of the subcontractors filed liens. The association brought suit on the bond to recover damages for the breach of its conditions. The jury returned a verdict for the association and also made findings of fact. The defenses were raised by a demurrer to the evidence, by a motion for a directed verdict, and a motion for judgment on the findings.

The building contract provided, among other things, that the building was to be erected according to plans and specifications prepared by a firm of architects at Salina and under their direction, and that they should construe the meaning of the plans and specifications. During the progress of the work a dispute as to whether the basement walls should be 21 or 25 inches in thickness arose between the association and the architect Smith, who acted for his firm, which resulted in his resignation. The association thereupon substituted one Barnes, its secretary, who from that time acted as superintendent of construction. He was without experience as an architect or builder, and his substitution without notice to or knowledge of the bonding company is one of the defenses pleaded in the answer and relied upon at the trial. Another defense is that certain material alterations in the plans were made without the knowledge or consent of the surety. The third defense is that the required percentage of money earned by the contractor was not retained by the association as required by the bond, and that the failure to comply with this condition discharged the surety. From our view of the case it is not deemed necessary

to consider any of these defenses except the last.

In respect to this defense the association makes the contention: First, that the provision in the contract whereby it was to pay 80 per cent of the written estimates of all work and material for thirty days preceding the first of each month does not in so many words say that 20 per cent should be retained, or that the final payment mentioned should be 20 per cent of such estimates; and, second, that the provision was solely for its benefit, and not that of the surety, and moreover was not a provision prohibiting it from making payment in full at any time it saw fit to do so, but on the contrary it was intended by the provision that it should be wholly optional with the association to retain part of the payments, or to pay the whole sums due to the contractors for any work or material furnished "when certificates for the same" were issued.

As to the first contention, we think it is clear that the contract provision for the payment of 80 per cent of the estimates of material and work furnished contemplated that 20 per cent might be retained as the "final payment," and that the only reasonable construction to be given to the words "final payment" is that they mean 20 per cent; that is, the percentage remaining due after the payment of the 80 per cent mentioned.

Article 9 of the contract reads: "It is hereby mutually agreed between the parties hereto that the sum to be paid by the owners to the contractors for said work and materials shall be thirty-four thousand six hundred (\$34,600) dollars, subject to additions and deductions as hereinbefore provided, and that such sum shall be paid by the owners to the contractors in current funds, and only upon the certificates of the architects, as follows: On or about the first of every month the architects shall make written estimates of all work and material furnished on the contract during the preceding thirty days, and 80 per cent of same shall be paid the contractors by the owners when presented. The final payment shall be made within ten days after the completion of the work included in this contract, and all payments shall be due when certificates for the same are issued."

The bond refers to the contract, and the conditions of the bond in respect to the matter under consideration read: "Now therefore, the condition of the foregoing obligation is such that if the said principal shall well and truly indemnify and save harmless the said obligee from any pecuniary loss resulting from the breach of any of the terms, covenants, or conditions of the said contract on the part of the said prin-

principal to be performed, then this obligation shall be void, otherwise to remain in full force and effect in law, provided, however, that this bond is issued subject to the following conditions and provisions: First. That no liability shall attach to the surety hereunder unless in the event of any default on the part of the principal in the performance of any of the terms, covenants, or conditions of said contract, the obligee shall promptly, and in any event not later than thirty days after knowledge of such default, deliver to the surety at its office in the city of Baltimore, written notice thereof with a statement of the principal facts showing such default and the date thereof; nor unless the said obligee shall deliver written notice to the surety at its office aforesaid, and the consent of the surety thereof obtained, before making to the principal the final payment provided for under the contract herein referred to. Second. That in case of such default on the part of the principal, the surety shall have the right, if it so desires, to assume and complete or procure the completion of said contract, and in case of such default the surety shall be subrogated and entitled to all the rights and properties of the principal arising out of said contract and otherwise, including all sureties and indemnities theretofore received by the obligee and all deferred payments, retained percentages, and credits due to the principal at the time of such default, or to become due thereafter by the terms and dates of the contract."

In their brief counsel for plaintiff (appellee) say: "Appellant in his brief assumes that the contract and bond required the retention of 20 per cent of the contract price until final settlement was made. Neither the contract nor the bond contains any such recital or provision. Contracts and bonds in other cases may contain such recitals. No provision was made in the contract in this case for the retention of any percentage until final settlement. . . . The language of the contract is '80 per cent of which shall be paid the contractors by the owners,' and is not, as counsel assumes, '20 per cent shall be retained by the owners.' And the contract further provides that 'all payments shall be due when certificates for the same are issued.' These are the only provisions in either contract or bond concerning payment or retention of any per cent."

In *O'Neill v. Title Guaranty & T. Co.* 113 C. C. A. 211, 191 Fed. 570, the contract provided: "Payments to be made on the first day of each month in the following manner: Ninety per cent of the amount of labor and material in place in said building, and 50 per cent of the amount of material

on the ground, the final payment to be made when the building is fully completed to the satisfaction of the architect." p. 571. The court of appeals for the sixth circuit approved the holding of the trial court, which was stated in the following language: "I think the parties contemplate, in such a contract, that at least 10 per cent of the contract price shall be found remaining in the final payment to be made, and that, when the owner has paid, on estimates, 90 per cent of the contract price, he should at least prima facie treat the remainder as the final payment." p. 572.

In *Cowdery v. Hahn*, 105 Wis. 455, 76 Am. St. Rep. 923, 81 N. W. 883, the contract provided that payments were to be made from time to time in amounts up to 85 per cent of the value of the material furnished and the labor performed; final payment to be made within thirty days after the contract was fulfilled, all payments to be made upon written certificates. It was construed as meaning that only 85 per cent was to be paid during the progress of the work, and 15 per cent after the contract was fulfilled, and that the payment of the entire contract price, when \$275 of the work remained to be done, released the surety, who in that case was a private individual, and not a surety company.

As before stated, we think the only reasonable construction of the language of the building contract is that the "final payment" mentioned was the 20 per cent remaining after the payment of 80 per cent of the amount of the estimates. It obviously could not have been intended to refer to the amounts that happened to remain unpaid to the contractor or to subcontractors on claims for labor and material at the time the building was completed. There is some conflict in the authorities upon the question of whether a provision of this character in a building contract is solely for the benefit of the owner, or for the mutual benefit of the owner and the surety. The bond refers to the contract, and the authorities are well settled that the two must be construed together. They constituted one transaction. The contract for the erection of the building was entered into first. Before any steps were taken under the contract, a copy of it was furnished to the bonding company and an application made for indemnity. The bond guarantees the faithful performance of the contract upon certain conditions, among which is the condition that no liability shall attach to the surety unless the association "shall deliver written notice to the surety," and the consent of the surety obtained, before making "the final payment provided for in the con-

tract herein referred to." There would be nothing upon which this carefully worded provision for the protection of the surety could operate, if, as contended, the plaintiff had the right to pay out the entire contract price before the completion of the building and without notice to the surety. In our opinion the provision in the contract that "all payments shall be due when certificates for the same are issued" cannot be construed to destroy the meaning of "the final payment," but it must be read together with what precedes it in the same article in reference to the final payment. That part of the contract reads: "On or before the first of every month the architects shall make written estimates of all work and material furnished on the contract during the preceding thirty days, and 80 per cent of same shall be paid the contractors by the owners when presented. The final payment shall be made within ten days after the completion of the work included in this contract, and all payments shall be due when certificates for the same are issued."

There is no ambiguity. The words "all payments shall be due when certificates for the same are issued" refer to the 80 per cent of each estimate, and this provision is clearly for the benefit of the contractor. In the first instance, before there was any surety, the provision in the contract authorizing the owner to retain 20 per cent as a final payment was solely for the benefit of the association. As between it and the contractor the association might waive the right to retain the amount due above the 80 per cent and pay the entire amount of each estimate. Eighty per cent it was obliged to pay when estimates from the architects were presented. And all such payments were due to the contractor as a matter of right "when certificates for the same" were issued. When the bonding company made its contract with the association, the provision for retaining all sums due upon estimates above the 80 per cent became a condition which the association, as between itself and the bonding company, was obliged to fulfil. The contract of suretyship expressly provides that the surety shall not be liable unless, upon written notice to the surety, its consent be obtained before making final payment, and in case of default there is a provision subrogating the surety to all the rights of the principal arising out of the contract for the erection of the building, including all deferred payments and "retained percentages." The purpose of a provision for retaining a percentage of the money due in contracts of this character has been stated by the courts to be primarily to remove from the contractor the temptation to abandon his work,

and to furnish an incentive for him to continue until the final completion of the contract.

"The object of reserving such percentages is manifestly to furnish an incentive to the contractor to finish the work, and to secure both the owner and guarantor; and it has been so often held that a failure on the part of the owner to retain the percentage will release the surety that little more than a citation of some of the decisions is necessary." *O'Neill v. Title Guaranty & T. Co.* 113 C. C. A. 211, 191 Fed. 570.

In *Prairie State Nat. Bank v. United States*, 164 U. S. 227, 41 L. ed. 412, 17 Sup. Ct. Rep. 142, Justice White said: "That a stipulation in a building contract for the retention, until the completion of the work, of a certain portion of the consideration, is as much for the indemnity of him who may be guarantor of the performance of the work as for him for whom the work is to be performed; that it raises an equity in the surety in the fund to be created; and that a disregard of such stipulation by the voluntary act of the creditor [owner] operates to release the sureties is amply sustained by authority." p. 233.

Counsel for the bonding company concedes that the rules of strict construction applicable to ordinary sureties are not enforced in the case of a bond written by a corporation engaged in the business (*Hull v. Massachusetts Bonding & Ins. Co.* 86 Kan. 342, 120 Pac. 544; *Chicago Lumber Co. v. Douglas*, 89 Kan. 308, 44 L.R.A.(N.S.) 843, 131 Pac. 563), but contends that the obligation cannot be extended beyond the plain meaning of the expressed terms.

In the case of *George A. Hormel & Co. v. American Bonding Co.* 112 Minn. 288, 33 L.R.A.(N.S.) 513, 128 N. W. 12, the supreme court of Minnesota had the same question before it. After deciding that bonds of this character, though resembling contracts of suretyship, are in effect contracts of insurance, to which the rules of construction peculiar to contracts of suretyship proper do not apply, the court laid down the following general rule: "If a guaranty insurance bond is fairly open to two constructions, one of which will uphold and the other defeat the claim of the insured, that should be adopted which is most favorable to the insured; but the plain intention of the parties cannot be nullified by construction." Syl. ¶ 2. The jury had found that there was no failure to retain. The court, while adopting and approving the liberal rule of construction of such contracts, reversed the judgment on the ground that the owner had failed to comply with a provision of the contract requiring him within a reasonable time to notify the com-

pany of the contractor's default. The case is reported in 33 L.R.A.(N.S.) 513, with a quite exhaustive note in which the author says that the case is sustained by the overwhelming weight of authority, and that, if a contract of this kind is ambiguous or fairly open to two constructions, it will be construed favorably to the assured. The Minnesota court in the case just quoted from approves the *pro tanto* rule as applied to the provision requiring that a percentage of the cost price be retained until the completion of the building. This is in accord with the rule that is frequently adopted in construing ordinary insurance policies. The *pro tanto* rule which is followed by some of the courts regards the failure to retain the required percentage as releasing the surety to the extent of the unauthorized payment. Other courts, which follow the same strict interpretation of contracts of this kind as in cases of volunteer or gratuitous sureties, go to the full extent of holding that the failure to retain the required percentage will discharge the surety absolutely and in any event.

The two lines of authorities fairly illustrate the application of the two rules of construction. In the Minnesota case, *supra*, the court approved an instruction of the trial court submitting to the jury the question of fact whether the owner failed to retain the percentage, and this upon the theory that, if there was a failure to retain, "it released the bond *pro tanto* only." On this branch of the question the court said: "It was held in the case of *Simonson v. Grant*, 36 Minn. 439, 31 N. W. 861, that such an overpayment would release the surety absolutely. That case, however, was not, as is this case, one of guaranty insurance, and the rule of strict construction was applied. It would seem to follow logically, from the rule of construction applicable to guaranty insurance, that any overpayment would release the surety company *pro tanto* only." 112 Minn. 295.

No reason is suggested why a surety company may not by its contract require that the usual percentage of the building cost shall be retained until the building is completed, and until it has notice of the default of the contractor and consents to the final payment. We are impressed with the reason and justice of the rule that a surety company, although engaged in the business for profit, should be released from liability to the extent of any payments made in excess of the amount or in advance of the time expressly provided in the bond itself. To hold otherwise would require the courts to make for the parties a new contract, and one not contemplated at the time the contract sued upon was entered into. L.R.A.1915C.

The following authorities are in point on the general proposition: *Backus v. Archer*, 109 Mich. 666, 67 N. W. 913; *Kiessig v. Allspaugh*, 91 Cal. 231, 13 L.R.A. 418, 27 Pac. 655; *Glenn County v. Jones*, 146 Cal. 518, 80 Pac. 695, 2 Ann. Cas. 764; *Fidelity & D. Co. v. Agnew*, 82 C. C. A. 103, 152 Fed. 955; *Shelton v. American Surety Co.* 60 C. C. A. 94, 131 Fed. 210. And as to failure to comply with a condition requiring notice to the surety, see *Knight & J. Co. v. Castle*, 172 Ind. 97, 27 L.R.A. (N.S.) 573, 87 N. E. 976; *George A. Hormel & Co. v. American Bonding Co.* *supra*.

The case of *Fidelity & D. Co. v. Robertson*, 136 Ala. 379, 34 So. 933, cited by plaintiff, appellee, in which it was held that a provision of the kind in question is solely for the benefit of the owner of the building, has been overruled by the case of *First Nat. Bank v. Fidelity & D. Co.* 145 Ala. 335, 5 L.R.A.(N.S.) 418, 117 Am. St. Rep. 45, 40 So. 415, 8 Ann. Cas. 241. In the latter case the Alabama court holds that the failure to comply with a condition in the building contract which provided that the owner might retain payment of certain classes of claims discharged the surety. The case is reported in 5 L.R.A.(N.S.) 418, with a note where many cases from courts which adhere to the rule of absolute discharge of the surety by the failure to retain required percentage are cited, as well as some adhering to the rule that the surety is released only to the extent of the excess payment.

In the case at bar there is little room for the application of the *pro tanto* doctrine, because it appears that a compliance with the requirement would have relieved the surety of all liability. The amount for which the jury found the surety company liable is \$1,423. The contract price was \$34,600; extra work \$141. The association retained the sum of \$5,056. If it had retained \$6,779, which was 20 per cent of the contract price of the building, it would have had on hand more than sufficient to pay the full amount of the judgment obtained against the surety company. The contract of the bonding company is quite different from those in many of the decided cases. The parties saw fit to provide expressly in the bond that no liability should attach to the surety company "unless the said obligee shall deliver written notice to the surety at its office aforesaid, and the consent of the surety thereto obtained, before making to the principal the final payment provided for under the contract herein referred to."

There is no ground for a claim of ambiguity in the phraseology in which this condition is expressed, nor, as already observed,

is there any basis for a misunderstanding of the meaning of the words "final payment," for they are defined in the building contract to which the bond refers.

Words & Phrases, vol. 3, p. 2803, defines a final payment as follows: "A 'final payment' is a last payment. Where a contract provided that a person might retain out of the money payable to the contractor 25 cents per lineal foot for the work done, which money was to be retained for six months, and was to be paid over at the expiration thereof provided that the work should be in good order, such 25 cents per lineal foot is evidently the last or final payment, instead of the payment made within thirty days after the acceptance of the work. *Johnson v. New York*, 48 Hun, 620, 16 N. Y. S. R. 260, 1 N. Y. Supp. 254, 255."

We fully recognize the distinction between ordinary sureties and insurers. *Hull v. Massachusetts Bonding & Ins. Co.* 86 Kan. 342, 120 Pac. 544; *Chicago Lumber Co. v. Douglas*, 89 Kan. 308, 44 L.R.A.(N.S.) 843, 131 Pac. 563. There can be no question of the rule in the case of ordinary volunteer surety. Where a builder has the privilege, as between himself and the contractor, of withholding a percentage of the estimates as the work progresses, as security for the performance of the contract, he is under an obligation to exercise the privilege of the benefit of a volunteer surety. 32 Cyc. 223; 40 Century Dig. title Principal & Surety, §§ 284 et seq. There are cases holding that this rule is not changed by the fact that the surety has received a compensation for executing the bond. *National Surety Co. v. Long*, 79 Ark. 523, 96 S. W. 745.

However, from the cases we have cited in this opinion, it will appear that the weight of authority supports the doctrine that a surety who is compensated for the risk he assumes is not entitled to the benefit of that rule, and can require the withholding of the percentage only when, as in this case, he has specifically contracted for it.

We have carefully examined every case cited by plaintiff, appellee, on this branch of the case. In none of them was there a provision in the bond declaring that no liability should attach to the surety if the owner failed to retain the required percentage. This difference alone is sufficient to deprive the decisions of any force as authority in the present case. In support of the doctrine that the right under the terms of contract to retain 20 per cent of the contract price was exclusively for the benefit of the owner, the plaintiff, in addition to the case overruled by the Alabama court, *supra*, cites *Meyers v. Wood*, 26 Tex. Civ. App. 591, 65 S. L.R.A.1915C.

W. 671. In the opinion in that case the civil court of appeals of Texas cites no authorities, and dismisses the proposition with the mere statement that the right to retain the required percentage was exclusive to the owners, which they might exercise or not as they saw fit, and their failure to do so would not of itself release the sureties. Another case cited is *United States Fidelity & G. Co. v. Baptist Church*, 31 Ky. L. Rep. 520, 102 S. W. 325. There the Kentucky court of appeals held that where excess payments were necessarily made in order to satisfy claims of laborers who otherwise would have asserted liens on the property from which the surety was bound to save the obligee harmless, such payments did not constitute a breach of the building contract sufficient to relieve the surety. No authorities are cited, and the decision turns on the liability of the surety to pay the identical claims advanced by the owner. In the case of *Wolf v. Aetna Indemnity Co.* 163 Cal. 597, 126 Pac. 470, the evidence was held sufficient to justify a finding that there were no premature payments. In *American Surety Co. v. Scott*, 18 Okla. 264, 90 Pac. 7, the contract authorized the retention of 20 per cent. The bond required the owner to retain 15 per cent until the building was completed. It was held that there was no violation of the bond in the payment of all sums up to 15 per cent.

In the case of *Drumheller v. American Surety Co.* 30 Wash. 530, 71 Pac. 25, the question of premature payments was neither involved nor discussed. In *People's Lumber Co. v. Gillard*, 136 Cal. 55, 68 Pac. 576, and *Aetna Indemnity Co. v. Waters*, 110 Md. 673, 73 Atl. 712, the question of premature payments was not involved. In *Blauvelt v. Kemon*, 196 Pa. 128, 46 Atl. 416, there was no provision for retaining a percentage, and, besides, it was found that there was no overpayment. In *Chapman v. Eneberg*, 95 Mo. App. 127, 68 S. W. 974, the 15 per cent was paid according to the express provisions of the contract. Moreover, in the opinion the court expressly approves the *pro tanto* doctrine in a case of failure to comply with a requirement in the bond that a percentage be retained.

In *Illinois Surety Co. v. Garrard Hotel Co.* — Ky. —, 118 S. W. 967, the only question remotely connected with this was upon what sum the 25 per cent should be computed; and it was held that the original contract price plus the extras should be considered.

In *St. John's College v. Aetna Indemnity Co.* 135 App. Div. 480, 120 N. Y. Supp. 496, it was held that the payment was not premature because the amount paid did not ex-

ceed 80 per cent of the work actually done at the time.

In the case of *Allen County v. United States Fidelity & G. Co.* 122 Ky. 825, 93 S. W. 44, it was held that the surety was not discharged because estimates were not certified by the architect; the certificate stating that he was present at the meeting of the building committee for the purpose of ascertaining and certifying in the manner provided by the contract.

In *De Mattos v. Jordan*, 15 Wash. 378, 46 Pac. 402, the owner accepted an order drawn by the contractor for payment of brick and took it out of the next estimate; and also advanced money to pay for material which was in possession of the railway company and without which the work could not proceed. The amount so paid was taken out of the next estimate. These were held not to be premature payments.

We therefore conclude that the bond and the contract are to be construed together, and that the provision in the latter authorizing the association to retain the balance after paying 80 per cent of the estimates required the association, as between itself and the surety company, to retain it; and that the failure to retain the percentage until notice to and consent of the surety, when, by complying with the condition, the association would have had in its hands a sum sufficient to satisfy the claims for which the findings show the surety company was liable on the bond, discharged the surety company from all liability.

It follows that the judgment is reversed, and the cause remanded, with directions to enter judgment for the appellant.

Mason, Smith, and West, JJ., concur.

Johnston, Ch. J., and Burch and Benson, JJ., dissent.

A petition for rehearing having been filed, the following *Per Curiam* response was handed down on May 9, 1914 (92 Kan. 467, 140 Pac. 892):

In the former opinion in this case (90 Kan. 332, 133 Pac. 894), the judgment was reversed and the cause remanded with directions to render judgment for the appellant because of the failure of the association, the owner of the building, to retain the required percentage of the estimates for work and labor furnished until notice to and consent of the surety company. A rehearing was granted on the sole question of whether or not the failure to retain the required percentage caused any loss to the appellant. We find it impossible to determine this from the state of the record. The trial L.R.A.1915C.

court adopted plaintiff's theory of the case, which was that the contract and bond did not require the retention of 20 per cent of the estimates, and submitted the case to the jury upon that theory. We construe the contract differently, and adhere to what was said in the former opinion; but, in view of the fact that the case was tried upon the wrong theory, the judgment will be reversed and remanded, with directions to find the amount of each estimate and the payments thereon, and the amount retained in the hands of the association, and to find whether or not the surety company lost by reason of the failure to comply with this provision of the contract and bond. The appellant is only entitled to defend the action to the extent it has been injured, if any, by such failure.

None of the other questions discussed in the original briefs or in the briefs on rehearing are to be retried.

KANSAS SUPREME COURT.

G. W. HURLESS

v.

H. C. WILEY et al., Admrs., etc., of H. C. Wiley, Deceased, Appts.

(91 Kan. 347, 137 Pac. 981.)

Statute of frauds — written confirmation of parol agreement.

1. Where, after a written contract for the sale of land has been entered into, the seller signs an undertaking to find a purchaser at an advanced price, within a stated time, the buyer may obtain damages for the breach of the agreement evidenced by such subsequent writing, upon proving by parol evidence that the consideration for it was an oral promise to the same effect, made when the original contract was executed.

Contract — to find purchaser — defense.

2. An action for the breach of an agree-

Headnotes by MASON, J.

Note.—The principle upon which the court in *HURLESS v. WILEY* permitted the establishment of a consideration for the subsequent promise to find a purchaser at an advanced price, by proof of an oral promise to the same effect, contemporaneous with the original written contract, is exemplified by cases cited in the notes to *Velten v. Carmack*, 20 L.R.A. 103, and *Shehy v. Cunningham*, 25 L.R.A. (N.S.) 1198 (referred to in the opinion); and see also *Harman v. Fisher*, 39 L.R.A. (N.S.) 157. A different application of the same principle is illustrated by the note to *Anderson v. American Suburban Corp.* 36 L.R.A. (N.S.) 896, on Admissibility of parol evidence as to improvements to be made on tract from which a lot is sold.

ment to find a purchaser for a tract of land at a fixed price, within a stated time, cannot be defeated by showing the impossibility of procuring such a purchaser.

(January 10, 1914.)

APPEAL by the administrators of the contractor from a judgment of the District Court for Finney County in plaintiff's favor in an action brought to recover damages for breach of a contract to find a purchaser for a tract of land at a certain price, within a certain time. Affirmed.

The facts are stated in the opinion.

Messrs. R. W. Hoskinson and Albert Hoskinson, for appellants:

Since the agreement of sale was reduced to writing, parol evidence cannot be introduced to contradict, vary, enlarge, alter, add to, or detract from the terms of that written instrument.

9 Enc. Ev. 321; Atchison, T. & S. F. R. Co. v. Truskett, 67 Kan. 26, 72 Pac. 562; Samson Cement Plaster Co. v. Heller, 70 Kan. 884, 78 Pac. 1115; Rodgers v. Perault, 41 Kan. 385, 21 Pac. 287; Robieson v. Royce, 63 Kan. 886, 66 Pac. 646; Cornell v. St. Louis, K. & A. R. Co. 25 Kan. 613; Ehrsam v. Brown, 64 Kan. 467, 67 Pac. 867.

There was no valuable consideration for the subsequent contract to sell the land at \$30 per acre.

9 Cyc. 349; Schuler v. Myton, 48 Kan. 282, 29 Pac. 163; 9 Enc. Ev. 358; Jones v. Risley, 91 Tex. 1, 32 S. W. 1027; Runkle & Fouse v. Kettering, 127 Iowa, 6, 102 N. W. 142; Gaar, S. & Co. v. Green, 6 N. D. 48, 68 N. W. 318; McCarthy v. Hampton Bldg. Asso. 61 Iowa, 287, 16 N. W. 114.

An undertaking that another's land shall sell for a given sum on a certain day is insufficient to support a promise, on the ground that a person cannot compel a sale of another's property.

Clark, Contr. 2d ed. p. 134; Stevens v. Coon, 1 Pinney (Wis.) 356.

Messrs. H. O. Trinkle and Foster & Gaskill for appellees.

Mason, J., delivered the opinion of the court:

H. C. Wiley and G. W. Hurless entered into a written contract by which the former agreed to sell, and the latter to buy, a tract of land at \$25 an acre, and in pursuance of the contract a deed was delivered, conveying the land from a third person to Hurless, who paid for it. A week after the execution of the contract Wiley signed and delivered to Hurless an agreement to find a purchaser for the land at \$30 an acre within the ensuing year. No buyer was found, and Hurless sued Wiley for a breach L.R.A.1915C.

of the contract. The plaintiff recovered a judgment, and an appeal is taken by the administrators of the defendant.

The appellants maintain that the contract sued upon is unenforceable because not supported by a sufficient consideration. The plaintiff contends, and the fact must be regarded as established by the judgment, that at the time the first written contract was made the defendant orally agreed to find a buyer at \$30 an acre within the year, this agreement being a part of the inducement for the purchase, and that the subsequent writing was given in pursuance of this promise. The appellants insist that to sustain a recovery on this ground would be to allow the terms of the written contract to be varied by parol.

The agreement on the part of the seller that he would find a purchaser for the property at a certain price within a fixed time appears to be one of that class which may be shown by parol to have been entered into at the time of the written contract of sale, although not mentioned or referred to therein. It has relation to the consideration of the contract, and is a part of its inducement. Such matters are ordinarily allowed to be shown by oral evidence, where they do not contradict the terms of the written instrument. 17 Cyc. 648, 693; notes in 17 L.R.A. 274 and 25 L.R.A.(N.S.) 1194. A somewhat similar question, concerning which there is some conflict, is whether the purchaser of a lot may show an oral agreement by the seller to make certain improvements on the tract of which it is a part. Note in 36 L.R.A.(N.S.) 896. The present situation seems to be one where the connection between the two writings might be shown by parol. This likewise is a matter concerning which there is a want of harmony in the authorities. 17 Cyc. 647. See also Schneider v. Anderson, 75 Kan. 11, 121 Am. St. Rep. 356, 88 Pac. 525; Hendricks v. Brooks, 80 Kan. 1, 133 Am. St. Rep. 186, 101 Pac. 622. We prefer, however, to put the decision on this ground: If originally the buyer would not have been permitted to show that at the time of his purchase, and as an inducement thereto, the seller orally agreed to find a new buyer at an advanced price within the year, the reason is that the law protects the seller from having his documentary evidence overthrown by mere word of mouth. When he reduced the promise to writing, the requirement of the law was met. The reason for his protection no longer existed. Oral evidence was necessary, not to prove the promise, but to show for what it was given. A consideration was implied from the contract being in writing, and its character was properly shown by parol.

The appellants also contend that no liability could attach for the breach of the contract to find a purchaser for the land at \$30 an acre, because that was impossible, such a purchaser not being procurable. The performance of the agreement was not impossible in any such sense as to relieve the defendant from responsibility. See *Hampe v. Sage*, 87 Kan. 536, and cases therein cited on page 541, 125 Pac. 53.

The judgment is affirmed.

Petition for rehearing denied.

KANSAS SUPREME COURT.

ELIZABETH PARKS

v.

C. C. YOST PIE COMPANY et al., Appts.

(93 Kan. 334, 144 Pac. 202.)

Food — guaranty of wholesomeness.

1. A dealer who sells human food for immediate consumption does so under an implied representation and guaranty that it is wholesome for the purpose for which it is sold.

Same — liability of manufacturer.

2. A manufacturer who prepares food for human consumption and places it in the hands of a dealer for sale is responsible in damages to the widow of a consumer who procures such food from the dealer and loses his life by partaking of such food.

(November 14, 1914.)

APPEAL by defendants from a judgment of the District Court for Wyandotte County in plaintiff's favor in an action brought to recover damages for the death of plaintiff's intestate, which was alleged to have been caused by defendants' negligence. Affirmed.

The facts are stated in the opinion.

Messrs. E. S. Herider, E. S. McNany, M. L. Alden, and Nathan Cree, for appellants:

There was no evidence to sustain the verdict against defendant Alfes, and the verdict against him was given under the influence of passion and prejudice and should have been set aside.

Headnotes by SMITH, J.

Note. — As to liability of manufacturer or seller of food products, see notes to *Tomlinson v. Armour & Co.* 19 L.R.A. (N.S.) 923, and *Mazetti v. Armour & Co.* 48 L.R.A. (N.S.) 213, 219.

As to the liability for serving unfit food, see notes to *Doyle v. Fuerst & Kraemer*, 40 L.R.A. (N.S.) 480, and *Merrill v. Hodson*, L.R.A.1915B, 481. L.R.A.1915C.

Sundgren v. Stevens, 86 Kan. 154, 39 L.R.A. (N.S.) 487, 119 Pac. 322; *Theobald v. Shepard Bros.* 75 N. H. 52, 71 Atl. 26; *Spaulding Mfg. Co. v. Holiday*, 32 Okla. 823, 124 Pac. 35; *Hooper v. Story*, 155 N. Y. 171, 49 N. E. 773; *D. M. Osborne & Co. v. Huntington*, 37 Minn. 275, 33 N. W. 789; *Edwards v. King*, 27 Okla. 403, 112 Pac. 961; *Hassell v. Morgan*, 27 Okla. 453, 112 Pac. 969; *Terry v. Creed*, 28 Okla. 857, 115 Pac. 1022; *Howard v. Farrar*, 28 Okla. 490, 114 Pac. 695; *Consor v. Andrew*, 61 Or. 483, 123 Pac. 46; *Elk Realty Co. v. Boyce*, 76 Misc. 560, 135 N. Y. Supp. 576; *Candia v. Pescia*, 120 N. Y. Supp. 32; *Ætna Ins. Co. v. Eastman*, — Tex. Civ. App. —, 72 S. W. 431; *Goldstone v. Rustemeyer*, 21 Idaho, 703, 123 Pac. 635; *Tyler v. Hoover*, 92 Neb. 221, 138 N. W. 128; *Chouquette v. Southern Electric R. Co.* 152 Mo. 257, 53 S. W. 897.

If the judgment is set aside as to defendant Alfes, it should also be set aside as to the defendant pie company.

Salisbury v. La Fitte, 22 Colo. App. 90, 123 Pac. 124; *Huckabee v. Nelson*, 54 Ala. 12; *Altman v. Hofeller*, 152 N. Y. 498, 46 N. E. 961; *Holz v. Rediske*, 116 Wis. 353, 92 N. W. 1105; *East Baltimore Lumber Co. v. K'Nessett Israel Aushe S'Phard Congregation*, 100 Md. 689, 62 Atl. 575; *Steinbuchel v. Wright*, 43 Kan. 307, 23 Pac. 560; *Bell v. Morse*, 48 Kan. 601, 29 Pac. 1080; *Drumm v. Cessnum*, 58 Kan. 331, 49 Pac. 78.

The jury could not award damages against the defendants for the benefit of plaintiff Melissa Conn, as she suffered no pecuniary loss.

Hulbert v. Topeka, 34 Fed. 510; *Garrett v. Louisville & N. R. Co.* 117 C. C. A. 109, 197 Fed. 715, 3 N. C. C. A. 769; *Louisville. N. A. & C. R. Co. v. Goodykoontz*, 119 Ind. 111, 12 Am. St. Rep. 371, 21 N. E. 472; *Pittsburgh, C. C. & St. L. R. Co. v. Reed*, 44 Ind. App. 635, 88 N. E. 1080; *Missouri P. R. Co. v. Henry*, 75 Tex. 220, 12 S. W. 828; *St. Louis, A. & T. R. Co. v. Johnston*, 78 Tex. 536, 15 S. W. 104; *Vining v. Rexford*, 120 C. C. A. 418, 201 Fed. 904; *Texas & N. O. R. Co. v. Mills*, — Tex. Civ. App. —, 143 S. W. 690; *Missouri, K. & T. R. Co. v. James*, 55 Tex. Civ. App. 588, 120 S. W. 269; *Texas Portland Cement & Lime Co. v. Lee*, 36 Tex. Civ. App. 482, 82 S. W. 306; *Standard Light & P. Co. v. Muncey*, 33 Tex. Civ. App. 416, 76 S. W. 931; *St. Louis Southwestern R. Co. v. Bishop*, 14 Tex. Civ. App. 504, 37 S. W. 764; *Gulf, C. & S. F. R. Co. v. Younger*, 10 Tex. Civ. App. 141, 29 S. W. 948.

Messrs. L. C. True, E. C. Little, and George W. Littick for appellee.

Smith, J., delivered the opinion of the court:

This action was brought by Elizabeth Parks, widow of Robert P. Parks, and Melissa Conn, daughter of Elizabeth Parks and Robert P. Parks, who also appears as next friend to Ada Belle Parks, a minor sister about twelve years of age. The action was brought to recover damages for the death of Robert P. Parks, the husband and father of the plaintiffs.

It is alleged that Parks came to his death from ptomaine poisoning resulting from eating a pie, or a portion thereof, which was manufactured by the defendant pie company and sold by it to Joseph Alfes, a retail grocery merchant, who in turn sold and delivered it to the deceased as suitable food for himself and family; that the deceased ate a portion thereof, and was thereby poisoned and made sick, and that his death resulted therefrom within twenty-four hours after partaking of such pie; that the pie contained deleterious ingredients in its manufacture, or had been infected with poison, which made it unwholesome and dangerous to human health and life, and that the defendants aided and abetted each other in placing the pie upon the market and selling it for use as human food; that the defendants were guilty of negligence in the manufacture and in the methods of handling the pie, and that such negligence was gross and wanton in endangering the health and life of Robert P. Parks and directly causing his death; that prior to such injury Robert P. Parks was a strong, healthy man about fifty-four years of age, and was industrious and prosperous, so that he at all times provided the plaintiffs, who were dependent upon him, with all the necessities and many of the luxuries of life. It is also alleged that Robert P. Parks died intestate, leaving as his sole heirs the plaintiffs and one other minor child, who has since died single and without issue; that the plaintiffs were dependent upon the deceased for their support, and no administrator had been appointed for the estate of Robert P. Parks. Plaintiffs claimed actual damages in the sum of \$5,000 and exemplary damages for the same amount, and judgment for \$10,000 was prayed for.

The defendant pie company in answer admitted its incorporation, and denied all the other allegations of the petition. The defendant Alfes also admitted the incorporation of the pie company, and made general denial of all the other allegations of the petition.

There is considerable conflict in the evidence as to the selling of the pie by Alfes, but there is sufficient evidence, if believed by

the jury, to justify their finding that the defendant corporation manufactured the pie in question, sold and delivered it to the defendant Alfes, to be sold in his usual course of business for human food; and there is sufficient evidence to justify the finding that Alfes sold the pie, through a son of the deceased, to the deceased for the purpose of human food. It appears from the counter abstract that one of the attorneys for the defendants in his opening statement to the jury said: "Joe Alfes during all this time purchased pies, and kept them for sale, that were supplied by the Rushton Baking Company, . . . and likewise also had the pies of the Yost Pie Company, but those pies were kept—the pie wagon came every day, and at the end—or on that day the man who had charge of the route went into Mr. Alfes's store in his show case, looked over the pies that were there to ascertain how many he needed, inspected the pies carefully to ascertain whether or not any of the pies were old. If they were old (and in warm weather they became old quicker than in cold weather, as you all know), he would take out those pies and put in fresh ones; and the pies that were taken out were taken to the plant in Missouri and thrown away. Where they were used afterwards has reference—sometimes some of the employees, it will be shown, took them to feed their chickens or their pigs, and they were never used after they once came back into the possession of a driver as a stale pie."

That this statement was made does not seem to be controverted, and by the usual rule should be taken as an admission of facts, so far as it goes.

During the trial the action was, by agreement, dismissed on behalf of Melissa Conn and Ada Belle Parks, and proceeded in the name of Elizabeth Parks, as the widow of Robert P. Parks; no personal representative of the estate of Robert P. Parks having been appointed. The widow is expressly authorized to maintain such an action where no personal representative has been appointed, by § 6015 of the General Statutes of 1909 (Code Civ. Proc. § 420).

Several instructions were requested by defendants, which were all refused, but the substance of many of them was incorporated in the instructions given by the court.

The degree of care required of a manufacturer or dealer in human food for immediate consumption is much greater by reason of the fearful consequences which may result from what would be slight negligence in manufacturing or selling food for animals. In the latter a higher degree of care should be required than in manufacturing or selling ordinary articles of commerce.

A manufacturer or dealer who puts human food upon the market for sale or for immediate consumption does so upon an implied representation that it is wholesome for human consumption. Practically he must know it is fit or take the consequences, if it proves destructive. *Tomlinson v. Armour & Co.* 75 N. J. L. 748, 19 L.R.A. (N.S.) 923, 70 Atl. 314.

The usual rule by which the existence or absence of negligence is to be determined in a particular case is whether the care exercised was commensurate with the danger reasonably to be apprehended, or as the trial court phrased it: "Ordinary care in a given case is to be determined by the circumstances and facts of that particular case, and is [must be] commensurate with the danger and the possible and probable results of a lack of such care and prudence."

See *Malone v. Jones*, 91 Kan. 815, L.R.A. 1915A, 328, 139 Pac. 387; *id.*, 92 Kan. 708, L.R.A. 1915A, 331, 142 Pac. 274.

It is strenuously urged that the court erred in its sixth instruction, in which the jury were told in substance that, if the plaintiff was entitled to recover, she was entitled to such sum as would be pecuniary compensation for the loss she and her two daughters had sustained, not considering the suffering of the deceased nor the wounded feelings of the survivors. It is contended that the married daughter had suffered no pecuniary loss.

The verdict and judgment were for \$3,000. No special questions were requested or submitted, the answers to which might have determined the items which made up the aggregate amount of the verdict, and the amount does not necessarily suggest that any sum was allowed as damages to or on account of the married daughter.

We find no substantial error in the trial, and the judgment is affirmed.

Petition for rehearing denied.

KENTUCKY COURT OF APPEALS.

FRED H. HAYDEN, Appt.,
v.

CHICAGO, MEMPHIS, & GULF RAIL-
ROAD COMPANY et al.

(— Ky. —, 170 S. W. 200.)

Carrier — alighting from moving train — negligence.

1. A passenger is negligent in alighting from a slowly moving train in the dark, on the side opposite the station, at a place which he knows to be more or less encumbered by *débris*, after he has stood on the L.R.A. 1915C.

step some time waiting for the train to slow down so that he could alight, which will prevent his holding the carrier liable for the injury in case he trips and falls under the train, although the train jerks at the moment he is stepping off.

Evidence — injury to passenger — act of other passengers.

2. Upon the question of the negligence of a passenger in alighting from a moving train in the dark, on the opposite side from the station, where he knows there might be *débris*, evidence is not admissible that other passengers had alighted on that side at that place.

Trial — question for court — contributory negligence.

3. The question of contributory negligence is for the court where the facts are uncontroverted and but one conclusion may fairly be drawn therefrom.

(November 12, 1914.)

Note. — Negligence of passenger in getting on or off moving train.

This note is supplementary to notes to *Carr v. Eel River & E. R. Co.* 21 L.R.A. 354, and *Hoylman v. Kanawha & M. R. Co.* 22 L.R.A. (N.S.) 741.

As to negligence of passenger in going upon platform or steps of car just before reaching station, see note to *Heinze v. Interurban R. Co.* 21 L.R.A. (N.S.) 715.

The negligence of a passenger in getting on or off a moving street car is treated in notes to *Jagger v. People's Street R. Co.* 38 L.R.A. 786, and *Fosnes v. Duluth Street R. Co.* 30 L.R.A. (N.S.) 270.

The contributory negligence of a child in jumping on or off a moving railroad train is treated in a note to *Baker v. Seaboard Air Line R. Co.* 29 L.R.A. (N.S.) 846.

Generally as to duty to prevent passenger from leaving train while in motion, see note to *Hanson v. Chicago, R. I. & P. R. Co.* 31 L.R.A. (N.S.) 624.

As to the duty of a carrier to prevent a minor passenger from alighting from a moving car, see *Kruger v. Omaha & C. B. Street R. Co.* 17 L.R.A. (N.S.) 101.

As to duty to see that a passenger has alighted before starting train at station, see note to *Chicago, B. & Q. R. Co. v. Lampman*, 25 L.R.A. (N.S.) 217.

As to duty of carrier to one who goes upon a train to assist a passenger, see notes to *Arkansas & L. R. Co. v. Sain*, 22 L.R.A. (N.S.) 910, and *Chesapeake & O. R. Co. v. Bell*, 28 L.R.A. (N.S.) 773.

Alighting from moving train—in general.

Supplementing notes in 21 L.R.A. 358, and 22 L.R.A. (N.S.) 742.

Particular circumstances may in some cases justify the court in declaring as matter of law that a passenger is negligent in alighting from a train while in motion.

Thus a passenger was held guilty of contributory negligence in *Hannestad v. Chicago, M. & St. P. R. Co.* — Iowa, —, 118 N. W. 38, where she did not start to leave

APPEAL by plaintiff from a judgment of the Circuit Court for Fulton County in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by the negligence of defendant's servants. Affirmed.

The facts are stated in the opinion.

Messrs. Hester & Hester for appellant. Messrs. R. V. Fletcher, Trabue, Doolan, & Cox, and R. G. Robbins with Messrs. Robbins & Davis, for appellees:

Plaintiff was guilty of contributory negligence in leaving the train while in motion in the dark and on the wrong side of the railroad.

Glasecock v. Cincinnati, N. O. & T. P. R. Co. 140 Ky. 724, 131 S. W. 779; 2 Wood,

the car until after it had started, and then voluntarily jumped off at a point some distance beyond the station.

The general rule, however, is that it is a question for the jury to determine, in view of all the circumstances of the particular case.

The rule in Kentucky and Alabama is that a person who steps from a slowly moving train and is injured is not as a matter of law guilty of contributory negligence, and that he may recover if his conduct in so doing is that of an ordinarily prudent man under the circumstances. *Chesapeake & O. R. Co. v. Dean*, — Ky. —, 170 S. W. 167; *Louisville & N. R. Co. v. Dilburn*, 178 Ala. 600, 59 So. 438.

So, whether a passenger exercised reasonable care in alighting from a moving train was held a question for the jury in *Chesapeake & O. R. Co. v. Robinson*, 135 Ky. 850, 123 S. W. 308.

The court in *Illinois C. R. Co. v. Dallas*, 150 Ky. 442, 150 S. W. 536, gave as an instruction to the jury that the calling of the station by the brakeman and the opening of the door of the car was an invitation to the passengers to get ready to alight, but was an invitation to alight only after the train had stopped, and that the jury should find for the defendant if they believed from the evidence that the decedent was not knocked or thrown from the car by a negligent and unnecessary jerk of the train, but voluntarily attempted to get off before the train stopped, and was thus injured, or if he was not a passenger on the car. The result, however, upon this hypothesis would seem to be referable to lack of negligence on the part of carrier, rather than contributory negligence on the part of passenger.

In *Ft. Worth & D. C. R. Co. v. Taylor*, — Tex. Civ. App. —, 162 S. W. 967, plaintiff was injured in alighting from a moving train. She started toward the front of the train to alight while it was standing, and could have done so in safety had she not changed her course on the advice of some passengers, who told her that there were no doors open the way she was going. It was held a question for the jury whether L.R.A.1915C.

Railroads, § 305; 2 Rorer, Railroads, chap. 52; *Pennsylvania R. Co. v. Aspell*, 23 Pa. 150, 62 Am. Dec. 323, 6 Am. Neg. Cas. 225.

Hannah, J., delivered the opinion of the court:

Fred H. Hayden was injured in alighting from a passenger train operated by the Chicago, Memphis, & Gulf Railroad Company, at a flag station known as "Miller's Spur" in Fulton county, and instituted this action in the Fulton circuit court against the railroad company to recover damages therefor. Upon a trial, the court at the close of the evidence for the plaintiff directed a verdict for the defendant. Plaintiff appeals.

she was, under the circumstances, negligent in relying on the statements of third persons, whereby she was injured.

—insufficient stop.

Supplementing Note in 22 L.R.A.(N.S.) 745.

It is generally held a question for the jury to determine whether a passenger is negligent in alighting from a moving train after an insufficient stop. See cases in earlier note.

Where plaintiff, an old woman, in order to avoid the more serious consequences of falling from the bottom step, being unable to get back upon the platform, attempted to protect herself by stepping forward from a very slowly moving car, it was held in *Findley v. Central of Georgia R. Co.* 7 Ga. App. 180, 66 S. E. 485, that this did not conclusively show a case of contributory negligence.

So, where a railroad company invites a passenger to alight at a station, and fails to stop a reasonable time as required by law in order that he might alight in safety, the passenger, who in order to avoid being carried beyond his destination attempts to alight from the train while it is moving slowly, and is thereby injured, is not guilty of such contributory negligence as will *per se* defeat his recovery for such injury. *Louisville & N. R. Co. v. O'Brien*, 1 Tenn. C. C. A. 492.

Although the stop was so short as not to afford a reasonable time for alighting from the train, the court in *Southern R. Co. v. Morgan*, 171 Ala. 294, 54 So. 626, granted a new trial because the weight of the evidence supported defendant's plea of contributory negligence, where it was shown that a passenger with suit case in hand left a lighted car, and blindly stepped or leaped sideways in the dark, from a train which was moving so rapidly as to cause him to fall heavily to the ground.

—failure to stop.

Supplementing notes in 21 L.R.A. 360, and 22 L.R.A.(N.S.) 747.

The railroad track at Miller's Spur runs approximately east and west. Immediately to the west of the spur or side track a public road crosses the railroad. About 10 feet to the east of this county road and on the south side of the main track is a platform some 15 or 20 feet long; and on the north side of the main track is the side track. Between this side track and the main track is a V-shaped piece of ground, which at the time plaintiff was injured was encumbered with wire, logs, ties, and other *débris* usually found around a siding where timber products are loaded and shipped. On November 11, 1913, plaintiff boarded a Chicago, Memphis, & Gulf passenger train at Tiptonville *en route* to Miller's Spur, where

he lived. The train was east bound. It arrived at the spur about 8 o'clock P. M. When the station was announced, plaintiff, who was in the smoker, went out the rear door thereof and turned to his right, down the steps on the rear end of the smoker, and on the north side of the train. The platform at the spur, as has been seen, was on the south side of the track; but plaintiff lived on the north side, and preferred to alight on that side. The brakeman was standing on the front platform of the coach immediately behind the smoker, and on the platform immediately opposite that where the plaintiff was, when plaintiff stepped down the steps. The manner in which he

Ordinarily where a train does not stop as expected a passenger is not justified in leaping therefrom, and such conduct has been held in some cases to be contributory negligence as a matter of law. See cases cited in earlier notes.

Thus, where a train passed a station at the rate of 20 miles an hour, a passenger was held guilty of negligence as a matter of law in alighting therefrom. *Texas & N. O. R. Co. v. Wallace*, —Tex. Civ. App. —, 139 S. W. 1052.

But that contributory negligence in such case is for the jury was held—in addition to the cases cited in note in 22 L.R.A. (N.S.) 748—in the following cases:

—*Kansas City Southern R. Co. v. Worthington*, 101 Ark. 128, 141 S. W. 1173. The court said that the failure to stop a train at a station will not justify a passenger in attempting to alight under circumstances which are obviously hazardous. But if the necessity of leaving the train while in motion has been put upon the passenger by the negligence of the carrier, by failing to stop its train at the station, then contributory negligence will not be imputed to the passenger from the fact of his attempting to alight from the moving train, if, under the circumstances of the case, such act was not a reckless or imprudent one;

—*Yazoo & M. Valley R. Co. v. Beattie*, —Miss. —, 49 So. 609, where the porter called the station, and the train slowed down nearly to a stop, and, to escape falling and perhaps getting under the wheels from the pressure of those following, plaintiff jumped and was thrown against a box car receiving severe injuries;

—*Evans v. Southern R. Co.* 12 Ga. App. 319, 77 S. E. 197, where the train slowed down at a station but did not stop as required, it not appearing that the danger attending the attempt to alight was so great as to be obvious to any person of common prudence and ordinary intelligence;

—*Puget Sound Electric R. Co. v. Felt*, 104 C. C. A. 402, 181 Fed. 938, where there was testimony tending to show that the railroad company either did not stop at all, or did not stop at the station for a sufficient length of time to enable the pas-

sengers to get off, and the train was moving very slowly when he alighted;

—*Pierce v. Georgia R. & Bkg. Co.* 9 Ga. App. 666, 72 S. E. 66, where the train was moving slowly, notwithstanding that the passenger alighted in the midst of a switch yard where there was likely to be a number of moving trains, his injury not having been caused by any of those dangers.

—before reaching stop.

Supplementing note in 22 L.R.A. (N.S.) 748.

The opening of the car doors of a train approaching a station is not an invitation to a passenger to alight before the train stops, and if he does so while the train is moving rapidly he is guilty of negligence. *Glascok v. Cincinnati, N. O. & T. P. R. Co.* 140 Ky. 720, 131 S. W. 779.

So, a passenger who has every reasonable opportunity to ascertain whether a train from which he is about to alight is still in motion and fails to assure himself that the train has stopped sufficiently to permit him to alight without danger, cannot hold the railroad responsible for injuries received while getting off the moving train. *Morris v. Illinois C. R. Co.* 127 La. 445, 31 L.R.A. (N.S.) 629, 53 So. 698.

But plaintiff's negligence in alighting from a moving train was held a question for the jury in *Owens v. Atlantic Coast Line R. Co.* 152 N. C. 439, 67 S. E. 993, where it was shown that the conductor had not only slowed down the train at a certain station, but had invited and encouraged plaintiff to jump, and just as he was about to do so, the train started up more rapidly and threw him to the ground.

And in *Wood v. Illinois C. R. Co.* 167 Ill. App. 644, a passenger was held not guilty of contributory negligence as a matter of law where, supposing the train to be stopped, he alighted, grasping with one hand the rod or rail of the coach and holding his valise with the other. The train was not stopped, and its motion was such that he was taken off his feet; and though he hung to the rail of the car with one hand, his shoulder hit upon something

was injured may now be described in the plaintiff's own words:

"I started to step down off of the train. The train was rolling up. I thought once I would step, and I said, 'I will wait until it rolls over another turn,' and it rolled over, going just about like a man in a slow walk. I thought it was safe to step down, and I stepped down; and the train overbalanced me, jerked me backward, and as I was getting my balance and come forward, I stepped three or four steps, and stumped my foot against something."

Plaintiff fell with his arm across the rail, and his forearm was so badly mangled that

amputation was necessary. The place where plaintiff stepped off was approximately opposite the east end of the platform. The object which caused him to stumble and fall was a railroad cross-tie which was lying on the north side of the main track about 8 to 12 feet to the west of the point where plaintiff struck the ground when he alighted. Plaintiff testified that just as he stepped off of the train, a sudden increase in the speed of the train caused him to lose his balance. He does not contend that he was jerked off, however, but admits that he stepped off voluntarily. He said that he took three or four steps after he got off on

causing him to release his hold on the rail, so that he fell under the wheels, receiving the injuries complained of. It was found that the train passed about 50 feet beyond the spot where he was found lying. A later appeal of this case, 185 Ill. App. 180, does not involve this question.

So, where a passenger hampered with bundles, alighted as a train was coming to a stop at a station, and was thereby injured, his negligence was held a question for the jury in *Ardisson v. Illinois C. R. Co.* 249 Ill. 300, 94 N. E. 501.

Whether or not a thirteen-year old boy was negligent in attempting to leave a train while it was in motion must be determined by ascertaining whether or not the ordinary boy of his age and experience, and with his knowledge of the situation and its dangers, would have done what he did. *Kam-bour v. Boston & M. R. Co.* — N. H. —, 45 L.R.A.(N.S.) 1188, 86 Atl. 624. (Generally as to contributory negligence of child in jumping on or off a moving train, see note in 29 L.R.A.(N.S.) 846.)

A passenger, however, was held not guilty of negligence in *Indiana Union Traction Co. v. Swafford*, 179 Ind. 279, 100 N. E. 840, in alighting from a moving interurban car whereby she was injured, where she mistakenly thought the train had come to a stop, and was justified in such a conclusion, since it was dark, she inexperienced, and the conductor, after calling out the stops, set and then released the brake, causing the train to move along slowly with no noise or jar of motion.

So, according to *Moses v. Boston & M. R. Co.* 76 N. H. 570, 79 Atl. 21, it is not negligence for a passenger on a railroad train to attempt to leave the car before the station is announced; the court observing that the case must be decided upon the common knowledge of mankind upon the subject, that there is no statute requiring passengers to remain in the car until the station is announced, and it is not common knowledge that this is what the ordinary man would do.

—after sufficient stop.

Supplementing note in 22 L.R.A.(N.S.) 749.
L.R.A.1915C.

An old and infirm woman was held in *Nashville, C. & St. L. R. Co. v. Casey*, 1 Ala. App. 344, 56 So. 28, guilty of contributory negligence in attempting, with the aid of her son, to alight from a train after it had started.

But in *St. Louis, I. M. & S. R. Co. v. Pate*, 90 Ark. 135, 118 S. W. 260, where a passenger in attempting to alight from a slowly moving train stepped upon a plank in the station platform negligently permitted to become decayed, broken, uneven, and loose, which gave way under him and caused him to slip under the moving train, resulting in injuries which caused his death, it was held that there was evidence enough to show that the negligence of the passenger, if any, did not contribute to his injury, or, at least, to leave that fact in doubt and a question for the jury.

—by direction or invitation of those in charge of the train.

Supplementing notes in 21 L.R.A. 361, and 22 L.R.A.(N.S.) 751.

The general rule of law applicable to the case of a person alighting from a moving train is that a passenger is not guilty of negligence *per se* in jumping from a moving train by the advice or order of the conductor or any other authorized servant of the carrier on whose opinion or judgment in the matter he has a right to rely, if the danger of such act would not be apparent to a man of ordinary prudence. *Farley v. Norfolk & W. R. Co.* 67 W. Va. 350, 27 L.R.A.(N.S.) 1111, 67 S. E. 1116.

So it has been held that a passenger is not *per se* negligent in alighting from a slowly moving train pursuant to conductor's orders. But the question of contributory negligence is for the jury. *Lake Erie & W. R. Co. v. Huffman*, 177 Ind. 126, 97 N. E. 434, Ann. Cas. 1914C, 1272; *Galveston, H. & S. A. R. Co. v. Krenek*, — Tex. Civ. App. —, 138 S. W. 1154; *Trinity Valley & N. R. Co. v. Green*, — Tex. Civ. App. —, 154 S. W. 278; *Ft. Worth & R. G. R. Co. v. Keith*, — Tex. Civ. App. —, 163 S. W. 142.

So, where a porter told a passenger to step off the train, assuring her that it was going very slowly and that she could do so with safety, whether such passenger was

the ground, staggering in an effort to regain his balance, and fell over the cross-tie. By his own testimony, and by that of one of his witnesses who examined the marks on the ground a short time after plaintiff was injured, it was shown that these three or four steps were taken in the direction opposite to which the train was moving. Just how this is to be accounted for we are at a loss to understand, and the record does not disclose. If he stepped off with his face turned in the direction in which the train was moving, the three or four steps doubtless would have been taken in that direction. On the other hand, had he stepped off

with his face to the rear of the train the effect seemingly would have been to have thrown him immediately upon his back, or at least to have caused a backward staggering in the direction in which the train was moving until he overcame the momentum caused by the movement of the train, and regained his equilibrium. Plaintiff, however, contended that he staggered toward the rear of the train in an effort to recover his balance, having lost his balance in alighting, owing to the sudden acceleration of the speed of the train. This sudden increase of speed, it appears, was in response to a signal given to the engineer from the

guilty of negligence in alighting was in *St. Louis, I. M. & S. R. Co. v. Plott*, 108 Ark. 292, 157 S. W. 385; held a question for the jury.

Where the railway company fails to stop its train at the destination of a passenger, and as it is passing the station the conductor of the train advises and directs the passenger to alight from the train while it is moving at a speed of from 3 to 4 miles an hour, the question whether the passenger who acts on the direction of the conductor and is injured is guilty of contributory negligence is one for the determination of the jury. *Walters v. Missouri P. R. Co.* 82 Kan. 739, 28 L.R.A.(N.S.) 1058, 109 Pac. 173.

But a passenger who attempts to alight from a moving railroad train, when he knows it is dangerous to do so, and is injured thereby, is guilty of such negligence as will preclude recovery, notwithstanding he may have been directed or told by the conductor to get off. *Farley v. Norfolk & W. R. Co.* 67 W. Va. 350, 27 L.R.A.(N.S.) 1111, 67 S. E. 1116. In the above case the court stated that one is not bound to assume the risk of a known danger because he is directed to do so by another. He must think and act for himself, and if he relies upon another's judgment, and does an act contrary to his own sense of prudence he is negligent.

Where it was alleged that a negro passenger who had entered a coach for white persons was injured by jumping from a moving train in obedience to the conductor's command to "get off here and go to the nigger coach, where you belong," the court in *Florida East Coast R. Co. v. Geiger*, 64 Fla. 282, 60 So. 753, said: "It seems clear that even if by reason of the well-recognized status and yielding disposition of the members of the colored race in the presence of commanding authority, there was some incentive for the plaintiff, a colored man, to reach the colored coach by alighting and getting on again, rather than to ask permission or assert a right to pass through the white coach to the colored coach, or to remain on the platform until he reached a place of safety, yet there was under the circumstances no reasonable occasion or excuse for the plaintiff, a man of twenty-

three years of age, and apparently accustomed to travel, to jump off the moving train against a truck that he could easily have seen; it being daylight. The plaintiff testifies that he was not being threatened by the conductor; and there appears to be nothing to justify a fear of personal violence from the conductor."

In *Chicago, R. I. & P. R. Co. v. Claunts*, 99 Ark. 248, 138 S. W. 332, plaintiff, a passenger who knew and had been informed that the train would not stop at a certain station, on hearing two blasts of the whistle which he thought was a signal to stop, informed the brakeman that he wished to alight, whereupon the brakeman opened the vestibule door, saying, "All right." The plaintiff then went down on the steps of the coach preparatory to alighting from the train, and stood on the steps while the train was still in motion, waiting for it to stop. The train, however, instead of further slackening its speed increased it, and the plaintiff, losing his balance and fearing that he would fall, jumped from the train on to the station platform and was injured. The court, in holding the plaintiff guilty of contributory negligence under the circumstances, stated "that the brakeman in answering, 'all right,' indicated only that if the train did actually stop at that place the plaintiff could get off." The opening of the vestibule was only to carry out this request made by plaintiff, and to make preparations to permit him to get off the train at that place in the event it stopped there. But no employee on the train directed plaintiff to go on the coach platform or on the coach steps, or invited him to do so. At the most the brakeman only acceded to his request that he be permitted to get off the train in event that it made a stop at this station. Ordinarily a passenger is not justified in being on the steps of a coach until the train has come to a stop; and the court was of the opinion that under the circumstances of this case the plaintiff was not justified in going and remaining on the steps of the coach while the train was in motion and before it had stopped, by any direction or conduct of any of defendant's employees. While it is true, observed the court, that ordinarily it is a question of fact to be determined by a

rear platform of the rear coach, and from the south side of that platform. Why this signal was given the evidence fails to disclose. The trial court held that plaintiff was guilty of contributory negligence as a matter of law, and for that reason directed a verdict for the defendant.

1. The general rule is that ordinarily it is not negligence *per se* for a passenger to alight from a moving train, when the train is proceeding at such a low rate of speed that it is safe to so alight. *Chesapeake & O. R. Co. v. Robinson*, 149 Ky. 258, 147 S. W. 886; *Dallas v. Illinois C. R. Co.* 144 Ky. 737, 139 S. W. 958; *Illinois C. R. Co. v.*

Dallas, 150 Ky. 442, 150 S. W. 536; *Louisville & N. R. Co. v. Eakin*, 103 Ky. 465, 45 S. W. 529, 46 S. W. 496, 47 S. W. 872; *Ford v. Paducah City R. Co.* 29 Ky. L. Rep. 752, 96 S. W. 441; *Illinois C. R. Co. v. Whittaker*, 22 Ky. L. Rep. 395, 57 S. W. 465. But, if the train is moving at a rate of speed that makes it probably unsafe to alight, it is negligence *per se* to do so. *Louisville & N. R. Co. v. Moore*, 150 Ky. 692, 150 S. W. 849; *Glascock v. Cincinnati, N. O. & T. P. R. Co.* 140 Ky. 725, 131 S. W. 779; *Hughlett v. Louisville & N. R. Co.* 15 Ky. L. Rep. 178, 22 S. W. 551; *Adams v. Louisville & N. R. Co.* 82 Ky. 608.

jury under the circumstances of each case, as to whether or not a passenger is guilty of contributory negligence in alighting from a moving train, that doctrine is not applicable to the facts of this case. That doctrine applies to those cases where the train has actually stopped at its regular station, or the passenger has reason to believe so, and the train then suddenly starts while the passenger is alighting therefrom, or where a train is moving so slowly at the regular stopping place, or one which the passenger has reason to believe and does believe to be the regular stopping place, that it could not be said as a matter of law to be negligence to alight therefrom.

In *Badovinac v. Northern P. R. Co.* 39 Mont. 454, 104 Pac. 543, plaintiff alleged that the train on which he was a passenger slackened its speed as it approached his destination, but did not stop; that it was so dark that he could not gauge the speed; that he jumped as directed by defendant's brakeman, receiving the injuries complained of. It was held that plaintiff having alleged in his complaint that the proximate cause of his injury was his voluntary act in jumping from the moving train, he thereupon assumed the burden of alleging facts sufficient to show that in so doing he was not guilty of contributory negligence; that in order to do this he must allege facts sufficient to show that he acted as a reasonably prudent person under like circumstances would have acted; that having failed to do this, his complaint did not state a cause of action. The court was of the opinion that under a sufficient complaint it would have been a question for the jury to determine whether plaintiff was guilty of contributory negligence, and this question would have to be resolved by determining whether he acted as a reasonably prudent person would have done under like circumstances.

—after being warned.

Supplementing note in 22 L.R.A.(N.S.) 755.

An infirm passenger over sixty-five years of age, encumbered with bundles, was held guilty of contributory negligence precluding I. R.A. 1915C.

a recovery in alighting from a train in spite of a flagman's warning not to do so, but to wait until the train could be stopped. *Louisville & N. R. Co. v. Dilburn*, 178 Ala. 600, 59 So. 438.

But whether a passenger was negligent in alighting from a moving train after being warned not to do so by her brother was held a question for the jury in *Ft. Worth & D. C. R. Co. v. Taylor*, — Tex. Civ. App. —, 153 S. W. 355.

—to avoid impending danger.

Supplementing note in 22 L.R.A.(N.S.) 756.

In *Prescott & N. W. R. Co. v. Morris*, 91 Ark. 365, 123 S. W. 392, the jury were held warranted in finding a passenger not guilty of contributory negligence who, to avoid a threatened wreck, jumped from a car that had broken loose from the train.

And it was held not negligence as a matter of law in *Nute v. Boston & M. R. Co.* 214 Mass. 184, 100 N. E. 1099, for a passenger to jump from a slowly moving train to avoid pistol shots and fighting among passengers.

But where a passenger stepped off or jumped from the rear platform of a slowly moving train which would have come into collision with a log train on the same track had not employees prevented it, the court in *Marsalis v. Louisiana & N. W. R. Co.* 129 La. 146, 55 So. 744, was of the opinion that plaintiff was unduly excited under the circumstances, and was hurt through her own fault.

In *Texas & P. R. Co. v. Boyd*, — Tex. Civ. App. —, 141 S. W. 1076, it was held that if the carrier wrongfully and negligently placed plaintiff in a perilous position, by closing the vestibule door leaving him on the lower step of a car of a moving train, and he, under the influence of sudden fright by reason thereof, jumped from the train, defendant could not urge as a defense that in alighting he was guilty of contributory negligence, barring a recovery.

Boarding train while in motion—in general.

Supplementing notes in 21 L.R.A. 356 and 22 L.R.A.(N.S.) 757.

But the conditions under which the passenger alights, other than the speed of the train, must also be considered in determining the existence or absence of negligence in the act of alighting therefrom. This distinction was recognized in *Louisville & N. R. Co. v. Mount*, 125 Ky. 593, 101 S. W. 1182, in which the court said that while stepping from a train at the place there involved might have been attended with no danger if the passenger alighted at the place in the daytime, yet to do so at night, without a light, might be attended with considerable danger.

In *Hunter v. Louisville & N. R. Co.* 150

A passenger attempting to board a moving train after he had alighted at an intermediate point need exercise only ordinary care. *Central of Georgia R. Co. v. Hingson*, — Ala. —, 65 So. 45.

It is not necessarily negligence to get upon a moving passenger train, and generally whether it is negligence or not is a question for the jury. *Irvin v. Missouri P. R. Co.* 81 Kan. 649, 26 L.R.A. (N.S.) 739, 106 Pac. 1063. In the above case a passenger while boarding a train pulling out of a station in the night came in contact with an express truck as he swung on the car. The railroad company was held liable, it being negligent to leave an express truck upon an unlighted depot platform at night and within 5 inches of a passing passenger train.

Whether a passenger in attempting to board a car after it has started is guilty of contributory negligence is held in *Osborne v. Texas Traction Co.* — Tex. Civ. App. —, 134 S. W. 816, a question for the jury, and depends upon whether he was using such care and caution as an ordinarily prudent person would have used under the same or similar circumstances.

Where plaintiff only attempted to board a train after discovering that it was leaving the station and would not stop at the usual place, and the train was moving about as fast as a man would walk at the time he attempted to board it, the court in *Le Duc v. St. Louis, I. M. & S. R. Co.* 159 Mo. App. 136, 140 S. W. 758, was of the opinion that he was not guilty of contributory negligence *per se*. While it has been often held, observed the court, that it is not negligence *per se* to attempt to board a slowly moving train, yet there can be no question that there is always more or less danger attending the act of doing so; the amount of danger depending upon the surroundings and speed of the train and the activity and experience of the party. Plaintiff in this case had never boarded a moving train before, and had there been no showing that he had the right to expect the train to stop the second time, and, instead of boarding it while standing, he had purposely waited until it started and then attempted to board it, we should have no

Ala. 594, 9 L.R.A. (N.S.) 848, 43 So. 802, a passenger was injured in alighting from a train. The court, in the course of the opinion, said: "We recognize the general rule that alighting from a moving train is not necessarily negligence *per se*; but, as was said in *Watkins v. Birmingham R. & Electric Co.* 120 Ala. 152, 43 L.R.A. 297, 24 So. 394: 'There may be, it is true, exceptional circumstances attending the attempt thus to alight, such as the great speed of the train, the age or infirmity of the passenger, or his being encumbered with bundles or children, or other facts which render the attempt so obviously dangerous that the

hesitancy in holding, under these circumstances, that he would have been guilty of negligence that would bar a recovery.

Whether a passenger who boarded a moving train and succeeded in grabbing the hand rail of the step of the vestibule of a sleeping car, and held on to it, was guilty of negligence in failing to jump off the train, while running at 3 or 4 miles an hour, instead of hanging on and sustaining an injury by being caught between the train and the station platform, though warned of the danger of hanging on, was not for the court; for it could not say as a matter of law that the passenger could have safely jumped off, or that he did not have the right to believe that he would be safer where he was, notwithstanding the warning, in the absence of anything to show that he was conscious of the fact that to remain on the train was dangerous. *Central of Georgia R. Co. v. Hingson*, supra.

But one attempting to board a train of cars, with closed gates, moving away from a station with quickly increasing speed, was held guilty of contributory negligence in *Sheehan v. Nassau Electric R. Co.* 143 App. Div. 621, 128 N. Y. Supp. 545.

According to the law of New York state the boarding of a moving train of railway cars is presumptively negligent. Thus, in *Greco v. Long Island R. Co.* 159 App. Div. 298, 144 N. Y. Supp. 240, the evidence was held insufficient to establish the passenger's freedom from negligence, where the train, in response to his signal to stop, having slowed down to 2 or 3 miles an hour, he attempted to board the third car, when the speed was accelerated with a jerk.

In holding the railroad company not liable where a conductor in trying to prevent a person boarding a moving train pushed him with such force that he fell over backwards receiving injuries which caused his death, the court in *Dwyer v. New York C. & H. R. Co.* 136 App. Div. 87, 120 N. Y. Supp. 634, stated that by decedent's own negligence he had created an emergency which the defendant's servant was required to meet.

A passenger, however, who having alighted from the train for exercise attempts to re-enter it with the aid of the Pullman

court may, where the testimony is undisputed, declare as matter of law that the passenger's conduct was reckless and negligent.'"

In *Hughlett v. Louisville & N. R. Co.* 15 Ky. L. Rep. 178, 22 S. W. 551, the court held that where a passenger familiar with the environments stepped off of a passenger train in the dark, while it was moving, and on the side opposite to the depot, he was guilty of contributory negligence.

In *Louisville & N. R. Co. v. Depp*, 17 Ky. L. Rep. 1049, 33 S. W. 417, the court held guilty of contributory negligence as matter of law a passenger who stepped off of a passenger train in the dark, although in that case the speed of the train was greater than in the case at bar.

The case of *Louisville & N. R. Co. v. Ricketts*, which was four times before this

court, is very similar to the case at bar. See (1) 93 Ky. 116, 19 S. W. 182; (2) 96 Ky. 44, 27 S. W. 860; (3) 18 Ky. L. Rep. 687, 37 S. W. 952; (4) 21 Ky. L. Rep. 662, 52 S. W. 939. In that case, Ricketts alighted from the train at Lebanon about 11 o'clock at night, on the side of the train opposite the depot platform, being familiar with the surroundings; and while walking along in the dark he fell over an obstruction, his arm was thrown across the track, and the train ran over it, necessitating its amputation. In that case, the court held that he was guilty of contributory negligence.

In the case at bar, plaintiff stood upon the steps of the coach for some little time before he stepped off. He himself testified that he was observing the speed of the train; that he knew, notwithstanding the

porter after it has started, is not *per se* negligent, although the statute makes it a crime for one not employed on the train to get upon a car while it is in motion without the consent of the one having the same in charge. *Gannon v. Chicago, R. I. & P. R. Co.* 141 Iowa, 37, 23 L.R.A.(N.S.) 1061, 117 N. W. 966.

A passenger was in *Lennon v. Canadian P. R. Co.* 112 C. C. A. 451, 192 Fed. 111, held guilty of negligence as a matter of law where she left her berth at 2 o'clock in the morning to get some fresh air while the train was standing at a station, and was injured in attempting to board the train, which started without signal just as she alighted. The court stated that the company's trainmen could not have anticipated that a passenger would leave her sleeper and go on to the day-coach platform, or otherwise expose herself to the dangers or temptations of an open vestibule door; nor can it be claimed that the absence of a closed vestibule door on another car platform is an invitation to a passenger upon a neighboring car to alight, the acceptance of which invitation it was the duty of the carrier, in the exercise of its required care for the passenger, to anticipate and render impossible. Surely the company could not have foreseen that a young woman unattended would leave the train in such a spot at such an hour. (Generally as to contributory negligence of passenger who alights at an intermediate station, see note to *Wetherla v. Missouri P. R. Co.* 51 L.R.A.(N.S.) 899.)

—after insufficient stop.

Supplementing note in 22 L.R.A.(N.S.) 758.

The question whether a passenger was guilty of contributory negligence in at-L.R.A.1915C.

tempting to board a train while in motion was held a question for the jury in *Hull v. Minneapolis, St. P. & S. Ste. M. R. Co.* 116 Minn. 349, 133 N. W. 852, where the train did not stop a sufficient length of time to permit passengers to go aboard, was moving slowly by the station platform, and the passenger making the attempt was physically active, his freedom of action unimpeded, and there were reasons justifying his attempt to take the particular train.

—after sufficient stop.

Supplementing note in 22 L.R.A.(N.S.) 759.

Where a passenger carrying an umbrella came into contact with a truck on the platform when he was attempting to board a train pulling out at a speed of between 4 and 7 miles an hour, he was in *Murphy v. Pere Marquette R. Co.* — Mich. —, post, —, 150 N. W. 122, held guilty of contributory negligence precluding a recovery.

So, where a passenger having plenty of time to get on a train while it was standing, waited until it began to move, and, in an attempt to get on board by seizing the railing of the car, his projecting body came in contact with a pair of trucks left near the track on the station premises, whereby he was injured, it was held that he could not recover damages on the ground that the railroad company was negligent in allowing the trucks to be placed near the track. *Southern R. Co. v. Nichols*, 135 Ga. 11, 68 S. E. 789.

On a later appeal of the above case, 137 Ga. 670, 74 S. E. 268, it was held erroneous to charge that "if the train did not stop long enough for that purpose [go to ticket office for pass], and when he discovered that the train was moving he undertook to board the moving train, and exercised ordi-

darkness, the place where he alighted. He exercised his own judgment, making his own calculations, and in the dark stepped off of a slowly moving train slowing down for the purpose of stopping to permit him to alight, alighting on the side of the track opposite the platform, upon ground known by him to be more or less encumbered by *débris*, he having lived within 300 feet of the place for about a year. We have no doubt that under this state of facts he was guilty of contributory negligence, and that but for his own fault, he would not have been injured.

Nor is it material that passengers alighting at Miller's Spur had theretofore gotten on and off trains on the north side of the track as a matter of convenience to themselves. It was so held in the Ricketts Case, *supra*. And, as plaintiff himself was negligent, and but for his negligent act would

not have been injured, the sudden acceleration in the speed of the train, just as he alighted, does not enable a recovery against the defendant for his injuries.

2. Ordinarily contributory negligence is a question for the jury. But where the facts are uncontroverted, and but one conclusion may fairly be drawn therefrom, the court may pass upon it as matter of law. *Louisville & N. R. Co. v. Eakin*, 103 Ky. 465, 45 S. W. 529, 46 S. W. 496, 47 S. W. 872, and authorities cited therein; *Dallas v. Illinois C. R. Co.* 144 Ky. 737, 139 S. W. 958; *Dailey v. South Covington & C. Street R. Co.* 158 Ky. 64, 164 S. W. 361.

The trial court properly directed a verdict for the defendant.

Judgment affirmed.

Petition for rehearing denied.

nary care in doing so, and would have done so but for the fact that his body came in contact with the trucks, and the defendant company was negligent in leaving the trucks there or starting the train while the trucks were dangerously near the train, then he can recover."

A passenger was held guilty of contributory negligence in *Plutschow v. Metropolitan West Side Elev. R. Co.* 155 Ill. App. 589, in attempting to board a moving elevated train after the gates had been closed or were being closed.

So, where a train did not stop at the usual place, as a passenger had reason to believe it would, he was held in *Le Duc v. St. Louis, I. M. & S. R. Co.* 159 Mo. App. 138, 140 S. W. 758, not *per se* guilty of negligence in attempting to board it while it was moving slowly, upon discovering that it was leaving the station.

—by direction of employee.

Supplementing note in 22 L.R.A.(N.S.) 759.

The general rule of law seems to be that the getting on a moving train by a passenger is generally regarded as contrary to reasonable prudence; but if it is done in response to the invitation or direction of a person in charge of the train, the passenger is said to be exonerated from fault, where the apparent danger is slight, and the real or actual danger is not readily discoverable by the passenger, on the theory that where danger is obvious, but slight, the passenger has the right to rely on the judgment of the conductor, whose duty and experience in regard to such matters may be presumed to justify an act which would otherwise constitute negligence. *Larson v. L.R.A.* 1916C.

Chicago, M. & St. P. R. Co. 31 S. D. 512, 141 N. W. 353.

A passenger is not guilty of negligence as a matter of law in boarding a slowly moving train on the invitation of the conductor. *Roberts v. Atlantic Coast Line R. Co.* 155 N. C. 79, 70 S. E. 1080; *Larson v. Chicago, M. & St. P. R. Co. supra*.

The speed of the train is not a conclusive test, as a matter of law, of the contributory negligence of one attempting to board a moving train, unless going at such a high rate of speed that no ordinarily prudent person, with common understanding, would undertake the hazard, although upon invitation or direction of the conductor. *Larson v. Chicago, M. & St. P. R. Co. supra*.

In *St. Louis, I. M. & S. R. Co. v. Green*, 110 Ark. 232, 161 S. W. 148, the attempt of a passenger who had failed to procure a ticket to board a train as it was slowly pulling out of the station, the defendant's claim agent, who was standing on the rear platform, having told her to get on and offered to help her, was held not necessarily to constitute negligence. The court observed that it was unimportant whether or not the person who gave the direction was an agent of the company, with authority to act in that regard; for if he was in a position to render such assistance, it was a circumstance for the jury to consider in testing the plaintiff's conduct.

But where a train was just pulling out of a station it was held in *Kopacka v. New York, N. H. & H. R. Co.* 88 Conn. 82, 90 Atl. 27, that the fact that the conductor, upon seeing a passenger, threw open the car gate, did not justify him in attempting to board the moving train, and that he was guilty of contributory negligence warranting a nonsuit in attempting to do so, hampered with bundles. J. D. C.

MINNESOTA SUPREME COURT.

NANCY B. GLIDDEN, Appt.,
v.

SECOND AVENUE INVESTMENT COM-
PANY, Impleaded, etc., Respt.

(125 Minn. 471, 147 N. W. 658.)

**Landlord and tenant — assignment of
reversion — liability on covenants.**

The owner of a building leased a portion
of it, and in the lease covenanted to furnish
heat to the tenant. It thereafter sold the

Headnote by HALLAM, J.

**Note. — Landlord and tenant: transfer
of reversion**

- I. In general, 191.
- II. Voluntary transfers.
 - a. In general, 192.
 - b. Notice to transferee.
 1. Necessity of referring, in transfer, to the lease, 193.
 2. Possession by tenant, 195.
 3. Recording the lease, 195.
 - c. Distinction between transfer of reversion and so-called assignment of lease by lessor, 195.
 - d. Necessity for seal, 198.
 - e. Transfer by subsequent lease.
 1. Concurrent leases, 198.
 2. Leases in reversion, 199.
 - f. Transfer by way of mortgage, 200.
 - g. Necessity for attornment, 201.
- III. Transfers by operation of law.
 - a. Necessity for attornment, 203.
 - b. By sale on lien.
 1. On lien subsequent to lease, 204.
 2. On lien prior to lease.
 - (a) In general, 204.
 - (b) Effect of attornment, 204.
 3. Inconsistent holdings and statutory changes, 204.
 - c. By sale under judicial decree not based on prior lien, 206.
 - d. By devolution upon landlord's death, 206.
 - e. By death of landlord who had only a life estate, 207.
- IV. Rights and liabilities of transferee.
 - a. In general, 209.
 - b. Based upon privity of estate, 209.
 - c. Based upon privity of contract.
 1. Right to sue on contract in name of lessor, 210.
 2. Under covenants that run with the land.
 - (a) Common-law doctrine and statutory changes, 210.
 - (b) Where lessor has no title, 213.
 - (c) Necessity for use of word "assigns" in the lease, 215.

property to one who assumed all its obligations under the lease, and the tenant recognized the grantee as landlord. The original lessor was not thereafter liable to employees of the lessee for damages for personal injury resulting from negligent failure to properly heat the premises.

(May 29, 1914.)

A PPEAL by plaintiff from a judgment of the District Court for Hennepin County in favor of defendant Investment Company in an action brought to recover damages for personal injuries resulting from negligent failure to properly heat cer-

IV. c, 2—continued.

- (d) Necessity for seal on lease, 215.
- (e) On particular covenants.
 - (1) In general, 216.
 - (2) To pay rent, 216.
 - (3) To renew the lease, 219.
 - (4) To repair, 220.
 - (5) To pay for tenants' repairs or improvements, 220.
 - (6) To sell premises to tenant if requested, 220.
 - (7) For quiet enjoyment, 220.
 - (8) To terminate the lease, 221.
 - (9) To conduct business in a proper manner, 221.
 - (10) To insure, 221.
 - (11) To pay taxes or assessments, 221.
 - (12) To furnish heat, 221.
 - (13) To leave improvements upon premises, 221.
 - (14) To leave all manure on farm, 221.
 - (15) To leave cotton seed on land, 221.
 - (16) To buy from lessor all goods to be sold upon the premises, 221.
 - (17) To grind all grain grown upon premises, 222.
 - (18) Not to remove straw, 222.

tain premises in accordance with the terms of a contract. Affirmed.

The facts are stated in the opinion.

Messrs. Spooner, Laybourn, & Lucas for appellant.

Messrs. Cohen, Atwater, & Shaw for respondent.

Hallam, J., delivered the opinion of the court:

Plaintiff appeals from a judgment on the pleadings in favor of the defendant Second Avenue Investment Company. The complaint alleges in substance that, in December, 1909, the defendant Investment Com-

pany owned a building in Minneapolis; that it leased the ground floor for five years to the L. C. Smith & Bros. Typewriter Company for use as an office and salesroom, and agreed to keep in the building proper steam warming apparatus, and to keep the premises comfortably warm at all seasons when required; that thereafter defendant Goodfellow, by mesne transfers and assignments, acquired all of the rights and interests of the defendant Investment Company in said premises, and became "charged with the fulfilment . . . of the terms, conditions, and agreements of the . . . Investment Company contained and provided for in

IV. c, 2—continued.

- (19) To compensate way-going tenant for extra labor, 222.
- (20) Giving to lessor discretion to relet in case he had to re-enter, 222.
- (21) To give up possession at end of term in good repair, 222.
- (22) To indemnify lessor against loss, 222.
- (23) To terminate lease in case of sale of premises, 222.
- (f) Lease of an incorporeal hereditament, 222.
- (g) In lease of personal chattels, 223.
- (h) Transfer of part of the reversion, 223.
- (i) For breaches prior to transfer, 224.
- 3. Under covenants that do not run with the land.
 - (a) In general, 224.
 - (b) Giving lessee a monopoly in trade, 225.
 - (c) To pay a collateral sum, 225.
 - (d) Relating to personal property, 225.
 - (e) Concerning land not included in the lease, 225.
 - (f) Concerning interests not owned by lessor, 226.
 - (g) Giving tenant an option to purchase, 226.
 - (h) To find subtenants for lessee, 226.
 - (i) To repair, 226.
 - (j) To terminate the lease, 226.

IV. c, 3—continued.

- (k) Affected by stipulation against implied covenants, 226.
- d. Availability by transferee of lessor's remedy for possession, 226.
- V. Rights and liabilities of transferrer.
 - a. In general, 227.
 - b. Based upon privity of estate, 227.
 - c. Based upon privity of contract.
 - 1. Right of action in general, 228.
 - 2. Right of action for rent.
 - (a) Accrued subsequent to transfer, 228.
 - (b) Accrued prior to transfer, 229.
 - (c) Where he reserves the rent, 229.
 - (d) On rent note, 230.
 - (e) Apportionment of rent, with respect to time, 231.
 - 3. Liabilities, 231.
- VI. Rights and liabilities of lessee.
 - a. In general, 233.
 - b. Rent paid in advance, 233.
 - c. Right to prove that lessor had parted with title, 233.
 - d. Right to show that transfer is ineffectual, 234.
 - e. Right to avoid payment of rent by proving a merger, 234.

I. In general.

The present note does not include the question as to the effect of an assignment of the lease by lessee. That question, so far as liability for rent is concerned, was considered in note to *Kanawka-Gauley Coal & Coke Co. v. Sharp*, 52 L.R.A. (N.S.) 968.

Cases involving only the assignment of rent, leaving the reversion in the original lessor, are not within the scope of this note; and where the fee is transferred by deed reserving rent to the grantor, his executors, administrators, and assigns, the case is not strictly within the scope of this note, for there is no reversion to transfer, although there may be its equivalent. So, while the rights of the parties in such cases are based

said lease;" that on December 26, 1911, plaintiff entered the employ of the Typewriter Company in its offices upon said premises; that at that time the premises were so cold as to be unfit for occupancy as an office; that plaintiff demanded of the Typewriter Company that the place be properly heated; that plaintiff and the Typewriter Company also demanded of defendant Goodfellow at many different times up to and including December 30, 1911, and that said Goodfellow always promised to heat the premises; that plaintiff, relying upon the promises of said Goodfellow, continued at her work up to and including December 30th, when she became seriously ill by rea-

son of the exposure to cold, and she brings this action to recover damages against both Goodfellow and the Investment Company.

On a former hearing (124 Minn. 101, L.R.A.—, 144 N. W. 428) this court held that this complaint stated a cause of action as to the defendant Goodfellow. The question now is, Does it state a cause of action as to defendant Investment Company? If it does, judgment on the pleadings should not have been given. We are of the opinion that the complaint does not state a cause of action as to the defendant Investment Company.

On the former appeal it was held that the landlord is liable directly to the employees of a tenant for personal injuries received from a defective condition of the

partly upon the same principles as govern cases where the reversion is transferred (*Van Rensselaer v. Hays*, 19 N. Y. 68, 75 Am. Dec. 278), that subject is not here covered.

II. Voluntary transfers.

a. In general.

Under the feudal system of tenures, the relation of landlord and tenant, in the early history of Great Britain, imposed upon the parties mutual obligations that have gradually ceased to be attached as a result of that relation. Because of that close personal relation the landlord could not, without the consent of his tenant, voluntarily sever the relation, or substitute another in his stead as landlord by transferring the reversion (see subd. IV. c, 2 (a), *infra*). If the tenant attorned to the new owner, the attornment did not terminate the leasehold estate, but merely created the relation of landlord and tenant between the new owner and the tenant during the remainder of the term. So, the early English statute and other statutes abolishing the necessity for attornment (subd. II. g, *infra*) take away from the tenant only the right to refuse to accept a new landlord, and carefully preserve all other rights. The purpose of the statutes evidently is to give to a voluntary transfer without attornment the same force and effect that was formerly given to such transfer with attornment. This statement does not refer to the statute of 32 Hen. VIII. chap. 34, which enabled the transferee of the reversion, to whom the tenant had attorned, to sue for breach of any covenant in the lease, and imposed upon him the obligations incident to the contract (see *infra*, subd. IV. c, 2 (a)), but to those statutes abolishing the necessity for attornment (see *infra*, subd. II. g).

A voluntary transfer of the reversion by the landlord neither terminates the leasehold estate nor deprives the tenant of any of his rights under the lease. *Doe ex dem. Agar v. Brown*, 2 El. & Bl. 331, 22 L. J. Q. B. N. S. 432; *Pyot v. St. John*, Cro. Jac. L.R.A.1915C.

329; *Dreyfus v. Hirt*, 82 Cal. 621, 23 Pac. 193; *Scheerer v. Cuddy*, 85 Cal. 270, 24 Pac. 713; *Garber v. Gianella*, 98 Cal. 527, 33 Pac. 458; *Whittemore v. Smith*, 50 Conn. 376; *Parker v. Gortatowsky*, 127 Ga. 560, 56 S. E. 846; *Blake v. Ashbrook*, 91 Ill. App. 45; *Barrett v. Geisinger*, 148 Ill. 98, 35 N. E. 354; *Leiter v. Pike*, 127 Ill. 287, 20 N. E. 23; *Williams v. Frybarger*, 9 Ind. App. 558, 37 N. E. 302 (and where the transferrer agrees, in a separate written instrument, to give the transferee actual possession immediately, falsely representing that he has an agreement with the tenant to give up possession, the transferee has a right of action against him for breach of the agreement, and may collect expenses incurred in inducing the tenant to give up possession); *Leebrick v. Stahle*, 68 Iowa, 515, 27 N. W. 490; *Yule v. Fell*, 123 Iowa, 662, 99 N. W. 559; *Chambers v. Irish*, 132 Iowa, 319, 109 N. W. 787; *Payson v. Holden*, 4 Ky. L. Rep. 352; *Breeding v. Taylor*, 13 B. Mon. 481; *Unger v. Bamberger*, 85 Ky. 11, 2 S. W. 498; *Houssiere Latreille Oil Co. v. Jennings-Heywood Oil Syndicate*, 115 La. 107, 38 So. 932; *Biddle v. Hussman*, 23 Mo. 597; *Green v. Sternberg*, 12 Mo. App. 578; *Stone v. Snell*, 77 Neb. 441, 109 N. W. 750; *Perry v. Carr*, 44 N. H. 118; *Woodbury v. Butler*, 67 N. H. 545, 38 Atl. 379 (but where the premises were sold at auction, and the tenant, who held at will, assented to the auctioneer's statement that the tenant would vacate in one month, he was estopped to demand the legal notice of three months, required to dispossess him); *Austin v. Ahearne*, 61 N. Y. 6; *Wintermute v. Light*, 46 Barb. 278; *Griffin v. Barton*, 22 Misc. 228, 49 N. Y. Supp. 1021, affirmed in 27 App. Div. 632, 50 N. Y. Supp. 1127; *Scheer v. Cihak*, — Okla. —, 142 Pac. 1007 (and if the purchaser takes possession before the lessee can do so, and refuses to give up possession to the lessee, he is liable in damages to him); *McCardell v. Williams*, 19 R. I. 701, 36 Atl. 719; *Millard v. Martin*, 28 R. I. 494, 68 Atl. 420; *Barber v. Watch Hill Fire Dist.* post, 245; *MeGlaufin v. Holman*, 1 Wash. 239, 24 Pac. 439; *Schulte v. Schering*, 2 Wash. 127, 26

leased premises arising subsequently to the date of the lease, where the landlord has expressly contracted to keep the premises in proper condition. The action in such case is not on the contract, for the employees of the lessee are strangers to the contract and its obligations. The sole remedy is an action for the wrong committed by the landlord by his negligence in failing to perform an act assumed by him which he should know would protect them from injury if performed, or expose them to injury if not performed. The contract creates an implied legal duty on the part of the landlord towards the employees of the tenant who are rightfully upon the premises, and a negligent violation thereof vests in them a right of action in tort against him

for injuries sustained. The allegations of the complaint, so far as they concern the defendant Goodfellow, were held to bring the case within these principles.

The question of the liability of the Investment Company was not there considered. The situation of the Investment Company is manifestly different from that of defendant Goodfellow. The Investment Company was the original lessor. It sold and delivered up the premises to Goodfellow before this cause of action arose.

A conveyance of the reversion brings the grantee in privity with the lessee, puts him in the place of the original lessor, subjects him to the burdens of such covenants of the lessor as run with the land, and entitles him to the benefits of the covenants

Pac. 78; Teater v. King, 35 Wash. 138, 76 Pac. 688 (this case involved the right of the assignee of the leasehold to evict a subtenant of the assignor); Simanek v. Nemetz, 120 Wis. 42, 97 N. W. 508.

And in all the other cases cited herein the courts recognize this general proposition.

And a contract by the owner to lease the premises when the building is completed may be specifically enforced against the owner's vendee, who purchases with knowledge of and subject to the contract. *Hodges v. Howard*, 5 R. I. 149.

But a tenancy at will is terminated by a transfer of the reversion, and if the tenant retains possession, he becomes a tenant by sufferance, liable to ouster by the transferee. *Hollis v. Pool*, 3 Met. 350; *Benedict v. Morse*, 10 Met. 223; *Rooney v. Gillespie*, 6 Allen, 74; *Hayden v. Ahearn*, 9 Gray, 438; *Bunton v. Richardson*, 10 Allen, 260; *Granger v. Parker*, 137 Mass. 228; *Streeter v. Ilsley*, 147 Mass. 141, 16 N. E. 776 (the rule applies where the reversion is transferred by lease for a term of years); *Hammond v. Thompson*, 168 Mass. 531, 47 N. E. 137; *Dixon v. Smith*, 181 Mass. 218, 63 N. E. 419 (and unless tenant is notified of the transfer, and thereafter continues in possession, he is not liable under statute for rent to the purchaser).

b. Notice to transferee.

1. Necessity of referring, in transfer, to the lease.

To give the lease priority over the transfer, so as to prevent a termination of the lease, reference to it in the transfer is unnecessary, provided that the transferee is not an innocent purchaser for value, without other notice or knowledge of facts sufficient to put him upon inquiry that would lead to knowledge of the existence of the lease. *Dreyfus v. Hirt*, 82 Cal. 621, 23 Pac. 193; *Scheerer v. Cuddy*, 85 Cal. 270, 24 Pac. 713; *Garber v. Gianella*, 98 Cal. 527, 33 Pac. 458; *Yule v. Fell*, 123 Iowa, 662, L.R.A.1915C.

99 N. W. 559; *Biddle v. Hussman*, 23 Mo. 597; *Friedlander v. Ryder* (*Friedlander v. Hewitt*) 30 Neb. 783, 9 L.R.A. 700, 47 N. W. 83; *Stone v. Snell*, 77 Neb. 441, 109 N. W. 750.

By accepting rent from transferrer's tenant, the transferee waives all rights that he may have had as an innocent purchaser without notice, to evict the tenant. *Payson v. Holden*, 4 Ky. L. Rep. 352.

Occasionally courts have regarded a transfer of the reversion or a part thereof, without stipulations protecting the tenant's interest, as some sort of wrong to the tenant. Thus, in *Nichol v. McDonald*, 69 Ark. 341, 64 S. W. 263, in an action for rent by the lessor against the lessee, the lessee pleaded in defense that the lessor had sold part of the reversion, and that the transferee had taken possession thereof to the damage of the defendant. The court apparently regarded this as a good defense if the sale was made without lessee's consent, and as a matter well pleaded in reduction of rent if made with his consent. See subd. IV. c, 2 (h), *infra*, as to rule when part only is conveyed.

And in *Staples v. Flint*, 28 Vt. 794, the lessor was held liable to the lessee where the former had conveyed the reversion to a third person, representing that the condition of the lease had been broken so as to work a forfeiture on the part of the lessee, which representation proved to be untrue.

But it is quite clear that the lessor is not guilty of any wrong upon the lessee by reason of his transfer of the reversion to another without any reference to the lease, as in such case the law fully protects the tenant's rights, and the lessor is not responsible in any manner for the acts of his transferee. This fact is emphasized in the opinions where lessor had transferred only part of the premises, and the transferee had evicted the tenant from the part transferred. Thus, in *Linton v. Hart*, 25 Pa. 193, 64 Am. Dec. 691, the court said: "The law will not apportion rent in favor of a wrongdoer, and therefore if the landlord wrongfully dispossesses his tenant of any

of the lessee. He may sue upon or release such covenants, and may enforce or accept a surrender of the lease. The possession of the tenant becomes his possession. *Cargill v. Thompson*, 57 Minn. 534-544, 59 N. W. 638. The rights and liabilities existing between the grantee and the lessee are the same as those that originally existed between the grantor and the lessee. 24 Cyc. 926, 927; *Charles Mulvey Mfg. Co. v. McKinney*, 161 Ill. App. 514; *Leominster Gaslight Co. v. Hillery*, 197 Mass. 267, 83 N. E. 870. In short, he becomes the landlord, and the original lessor ceases to be such. *Fisher v. Deering*, 60 Ill. 114; *Lindley v. Dakin*, 13 Ind. 388; *Page v. Esty*, 54 Me. 319, 326; *Chambers v. Irish*, 132 Iowa, 319, 109 N. W. 787. The tenant holds of the

new landlord upon the same terms as he held of the old.

In this case it would appear that the tenant assented to the change of landlords, but it is probably not important whether it did or not. The new relation is consummated by a conveyance of the reversion. Attornment, or consent by the tenant, is now no longer necessary. *Jones v. Rigby*, 41 Minn. 530, 43 N. W. 390.

We would not say that the original lessor is, by a conveyance of the reversion, released from his personal obligations and covenants contained in the lease (see 24 Cyc. 919, 920, 927; *Jones v. Parker*, 163 Mass. 564, 47 Am. St. Rep. 485, 40 N. E. 1044; *Stuart v. Joy* [1904] 1 K. B. 362, 73 L. J. K. B. N. S. 97, 90 L. T. N. S. 78,

portion of the demised premises, the rent is suspended for the whole; but the owner of a reversion has a right to sell the whole or any part of it. Such right is incident to the right of property, and necessary to the full enjoyment of it. The exercise of it is not wrongful, and therefore, in the case of a sale of a part of the reversion, the law will apportion the rent; and the right of apportionment attaches the moment the sale is made. No action of the purchaser, or his aiders and abettors, in dispossessing the tenant of the part purchased, after such severance, can have any effect upon the rent growing out of the unsold part remaining in his undisturbed possession. It matters not that the original reversioner, after such severance, becomes a party to the trespass by aiding his vendee in committing it. The trespass has relation only to the part sold, and cannot be visited upon the other part of the premises. These principles are fully affirmed in *Reed v. Ward*, 22 Pa. 144. If this be the law in the case of a sale voluntarily made for the mere convenience of the reversioner, it applied with much greater reason to a sale made under compulsion to a railroad corporation having authority from the commonwealth to take the property for the purposes of the road without the consent of the owner. In such a case there is no reason for visiting the reversioner with the consequences of a trespass committed by the corporation. It had no right to take the estate of the tenant without compensation given or secured. The sale of the reversioner's interest in the part so taken conferred no such right, and the tenant has an ample remedy for the injury without depriving his landlord of the just portion of rent due for the premises enjoyed under the lease."

And the transferee of the reversion is liable in trespass if he interferes illegally with the tenant or his property. *Barber v. Watch Hill Fire Dist.* post, 245.

And in *Engler v. Garrett*, 100 Md. 387, 59 Atl. 648, it was held that in an action for specific performance of a contract for the sale of land, the fact that plaintiff would not give security for his noninterference L.R.A.1915C.

with the rights of the tenant in possession did not constitute a good defense, for the reason that the plaintiff would take title subordinate to the tenant, and could not dispossess him or increase his rent.

And in *Chesterman v. Gardner*, 5 Johns. Ch. 29, 9 Am. Dec. 265, it was held that transferring the reversion while tenant was in possession, without any reference to the lease, was not a fraud upon the rights of the tenant.

And an outstanding lease is an encumbrance, and while the transferee of the reversion by warranty deed may take the place of the transferor as landlord, and collect the rents as they accrue (see subd. IV. c. 2 (e) (2), *infra*), he is not compelled to accept the rent in full satisfaction of damages for his being deprived of possession during the term of the lease, but may sue the transferor for breach of his covenant against encumbrances. *Van Wagner v. Van Nostrand*, 19 Iowa, 422; *Smith v. Davis*, 44 Kan. 362, 24 Pac. 428; *Clark v. Fisher*, 54 Kan. 403, 38 Pac. 493; *Schwitzgebel v. Beakey*, 81 Kan. 38, 105 Pac. 42; *Chase v. Barnes*, 82 Kan. 28, 107 Pac. 769; *Fritz v. Pusey*, 31 Minn. 368, 18 N. W. 94; *Edwards v. Clark*, 83 Mich. 246, 10 L.R.A. 659, 47 N. W. 112 (if the purchaser does not accept rent from the tenant, the amount of the rent cannot be deducted in estimating the amount of damages); *Logan v. Woolwine*, 56 Mo. App. 453 (an incidental holding); *Eiseley v. Spooner*, 23 Neb. 470, 8 Am. St. Rep. 128, 36 N. W. 659 (the holding was in this case incident to the main decision on the proper construction of a deed).

Oral testimony is not admissible to prove that the parties had agreed that the lease was excepted from the covenant against encumbrances. *Edwards v. Clark*, 83 Mich. 246, 10 L.R.A. 659, 47 N. W. 112.

And see cases cited under subd. IV. c. 2 (h), *infra*, where part of the premises were transferred.

But where the lessor transfers the reversion to an innocent purchaser for value who had no notice of the tenancy, and nothing sufficient to put him upon inquiry existed at the time of the sale, the transfer

20 Times L. R. 109; *Hazen v. Hoyt*, — Iowa, —, 75 N. W. 647); but the relation of landlord and tenant between them no longer exists. The obligations of the original lessor that remain after the conveyance of the reversion are personal contract obligations only, and involve no duty of control over the premises. In fact, his obligation is no longer a primary obligation, but is secondary only. The new landlord, having assumed or become charged with the fulfilment of the terms, conditions, and agreements of the lessor, contained and provided for in said lease, has succeeded to the primary liability. The liability of the original lessor has become the liability of a surety only. The original lessor is now a stranger to the premises; as much so as

though he had never owned them. He has no right to enter for any purpose without the consent of his grantee.

We know of no decision holding the original lessor liable to strangers to the contract for negligent care of the premises under such circumstances. The tort liability of a landlord who covenants to heat or repair the leased premises is predicated on his right and duty to enter the premises and to exercise there a measure of control. If he leases the premises without assuming any obligations to heat or repair, he is under no obligation either to the tenant or to third persons to heat or repair, for the reason that he has surrendered to his tenant the exclusive possession and control of the premises leased, and without the per-

destroys the leasehold, is a wrong to the lessee, and renders the lessor liable to the lessee in an action at law for damages. *Williams v. Young*, 78 N. J. Eq. 293, 81 Atl. 1118. And in this case it was held that equity had no jurisdiction, since the lessee had a full and adequate remedy at law. But see II. b, 2, *infra*, on possession as notice.

The case of *Maule v. Ashmead*, 20 Pa. 482, is different. Here, an administratrix leased the property of her intestate, and later, upon her petition to sell real estate for the payment of decedent's debts obtained an order for the sale of the leased property, upon which she sold the same, making no reservation of lessee's rights, and the purchaser evicted the tenant two years before his term expired, after he had expended considerable money in improving the land. Her estate, represented by the administrator, was held liable to the tenant for his loss. The ground of the decision is not clearly disclosed; but on general principles it would appear that the administratrix had no authority to make the lease. Presumably, this was the ground upon which the purchaser succeeded in dispossessing the tenant, although this fact is not disclosed. It was held that there was a breach of an implied covenant for quiet enjoyment.

2. Possession by tenant.

On the question as to possession of tenant constituting notice of his interest as tenant, see note in 13 L.R.A.(N.S.) 96; and as constituting notice of his independent interests, see *id.* 98. Also see reference note to *Sassen v. Haegle*, 52 L.R.A.(N.S.) 1176. If possession by tenant is notice of the terms of the lease *a fortiori*, it is notice of the fact of lease.

8. Recording the lease.

On the general doctrine of notice from registration of title, see note in 23 L.R.A. 565.

On the question of lease as conveyance within meaning of recording statutes, see L.R.A.1915C.

note to *Eadie v. Chambers*, 24 L.R.A.(N.S.) 879.

The question whether the recording statutes cover leases is not within the scope of the present note.

But, assuming leases are within the purview of the recording statutes, the record of a lease is constructive notice to a transferee of the reversion. *Garber v. Gianella*, 98 Cal. 527, 33 Pac. 458; *Chapman v. Gray*, 15 Mass. 439; *Toupin v. Peabody*, 162 Mass. 473, 39 N. E. 280.

And since most recording statutes provide that a purchaser without actual notice of an unrecorded instrument affecting the title adversely takes title free from the effect of such unrecorded instrument, the lessee in an unrecorded lease holds subordinate to the transferee of the reversion if the latter did not have actual knowledge of the lease, provided, of course that the lease is such as is required by the statute to be recorded. *Toupin v. Peabody*, 162 Mass. 473, 39 N. E. 280; *Bova v. Norigian*, 28 R. I. 319, 125 Am. St. Rep. 741, 67 Atl. 326.

Where the lease is unrecorded, the tenant should be permitted to show by extrinsic evidence in an action to evict him, that the transferee knew of the lease and its contents at the time of the transfer. *Whittemore v. Smith*, 50 Conn. 376.

On the question of record of instrument, not entitled to be recorded, as actual notice, see note to *Nordman v. Rau*, 38 L.R.A. (N.S.) 400.

c. Distinction between transfer of reversion and so-called assignment of lease by lessor.

The scope of this note being limited to the transfer of the reversion and the effect thereof, it does not include the question of severing rent from the reversion by a transfer of the rent without the reversion. However, through lack of precision in the use of language, the expression "assignment of lease" has frequently been used with reference to the lessor's interest, and no little confusion has been thereby created.

It is here suggested that, for the purpose

mission of the tenant he has no right to enter upon the premises for any purpose. Underhill, Land. & T. § 485. A similar situation is presented here. When the Investment Company sold these premises to Goodfellow, it yielded up to him its right of control of the premises. It seems manifest that it no longer owed the duty nor

had the right to go upon the premises to operate the heating plant after it had conveyed the premises. It follows that its failure to do so was not negligence, and the order granting judgment on the pleadings was right.

Judgment affirmed.

or avoiding ambiguity, the expression "assignment of lease" ought always to refer to the interest of the lessee, and never to that of the lessor. But the word "lease" and the phrase "all right, title, and interest in a certain lease," have been sometimes used in designating the thing transferred by the lessor. The name of the instrument by which an estate is created may be used to designate the estate, and in this way the very frequent use of the word "lease," in designating the leasehold interest of the lessee, is justified, but it is difficult to justify the use of that word in a transfer by the lessor, since the lessor's estate is not created by the lease, and the expression does not describe the thing conveyed (the lessor's interest) with sufficient particularity.

When the lessor has actually assigned his lease or his interest under the lease, with no indication as to what was intended to pass, the most reasonable rule is, and most courts have held, that unaccrued rents pass, together with such covenants as are designed for the collection thereof, but all covenants designed for the protection of the reversion, with the reversion itself, remain in the assignor.

Although the language used is ambiguous, it is evident that the parties intended the transfer of something, yet it seems definite enough to preclude the theory that they intended to transfer the reversion. The most reasonable and liberal view would therefore be that since the reversion is not transferred, rights under covenants intended to protect or be beneficial or incidental to the reversion remain in the transferor, the transferee taking rents subsequently accruing, with all rights under covenants designed for the collection thereof. This is apparently the position taken by most courts. *Dixon v. Buell*, 21 Ill. 203; *Borderaux v. Walker*, 85 Ill. App. 86; *Demarest v. Willard*, 8 Cow. 206; *Huerstel v. Lorillard*, 6 Robt. 260, affirmed at general term in 7 Robt. 251.

The actual holding in the following cases is not inconsistent with this theory, although the cases cannot be cited as directly supporting it: *Meyer v. Sachsel*, 143 Ill. App. 563; *McKinney v. Charles Mulvey Mfg. Co.* 157 Ill. App. 339; *Watson v. Hunkins*, 13 Iowa, 547; *Lufkin & Wilson v. Preston*, 52 Iowa, 235, 3 N. W. 58; *Haywood v. O'Brien*, 52 Iowa, 537, 3 N. W. 545; *Trulock v. Donahue*, 76 Iowa, 758, 40 N. W. 696, second appeal, 85 Iowa, 748, 52 N. W. 537; *Harrison v. Steele*, 4 Harr. & McH. 218; *Wood v. Partridge*, 11 Mass. 488; *Bridgham v. Tileston*, 5 Allen, 371; *Hunt v. Thompson*, 2 Allen, 341; *Kost v. Theis*, L.R.A.1915C.

9 Sadler (Pa.) 336, 20 W. N. C. 545, 12 Atl. 262; *Hecht v. Acme Coal Co.* 19 Wyo. 10, 113 Pac. 786.

In *Chapman v. McGrew*, 20 Ill. 101, the court said: "The indorsement, by the lessor, of a lease to a stranger to the contract, undoubtedly passes an equitable title to the assignee, but does not pass such a legal interest as can be recognized by, and enforced in, his name, in a court of law. Such an instrument is not assignable by the common law, and has not been made so by our statute. *Buckmaster v. Eddy*, *Breese* (Ill.) 300; *Beezley v. Jones*, 2 Ill. 34."

In *Kimball v. Pike*, 18 N. H. 419, the court speaks of an "assignment of the lease by the lessor," but the assignee was held to have no claim upon the rents, because of a prior transfer of the reversion by way of mortgage, so that it became unnecessary to decide what would otherwise have passed by the "assignment of lease by the lessor."

In *Corrigan v. Trenton Delaware Falls Co.* 7 N. J. Eq. 489, the lessor had made what the parties called "absolute and unconditional assignment of leases," and after the appointment of a receiver for the lessor, it was held that this amounted to no more than a power of attorney under which the assignee could collect the rents and apply them to the payment of the debts for which the assignment was collateral; hence, on distribution, all rents due, although not paid at the time the receiver was appointed, were appropriated as directed in the assignments; those falling due after the receiver's appointment, but before sale of the reversion, should go to the receiver for the estate, and those falling due after the sale should go to the purchaser of the reversion.

But there are decisions that are not in harmony with this rule. Since the reversion is not created by the lease, and the lessor's interest under the lease does not include the reversion, it seems quite clear that a transfer of "lease" by the lessor does not transfer the reversion; yet such transfer has apparently been held to do so, at least, during the term. *Merchants' State Bank v. Ruettell*, 12 N. D. 519, 97 N. W. 853 (the actual holding in this case may be consistent with the theory that only the rent, with the right to collect it, passed to the transferee, but the language of the court and the reasons assigned for the holding can be justified on no other theory than that the assignment transferred the reversion); *Iowa Sav. Bank v. Frink*, 1 Neb. (Unof.) 14, 92 N. W. 916.

In *Keeley Brewing Co. v. Mason*, 102 Ill. App. 381, the holding is not entirely clear. The language was: "All my right, title,

and interest in and to a certain indenture of lease," and the court said: "We are of opinion this language is ample to pass all the interest of the lessor, to the extent of the lease, not only to the premises therein demised, but also to the rents accruing thereunder." As the action was for rent by the transferee, the language of the court might mean no more than that there was a mere assignment of rent, with the right to collect it.

In *Wineman v. Hughson*, 44 Ill. App. 22, where the assignment, written upon the lease, was of "this lease and all rents accrued and to accrue hereunder until my indebtedness to her is fully paid," it was held that, in the absence of an attornment, the transfer amounted to a mere assignment of the rent. The inference is that if, as is the case in most states, no attornment had been necessary for a transfer of the reversion, this would have amounted to more than an assignment of rent.

If a transfer of "lease" be regarded as a transfer of all of lessor's rights and interests under the lease, as distinguished from an estate created by the lease, then lessor's rights under the covenants, including those that run with the land, are thereby transferred; the reversion remains in the lessor, but all rights to protect it and those incidental to it are transferred to another. It cannot be successfully contended that covenants which ordinarily run with the land should not do so in this case, because of the general intention of the parties to the contrary. That the parties did not intend all of the rights of lessor under all of the covenants to pass is quite evident. Yet some courts have apparently held that all of lessor's rights do pass. In *Lennen v. Lennen*, 87 Ind. 130 (by the headnote in this case it would appear to be the lessee who assigned the lease, but the opinion discloses the error), the court said: "It is clear to our minds that the assignment of the lease by the lessor conferred a right against the tenant, but conveyed no interest in the land. It is one thing to sell the reversion, and another thing to assign the lease. In the one case, an interest in the land itself passes; in the other, only a right to enforce the covenants and conditions of the lease is transferred. A man may sell his interest in a lease, and yet retain his reversionary interest intact. In the case before us, the appellee acquired no right in the land, but did acquire a right to enforce the conditions and covenants of the lease against the tenant."

If it be held, as it has been held in *Allen v. Wooley*, 1 Blackf. 148, that the lessor's rights under the covenants which run with the land do not pass by the transfer, then rents do not pass, since covenants to pay rent run with the land (see subd. IV. c, 2 (e) (2), *infra*), and the transfer becomes meaningless. The question of rents or the collection thereof was not, however, before the court, and the rule promulgated was broader than was necessary for the decision of the case.
L.R.A.1915C.

In *Isman v. Hanscom*, 217 Pa. 133, 66 Atl. 329, the lease contained the following clause: "And the said lessees shall not make any alterations, additions, or improvements to the hereby demised premises without first having the consent, in writing, of the lessor, and after such consent having been given, all alterations, additions, and improvements, made by either of the parties hereto, upon the premises, except movable furniture put in at the expense of the lessees, shall, at the option of the lessor, remain upon the premises at the expiration or sooner determination of the lease, and be surrendered with the premises, without molestation or injury, and become the property of the lessor, or, at the option of the lessor, the said lessees shall restore the said premises to the same good order and condition as the same are now;" and the assignment, made by the lessor to Felix Isman, agent, conveyed all my "right, title, and interest in this lease, and all benefit and advantages to be derived therefrom." On bill for an injunction to enjoin the removal by the tenant at the close of the term of property falling within the prohibitory clause of the lease, the court said: "In addition to the fact that Isman, as the agent of an undisclosed principal, is the owner of the lease, it also appears that he gave the three months' notice to the defendants to vacate the premises, and also notified them that he exercised the option to retain the alterations, additions, and improvements which were put upon the premises. The defendants held the property under him as agent, and they are not in a position to contest his title or his right to maintain the bill." Since the court decided in favor of the agent without a disclosure of the identity of his principal, it must be assumed that the principal was not the owner of the reversion. It is difficult to see just what benefit would accrue to the assignee by reason of the enforcement of this clause, unless it be further held that title to the added property vested in him, with a right to remove it after the expiration of the term of the lease. Ordinarily the rights of the assignee expire with the termination of the lease. If so, he could not remove the fixtures either before or after the lease had expired. They belonged to the tenant before, and to the lessor after, that time. These questions were not discussed by the court.

In *Burton v. Barclay*, 7 Bing. 745, the court used language that seems to indicate that all of lessor's rights and liabilities under all of the covenants pass to his transferee where he has by deed properly transferred, but the case cannot be regarded as authority for two reasons: (1) The lessor was himself only a lessee of another, and the transfer was made to the owner of the premises, the transferee retaining in himself the reversion for a period of twenty-one days, covered by his lease with the owner, but not covered by the lease transferred. So the covenants were enforced by the owner of the ultimate reversion, al-

though an immediate reversion remained in the transferee. (2) The language used in the deed of transfer on the back of the lease was quite comprehensive, being a conveyance of "the within written indenture, and the messuage or tenement, with the appurtenances, thereby granted, and all the estate, right, title, interest, etc., of Bates, to hold to the said John Langdon, his executors, administrators, or assigns, from thenceforth for all such time or term therein as within mentioned."

A different situation is created where a lessee has sublet and then assigns the original lease. The assignee of the original lease is a transferee of the reversion as to the subtenant (see subd. IV. c, 2 (a), *infra*); but in such case the assignee actually owns the estate to which the lesser estate will revert.

d. Necessity for seal.

Since the character of an estate is not changed by the fact that another has acquired a leasehold interest therein, a transfer of the reversion usually must meet the same tests, as to requirements, as are applied to transfers generally.

Conveyance of the reversion by livery of seisin usually is not possible because of tenant's possession of the premises (*Doe ex dem. Were v. Cole*, 7 Barn. & C. 243, 1 Mann. & R. 33, 6 L. J. K. B. 20); hence the reversion was at common law usually transferred by what was regarded as the equivalent of livery of seisin, *i. e.*, a conveyance under seal, with attornment (while attornment was necessary. See subd. II. g, *infra*). In note (3) to *Thursby v. Plant*, 1 Wms. Saund. 234, it is said: "At the common law a reversion could only be granted by deed or fine; and such grant, together with the attornment of the tenant (while attornments were necessary), was held to be of equal notoriety with, and therefore equivalent to, a feoffment and livery of lands in immediate possession. Co. Litt. 172a; *Lincoln College's Case* 3 Coke, 63a; 2 Bl. Com. 317; *Doe ex dem. Were v. Cole*, *supra*."

Therefore, at common law there were but two ways by which the reversion could be conveyed, *i. e.*, by livery of seisin (when that was possible) and by conveyance under seal, with the consent of the tenant, while attornment was necessary, and later without such consent (see *infra* subd. II. g). *Doe ex dem. Were v. Cole*, *supra*.

And see quotation from note to *Thursby v. Plant*, *supra*.

And, on the ground that an assignment must be by an instrument of as high a nature as the instrument which it purports to transfer, it has been held that while an "assignment of lease" not under seal when the lease itself is under seal transfers to the assignee an equitable right to the rents, he cannot maintain an action against the lessee for rent under the covenants to pay rent. (This differs from a transfer of the reversion. See subd. II. c, *supra*). *Wood L.R.A.1915C*.

v. Partridge, 11 Mass. 488; *Bridgham v. Tileston*, 5 Allen, 371.

And a concurrent lease (see *infra*, subd. II. c, 1), if not under seal, did not at common law transfer the reversion. *Brawley v. Wade*, M'Clel. 664.

The transfer need not be under seal merely because the lease itself is under seal. *Keeley Brewing Co. v. Mason*, 102 Ill. App. 381. Although this case involved an "assignment of lease," it may have been merely an assignment of rent. See same case, *supra*, subd. II. c.

e. Transfer by subsequent lease.

1. Concurrent leases.

By a concurrent lease is meant a second lease, made by the owner of the reversion, to one other than the tenant holding under a former lease all or part of the same premises covered by the second lease, the terms of the two leases including at least some time in common.

The lessor may convey to a third person his reversion, by a concurrent lease, and the lessee thereunder becomes the landlord of the first lessee, with the right to collect the rent and enforce the covenants of the first lease until the expiration of the term of one or the other of the two leases. *Wordsley Brewery Co. v. Halford*, 90 L. T. N. S. 89; *Attoe v. Hemmings*, 2 Bulstr. 281; *Harmer v. Bean*, 3 Car. & K. 307; *Horn v. Beard*, 81 L. J. K. B. N. S. 935, [1912] 3 K. B. 181, 107 L. T. N. S. 87; *Disdale v. Iles*, 2 Lev. 88; *Holland v. Vanstone*, 27 U. C. Q. B. 15; *Cheatham v. J. W. Beck Co.* 96 Ark. 231, 131 S. W. 699; *Root v. Trapp*, 10 Kan. App. 575, 62 Pac. 248 (the holding here was only incidental to the point here discussed, it being that the lessor has the right to make a concurrent lease, and is not responsible for trouble between the tenant and the concurrent lessee); *Harmon v. Flanagan*, 123 Mass. 288; *Shea v. McCauliff*, 186 Mass. 569, 72 N. E. 69 (the principle was here recognized, but the holding is based upon other grounds); *Hendrickson v. Beeson*, 21 Neb. 61, 31 N. W. 266; *Russo v. Yuzolino*, 19 Misc. 28, 42 N. Y. Supp. 482 (he may maintain summary proceedings to oust lessee for failure to pay rent under the covenant; but in *Cohen v. Suckno*, 32 Misc. 689, 66 N. Y. Supp. 467, this proposition is denied); *Logan v. Green*, 39 N. C. (4 Ired. Eq.) 370, 10 Mor. Min. Rep. 322; *Silveira v. Ah Lo*, 16 Haw. 702.

Under a statute providing that "a person to whom real property is transferred or devised, upon which rent has been reserved or to whom any such rent is transferred, is entitled to the same remedies for the recovery of rent, for nonperformance of any of the terms of the lease, or for waste or cause of forfeiture, as his grantor or deviser might have had," a lease *in presenti* for the term of five years, of property in possession of a tenant from month to month, conveys such an estate as will enable the lessee to oust the tenant, who has not attorned

to him. *McDonald v. Hanlon*, 79 Cal. 442, 21 Pac. 861.

And the transferee by concurrent lease is entitled to the benefit of covenants in the prior lease, as against the tenant. *Wright v. Burroughes*, 3 C. B. 685, 4 Dowl. & L. 438, 16 L. J. C. P. N. S. 6, 12 Jur. 968; *Bristow's Case*, Godb. 161 (a covenant to repair); *Dowse v. Cale*, 2 Vent. 126, 3 Lev. 264.

And the lessee by concurrent lease may maintain an action of forcible detainer under the covenants in the prior lease, on failure of the tenant under the prior lease to pay rent, and upon his refusal to give up possession. *Hendrickson v. Beeson*, 21 Neb. 61, 31 N. W. 266.

The transferor by concurrent lease cannot give to the tenant of the prior lease a valid notice to vacate at the expiration of the term (*Wordsley Brewery Co. v. Halford*, 90 L. T. N. S. 89), since it is the right of the transferee to give the notice of termination (*Doe ex dem. Jarvis v. McCarthy*, 5 N. B. 63).

A tenancy at will is terminated at once by the grant of a term for years by the lessor to a third person, and where the second lease is to take effect at once, this consequence is not prevented by a stipulation in the second lease that possession is to be given at the next rent day of the tenant at will, so that the lessor in such case cannot collect the rent from the tenant at will. It belongs to the concurrent lessee. *Disdale v. Iles*, 2 Lev. 88.

2. Leases in reversion.

By a lease in reversion is meant a lease that becomes effective only at the expiration of the term of the prior lease. That the lease is to have this effect may be expressed in two ways, *i. e.*, the time set for the beginning of the term in the second lease may be made to correspond with the time set for the expiration of the term of the prior lease, or the second lease may contain a reference to the first, and be so worded as to become effective at the expiration of the term thereof. If the first form is used, the lease in reversion does not become effective until the date set therefor, even though the prior lease should be forfeited or surrendered; but if the lease in reversion is in the latter form, it will take effect immediately upon the termination of the term of the prior lease, even though that term is terminated prematurely. *Tiffany, Land. & T. § 146d*, citing *Bishop of Bath's Case*, 6 Coke, 34b; 1 Platt, Leases, 443; *Bacon Abr. Lease (L) 1*; *Co. Litt. 46b*.

The lessee under a lease in reversion has only an *interesse termini* until he gets possession. *Joyner v. Weeks* [1891] 2 Q. B. 31, 60 L. J. Q. B. N. S. 510, 65 L. T. N. S. 16, 39 Week. Rep. 583, 55 J. P. 725; *Lewis v. Baker* [1905] 1 Ch. 48, 74 L. J. Ch. N. S. 39, 21 Times L. R. 17, 54 Week. Rep. 146; *Smith v. Day*, 2 Mees. & W. 684, *Murph. & H. 185*, 6 L. J. Exch. N. S. 219; *Logan v. L.R.A.*1915C.

Green, 39 N. C. (4 Ired. Eq.) 370, 10 Mor. Min. Rep. 322.

The lessor does not sever the relation of landlord and tenant between himself and the lessee by executing to a third person a lease in reversion, and such third person does not become the landlord of the tenant, even though the tenant holds over into the time when the lease in reversion was to have commenced. *Blatchford v. Cole*, 5 C. B. N. S. 514, 28 L. J. C. P. N. S. 140, 5 Jur. N. S. 412; *Smith v. Day*, 2 Mees. & W. 684, *Murph. & H. 185*, 6 L. J. Exch. N. S. 219; *Thomas v. Wightman*, 129 Ill. App. 305; *Cullinan v. Goldstein*, 61 Misc. 82, 113 N. Y. Supp. 21.

And the fact that lessor has given a lease in reversion of the premises, to commence at the expiration of the term of his first lessee, does not deprive him of his right to maintain against the first lessee, who holds over, a statutory action for possession of the premises, on the theory that he has transferred the reversion. *Eells v. Morse*, 208 N. Y. 103, 101 N. E. 803; *Imbert v. Hallock*, 23 How. Pr. 456; *Goelet v. Roe*, 14 Misc. 28, 35 N. Y. Supp. 146; *Cullinan v. Goldstein*, 61 Misc. 82, 113 N. Y. Supp. 21.

So it has been held that a lessee whose term begins at the expiration of the term of another lessee is not a transferee of the reversion, and that the lessor is the proper party to sue the first lessee for the penalty fixed in his lease for holding over. *Thomas v. Wightman*, 129 Ill. App. 305.

And the lessor's vendee, who has recognized the rights of the lessee in reversion, is the proper person to give to the prior lessee the notice to give up possession so as to prevent a legal holding over, and for a failure to do so he is liable to the lessee in reversion for damages suffered because of inability to get possession according to contract. *Hammond v. Jones*, 41 Ind. App. 32, 83 N. E. 257.

And the lessee in reversion cannot maintain an action against the prior lessee to recover a statutory penalty for holding over. *Blatchford v. Cole*, 5 C. B. N. S. 514, 28 L. J. C. P. N. S. 140, 5 Jur. N. S. 412.

And the lessee in reversion has no right of action against the prior lessee for lawfully holding over his term, thus keeping the former out of possession, to his damage. *Hammond v. Jones*, 41 Ind. App. 32, 83 N. E. 257.

But, in *United Merchants' Realty & Improv. Co. v. Roth*, 193 N. Y. 570, 86 N. E. 544, it was held that by virtue of a statute which provides that "the grantee of leased real property, or of a reversion thereof, or of any rent, the devisee or assignee of the lessor of such a lease, or the heir or personal representative of either of them, has the same remedies by entry, action or otherwise, for the nonperformance of any agreement contained in the assigned lease for the recovery of rent, for the doing of any waste, or for other cause of forfeiture as his grantor or lessor had, or would have had, if the reversion had remained in him,"

a lessee in reversion, whose term begins at the expiration of that of a prior tenant of the same lessor, may take advantage of a provision in the first lease that permits the lessor to elect to treat the tenant as a tenant for another year in case he holds over his term, and that the tenant in reversion, after having so elected, may collect rent from the prior tenant according to the terms of the prior lease. The court held that there is privity of estate between the two tenants. This case appears to overrule *Cullinan v. Goldstein*, 61 Misc. 82, 113 N. Y. Supp. 21, where it was held that the lessee in reversion could not maintain summary proceedings as landlord to dispossess the prior lessee holding over illegally. While the Roth Case was for rent and the Goldstein Case was for possession, the wording of the statute is such that it would be difficult to escape the conclusion that if it gives the one right of action, it also gives the other.

And it was held in *Pendergast v. Young*, 21 N. H. 234, that the lessor (in this case, his representatives after his death) could not collect rent from the lessee for the time the latter held over his term if the lessor had leased the premises to a third party, whose term was to begin at the expiration of that of the tenant who held over. This decision is based upon the ground that the lessor had, by the lease in reversion, parted with his right to possession for the time for which he was seeking to collect the rent.

In *Alexander v. Loeb*, 230 Ill. 454, 82 N. E. 833, under the second lease the term did not begin until the expiration of the term of the first lessee, and by an agreement with the second lessee, contemporaneous with his lease, it was specifically provided that possession was not to be given during the time the first lessee might prevent it, by holding over against the desires of the lessor. In an action by the lessor against the first tenant for the statutory penalty for willfully holding over against the lessor, it was held that the lessor, and not the second lessee, was the proper party to sue as landlord.

A tenant at will, having sublet part of the premises, must terminate the under-tenancy before leasing the same premises to another, for he does not have the power to make a valid written lease that will give the lessee a better title than the one he has already granted. *Hilbourn v. Fogg*, 99 Mass. 11.

1. Transfer by way of mortgage.

As to rights of mortgagee in general, see note to *Cooke v. Cooper*, 7 L.R.A. 273.

The question as to the right of the mortgagee to enforce any of the rights of a landlord against the lessee of the mortgagor, where the mortgage is prior in point of time to the lease, is not within the scope of this note, for the reason that the mortgage covers the whole estate, so that, if foreclosed, the purchaser at the sale takes L.R.A.1915C.

title paramount to that of the lessee. See *infra*, III. b, 2.

In jurisdictions where a mortgage creates only a lien to secure a debt, and does not pass title until default, foreclosure, and sale, no question can arise prior to foreclosure in case the reversion is covered by a mortgage given pending the lease, since there is no transfer of the reversion. *Merchants' Union Trust Co. v. New Philadelphia Graphite Co.* — Del. —, 83 Atl. 526, affirmed on application to amend in — Del. —, 87 Atl. 1022; *Reed v. Bartlett*, 9 Ill. App. 267; *David Bradley & Co. v. Peabody Coal Co.* 99 Ill. App. 427; *Heavilon v. Farmers' Bank*, 81 Ind. 249; *Truelock v. Donahue*, 76 Iowa, 758, 40 N. W. 696, second appeal, 85 Iowa, 748, 52 N. W. 537; *Burden v. Thayer*, 3 Mete. 76, 37 Am. Dec. 117; *Russell v. Allen*, 2 Allen, 42; *Mirick v. Hoppin*, 118 Mass. 582; *Tilleny v. Knoblauch*, 73 Minn. 108, 75 N. Y. 1039; *Simers v. Saltus*, 3 Denio, 214 (by way of argument); *Myers v. White*, 1 Rawle, 353.

And a conveyance by way of mortgage by the lessor to the lessee does not merge the leasehold into the fee. In such case the lessee may refuse to pay the rent, but must credit lessor with the amount thereof on the mortgage debt, applying it first to payment of interest and balance upon principal. But if he voluntarily pays the rent, lessor is bound for the full mortgage debt and interest. *Newall v. Wright*, 3 Mass. 138, 3 Am. Dec. 98.

Where the mortgagee leases the land for a term of years, a payment of the mortgage debt in full by the mortgagor terminates the tenancy, and the mortgagor may eject the tenant before the expiration of the term. *Holt v. Rees*, 44 Ill. 30, approved in 46 Ill. 181.

But where a mortgage passes title to the mortgagee, subject to defeat by payment of the debt, a mortgage executed by the lessor after the execution of the lease transfers the reversion to the mortgagee. In such case the mortgagee, as transferee of the reversion, becomes the landlord to the lessee, upon giving notice to the latter of the transfer, and of his desire to receive the rents, etc. *Moss v. Gallimore*, 1 Dougl. K. B. 279, 18 Eng. Rul. Cas. 404; *Cook v. Guerra*, L. R. 7 C. P. 132, 41 L. J. C. P. N. S. 89, 26 L. T. N. S. 97, 20 Week. Rep. 367; *Rogers v. Humphreys*, 4 Ad. & El. 299, 1 H. & W. 625, 5 Nev. & M. 511, 5 L. J. K. B. N. S. 65; *Trent v. Hunt*, 9 Exch. 14, 22 L. J. Exch. N. S. 318, 17 Jur. 899, 1 Week. Rep. 481; *Forse v. Sovereign*, 14 Ont. App. Rep. 482; *Kinnear v. Aspden*, 19 Ont. App. Rep. 468; *Perdue v. Hays*, 31 U. C. Q. B. 111; *Dauphinais v. Clark*, 3 Manitoba L. Rep. 225; *Comer v. Sheehan*, 74 Ala. 452 (statement by way of explanation); *Coffey v. Hunt*, 75 Ala. 236; *McMillan v. Otis*, 74 Ala. 560 (rule not applied, for the reason that, by the terms of the mortgage, the mortgagee was not entitled to possession); *American Freehold Land Mortg. Co. v. Turner*, 95 Ala. 272, 11 So. 211; *Smith v. Taylor*, 9 Ala. 633 (rule not applicable where the

terms of the mortgage imply right of possession in mortgagor until default. And in such case notice to tenant to pay to mortgagee is necessary even after default, in order to relieve him of liability to mortgagor; Walker v. Baldwin, 21 Conn. 168; King v. Housatonic R. Co. 45 Conn. 226; Merchants' Union Trust Co. v. New Philadelphia Graphite Co. — Del. —, 83 Atl. 520 (statement by way of argument, the decision being affirmed on application to amend in — Del. —, 87 Atl. 1022); Scheidt v. Belz, 4 Ill. App. 431; Reed v. Bartlett, 9 Ill. App. 267 (statement by way of explanation); Castleman v. Belt, 2 B. Mon. 157 (statement by way of argument); Burden v. Thayer, 3 Met. 76, 37 Am. Dec. 117; Cavis v. McCleary, 5 N. H. 529; Kimball v. Pike, 18 N. H. 419; Souders v. Vansickle, 8 N. J. L. 313 (not applied, for the reason that mortgage was prior to the lease); Abbott v. Hanson, 24 N. J. L. 493 (statement by way of explanation); Kimball v. Lockwood, 6 R. I. 138 (merely a statement of the rule); Teal v. Walker, 111 U. S. 242, 28 L. ed. 415, 4 Sup. Ct. Rep. 420 (statement by way of argument).

The assignee of the mortgagee of the reversion is in privity of contract with the lessee, and can enforce the covenants of the lease against the lessee. Chapman v. Smith [1907] 2 Ch. 97, 76 L. J. Ch. N. S. 394, 96 L. T. N. S. 662.

And the right to rent accruing prior to an assignment of a mortgage, of the mortgagee, who, after his right to dispossess the mortgagor had accrued, made an agreement with the mortgagor that in case the mortgage debt was not paid, the latter should pay a certain amount as rent, turns upon the question as to whether the mortgage debt had been paid. Thornton v. Strauss, 79 Ala. 164.

g. Necessity for attornment.

A definition of an attornment, together with a condensed statement of both the common law and the rules under the English statutes, is to be found in note 4, to Thursby v. Plant, 1 Wms' Saund. 234, as follows: "An attornment at the common law was an agreement of the tenant to the grant of seignory, or of a rent; or of the donee in tail, or tenant for life or years, to a grant of a reversion, or remainder made to another. Co. Litt. 309a; 2 Bl. Com. 288. [Accordingly, an attornment is defined to be 'the act of the tenant's putting one person in the place of another as his landlord.' Cornish v. Searell, 8 Barn. & C. 476, per Holroyd, J. The tenant who has attorned continues to hold upon the same terms as he held of his former landlord; hence, where the tenant signed an instrument by which he 'attorned and became tenant' to A of certain lands, 'to hold the same for such time and on such conditions as may be subsequently agreed on 'between him and A, it was held that the instrument required a stamp, as being not a mere attornment, but L.R.A.1915C.

an agreement for a new tenancy. Cornish v. Searell, 8 Barn. & C. 471, 1 Mann. & R. 703, 6 L. J. K. B. 254. And the attornment was necessary to the perfection of the grant. However, the necessity of attornment was in some measure avoided by the statute of uses; as, by that statute, the possession was immediately executed to the use (Birch v. Wright, 1 T. R. 384), 1 Revised Rep. 223, 15 Eng. Rul. Cas. 626; and by the statute of wills, by which the legal estate is immediately vested in the devisee. Yet attornment continued after this to be necessary in many cases. But both the necessity and efficacy of attornments have been almost totally taken away by the statutes 4 & 5 Anne, chap. 16, §§ 9, 10, and 11 Geo. II. chap. 19, § 11. By the former of those statutes it was enacted, 'that all grants or conveyances of any manors or rents, or of the reversion or remainder of any messuages or lands, shall be good and effectual, without any attornment of the tenants of any such manors, or of the land out of which such rents shall be issuing, or of the particular tenants upon whose particular estate any such reversions or remainders shall be expectant or depending, as if their attornment had been had and made: provided that no such tenant shall be prejudiced or damaged by payment of any rent to any grantor or conusor, or by breach of any condition for nonpayment of rent, before notice shall be given to him of such grant by the conusee or grantee.' Notice of the title of *cestui que trust* has been held sufficient to entitle his trustees to maintain an action as grantees of the reversion against the tenant, without attornment. Lumley v. Hodgson, 16 East, 99, 14 Revised Rep. 316. [But the grantee cannot, it should seem, recover for the use and occupation of the premises for any bygone time before the grant of the reversion, notwithstanding the demise was by parol; his proper remedy is by an action of debt for rent on the demise. Mortimer v. Preedy, 3 Mees. & W. 605]. By the latter statute it was enacted, 'that the attornments of tenants to strangers claiming title to the estate of their landlords shall be absolutely null and void, to all intents and purposes whatsoever; and that the possession of their respective landlord or landlords, lessor or lessors, shall not be deemed or construed to be in anywise changed, altered, or affected by any such attornment or attornments: provided, that nothing herein contained shall extend to or vacate or affect any attornment made pursuant to, and in consequence of, some judgment at law, or decree, or order of a court of equity, or made with the privity and consent of the landlord or landlords, lessor or lessors, or to any mortgagee, after the mortgage is become forfeited.' The first statute having made attornment unnecessary, and the other having made it inoperative, it is now held not to be necessary either to aver it in a declaration in covenant, or plead it in an avowry or other pleading whatever. Moss v. Gallimore, 1 Dougl. K. B. 283, 18

Eng. Rul. Cas. 404; *Rivis v. Watson*, 5 Mees. & W. 255, 9 L. J. Exch. N. S. 67."

The above statements regarding the common-law rule and the change thereof as historical facts are supported by statements by the court in *Doe ex dem. Agar v. Brown*, 2 El. & Bl. 331, 22 L. J. Q. B. N. S. 432; *Scalcoff v. Harston*, L. R. 1 C. P. Div. 106, 45 L. J. C. P. N. S. 125, 34 L. T. N. S. 130, 24 Week. Rep. 431; *Cook v. Moylan*, 1 Exch. 67, 5 Dowl. & L. 701; *Lumley v. Hodgson*, 16 East, 99, 14 Revised Rep. 315; *English v. Key*, 39 Ala. 113; *American Freehold Land Mortg. Co. v. Turner*, 95 Ala. 272, 11 So. 211; *King v. Housatonic R. Co.* 45 Conn. 226; *Fisher v. Deering*, 60 Ill. 114; *Scheidt v. Belz*, 4 Ill. App. 431; *Sampson v. Grimes*, 7 Blackf. 176; *Burden v. Thayer*, 3 Met. 76, 37 Am. Dec. 117; *Farley v. Thompson*, 15 Mass. 18; *Jones v. Rigby*, 41 Minn. 530, 43 N. W. 390; *Pierce v. Rollins*, 60 Mo. App. 497; *Mussey v. Holt*, 24 N. H. 248, 55 Am. Dec. 234; *Abbott v. Hanson*, 24 N. J. L. 493; *Morris v. Niles*, 12 Abb. Pr. 103; *Pelton v. Place*, 71 Vt. 430, 46 Atl. 63. And in a great many cases the decision is based upon a local statute adopting the statute of Anne, supra, or enacting a similar rule. *English v. Key*, 39 Ala. 113; *American Freehold Land Mortg. Co. v. Turner*, 95 Ala. 272, 11 So. 211; *Wise v. Falkner*, 51 Ala. 359; *Tubb v. Fort*, 58 Ala. 277; *Dreyfus v. Hirt*, 82 Cal. 621, 23 Pac. 193; *McDonald v. Hanlon*, 79 Cal. 442, 21 Pac. 861; *Lindley v. Dakin*, 13 Ind. 388; *Kellum v. Berkshire L. Ins. Co.* 101 Ind. 455; *Abbott v. Hanson*, 24 N. J. L. 493; *State, Watson, Prosecutrix, v. Idler*, 54 N. J. L. 467, 24 Atl. 554.

In some states it appears that the statute of Anne, supra, has been adopted without legislative sanction, as forming part of the common law. *King v. Housatonic R. Co.* 45 Conn. 226; *Sampson v. Grimes*, 7 Blackf. 176; *Abercrombie v. Redpath*, 1 Iowa, 111; *Farley v. Thompson*, 15 Mass. 18; *Burden v. Thayer*, 3 Met. 76, 37 Am. Dec. 117; *Russ v. Alpaugh*, 118 Mass. 374, 19 Am. Rep. 464; *Hendrickson v. Beeson*, 21 Neb. 61, 31 N. W. 266; *Pendergast v. Young*, 21 N. H. 234; *Mussey v. Holt*, 24 N. H. 248, 55 Am. Dec. 234; *Morris v. Niles*, 12 Abb. Pr. 103. Report of Judges of the Supreme Court of Pennsylvania to the Legislature in 1808, as to What English Statutes Are or Ought to be in Force in That State. 3 Binn. 625; *Tilford v. Fleming*, 64 Pa. 300; *Mortimer v. O'Reagan*, 10 Phila. 500; *Braker v. Deuser*, 49 Pa. Super. Ct. 215.

And in some cases the courts, while refusing to adopt the English statute, have held that the ancient common-law rule requiring attornment is not applicable under the allodial system of tenures; thus they reach the same result as if they adopted the statute of Anne, supra. *Jones v. Rigby*, 41 Minn. 530, 43 N. W. 390; *Perrin v. Lepper*, 34 Mich. 292; *Kelly v. Bowerman*, 113 Mich. 446, 71 N. W. 836; *Pelton v. Place*, 71 Vt. 430, 46 Atl. 63.

The statute of Anne to which reference is made, supra, and other similar statutes, L.R.A.1915C.

apply to concurrent leases, i. e., transfers of the reversion for a limited time, so that attornment by the lessee to the transferee by way of concurrent lease is not necessary (for definition of concurrent lease, see II. e, 1, supra). *Horn v. Beard*, 81 L. J. K. B. N. S. 935, [1912] 3 K. B. 181, 107 L. T. N. S. 87; *Doe ex dem. Agar v. Brown*, 2 El. & Bl. 331, 22 L. J. Q. B. N. S. 432; *Doe ex dem. Jarvis v. M'Carthy*, 5 N. B. 63; *McDonald v. Hanlon*, 79 Cal. 442, 21 Pac. 861; *Henrickson v. Beeson*, 21 Neb. 61, 31 N. W. 266; *Morris v. Niles*, 12 Abb. Pr. 103.

But the court in *Edwards v. Wickwar*, L. R. 1 Eq. 403, 35 L. J. Ch. N. S. 309, 12 Jur. N. S. 158, 14 Week. Rep. 363, held that an attornment was necessary in a case involving a transfer of the reversion by a concurrent lease. There is no mention made of the statute, and the note to the report of the case in 35 L. J. Ch. N. S. seems to indicate that the statute of Anne was overlooked.

In *Comstock v. Cavanagh*, 17 R. I. 233, 21 Atl. 498, cited with approval in *Moshassuck Encampment v. Arnold*, 25 R. I. 65, 54 Atl. 771, it was held that statutes 32 Hen. VIII. chap. 34, and 4 & 5 Anne, chap. 16, § 9, are not applicable to this class of cases, and therefore the common-law rule requiring attornment was applied. The reasoning underlying the holding is not satisfactory. The reason given is that a lease does not transfer any interest or estate in the land, but a mere right to possession; and since the first lessee has the paramount right of possession, the second lessee takes nothing by his lease until the expiration of the prior term; that is, the second lease created a mere *interesse termini*. Mr. Tiffany (see *Tiffany, Land & T. vol. 1, § 146, note 45*), criticizes the case as follows: "Since it was the lack of an attornment which, at the common law, caused the second lease to take effect merely as creating an *interesse termini* (see *Bacon, Abr. Lease [N]*; *Rawlins's Case*, 4 Coke, 53a), it is somewhat difficult to understand the reason given for the nonapplicability of the statute. The statement seems equivalent to saying that the statute dispensing with an attornment does not apply because an attornment is necessary. The court cites *Edwards v. Wickwar*, supra, which no doubt supports it, but it also cites *Doe ex dem. Agar v. Brown*, 2 El. & Bl. 348, 22 L. J. Q. B. N. S. 432, which is directly contrary to its conclusion."

In *White v. Kane*, 53 Mo. App. 300, it was assumed that attornment of lessee to the lessee in a concurrent lease is necessary. And see *Missouri cases, infra*, assuming that this is the rule on any kind of transfer.

At common law, however, attornment by the tenant to the transferee by way of concurrent lease was necessary. Anonymous, Leon. pt. 3, p. 17.

There are a few cases, however, where the court apparently assumes that attornment is necessary to create the relation of land-

lord and tenant between the transferee of the reversion and the tenant of the transferor. *Thompson v. Chapman*, 57 Ga. 16; *Smith v. Aude*, 46 Mo. App. 631; *Duke v. Compton*, 49 Mo. App. 304; *Winkelman v. Katzenburger*, 77 Mo. App. 117.

In *Fisher v. Deering*, 60 Ill. 114, it was held that the statute of Anne, supra, was not adopted in Illinois, hence attornment by the lessee to the transferee of the reversion is necessary, and this holding seems to have been considered correct in *Hayes v. Lawver*, 83 Ill. 182; *Mackin v. Haven*, 187 Ill. 480, 58 N. E. 448; *Raymond v. Kerker*, 2 Ill. App. 496; *Oswald v. Mollet*, 29 Ill. App. 449. But in *Barnes v. Northern Trust Co.* 169 Ill. 112, 48 N. E. 31, it was held that the necessity for attornment was abolished by a state statute which provided: "The grantees of any demised lands, tenements, rents, or other hereditaments, or of the reversion thereof, the assignees of the lessor of any demise, and the heirs and personal representatives of the lessor, grantee or assignee, shall have the same remedies by entry, action or otherwise, for the nonperformance of any agreement in the lease, or for the recovery of any rent, or for the doing of any waste or other cause of forfeiture, as their grantor or lessor might have had, if such reversion had remained in such lessor or grantor." To the same effect are *David Bradley & Co. v. Peabody Coal Co.* 99 Ill. App. 427; *Howland v. White*, 48 Ill. App. 236.

The effect of the decision in *Marney v. Byrd*, 11 Humph. 95, is to require an express promise by the lessee to the transferee of the reversion if the lease was under seal, as a prerequisite to the maintenance of an action on the contract, by the transferee, in his own name, for the rent reserved in the lease. (See same case cited under subd. IV. c, 1, infra, as to transferee's right to sue in name of lessor). But there is no mention of any statute, either English or local, and the case did not turn upon the question of attornment, the court merely making an extrinsic remark that if there had been an express promise to pay the rent, the action could have been maintained. The court appears to have, without directly so stating, rejected the doctrine established by 32 Hen. VIII. chap. 34 (see infra, subd. IV. c, 2 (a), for it held that while the transferee was the equitable owner of the rents, he could not sue in his own name upon the lessee's covenant to pay the rent. The decision appears to be directly opposed to an earlier decision by the same court, *Shelby v. Hearne*, 6 Yerg. 512, where it was held that, by reason of statute 32 Hen. VIII., adopted by a local statute, the transferee of the reversion could sue the lessee for any subsequent breach of a covenant that runs with the land. The question of attornment was not involved in either case, except as it would be affected by a repudiation of the doctrine established by the statute of 32 Hen. VIII., and if the decision in the *Shelby* Case was correct, the question of attornment was left undecided. And see L.R.A.1915C.

Ohio cases, cited infra, subd. IV. c, 2 (a), rejecting the doctrine established by the statute of 32 Hen. VIII.

It has been held that under the statute of Anne, attornment is necessary to establish privity of contract between the transferee of the reversion and a lessee under an oral lease, where the lessee had assigned prior to the transfer, both the transferor and the transferee having refused to accept the assignee of the oral lease as their tenant. *Allcock v. Moorhouse*, L. R. 9 Q. B. Div. 366, 47 L. T. N. S. 404, 30 Week. Rep. 871, 47 J. P. 85.

Where the reversion passes to the beneficiary under the statute of uses, attornment by the lessee of the trustee is not necessary. *Anonymous*, 1 Dyer, 30a (although the lease was made before the passage of the statute of uses); *Morgan's Case*, 2 Ander. 203 (this case should be read in connection with the rule in *Littleton*, 34 Hen. VI. 41, to which the court refers); *Watts v. Ognell*, Cro. Jac. 192 (cited with approval in *Birch v. Wright*, 1 T. R. 385, 1 Revised Rep. 223, 15 Eng. Rul. Cas. 626); *Finch's Case*, 6 Coke, 63a (at page 68b, the principle is stated by way of argument). And see quotation, supra, from note to *Thursby v. Plant*, concerning the statute of uses.

III. Transfers by operation of law.

a. Necessity for attornment.

While at common law the tenant was under no obligation to recognize as his landlord one to whom the reversion had been voluntarily transferred (see supra, subd. II. g), a different rule prevailed where the transfer of the reversion was by operation of law. In such case no statute was needed to abolish the necessity for attornment. It should be noted that a judicial sale upon a lien which attached prior to the date of the lease conveys more than the reversion, i. e., a superior title (see infra, subd. III. b, 2 (a)), and that in such case an actual attornment amounts to a new agreement (see infra, subd. III. b, 2 (b)). Another apparent exception is in case of a lessor who has a bare life estate, who leases and dies during the term. His death terminates the lease, so it requires an attornment amounting to a novation to establish the relation of landlord and tenant between the remainderman and the tenant. In this case there is really no transfer of the reversion (see subd. III. e, infra).

Where the reversion was transferred by operation of law, attornment by the tenant to the transferee was not necessary, at common law, to create the relation of landlord and tenant between the transferee and the lessee. *Rogers v. Pitcher*, 6 Taunt. 202, 1 Marsh. 541, *semble*; *Lloyd v. Davies*, 2 Exch. 103, 18 L. J. Exch. N. S. 80, 15 Eng. Rul. Cas. 326.

In *Lloyd v. Davies*, supra, Parke, B., said: "There are three authorities in the Year Books against you [referring to op-

posing contention], cited in 1 Rolle, Abr. title, 'Attornment,' (F); 37 Hen. VI. 33; 39 Hen. VI. 24; 20 Hen. VI. 7 b. They settle this point, and decide that attornment is not necessary; where the reversion was assigned by operation of law it was not requisite, but it was when assigned by act of parties. If a party gets the reversion, he is entitled to the rent which is attached to it. Rolfe, B., referred to 1 Rolle, Abr., title, 'Execution' (B)."

b. By sale on lien.

1. On lien subsequent to lease.

A judgment, mortgage, or other lien upon the landlord's estate in the premises, created after the date of the lease, is, of course, subordinate thereto; hence, a sale resulting from such lien transfers to the purchaser only the reversion, and creates the relation of landlord and tenant between purchaser and lessee. *English v. Key*, 39 Ala. 113; *Otis v. McMillan*, 70 Ala. 46; *American Freehold Land Mortg. Co. v. Turner*, 95 Ala. 272, 11 So. 211; *Hayes v. New York Gold Min. Co.* 2 Colo. 273; *Strousse v. Bank of Clear Creek County*, 9 Colo. App. 478, 49 Pac. 280; *Reed v. Bartlett*, 9 Ill. App. 267; *Epley v. Eubanks*, 11 Ill. App. 272; *Murphy v. Teter*, 56 Ind. 545; *Wheat v. Brown*, 3 Kan. App. 431, 43 Pac. 807 (the date of the lien is not given, and no point is made regarding it); *Abrams v. Sheehan*, 40 Md. 446; *Rhyn v. Guevara*, 67 Miss. 139, 6 So. 736; *Smith v. Aude*, 46 Mo. App. 631; *Souders v. Vansickle*, 8 N. J. L. 313; *Wacht v. Erskine*, 61 Misc. 96, 113 N. Y. Supp. 130; *Lancashire v. Mason*, 75 N. C. 455; *Groos v. Chittim*, — Tex. Civ. App. —, 100 S. W. 1006; *Butt v. Ellett*, 19 Wall. 544, 22 L. ed. 183.

2. On lien prior to lease.

(a) In general.

Where premises are subject to a lien, of course the owner can convey no estate therein free from the lien. If he grants a leasehold estate therein, it is subject to the lien, and a sale based upon the lien passes to the purchaser an estate superior to that of the lessee.

Thus, a purchaser, at a sale based upon a lien, of premises in which a leasehold estate had been created subsequent to the date at which the lien attached, does not, by virtue of the transfer of title, become the landlord of the lessee, but he, as one having a superior title, may evict the tenant. *American Freehold Land Mortg. Co. v. Turner*, 95 Ala. 272, 11 So. 211; *Fitzgerald v. Beebe*, 7 Ark. 310; *Ish v. Morgan*, 48 Ark. 413, 3 S. W. 440 (an action for unlawful detainer); *McDermott v. Burke*, 16 Cal. 580 (the case turned upon the question as to whether or not there had been a new contract); *Bartlett v. Hitchcock*, 10 Ill. App. 87; *Jones v. Thomas*, 8 Blackf. 428; *Castleman v. Belt*, 2 B. Mon. 157 (but it was held that notice by the purchaser to

the tenant that he would demand all future rents was sufficient to enable him to bring an action for use and occupation for rent accruing after the notice); *Thompson v. Flathers*, 45 La. Ann. 120, 12 So. 245; *Simers v. Saltus*, 3 Denio, 214; *Whalin v. White*, 25 N. Y. 462 (the principle was here recognized, but not applied, for two reasons (1) There was a voluntary transfer of reversion to the plaintiff, who was also the purchaser at the sale, and this entitled him to the rents sued for, i. e., those accruing after the sale, but before acquiring title. (2) There was a clause in the lease which bound the lessee to attorn to anyone who might acquire a title paramount to the lessor, if such owner should confirm the lease); *Sprague Nat. Bank v. Erie R. Co.* 22 App. Div. 526, 48 N. Y. Supp. 65; *O'Neill v. Morris*, 28 Misc. 613, 59 N. Y. Supp. 1075; *Peters v. Elkins*, 14 Ohio, 344; *Heidelberg v. Slader*, 1 Handy (Ohio) 456; *Groos v. Chittim*, — Tex. Civ. App. —, 100 S. W. 1006.

(b) Effect of attornment.

Since an attornment is equivalent to a novation, an actual attornment by the tenant to the purchaser of the premises at a sale based upon a lien prior to the date of the lease creates the relation of landlord and tenant between the purchaser and the tenant. In such case it makes no difference whether the lien was prior or subsequent to the lease. *Coker v. Pearsall*, 6 Ala. 542; *Randolph v. Carlton*, 8 Ala. 606; *McDermott v. Burke*, 16 Cal. 580; *Magill v. Hinsdale*, 6 Conn. 464, 16 Am. Dec. 70; *Conley v. Schiller*, 24 N. Y. Supp. 473.

3. Inconsistent holdings and statutory changes.

In a few cases the courts have erroneously treated the purchaser at a sale on a lien prior to the lease as the landlord of the lessee, regarding the date of the sale as the time as of which the rights of the parties became fixed. It was probably not pointed out to the court that the purchaser's title for this purpose must date back to the time the lien under which he purchases attached, otherwise a mortgagor or lien debtor could materially lessen his creditor's security by executing an unfavorable lease. In the following cases the courts appear to have fallen into this error. *Harris v. Foster*, 97 Cal. 292, 33 Am. St. Rep. 187, 32 Pac. 246; *Condon v. Marley*, 7 Kan. App. 383, 51 Pac. 924; *Henshaw v. Wells*, 9 Humph. 568.

In *Martin v. Martin*, 7 Md. 368, 61 Am. Dec. 364, although the tenant appears to have acknowledged as his landlord the purchaser of the reversion at an execution sale on a judgment prior to the commencement of the lease, the court apparently lost sight of the fact, and asserts as a general rule that the purchaser in such case is entitled to all rent falling due after the acknowledgment of the sheriff's deed. But the court was here considering the rule that rents will not be apportioned between the

lessor and the purchaser, and may have meant merely that when the lessee has attorned to the purchaser that rule will be applied, although the judgment was prior to the lease. And the court cites and appears to have given considerable weight to *Bank of Pennsylvania v. Wise*, 3 Watts, 394, which case was based upon a local statute. See same case and other Pennsylvania cases, cited *infra*.

The rule that the relation of landlord and tenant is not created between the lessee and the purchaser at a judicial sale upon a lien prior to the lease, it was held in *American Freehold Land Mortg. Co. v. Turner*, 95 Ala. 272, 11 So. 211, is not changed by a statute which reads as follows: "Where real estate, or any interest therein, is sold under execution, or by virtue of any decree in chancery, or under any deed of trust, or power of sale in a mortgage, the same may be redeemed by the debtor from the purchaser, or his vendee, within two years thereafter, in manner following." . . . "the possession of the land must be delivered to the purchaser, within ten days, after the sale thereof, by the debtor, if in his possession, on demand of the purchaser or his vendee. If the land is in the possession of a tenant, notice to him by the purchaser, or his vendee, of the purchase, after the lapse of ten days from the time of the sale, and that it has not been redeemed, vests the right to the possession in him, in the same manner as if such tenant had attorned to him."

The Pennsylvania decisions are very materially influenced by an early statute (June 16, 1836, § 119), which reads as follows: "If any lands or tenements shall be sold upon execution, as aforesaid, which, at the time of such sale, or afterwards, shall be held, or possessed by a tenant, or lessee or person holding or claiming to hold the same under the defendant in such execution, the purchaser of such lands or tenements shall, upon receiving a deed for the same, as aforesaid, be deemed the landlord of such tenant, lessee, or other person, and shall have the like remedies, to recover any rent or sums accruing subsequently to the acknowledgment of a deed to him, as aforesaid, whether such accruing rent may have been paid in advance, or not, if paid, after the rendition of judgment on which sale was made, as such defendant might have had, if no such sale had been made." It has been held that this statute does not change the rule that the purchaser at a sale on a lien attaching subsequent to the date of the lease necessarily becomes the landlord of the lessee. *Hemphill v. Tevis*, 4 Watts & S. 535; *Borrell v. Dewart*, 37 Pa. 134.

But where the lien attaches before the execution of the lease, the purchaser at the execution sale upon the lien may elect to affirm or to disaffirm the lease. *Hemphill v. Tevis*, *supra*; *Menough's Appeal*, 5 Watts & S. 432; *Duff v. Wilson*, 69 Pa. 316; *Hayden v. Patterson*, 51 Pa. 261; *Farmers' & M. Bank v. Ege*, 9 Watts, 436, 36 Am. Dec. 130; *Boyd v. McCombs*, 4 Pa. 146; L.R.A.1915C.

Bank of Pennsylvania v. Wise, 3 Watts, 394; *Braddee v. Wiley*, 10 Watts, 362; *King v. Bosserman*, 8 Pa. Dist. R. 344, affirmed in 13 Pa. Super. Ct. 480; *Reams v. Yeager*, 29 Pa. Super. Ct. 520.

If he disaffirms the lease, he cannot afterward maintain any action necessarily founded upon the contract. *Hemphill v. Tevis*, 4 Watts & S. 535; *Duff v. Wilson*, 69 Pa. 316; *Farmers' & M. Bank v. Ege*, 9 Watts, 436, 36 Am. Dec. 130.

But in such case, by another section of the same act, the tenant, after notice of disaffirmance by the purchaser, becomes in effect a tenant at will of the purchaser while he thereafter remains in possession. *Bittinger v. Baker*, 29 Pa. 66, 70 Am. Dec. 154; *Adams v. McKesson*, 53 Pa. 81, 91 Am. Dec. 183.

As a tenant at will he is liable to an action in assumpsit for use and occupation (*Stockton's Appeal*, 64 Pa. 58; *Mozart Bldg. Asso. v. Friedjen*, 12 Phila. 515); or he is liable for mesne profits during the time the purchaser is maintaining an action of ejectment against him (*Stockton's Appeal*, *supra*).

Under the act of 1802, the purchaser at a sheriff's sale could collect rent from the judgment debtor's tenant, and he received all that accrued after the sale, even though most of it was earned prior thereto. *Hart v. Israel*, 2 Browne (Pa.) 22.

But the purchaser at a sheriff's sale, on a judgment prior to the lease, is not, under the statute, entitled to any part of the tenant's crops when the crops were not part of the rent, the rent having been paid to the lessor, the tenant being entitled to the way-going crop. *McKeeby v. Webster*, 170 Pa. 624, 32 Atl. 1096.

It was asserted in *American Freehold Land Mortg. Co. v. Turner*, 95 Ala. 272, 11 So. 211, that the purchaser at a judicial sale on a lien prior to the lease could maintain an action for use and occupation against the tenant in possession. This assertion was clearly inconsistent with the court's holding that the relation of landlord and tenant did not exist, since that relation is necessary to support the action of use and occupation.

In *Stewart v. Gregg*, 42 S. C. 392, 20 S. E. 193, the court appears to have adopted this same inconsistent rule. There was, however, no question in respect to the date of the lien, as the sale was upon a decree in equity. It was held that the purchaser could maintain an action for use and occupation, but could not enforce payment of rent by distress.

In *Harris v. Foster*, 97 Cal. 292, 33 Am. St. Rep. 187, 32 Pac. 246, it was held that the purchaser at a sale upon a lien prior to the lease could maintain an action for use and occupation against the tenant, but this decision is based upon the erroneous theory that the relation of landlord and tenant existed. See same case, *supra*.

Other courts have correctly held that in such case the action for use and occupation cannot be maintained. *McDermott v.*

Burke, 16 Cal. 580 (not a direct holding, but a statement); *Peters v. Elkins*, 14 Ohio, 344; *Heidelbach v. Slader*, 1 Handy (Ohio) 456. (But a tenant's remaining in possession after notice that he would be deemed a tenant was held to be sufficient recognition of the purchaser's claim as landlord to enable him to maintain the action.)

The question as to whether the purchaser or the former owner is entitled to the rent accruing before the title of the purchaser has been perfected is largely governed by local statutes. See note to *Schaepfi v. Bartholomae*, 1 L.R.A.(N.S.) 1079.

c. By sale under judicial decree not based on prior lien.

A sale of the landlord's estate in the leased premises under a judicial decree for the purpose of partition or distribution transfers only the reversion, creating the relation of landlord and tenant between the purchaser and the tenant. *Mahoney v. Alvino*, 51 Cal. 440; *Wilson v. Delaplaine*, 3 Harr. (Del.) 499; *Disselhorst v. Cadogan*, 21 Ill. App. 179; *Eirich v. Leitschuh*, 81 Ill. App. 573 (but if purchaser does not pay the purchase money until he gets his deed, some months after the sale, he cannot have the rents accruing in the meantime); *Murray v. Mounts*, 19 Ind. 364; *Keesee v. Sloan*, 69 Miss. 369, 11 So. 631 (in spite of the fact that lessor had taken a rent note, and had transferred the same to another after the decree, but before the sale); *Stevenson v. Hancock*, 72 Mo. 613; *Winfrey v. Work*, 75 Mo. 55; *Zeyssing v. Welbourn*, 42 Mo. App. 352; *Burns v. Cooper*, 31 Pa. 426; *Strange v. Austin*, 134 Pa. 96, 19 Atl. 492 (but under the Pennsylvania statutes the purchaser at an orphans' court sale can collect only the rent falling due after he pays the purchase money and gets his deed; the tenant is liable to the former owners for rent accruing between confirmation of sale and time deed is delivered); *Marys v. Anderson*, 24 Pa. 272; *Shultz v. Spreain*, 1 Tex. App. Civ. Cas. (White & W.) 516; *Peterman v. Kingsley*, 140 Wis. 666, 133 Am. St. Rep. 1107, 123 N. W. 137.

And the same is true where the decree of sale is made for the purpose of distribution among the general creditors of the lessor in bankruptcy. *Corrigan v. Trenton Delaware Falls Co.* 7 N. J. Eq. 489; *Evans v. Hamrick*, 61 Pa. 19, 100 Am. Dec. 595.

It has been held that where land was sold pursuant to an order of court during the term of a tenancy, and the tenant held over, but left the premises before the purchaser received his deed, the latter could not collect the rent from the tenant on an agreement to be implied from the tenant's holding over. *Couch v. McKellar*, 33 Ala. 473.

But it has been held that all rent accruing after the date of such sale is collectable by the purchaser, even though the lease expires and the tenant leaves at the time it expires, and the sale is not confirmed until L.R.A.1915C.

after the tenant has given up possession. *Hand v. Liles*, 56 Ala. 143.

A sale under a decretal order by a court of chancery, followed by the deposit required of the purchaser, is not a sufficient transfer to entitle the purchaser to rent, so that payment to him will not protect the tenant in an action for rent, brought by the owner of the land. *Richardson v. Trinder*, 11 U. C. C. P. 130.

Since a tax title is derived from a source other than the lessor, it is paramount to the lease. See note to *Carlson v. Curran*, 6 L.R.A.(N.S.) 260, and the purchaser cannot be said to be a transferee of the reversion. Therefore, cases involving the transfer of leased premises by tax sales are not included in the present note.

d. By devolution upon landlord's death.

Where the landlord dies intestate before the expiration of the term, the reversion passes according to the inheritance laws, and the new owner becomes the landlord in the place of the intestate. In most, if not all, jurisdictions, the heirs are the new owners if the leased property is real estate, but if it is personal property, the personal representative of decedent becomes the landlord until final disposition of the property. If the natural order of devolution is interrupted, as by court order of sale of real estate for payment of decedent's debts, the personal representative usually takes the place of the landlord until sale, when the reversion passes to the purchaser. See supra, III. c. This question, so far as it involves rent, was considered in the note to *Walsh v. Packard*, 40 L.R.A. 321.

The reversion in leased real estate, upon the death of the landlord intestate, passes to his heirs, and the relation of landlord and tenant is created between them and the lessee. *Sacheverel v. Frogate*, 1 Vent. 161; *West v. Lassels*, Cro. Eliz. pt. 2, p. 851; *Anonymous*, 1 Dyer, 45a (even though the word "heirs" is not used in the lease); *Lougher v. Williams*, 2 Lev. 92; *Machel's Case*, Leon. pt. 2, p. 33; *Sale v. Kitchingham*, 10 Mod. 158; *Vivian v. Champion*, 2 Ld. Raym. 1125, 1 Salk. 141, Holt, 178; *Derisley v. Custance*, 4 T. R. 75; *Beer v. Beer*, 12 C. B. 60, 16 Jur. 223, 21 L. J. C. P. N. S. 124; *Ewer v. Moyle*, Cro. Eliz. pt. 2, p. 771; *Palmer v. Steiner*, 68 Ala. 400 (but the rule is subject to the statutory power of the personal representatives of decedent to intercept the descent to the heir in order to pay decedent's debts); *Green v. Massie*, 13 Ill. 363; *Dixon v. Niccolls*, 39 Ill. 372, 89 Am. Dec. 312 (statement by way of argument); *Crosby v. Loop*, 13 Ill. 625 (by way of argument); *King v. Anderson*, 20 Ind. 385; *Dorsett v. Gray*, 98 Ind. 273 (statement by way of argument); *Shawhan v. Long*, 26 Iowa, 488, 96 Am. Dec. 164; *Williamson v. Richardson*, 6 T. B. Mon. 596; *Stinson v. Stinson*, 38 Me. 593; *Boeing v. Owsley*, 122 Minn. 190, 142 N. W. 129; *Bloodworth v. Stevens*, 51 Miss. 475; *Condit*

v. Neighbor, 13 N. J. L. 83; Allen v. Van Houton, 19 N. J. L. 49; Roberts v. McPherson, 62 N. J. L. 165, 40 Atl. 630, affirmed in 63 N. J. L. 352, 43 Atl. 1098 (under a local statute); Chamberlain v. Dunlop, 126 N. Y. 45, 22 Am. St. Rep. 807, 26 N. E. 966 (the point is here apparently assumed, and it was held that the damages to lessee for breach of covenant to rebuild, the mill having burned after lessor's death, were properly payable out of the estate by the executor, the testator having died intestate as to the leased premises); Verplanck v. Wright, 23 Wend. 506 (the point was raised here, but the covenant was enforced by the heir); Chamberlain v. Dunlop, 126 N. Y. 45, 22 Am. St. Rep. 807, 26 N. E. 966 (the point was apparently assumed); Hunt v. Wolfe, 2 Daly, 298; Cole v. Patterson, 25 Wend. 456; Simon v. Schmitt, 118 N. Y. Supp. 326, reversed on other grounds in 137 App. Div. 625, 122 N. Y. Supp. 421; Johnston v. Smith, 3 Penr. & W. 496, 24 Am. Dec. 339; Blantire v. Whitaker, 11 Humph. 313; Prout v. Roby, 15 Wall. 471, 21 L. ed. 58; Broadwall v. Banks, 134 Fed. 470. And see cases cited in note in 40 L.R.A. 343, on right of heir to rent, and statutory right of administrator thereto.

If the tenant attorns to the personal representative of the lessor, he cannot deny the title of the latter, or his right to rent accruing after the lessor's death (this, of course, applies only where the suit is between the personal representative and the lessee, and the heir is not a party thereto). *Howe v. Gregory*, 2 Ind. App. 477, 28 N. E. 776.

But for breaches of contract occurring during the ancestor's lifetime, including breaches of covenant to pay rent, the personal representative of the decedent, and not his heir, is the party to sue (this is upon the principle that breaches occurring before the transfer do not furnish transferee a cause of action; see *infra*, IV. c. 2 (i)). *Ricketts v. Weaver*, 12 Mees. & W. 718, 13 L. J. Exch. N. S. 195; *Raymond v. Fitch*, 2 Crompt. M. & R. 588, 5 Tyrw. 985, 5 L. J. Exch. N. S. 45; *King v. Anderson*, 20 Ind. 385; *Dorsett v. Gray*, 98 Ind. 273 (statement by way of argument); *Henry v. Stevens*, 108 Ind. 281, 9 N. E. 356 (this is also true where lessor had only a life estate in the leased premises); *Howe v. Gregory*, 2 Ind. App. 477, 28 N. E. 776 (if the tenant attorns to the personal representative of the deceased lessor, he is thereafter estopped to deny the right to rent accruing after the death of the lessor); *McDowell v. Hendrix*, 67 Ind. 513, 9 Mor. Min. Rep. 96; *Williamson v. Richardson*, 6 T. B. Mon. 596; *Williams v. Williams*, 118 Mich. 477, 76 N. W. 1039; *Bloodworth v. Stevens*, 51 Miss. 475; *Coberly v. Coberly*, 189 Mo. 1, 87 S. W. 957; *Allen v. Van Houton*, 19 N. J. L. 47; *Allen v. Van Houton*, 19 N. J. L. 49; *Rogers v. McKenzie*, 65 N. C. 218; *Broadwell v. Banks*, 134 Fed. 470. And see cases cited in note in 40 L.R.A. 342, on administrator's right to L.R.A.1915C.

rent that had accrued before lessor's death.

Or if the rent arises out of the lease of personal property, the personal representative, and not the heir, is entitled to the rent accruing after the lessor's death. *Williamson v. Richardson*, 6 T. B. Mon. 596.

An action on the covenant for quiet enjoyment may be maintained by the lessee against the heir of the lessor for a breach occurring after the lessor's death in exactly the same way as if it were against a transferee by deed. *Derisley v. Custance*, 4 T. R. 75.

And the heir who inherits the reversion may maintain an action for breach of lessee's covenant, occurring after lessor's death, even though the word "heir" is not in the covenant. *Lougher v. Williams*, 2 Lev. 92; *Sale v. Kitchingham*, 10 Mod. 158.

And if the substantial part of the breach occurred after the death of the lessor, his heir or devisee is the proper party to sue for the breach. *Hendrix v. Dickson*, 69 Mo. App. 197.

Although the premises were out of repair at the time of the lessor's death, yet, if the lessee permits them to continue in disrepair after the lessor's death, the heir, who inherits the reversion, may maintain an action for breach of the covenant. *Vivian v. Champion*, 2 Ld. Raym. 1125, 1 Salk. 141, Holt, 178.

e. By death of landlord who had only a life estate.

Where a life tenant is lessor, having given a lease for a term of years, and dies during the term, the lease is terminated at once, for the obvious reason that the lessor had no power to grant an estate beyond the termination of his own estate. In reality this is not a transfer of the reversion, but merely the termination of the estate out of which the leasehold estate was granted. But where the lease was made by one who owned a fee in the premises, the reversion having later, by operation of law or otherwise, become vested in a life tenant, who dies during the term, there is a transfer of the reversion. In the latter case, the leasehold estate is not terminated, and the remainderman becomes the landlord of the lessee. *Botheroyd v. Woolley*, 5 Tyrw. 522, 1 Gale, 66, 4 L. J. Exch. N. S. 153; *Watson v. Penn*, 108 Ind. 21, 58 Am. Rep. 26, 8 N. E. 636. Early legislation on apportionment of rent brought the former class of cases into a very close analogy to those in which there is an actual transfer of the reversion. There is still another situation where the reversion is transferred upon the death of a life tenant who was the lessor. It has been held that where the life tenant holds under an instrument which also gives him power to lease for a definite length of time, and he exercises the power, his death during the term does not terminate the leasehold estate, but that the remainderman may sue the tenant for a breach of a covenant contained in the lease if the breach occurred after the death of the life tenant. *Isher-*

wood v. Oldknow, 3 Maule & S. 382, 16 Revised Rep. 305; Greenaway v. Hart, 14 C. B. 340, 2 C. L. R. 370, 23 L. J. C. P. N. S. 115, 18 Jur. 449, 2 Week. Rep. 702; Hamilton v. Wright, 28 Mo. 199. It was held in the Missouri case that, because of this principle, the life tenant's general estate is liable to the tenant for the failure of the life tenant to make an appointment during his lifetime that would have prevented the termination of the leasehold estate, as for breach of a covenant for quiet enjoyment, if the remainderman takes possession before the term expired.

On the general question as to the right to rents as between the life tenant and the remainderman, see note to *Re Archambault*, 36 L.R.A.(N.S.) 637.

As to right of lessee of life tenant to possession and emblements upon death of his lessor, see note to *Edghill v. Mankhey*, 11 L.R.A.(N.S.) 688.

Upon the death of a life tenant there is an immediate termination of all leasehold estates that he has granted out of the life estate, and the remainderman does not become the landlord of the lessees. *Jenner v. Morgan*, 1 P. Wms. 392; *Hay v. Palmer*, 2 P. Wms. 501; *Botheroyd v. Woolley*, 5 Tyrw. 522, 1 Gale, 66, 4 L. J. Exch. N. S. 153 (rule not applied, as leases were granted by the predecessor of the life tenant); *Ex parte Smyth*, 1 Swanst. 337; *Hawkins v. Kelly*, 8 Ves. Jr. 308; *Paget v. Gee*, 1 Ambl. 198, 3 Swanst. 694; *Swan v. Stransham*, 3 Dyer, 257a; *Adams v. Gibney*, 6 Bing. 656, 4 Moore & P. 491, 8 L. J. C. P. 242, 31 Revised Rep. 514, 15 Eng. Rul. Cas. 743; *Peck v. Peck*, 35 Conn. 390 (a statute regarding summary process for recovering possession of leased land recognizes this principle by providing that the remainderman may, at the death of the life tenant, bring such process against the latter's tenant); *Horsey v. Horsey*, 4 Harr. (Del.) 517; *Hoagland v. Crum*, 113 Ill. 365, 55 Am. Rep. 424 (the court declared that at common law the tenant could leave the premises on the death of the life tenant, and no one could then collect rent from him although the same had been earned, but not accrued at the time of the life tenant's death; but that, by statute, if he remained to the end of the term, the remainderman could collect all the rent in an action for use and occupation); *Lowrey v. Reef*, 1 Ind. App. 244, 27 N. E. 626 (but the remainderman and the lessee may, by a course of action after lessor's death, give rise to an implied agreement that creates the relation of landlord and tenant between them for the remainder of the term); *Carman v. Mosier*, 105 Iowa, 367, 75 N. W. 323 (but if tenant continues in possession, he becomes the tenant at will of the remainderman, or if he has crops sown when lessor dies, he is entitled to emblements if ousted); *Sanders v. Sutlive Bros.* — Iowa, —, 143 N. W. 492 (but the remainderman and the tenant may, by a course of conduct, give vitality to the lease, in which case it becomes binding); *Redmon v. Bedford*, 80 Ky. 13; *Hamilton v. Wright*, L.R.A.1915C.

28 Mo. 199; *Marshall v. Moseley*, 21 N. Y. 280 (a statement by way of argument); *Barson v. Mulligan*, 191 N. Y. 306, 16 L.R.A.(N.S.) 151, 84 N. E. 75.

Where a lessor who has only a life estate dies between the stated periods for payment of rent which was not payable in advance, the rent earned between the last rent-paying period and the date of lessor's death was, according to the common law, lost to the landlord. It could not be collected by the personal representatives of the lessor because the lease terminated before any rent became due; and it could not be collected by the remainderman, since the lessor's death terminates the lease; and even if the tenant continued in possession, there was then no relation of landlord and tenant unless by virtue of some new agreement which could not relate back farther than the time of lessor's death. *Jenner v. Morgan*, 1 P. Wms. 392; *Hay v. Palmer*, 2 P. Wms. 501 (statement of the common law, made by way of argument); *Ex parte Smyth*, 1 Swanst. 337 (a statement of the rule); *Hawkins v. Kelly*, 8 Ves. Jr. 308 (a statement of the rule); *Paget v. Gee*, 1 Ambl. 198, 3 Swanst. 694 (statement of common law rule); *Marshall v. Moseley*, 21 N. Y. 280 (a statement of the law, made by way of argument); *Watson v. Penn*, 108 Ind. 21, 58 Am. Rep. 26, 8 N. E. 636 (a statement by way of argument); *Perry v. Aldrich*, 13 N. H. 343, 38 Am. Dec. 493 (applied where the lease was made by a tenant *pur auter vie*); *Gee v. Gee*, 22 N. Y. (2 Dev. & B. Eq.) 103 (merely a statement of the law as to the administrator); and see cases cited in note in 27 L.R.A.(N.S.) 450, to the point that there can be no apportionment of rent between remainderman and the personal representatives of the life tenant.

But this rule was changed by statute 11, Geo. II. chap. 19 (for wording of the statute see *Clun's Case*, 10 Coke, 128a, note, f), so as to make such rent collectable by the personal representatives of the lessor. *Ibid.*; *Jenner v. Morgan*, 1 P. Wms. 392, note; *Mills v. Trumper*, L. R. 1 Eq. 671, 12 Jur. N. S. 329, 14 L. T. N. S. 220, 14 Week. Rep. 630 (overruled in L. R. 4 Ch. 320, 20 L. T. N. S. 384, 17 Week. Rep. 428, on the ground that the facts did not bring the case within the statute); *Norris v. Harrison*, 2 Madd. Ch. 268; *Paget v. Gee*, 1 Ambl. 198, 3 Swanst. 694 (a tenant in tail, who died without issue, was here held to be within the statute); *Doe ex dem. Vaughan v. Meyler*, 2 Maule & S. 276, 15 Revised Rep. 244; *Marshall v. Moseley*, 21 N. Y. 280 (the statute was substantially adopted by legislative enactment in New York); *Perry v. Aldrich*, 13 N. H. 343, 38 Am. Dec. 493 (not applied because lessor was tenant *pur auter vie* and was still living. See same case, *infra*); see cases cited in note in 27 L.R.A.(N.S.) 450, showing statutory changes.

And a later English statute (4 & 5 Will. IV. chap. 22) provided for the apportionment of the rent in such case if for any reason the lease is not terminated. *Browne*

v. Amyot, 3 Hare, 173, 13 L. J. Ch. N. S. 232; Llewellyn v. Rous, 35 Beav. 591, L. R. 2 Eq. 27, 12 Jur. N. S. 580; Lock v. De-Burgh, 4 De G. & S. 470, 20 L. J. Ch. N. S. 384, 15 Jur. 961; Symons v. Symons, 6 Madd. Ch. 207; Plummer v. Whiteley, 5 Jur. N. S. 1416, Johns. B. C. (Eng.) 585, 29 L. J. Ch. N. S. 247, 1 L. T. N. S. 230, 8 Week. Rep. 120; St. Aubyn v. St. Aubyn, 1 Drew. & S. 611, 30 L. J. Ch. N. S. 917, 5 L. T. N. S. 519, 9 Week. Rep. 922 (facts did not bring the case within the law); Marshall v. Moseley, 21 N. Y. 280 (merely a statement by the court); Perry v. Aldrich, 13 N. H. 343, 38 Am. Dec. 493.

A tenant under a five-year lease from a life tenant does not, on the death of the lessor during the term, become a tenant from month to month by continuing to pay, to the remainderman and his transferee, the monthly payments as stipulated in the original lease, without any new understanding or agreement. *Bernstein v. Demmert*, 73 N. J. L. 118, 62 Atl. 187.

In *Wykham v. Wykham*, 3 Taunt. 331, Mansfield, Ch. J., asked the question: "Has it ever been determined that the executor of a tenant *pur auter vie* is entitled to recover a portion of the rent from the last quarter day under that statute?" Then he remarked: "He is certainly within the mischief, for otherwise the tenant of the land may keep the rent for his own benefit." But it was directly held in *Perry v. Aldrich*, 13 N. H. 343, 38 Am. Dec. 493, that a tenant *pur auter vie* as lessor, who is living when the estate is terminated by the death of the *cestui que vie*, is not within the statute of 11 Geo. II, chap. 19, hence he loses the rent earned between the last rent day and the date of termination of his estate.

Where one had leased to another land in which his wife had a life estate, for a year, and received the whole year's rent therefor, and the wife died during the year, it was held in *Price v. Pickett*, 21 Ala. 741, that the remainderman could, in an action for money had and received, collect from the lessor the rent from the date of the wife's death to the end of the year.

IV. Rights and liabilities of transferee.

a. In general.

The scope of this division of the note, as well as of the divisions following, includes the cases logically falling within the division, whether the transfer was voluntary (see subd. II. *supra*), or by operation of law (see subd. III. *supra*), so that all of the principles of law hereinafter discussed must be understood to be subject to and supplemented by those discussed, in a general way, *supra*.

b. Based upon privity of estate.

Obviously a transfer of the reversion creates privity of estate between the transferee and the lessee. It follows that all rights and liabilities that may be based upon privity of estate exist. *Walker's Case*, L.R.A.1915C.

3 Coke, 22a (this case involved only an assignment by lessee, but the court, on page 22b, states the rule as to transferee of the reversion); *Allen v. Bryan*, 5 Barn. & C. 512, 4 L. J. K. B. 210, 29 Revised Rep. 307; *Fryer v. Coombs*, 11 Ad. & El. 403, 4 Perry & D. 120, note (this was an action in debt by the transferee of the reversion, against the assignee of the leasehold); *Lumley v. Hodgson*, 16 East, 99, 14 Revised Rep. 315; *Abercrombie v. Redpath*, 1 Iowa, 111; *Mixon v. Coffield*, 24 N. C. (2 Ired. L.) 301.

On the ground that there is privity of estate between the transferee of the reversion and the lessee, it has been held that the former has the right as against the latter to—

—maintain an action of debt, as distinguished from an action on the covenant, for rent accruing after the transfer (as to action of covenant, see subd. IV. c, 2 (e) (2), *infra*); *Thursby v. Plant*, 1 Wms' Saund. 237, 1 Lev. 259, 1 Sid. 401; *Ards v. Watkin*, Cro. Eliz. pt. 2, pp. 637, 651; *Allen v. Bryan*, 5 Barn. & C. 512, 4 L. J. K. B. 210, 29 Revised Rep. 307; *Baldwin v. Walker*, 21 Conn. 168 (this was an action in covenant, but the principle here stated was clearly stated by this court, page 180); *Outtoun v. Dulin*, 72 Md. 536, 20 Atl. 134; *Howland v. Coffin*, 12 Pick. 125; *Patten v. Deshon*, 1 Gray, 325; *McCardell v. Williams*, 19 R. I. 701, 36 Atl. 719; *Mixon v. Coffield*, 24 N. C. (2 Ired. L.) 301;

—maintain an action for use and occupation against the lessee, *Rawson v. Eicke*, 2 Nev. & P. 423, 7 Ad. & El. 451, W. W. & D. 675, 7 L. J. Q. B. N. S. 17 (where tenant was holding under an agreement for a lease); *Ansley v. Longmire*, 4 N. B. 321 (tenant cannot defend on the ground that there is another who claims to be the real transferee); *Wise v. Falkner*, 51 Ala. 359; *Chapin v. Foss*, 75 Ill. 280 (where contract was implied between the transferor and defendant); *Hoagland v. Crum*, 113 Ill. 365, 55 Am. Rep. 424; *Sampson v. Grimes*, 7 Blackf. 176; *Abercrombie v. Redpath*, 1 Iowa, 111; *Starbuck v. Avery*, 132 Mo. App. 542, 112 S. W. 33; *Alton v. Pickering*, 9 N. H. 494; *Bachelor v. Dean*, 20 N. H. 467; *Gribbie v. Toms*, 70 N. J. L. 522, 57 Atl. 144, affirmed in 71 N. J. L. 338, 59 Atl. 1117; *Morris v. Niles*, 12 Abb. Pr. 103; *Stewart v. Gregg*, 42 S. C. 392, 20 S. E. 193; *Jacks v. Smith*, 1 Bay, 315;

—assert a forfeiture of the lease, where the tenant has disclaimed the tenancy, in the same ways and to the same extent as the lessor might have done had there been no transfer, *Page v. Esty*, 54 Me. 319; *Evans v. Enloe*, 70 Wis. 345, 34 N. W. 918, 36 N. W. 22;

—maintain an action of replevin against tenant and vendor to recover the landlord's share of the crop while it was in their possession, it being harvested and stored after the transfer of the reversion, *Hatfield v. Lockwood*, 18 Iowa, 296.

An action against the lessee for damages done to the land while he occupies it under the lease, after the land has been trans-

ferred by the lessor, may be maintained by the transferee in his own name without any assignment to him of the cause of action, even though the lease was an oral one. *Shinn v. Guyton & H. Mule Co.* 109 Mo. App. 557, 83 S. W. 1015.

An action for damage to the property caused by the tenant's negligence after the transfer, but during the term, may be maintained by the transferee after the term has expired. *Finch v. Shackelford*, 7 Ky. L. Rep. 600.

But since there is no privity of estate between the transferee of the reversion and the lessee after the latter has assigned the leasehold, the former cannot maintain an action of debt against the latter for rent accruing after the assignment of the leasehold. The proper remedy here would be an action on the covenant to pay rent. This point is covered in the note to *Kanawha-Gauley Coal & Coke Co. v. Sharp*, 52 L.R.A. (N.S.) 968, subdivisions I. and II., the transferee there being treated as an original lessor.

c. Based upon privity of contract.

1. Right to sue on contract in name of lessor.

It will be seen, *infra*, subd. IV. c, 2 (a), that actions by the transferee of the reversion for breaches of covenants in the lease are based upon the statute of 32 Hen. VIII. chap. 34, or statutes of similar import. The question arises whether, independently of statute, the transferee of the reversion might not sue upon the contract in the name of the lessor. Presumably because of the statute, this question has not been given much consideration by the courts.

It has been held that where the case does not properly come within the statutory provisions enabling the transferee of the reversion to bring the action, he may maintain an action, in the name of the lessor, for subsequent breaches of covenant, provided that the intention to pass the benefit of the covenant to the transferee clearly appears. This theory is based upon the common-law rule that the assignee of a chose in action may sue thereon in the name of the assignor. For application of same rule where a statute enables an assignee to sue on a chose in action, see subd. IV. c, 2 (a), *infra*.

This rule was apparently the basis for the decision in *Bridgham v. Tileston*, 5 Allen, 371, where the court permitted an action by the lessor for one to whom he had, by an instrument not under seal, assigned a lease that was under seal, for rent accruing subsequent to the assignment, and refused to permit lessee to offset against the claim a note upon which lessor and a third party were liable as joint makers, holding that the assignment not under seal passed only an equitable interest, so that the suit was properly brought in the name of the lessor for the assignee. Hence, lessor's debt L.R.A.1915C.

was no offset, as the rent belonged to the transferee.

And this appears to be the underlying principle of the decision in *Marney v. Byrd*, 11 Humph. 95, where it was held that since the contract to pay rent was under seal, the transferee of the reversion, could not sue lessee for after-accruing rent thereunder in his own name without attornment, the court stating that the action might have been maintained by him for his benefit if brought in the name of the transferor.

And in *Alcock v. Moorhouse*, L. R. 9 Q. B. Div. 366, 47 L. T. N. S. 404, 30 Week. Rep. 871, 47 J. P. 85, where the action for rent on the covenant by the transferee of the reversion was dismissed because the transfer was oral, and therefore did not pass the covenants, Mathew, J., says that if the action had been in the name of the lessor, the defendant would have been liable.

And in *Hagar v. Buck*, 44 Vt. 285, 8 Am. Rep. 368, the decision would appear to be based upon this principle. While the action was against the lessor and his transferee by the assignee of the leasehold, and the discussion is devoted largely to the standing of the assignee of the leasehold to enforce against lessor a covenant to sell the premises to lessee, the court said that there is no question but that the transferee stood in the place of the lessor. It was held that since the assignee could at law enforce the covenant in the name of the assignor, he could do so in equity in his own name, provided the case was otherwise cognizable in equity.

But the right of a remote grantee to thus sue in the name of the lessor has been questioned, for the reason that the theory underlying the rule is that the assignee sued as the attorney for the lessor. *Tiffany, Land. & T.* § 149, footnote, 93.

2. Under covenants that run with the land.

(a) Common-law doctrine and statutory changes.

Statute 32 Hen. VIII. chap. 34, and statutes of similar import.

The doctrine of attornment, which was discussed *supra*, subd. II. g, is very closely related to the doctrine established by the statute of 32 Hen. VIII. chap. 34. Under the early common law, a transfer of the reversion without an attornment by the tenant appears to have been regarded as of no effect whatever, so far as the tenant was concerned, but a transfer with an attornment created the relation of landlord and tenant between the transferee and the tenant, giving to the transferee the right to the rent and services that were attached to the reversion. However, he did not have the right to sue for breach of covenant, hence could not maintain the common-law action of covenant for rent. His form of action would probably be an action in debt for the rent, or any form that did not require

the action to be based upon the contract, but merely upon the relation of landlord and tenant.

The statute of 32 Hen. VIII. chap. 34, did not abolish attornment, but established full privity of contract between the transferee and the tenant in case there had been an attornment. So, in case there had been no attornment, the situation was the same as at common law; that is, there were no duties or obligations between the transferee and the tenant, but in case of attornment the transferee was given the same rights that his transferor had prior to the transfer to sue in covenant or any other form of action. Later, after the enactment of the statutes referred to, *supra*, II. g, abolishing the necessity for attornment, the transferee had all the rights and was subject to all the obligations created by the statute of 32 Hen. VIII. chap. 34, even though there were no attornment.

The courts early established the rule that even after the enactment of the statute of 32 Hen. VIII. chap. 34, the transferee could not maintain an action upon a covenant that does not run with the land, but might do so upon any covenant that does so run. For the question as to what particular covenants run and which do not run with the land, see *infra* subd. IV. c, 2 (e) and subd. IV. c, 3.

The question as to whether statute 32 Hen. VIII. chap. 34, establishing privity of contract between the transferee of the reversion and the lessee of the transferor, was merely declaratory of the common law or changed the common law in that respect, seems to be not wholly free from doubt, but the overwhelming weight of authority supports the theory that at common law there was no privity of contract between the transferee of the reversion and the tenant. The preamble to the statute so states as a reason for its enactment.

There are a few cases where the court appeared to have proceeded upon the theory that at common law the transferee of the reversion could sue upon the covenants in the lease. *Brett v. Cumberland*, 3 Bulstr. 163, 1 Rolle, Rep. 359 (an action of covenant for not repairing); *Attoe v. Hemmings*, 2 Bulstr. 281.

But in most cases the English courts have either directly held that at common law there was no privity of contract between the transferee of the reversion and the lessee, or have referred to the statute as the basis of the holding that there is privity of contract after notice of the transfer has been served upon the lessee. *Thursby v. Plant*, 1 Wms.' Saund. 237, 1 Lev. 259, 1 Sid. 401; *Moss v. Gallimore*, 1 Dougl. K. B. 279, 18 Eng. Rul. Cas. 404; *Barker v. Damer*, 3 Mod. 336, Carth. 182; *Isherwood v. Oldknow*, 3 Maule & S. 382, 16 Revised Rep. 305; *Twynnam v. Pickard*, 2 Barn. & Ald. 105, 20 Revised Rep. 368; *Vernon v. Smith*, 5 Barn. & Ald. 1, 24 Revised Rep. 257; *Hill v. Grange*, 2 Dyer, 130b; *Stevens v. Copp*, L. R. 4 Exch. 20 (statement by Martin, B., on page 25, 38 L. J. Exch. N. S. L.R.A.1915C.

31, 19 L. T. N. S. 454, 17 Week. Rep. 166); *Doe ex dem. Agar v. Brown*, 2 El. & Bl. 331, 22 L. J. Q. B. N. S. 432; *Martyn v. Williams*, 1 Hurlst. & N. 817, 26 L. J. Exch. N. S. 117, 5 Week. Rep. 351; *Thrale v. Cornwall*, 1 Wils. K. B. 165; *Sunderland Orphan Asylum v. River Wear Comrs*, 81 L. J. Ch. N. S. 269, [1912] 1 Ch. 191, 106 L. T. N. S. 288.

The effect of the statute of 32 Hen. VIII. chap. 34, was to create a "privity of contract in respect of the estate as between assignees of the reversion and the lessees or their assignees." Editor's notes (m) and (n) to Walker's Case, 3 Coke, 23a (citing *Beely v. Parry*, 3 Lev. 154; *Webb v. Russell*, 3 T. R. 395, 1 Revised Rep. 725, and 1 Wms.' Saund. 241b, referring, no doubt, to where the court in *Thursby v. Plant*, cites *Brett v. Cumberland*, Cro. Jac. 521); *Sacheverell v. Froggatt*, 2 Wms.' Saund. 367; *Midgley v. Lovelace*, Carth. 289, Holt, 74, 12 Mod. 45; *Isherwood v. Oldnow*, 3 Maule & S. 382, 16 Revised Rep. 305; *Twynnam v. Pickard*, 2 Barn. & Ald. 105, 20 Revised Rep. 368; *Vernon v. Smith*, 5 Barn. & Ald. 1, 24 Revised Rep. 257; *Hill v. Grange*, 2 Dyer, 130b; *Grogan v. Magan*, Alcock & N. 366.

And the statute has that effect even though the reversion be only for life (see subd. III. e, *supra*); or for a term of years. *Matures v. Westwood*, Cro. Eliz. pt. 2, p. 599; *Davy v. Matthew*, Cro. Eliz. pt. 2, p. 649; *Williams v. Hayward*, 1 El. & El. 1040, 5 Jur. N. S. 1417, 28 L. J. Q. B. N. S. 374, 7 Week. Rep. 563; *Clarke v. Coughlan*, 3 Ir. L. Rep. 427. And see II. e, 1, *supra*. And the assignee of the lessee is treated, in respect to the subtenants, as the transferee of the reversion. *Hyde v. Warden*, 37 L. T. N. S. 567, 47 L. J. Exch. N. S. 121, L. R. 3 Exch. Div. 72, 26 Week. Rep. 201; *Pyot v. St. John*, Cro. Jac. 329; *Vernon v. Smith*, 5 Barn. & Ald. 1, 24 Revised Rep. 257; *Dewar v. Goodman* [1908] 1 K. B. 94, 77 L. J. K. B. N. S. 169, 97 L. T. N. S. 885, 24 Times L. R. 62, affirmed in 25 Times L. R. 137, [1908] W. N. 250, 53 Sol. Jo. 116; *Cook v. Arundel*, Hardr. 87; *Wahl v. Barroll*, 8 Gill, 288; *Patten v. Deshon*, 1 Gray, 325; *Porter v. Merrill*, 124 Mass. 534; *Coulter v. Norton*, 100 Mich. 389, 43 Am. St. Rep. 458, 59 N. W. 163; *Walker v. Harper*, 33 Mo. 592; *Belden v. Union Warehouse Co.* 11 App. Div. 160, 42 N. Y. Supp. 650.

The question as to what the common law was is not of great importance, since in most of the early decisions the courts take the position that the statute was here adopted as part of the common law, and legislation in many states has made the rule approximately the same as the English rule, except that, as a rule, the American statutes establish privity of contract after the lessee "has notice of the transfer," while the English statute does so after "notice is served upon the lessee."

The following cases may be regarded as authority for the statement that the statute of 32 Hen. VIII. chap. 34, was adopted as a part of the common law of the state: *Fisher v. Deering*, 60 Ill. 114; *David Brad-*

ley & Co. v. Peabody Coal Co. 99 Ill. App. 427; Scheidt v. Belz, 4 Ill. App. 431; Abercrombie v. Redpath, 1 Iowa, 111; Ventura Hotel Co. v. Pabst Brewing Co. 33 Ky. L. Rep. 149, 109 S. W. 354; Moale v. Tyson, 2 Harr. & McH. 387; Baltimore v. White, 2 Gill, 444; Outtoun v. Dulin, 72 Md. 536, 20 Atl. 134; Howland v. Coffin, 12 Pick. 125; Hadley v. Bernero, 97 Mo. App. 314, 71 S. W. 451, affirmed on a question of jurisdiction in 103 Mo. App. 549, 78 S. W. 64; Metropolitan Land Co. v. Manning, 98 Mo. App. 248, 71 S. W. 696; Kornegay v. Collier, 65 N. C. 69; Report of Judges of the Supreme Court of Pennsylvania, to the Legislature in 1808, as to What English Statutes Are or Ought to be in Force in That State, 3 Binn. 620; Streaper v. Fisher, 1 Rawle, 155, 18 Am. Dec. 604; Braker v. Deuser, 49 Pa. Super. Ct. 215; Newbold v. Comfort, 2 Clark (Pa.) 331; Magoon v. Eastman, 86 Vt. 261, 84 Atl. 869.

In the following cases the construction of a local statute is practically the same as that placed upon the statute 32 Hen. VIII. chap. 34; Wise v. Falkner, 51 Ala. 359; Adams v. Shirk, 55 C. C. A. 25, 117 Fed. 801 (construing an Illinois statute); Fanning v. Voelker, 40 Mo. 129; Roberts v. McPherson, 62 N. J. L. 165, 40 Atl. 630, affirmed in 63 N. J. L. 352, 43 Atl. 1098; Lloyd v. Richman, 57 N. J. L. 385, 30 Atl. 432; State, Watson, Prosecutrix, v. Idler, 54 N. J. L. 467, 24 Atl. 554; Myers v. Burns, 33 Barb. 101, affirmed in 35 N. Y. 269; Re Zink, 19 N. Y. S. R. 479, 3 N. Y. Supp. 4; Northern P. R. Co. v. McClure, 9 N. D. 73, 47 L.R.A. 149, 81 N. W. 52; Shelby v. Hearne, 14 Tenn. 512.

The court in Baldwin v. Walker, 21 Conn. 168, held that the statute 32 Hen. VIII. chap. 34, had not been adopted, but brought about the same result as if it had been adopted by holding that the principle of the common law that did not permit a transferee of the reversion to maintain an action of covenant against the tenant is not suitable to conditions in this country, hence that principle would not be enforced; so the action of covenant was permitted.

But it was held in Alcock v. Moorhouse, L. R. 9 Q. B. Div. 366, 47 L. T. N. S. 404, 30 Week. Rep. 871, 47 J. P. 85, that the statute is not applicable so as to establish privity of contract between the transferee of the reversion and the tenant under an oral lease, the tenant having assigned the lease prior to the transfer, although the assignee of the lease had never been accepted by either the transferor or transferee. This appears to be due to the fact that the lease was oral, and apparently it carried no covenant which would pass. As the privity of estate was broken by the assignment, the action for rent failed entirely. As to liability of lessee after he had assigned, see note to Kanawha-Gauley Coal & Coke Co. v. Sharp, 52 L.R.A. (N.S.) 968.

In Ohio it has been held that the statute of 32 Hen. VIII. chap. 34, was never adopted. Crawford v. Chapman, 17 Ohio, 449; L.R.A.1915C.

Masury v. Southworth, 9 Ohio St. 340; Sutliff v. Atwood, 15 Ohio St. 186 (statement by way of argument); Smith v. Harrison, 42 Ohio St. 180; Broadwell v. Banks, 134 Fed. 470, construing an Ohio contract. But see *infra*, as to effect of a different statute in Ohio.

And that a transferee of the reversion cannot maintain an action against the lessee on the latter's covenant to pay rent. Crawford v. Chapman, 17 Ohio, 449; Sutliff v. Atwood, 15 Ohio St. 186 (arguendo); Taylor v. De Bus, 31 Ohio St. 468 (mere statement on page 473); Broadwell v. Banks, 134 Fed. 470 (construing an Ohio contract); but in Newburg Petroleum Co. v. Wear, 44 Ohio St. 604, 9 N. E. 845, the court appeared to regard Spencer's Case, 1 Smith Lead. Cas. (Hare & W.) 69, 5 Coke, 16a, 15 Eng. Rul. Cas. 233, as law upon the question. And see *infra*, as to construction given to an Ohio statute that permits an action for choses in action.

And in Marney v. Byrd, 11 Humph. 95, the court apparently rejected the doctrine established by the statute of 32 Hen. VIII. *supra*, but see the earlier case, Shelby v. Hearne, 6 Yerg. 512, cited *supra*, to the proposition that the statute 32 Hen. VIII. has been adopted in Tennessee by statute. For full holding, see these cases cited, *subd.* II. g. *supra*, as to attornment.

A devisee of the reversion under the statute of 32 Hen. VIII., is the same as a transferee by deed, etc.; i. e., he becomes the landlord in place of his testator. Machel's Case, Leon, pt. 2, p. 33; Lougher v. Williams, 2 Lev. 92; Sampson v. Easterby, 9 Barn. & C. 505, 4 Mann. & R. 422, 5 L. J. K. B. 291, affirmed in 6 Bing. 644, 5 Moore & P. 601, 1 Crompt. & J. 105; Roe ex dem. Bamford v. Hayley, 12 East, 464, 11 Revised Rep. 455; Doe ex dem. Wright v. Smith, 8 Ad. & El. 255, 2 Jur. 854, 3 Nev. & P. 335, 7 L. J. Q. B. N. S. 158; Noble v. Thayer, 19 App. Div. 446, 46 N. Y. Supp. 302; Van Rensselaer v. Jones, 2 Barb. 643; Main v. Green, 32 Barb. 458; Moale v. Tyson, 2 Harr. & McH. 387; Lewis v. Wilkins, 62 N. C. (Phill. Eq.) 303 (rule not applied, as the facts did not bring the case within it); Rogers v. McKenzie, 65 N. C. 218.

Where parties who claimed to be devisees under a will, during the pendency of a suit contesting the will, and in settlement of the suit, transferred all their right title, and interest in and to the real estate to the administrator *c. t. a.*, the transfer was held in Chisolm v. Spullock, 87 Ga. 665, 13 S. E. 571, to carry with it the right to all the rents that accrued prior to the transfer.

But where the final decree established the will, and the facts were otherwise practically the same as those involved in Chisolm v. Spullock, *supra*, it was held in Kennedy v. Kennedy, 66 Ill. 190, that the devisee was entitled to the rent accruing between the date of testator's death and the conveyance of the land in settlement of the suit.

Statute permitting the assignee of a chose in action to sue at law thereon.

In Ohio it has been held that, while the statute 32 Hen. VIII., chap. 34, has never been adopted in the state (see Ohio cases cited *supra*), a local statute which enables the transfer of choses in action operates with a more extended effect than the English statute to enable the transferee of the reversion to sue upon the covenants in the lease, provided the instrument of transfer is such that it may be construed as transferring the choses in action created by the covenants; and since, if the chose in action is actually transferred, it makes no difference whether the covenant creating it runs with the land or not, the owner of the reversion and of the right of action may bring his suit thereon. *Masury v. Southworth*, 9 Ohio St. 340; *Smith v. Harrison*, 42 Ohio St. 180; *Broadwell v. Banks*, 134 Fed. 470, construing an Ohio contract.

(b) Where lessor has no title.

Can the transferee of the reversion benefit by the well-established doctrine that a tenant is estopped from denying his landlord's title, thereby enabling himself to sue upon the covenants in the lease notwithstanding lessor had no title to the premises? The question is sometimes put in another form, *i. e.*, do the covenants run with the land to the transferee of the lessor when the lessor had merely a title by estoppel? The question, in the present development of the English law, must be answered in the affirmative, although the earlier decisions do not warrant an affirmative answer. The earlier decisions appear to approve the doctrine that since a lessor without legal title conveys no estate to his transferee, nothing passes with which a covenant could run. *Whitton v. Peacock*, 2 Bing. N. C. 411, 2 Scott, 630, 5 L. J. C. P. N. S. 124. Later it was held that unless the lack of title appeared upon the face of the record in plaintiff's pleadings, an action on the covenants could be maintained. Then, in *Cuthbertson v. Irving*, *infra*, it was held that the covenants do run except where the lessor's lack of title appears upon the face of the lease. And still later (in *Dancer v. Hastings*, 4 Bing. 2, 12 J. B. Moore, 34, 5 L. J. C. P. N. S. 3, 29 Revised Rep. 740; *Jolly v. Arbuthnot*, 4 De G. & J. 224, 28 L. J. Ch. N. S. 547, 5 Jur. N. S. 689, 7 Week. Rep. 532; *Morton v. Woods*, L. R. 4 Q. B. 293, 9 Best & S. 632, 38 L. J. Q. B. N. S. 81, 17 Week. Rep. 414), the doctrine that estoppel is prevented by the disclosure of lack of lessor's title upon the face of the indenture of lease was repudiated. While the court, in none of the three cases just cited, was passing directly upon the question as to the running of the covenant with the reversion, the holdings repudiate the doctrine in question generally. So it would seem to be the present rule that covenants in the lease that would ordinarily run with the land run with the reversion, even L.R.A.1915C.

though the lessor had only a title by estoppel.

In *Cuthbertson v. Irving*, 4 Hurlst. & N. 742 (affirmed in 6 Hurlst. & N. 135, 29 L. J. Exch. N. S. 485, 6 Jur. N. S. 1211, 3 L. T. N. S. 335, 8 Week. Rep. 704), there is a review and discussion of all the earlier decisions, and a clear statement of the law at that time. (But see later decisions, *Dancer v. Hastings*; *Morton v. Woods*; and *Jolly v. Arbuthnot*,—*supra*, as to cases where the lack of lessor's title appears upon the face of the lease itself). The court said: "The second objection is, that the case shews that the lessor had no legal estate in the premises demised at the time of the lease, and therefore had no estate in reversion to assign; and consequently the plaintiff was not an assignee within the meaning of the statute 32 Hen. VIII. chap. 34; and as the deed of assignment to the plaintiff under the old system of pleading would have shewn on oyer the want of legal title, and the objection would then have appeared on the record, and as now of necessity it appears in evidence on the plaintiff's own case, there could be no estoppel. Upon consideration, we think the authorities shew that the defendant is estopped from disputing that the lessor was seised of an estate in reversion; and as there are apt words in the assignment to convey a legal estate in fee in reversion to the plaintiff, the estoppel continues in his favour, notwithstanding the assignment to him shews the want of title. The estate in reversion by estoppel was created before the assignment was executed, and in our opinion was not destroyed by it.

"It would have been otherwise if the want of title had appeared on the face of the lease itself. In that case, the true facts being there disclosed, there would be no estoppel at all. *Pargeter v. Harris*, 7 Q. B. 708, 15 L. J. Q. B. N. S. 113, 10 Jur. 260. There are some points in the law relating to estoppels which seem clear. First, when a lessor, without any legal estate or title, demises to another, the parties themselves are estopped from disputing the validity of the lease on that ground; in other words, a tenant cannot deny his landlord's title, nor can the lessor dispute the validity of the lease. Secondly, where a lessor by deed grants a lease without title, and subsequently acquires one, the estoppel is said to be fed; and the lease and reversion then take effect in interest, and not by estoppel, and an action will lie by the assignee of the reversion against the tenant on the covenants in the lease (*Webb v. Austin*, 7 Mann. & G. 701, 8 Scott, N. R. 419, 13 L. J. C. P. N. S. 203), and by the tenant against the assignee of the reversion (*Sturgeon v. Wingfield*, 15 Meses. & W. 224, 15 L. J. Exch. N. S. 212). A question which further arises is that in the present case, *viz.*, whether the assignee of a lessor in a lease by deed, who has no estate in the land, has a reversion by estoppel as against the lessee. This question arises not unfrequently, as in the present instance, where a mortgagor makes

a lease by deed, and assigns his equity of redemption with words that would pass a legal reversion in fee. It seems clearly established that upon a mortgage of lands, whatever the title of the mortgagor may be, his subsequent possession or occupation is at the will of the mortgagee, and he has nothing in the land whereout any interest can pass to a tenant, so as to affect the right of the mortgagee; and that in the present instance no further or other interest passed to the defendant than by estoppel. Thus far seems plain: but upon the remaining part of the question the authorities unfortunately are not uniform. In the first case on the subject, *Noke v. Awder*, Cro. Eliz. pt. 1, p. 436; *F. Moore*, 419, it was supposed to be established that covenant never lay by the assignee upon the assignment of an estate by estoppel. This is adopted in Comy's Dig. 'Covenant' (B. 3), and in several other books. The question, however, did not arise, and was not necessary for the decision of the case. See *Palmer v. Ekins*, 2 Ld. Raym. 1552, and the note of the learned editors of Smith's Leading Cases (*Hare & W.*) vol. 1, p. 75, to *Spencer's Case*. In *Whitton v. Peacock*, 2 Bing. N. C. 411, 2 Scott, 630, 5 L. J. C. P. N. S. 124, which was a case out of chancery, sent to the court of common pleas, and where the reasons are not given for the judgment, it is to be inferred from the facts and the arguments that the judgment proceeded on the ground that the assignee of a reversion by estoppel could not maintain an action for breach of the covenants in the lease. In a subsequent case of *Gouldsworth v. Knights*, 11 Mees. & W. 337, 12 L. J. Exch. N. S. 282, Parke, B., says *Whitton v. Peacock*, was correctly decided, but not for the reason supposed; but for that the reversion by estoppel was not of a copyhold nature, and could not pass by surrender and admittance; and there being no deed by which the reversion by estoppel could pass to the assignee, the judgment was right. See also the subsequent case of *Webb v. Austin*, supra, and the observations there of Tindal, Ch. J., upon the case of *Gouldsworth v. Knights*; and also the elaborate argument in the case of *Pargeter v. Harris*, 7 Q. B. 708, and the *dictum* of Wightman, J., at p. 722, 'that several cases shew that in leases by estoppel the assignee does not take the legal right to sue on covenants.'

"The case of *Carvick v. Blagrove*, 1 Brod. & B. 531, 4 J. B. Moore, 303, 21 Revised Rep. 710, cited on the argument, only shews that the allegation of the interest of the lessor in the declaration is traversable, and does not affect the present question. Later cases, however, have laid down that the estoppel on a lease by indenture, where the lessor has no title, extends to the assignee of the lessor, and that he takes a reversion by estoppel, and is capable to sue on the covenants in the lease as an assignee of the reversion. The case of *Gouldsworth v. Knights*, supra, is to this effect: 'It was a tenancy from year to year; the lessors (trustees) had assigned their interest to

the defendants; it was assumed the legal estate was not in them; and a question was raised, whether the defendants, assignees of the lessors, could distrain.' Parke, B., said: 'The tenant is estopped from disputing the title of the old trustees, and is he not estopped as to the title assigned to the new trustees?' and this view is assented to and affirmed by the judgment of the court. In *Sturgeon v. Wingfield*, supra, the same view will be found laid down by the same learned judge. That was a case where the lease by indenture was originally good only by estoppel, and the supposed reversion was assigned to the defendant, together with a subsequently-acquired legal term for years, which fed the estoppel. His lordship said that taking it that in point of fact the lessor had no interest originally, there was an estate by estoppel, and that the estate was *prima facie* an estate in fee simple. *Palmer v. Ekins*, 2 Ld. Raym. 1550, was an action by the assignee of the reversion against the lessee for nonpayment of rent. Plea: That the lessee, before making the lease, conveyed his estate to another: it was held, that the plea simply amounted to a special *nil habuit in tenementis*, and was bad; and Lord Raymond, in giving the judgment of the court, expressly says 'that the assignee shall take advantage of the estoppel.' The note of Serjt. Williams to *Walton v. Waterhouse*, 2 Wms. Saund. 418c, is, 'Where the grantor or lessor has nothing in the lands at the time of the grant or lease, and therefore no interest passes out of him to the grantee or lessee by the grant or lease, but the title begins by the estoppel which the deed creates between the parties, such estoppel runs with the land' (and, it is presumed, with the reversion also) 'into whose hands soever it comes, whether heir or assignee.'

"We adopt this note as the right statement of the law, and in that the following propositions may be laid down:—

"First, if any estate or interest passes from the lessor, or the real title is shewn upon the face of the lease, there is no estoppel at all.

"Secondly, if the lessor have no title, and the lessee be evicted by him who has title paramount, the lessee can plead this, and establish a defense to any action brought against him. Doe ex dem. *Higginbotham v. Barton*, 11 Ad. & El. 307, 3 Perry & D. 194, 9 L. J. Q. B. N. S. 57, 4 Jur. 432. But, thirdly, so long as the lessee continues in possession under the lease, the law will not permit him to set up any defense founded upon the fact that the lessor *nil habuit in tenementis*; and that upon the execution of the lease there is created, in contemplation of law, a reversion in fee-simple by estoppel in the lessor, which passes by descent to his heir, and by purchase to an assignee or devisee. A pleading test may be applied. Had the plaintiff declared that Biglands was seised in fee, and demised to the defendant, and assigned his reversion to the plaintiff, the defendant could not effectually have traversed the as-

signment. Could he the seisin? The plaintiff would have made a prima facie case by shewing the lease to the defendant, and possession taken and enjoyed under it. The defendant could not have shewn any other estate in Biglands; he must therefore have said, 'Biglands *nil habuit in tenementis*.' We are of opinion the law would not permit him to do so. This state of the law in reality tends to maintain right and justice, and the enforcement of the contracts which men enter into with each other (one of the great objects of all law); for so long as a lessee enjoys everything which his lease purports to grant, how does it concern him what the title of the lessor, or the heir or assignee of his lessor, really is? All that is required of him is that, having received the full consideration for the contract he has entered into, he should on his part perform it. For these reasons we think the verdict on the second issue ought to be entered for the plaintiff.

"It may be proper to mention that it would appear, from the deed of conveyance of the 2d February, 1854, that the lands were customary lands of a tenure common in Cumberland, and that the legal estate was in Thomas Rae. The estates both of mortgagor and mortgagee would therefore be equitable estates, and according to the opinion of Baron Parke, expressed in *Gouldsworth v. Knights*, the reversion by estoppel would be an estate in fee simple; and it was not contended that the conveyance to the plaintiff was not sufficient to pass such a reversion had it really existed. Judgment for the plaintiff."

Where the declaration, in an action in covenant for rent by the transferee of the reversion, contains an allegation of title in the lessor at the time of the lease, and shows a legal transfer to the plaintiff, the lessee is estopped by the indenture under seal from alleging as a defense that before the execution of the lease the lessor had conveyed the fee to another person, and hence the action may be maintained. *Palmer v. Ekins*, 2 Ld. Raym. 1550. This was a transfer before the lease. As to right of tenant to prove a transfer after the lease, see note to *Raines v. Hindman*, 38 L.R.A. (N.S.) 863.

But covenants made by one other than transferee's predecessors in title are not binding upon the transferee; hence it has been held that where mortgagor and mortgagee leased the premises, but only the mortgagor entered into the covenants with the lessee, the assignee of the mortgagee cannot sue upon the covenants. *Webb v. Russell*, 3 T. R. 393, 1 Revised Rep. 725; *Russell v. Stokes*, 1 H. Bl. 562.

(c) Necessity for use of word "assigns" in the lease.

No doubt there is a distinction between the transferee of the reversion and the assignee of lessor's rights and interest under the lease. (See subd. II. c, supra.) But the transferee usually acquires the rever-

sion by deed of the real property, and there may not be any assignment whatever of the contract of lease. Even so, the statute of 32 Hen. VIII. chap. 34, established privity of contract between the transferee, who has not taken an assignment of the lease, and the lessee. (See subd. IV. c, 2 (a), supra.) The statute make no requirement as to the use of the word "assigns" in the lease, and in view of the fact that the transferee is not the assignee of the contract, it is difficult to see why there should be any such requirement. But the court in *Spencer's Case*, 5 Coke, 16a, 1 Smith, Lead. Cas. (Hare & W.) 68, 15 Eng. Rul. Cas. 233, apparently established a general rule that if the covenant concerns a thing not *in esse*, even though it touches or concerns the land, it will not bind the assigns unless the "assigns" are expressly mentioned in the lease. The actual holding had reference to the assignee of the lessee, but the broad ruling of the court seemed to be applicable to those who succeed to the rights of the lessor under the lease by becoming owners of the reversion. There has been considerable dissension and lack of harmony among the courts, not only as to what was really established in *Spencer's Case*, but as to whether or not it should be followed. For a full discussion of the question, see note to *Sexauer v. Wilson*, 14 L.R.A. (N.S.) 185.

(d) Necessity for seal on lease.

Where the lease is not under seal, it appears that the statute of 32 Hen. VIII. chap. 34, is not applicable, since only "indentures of lease" are within the terms of the statute; hence in such case there is no privity of contract enabling the transferee to sue upon the covenants in the lease. *Bickford v. Parson*, 5 C. B. 920, 17 L. J. C. P. N. S. 192, 12 Jur. 377; *Standen v. Christmas*, 10 Q. B. 135, 16 L. J. Q. B. N. S. 265, 11 Jur. 694; *Smith v. Eggington*, L. R. 9 C. P. 145, 43 L. J. C. P. N. S. 140, 30 L. T. N. S. 521; *Dove v. Dove*, 18 U. C. C. P. 424.

In *Sheets v. Selden*, 2 Wall. 177, 17 L. ed. 822, the point as to statute 32 Hen. VIII., chap. 34, was conceded, but the court held that the rule had been changed by an Indiana statute applicable to the case.

But in case of a tenancy from year to year created otherwise than by a lease under seal, the English courts hold that the payment of rent by the lessee to the transferee of the reversion, coupled with the fact that the latter does not exercise his legal right to terminate the tenancy by notice, gives rise to an implied agreement between the parties that the terms of the old tenancy shall govern the rights and liabilities of the transferee and the lessee. In this way there is wrought a practical substitution of the transferee in place of the lessor. *Cornish v. Stubbs*, L. R. 5 C. P. 334, 39 L. J. C. P. N. S. 202, 22 L. T. N. S. 21, 18 Week. Rep. 547; *Manchester Brewery Co. v. Coombs* [1901] 2 Ch. 608, 82 L. T. N. S. 347, 18 Times L. R. 299, 70 L. J. Ch. N.

S. 814; *Buckworth v. Simpson*, 1 Crompt. M. & R. 834, 5 Tyrw. 344, 1 Gale, 38, 4 L. J. Exch. N. S. 104 (this was a case involving the assignee of lessee, but the court's statement includes the reversioner).

In *Standen v. Christmas*, supra, the court made a distinction between leases for a term of years and leases from year to year, stating that no case had been found holding that the covenants run when the lease was not under seal, and the demise was for a term of years. But in *Smith v. Eggington*, supra, the lease was not under seal, and was terminable by either party upon six months' notice. The court proceeded upon the theory that the covenants would run if the transferee of the reversion had recognized the tenant, and left it to the jury to determine the question as to whether there had been a recognition. It may be that the court regarded this as a tenancy from year to year, since it was terminable upon short notice. According to the statement of the court in the *Standen Case*, the distinction is based upon the fact that in a tenancy for a term of years the landlord does not have, and in the tenancy from year to year, he does have, the power to terminate the tenancy by notice. But, to infer an agreement from the fact that the transferee failed to give notice of termination of a relation that never existed between himself and the lessee, and which has, as between lessor and lessee, already terminated, would appear to be somewhat inconsistent.

The Mississippi Code 1906, §§ 2877, 2878, and New Jersey, 1 Gen. Stat. p 881, §§ 126 and 127, appear to follow the English statute in respect to limiting the effect of the statute to "indentures of lease," but the statutes of the other states, so far as revealed by the decisions cited under subd. IV. c, 2 (a), supra, do not seem to restrict the operation of the statute to "indenture of lease," as is the case with the English statute.

In *Sheets v. Selden*, 2 Wall. 177, 17 L. ed. 822, the court, in construing an Indiana contract, said: "It is conceded that at the common law the grantee of a reversion could not enter or bring ejectment for breach of the covenants of a lease; and that the statute of 32 Hen. VIII., giving the right of entry and of action to such grantee, was confined to leases under seal. The statute speaks of conditions, covenants, and agreements, contained in indentures of leases, demises, and grants,—language only applicable to sealed instruments. That statute was adopted in Indiana as early as 1818, but a law of the state, passed in 1843, alters its rule, and extends its remedies to all leases."

It is here suggested that in jurisdictions where the courts, by reason of the wording of the statute there in force, are inclined to follow the strict construction of the English courts, the injustice might be avoided by change in the form of action. If the action is for rent, it could always be brought in such form that it would be based upon privity of estate without reference to con-

tract. (See subd. IV. b, supra.) If the cause of action is such that it must be brought upon the contract, the plan of bringing it in the name of the assignor for the assignee of a chose in action should be considered. See subd. IV. c, 1, supra, and subd. IV. c, 2 (a), supra, on effect of a statute which enables the assignee of a chose in action to sue thereon.

(c) On particular covenants.

(1) In general.

No precise or exact rule has been enunciated for determining what covenants run with the land. It is usually said by the courts that if the covenant in the lease will be of benefit either to the landlord or tenant by reason of his relation to the particular land, then it touches or concerns the land so as to run. But such a rule is not always easy to apply, and the particular cases show that the courts have necessarily used considerable discretion in deciding what particular covenants are included. As to what covenants will not run, see subd. IV. 3, infra. As shown, supra, subd. IV. c, 2 (a), the transferee of the reversion may maintain an action upon any covenant that is held to run with the land.

(2) To pay rent.

On the question of effect of giving a note for future rents, upon the question here considered, see subd. V. c, 2 (d), infra.

And on the question of apportionment of rent where the transfer of the reversion occurs between two rent days, see subd. V. c, 2 (e), infra. As to rent paid in advance, see infra, subd. VI. b.

On the question as to right to rent as between vendor and purchaser, where the real estate is sold upon a contract, see note to *Speicher v. Lacy*, 35 L.R.A.(N.S.) 1066, supplemented by note to *Re Boyle*, 38 L.R.A.(N.S.) 420.

On the ground that covenants to pay rent run with the land, it is the general rule that the transferee of the reversion may sue lessee on his covenant to pay rent for rent accruing after the assignment. *Thursby v. Plant*, 1 Wms.' Saund. 237, 1 Lev. 259, 1 Sid. 401; *Harper v. Bird*, T. Jones, 102; *Sacheverell v. Froggatt*, 2 Wms.' Saund. 367; *Palmer v. Ekins*, 2 Ld. Raym. 1550; *Parker v. Webb*, 3 Salk. 5; *Harmer v. Bean*, 3 Car. & K. 307; *Cobb v. Carpenter*, 2 Campb. 13, note (but transferee must have the legal title, the equitable title alone being held insufficient); *Allenspach v. Wagner*, 9 Colo. 127, 10 Pac. 802; *Peck v. Northrop*, 17 Conn. 217; *Scheidt v. Belz*, 4 Ill. App. 431; *Kimball v. Walker*, 71 Ill. App. 309; *Burbank v. Dyer*, 54 Ind. 392; *Kellum v. Berkshire L. Ins. Co.* 101 Ind. 455; *Indiana Natural Gas & Oil Co. v. Lee*, 34 Ind. App. 119, 72 N. E. 492 (but payment to the transferor prior to notice of transfer to the tenant is a good defense); *Worthington v. Cooke*, 56 Md. 51; *Outtoun v. Dulin*, 72 Md. 536, 20 Atl. 134; *Patten*

v. Deshon, 1 Gray, 325; Pfaff v. Golden, 126 Mass. 402; Myers v. Burns, 33 Barb. 401; Streaper v. Fisher, 1 Rawle, 155, 18 Am. Dec. 604 (tenant held title by deed reserving a ground rent, the grantor's interest later being transferred by sheriff's deed); McCardell v. Williams, 19 R. I. 701, 36 Atl. 719; Magoon v. Eastman, 86 Vt. 261, 84 Atl. 869.

Since the common-law forms of pleading in respect to actions in debt and in covenant have been abolished in most jurisdictions, and the rule that covenants to pay rent run with the land has long been firmly established, courts very frequently omit all reference to these basic principles when passing upon cases evidently involving them. In the following cases the action for after-acquired rent was upon the contract, and the court simply held that the transferee could maintain it against the lessee or his successors:

U. S.—Butt v. Ellett, 19 Wall. 544, 22 L. ed. 183.

Ala.—Otis v. McMillan, 70 Ala. 46; Westmoreland v. Foster, 60 Ala. 448; Hand v. Liles, 56 Ala. 143; Tubb v. Fort, 58 Ala. 277; Blankenship v. Blackwell, 124 Ala. 355, 82 Am. St. Rep. 175, 27 So. 551.

Ark.—Gibbons v. Dillingham, 10 Ark. 9, 50 Am. Dec. 233; Latham v. First Nat. Bank, 92 Ark. 315, 122 S. W. 992.

Cal.—Mahoney v. Alvizo, 51 Cal. 440.

Conn.—King v. Housatonic R. Co. 45 Conn. 226. The court said: "It is a well-settled principle of the common law that the grant of the reversion of an estate expectant on the determination of a lease for years passes to the grantee the rents reserved in the lease as incident to the reversion. Co. Litt. 151, 152; 2 Bl. Com. 176; 4 Kent, Com. 354."

Ill.—Keeley Brewing Co. v. Mason, 102 Ill. App. 381; Crosby v. Loop, 13 Ill. 625 (by way of argument); Epley v. Eubanks, 11 Ill. App. 272; Graham v. LeSourd, 99 Ill. App. 223; Keeley Brewing Co. v. Mason, 104 Ill. App. 241; Meyer v. Sachael, 143 Ill. App. 563; Barr v. Florentine Alabaster Co. 174 Ill. App. 256; Disselhorst v. Cado-gan, 21 Ill. App. 179.

Ind.—Kellum v. Berkshire L. Ins. Co. 101 Ind. 455; Swope v. Hopkins, 119 Ind. 125, 21 N. E. 462; Chandler v. Pittsburgh Plate Glass Co. 20 Ind. App. 165, 50 N. E. 400; Hammond v. Jones, 41 Ind. App. 32, 83 N. E. 257; Powell v. Jones, 50 Ind. App. 493, 98 N. E. 646.

Iowa.—Abercrombie v. Redpath, 1 Iowa, 111; McLott v. Savery, 11 Iowa, 323; Hatfield v. Lockwood, 18 Iowa, 296; Van Wagner v. Van Nostrand, 19 Iowa, 422; Van Driel v. Rosierz, 26 Iowa, 575; Townsend v. Isenberger, 45 Iowa, 670; Winn v. Murehead, 52 Iowa, 64, 2 N. W. 949. In Re Boyle, 154 Iowa, 249, 38 L.R.A.(N.S.) 420, 134 N. W. 590. But an executory contract of sale in which vendee is not given the right of possession until after the rent accrues does not entitle him to the rent.

Kan.—Dunn v. Jaffray, 36 Kan. 408, 13 Pac. 781; Scott v. Stone, 72 Kan. 545, 84 L.R.A.1915C.

Pac. 117 (where, under an executory contract for the sale of land, the vendee pays interest on all unpaid instalments, and complies with all the terms of the sale, he is entitled to all rent accruing after the date of the contract); Chase v. Barnes, 82 Kan. 28, 107 Pac. 769.

Ky.—Owings v. Norton, 1 A. K. Marsh. 573 (but upon a contract to convey when the purchaser gives notes as security, the purchaser cannot claim the rent accruing after the date of the contract, but before he has tendered his notes); Castleman v. Belt, 2 B. Mon. 157; Epperson v. Blakemore, 2 Bush, 241 (the assignee of a title bond is a purchaser, and entitled as such to rents subsequently accruing); Miller v. Stagner, 3 B. Mon. 58, 38 Am. Dec. 178; Henshaw v. Bell, 10 Ky. L. Rep. 444; Ventura Hotel Co. v. Pabst Brewing Co. 33 Ky. L. Rep. 149, 109 S. W. 354.

Me.—Winslow v. Rand, 29 Me. 362; Darnen v. American Light & P. Co. 91 Me. 334, 40 Atl. 63.

Md.—Martin v. Martin, 7 Md. 368, 61 Am. Dec. 364; Dailey v. Grimes, 27 Md. 440.

Mass.—Farley v. Thompson, 15 Mass. 18 (but the tenant, having paid rent that accrued after the transfer, to transferor, in the absence of notice thereof, is protected against transferee's claims therefor); Beal v. Boston Car Spring Co. 125 Mass. 157, 28 Am. Rep. 216. This principle was taken as the ground for a holding that a lessor could maintain an action against sublessees for rent accruing after the lessee had surrendered the lease "without prejudice to the subtenants."

Mich.—Perrin v. Lepper, 34 Mich. 292; Kelly v. Bowerman, 113 Mich. 446, 71 N. W. 836.

Mo.—Lindenbower v. Bentley, 86 Mo. 515; Latta v. Weiss, 131 Mo. 230, 32 S. W. 1005; Page v. Culver, 55 Mo. App. 606; Starbuck v. Avery, 132 Mo. App. 542, 112 S. W. 33; Lunt v. Biehl, 159 Mo. App. 361, 140 S. W. 757 (even though the transfer was made before the tenant was entitled to possession under his lease, which was prior to the transfer); Loomis v. Shriner, 165 Mo. App. 25, 145 S. W. 865; Vantage Min. Co. v. Baker, 170 Mo. App. 457, 155 S. W. 466 (the rule was recognized, but not applied, as there had been no transfer of the reversion); John McMenamy Invest. & Real Estate Co. v. Dawley, 183 Mo. App. 1, 165 S. W. 829 (but if the rent has been previously assigned and the assignment recorded, the purchasers of the premises cannot collect the rent that has been assigned); Culverhouse v. Worts, 32 Mo. App. 419.

Neb.—Eiseley v. Spooner, 23 Neb. 470, 8 Am. St. Rep. 128, 36 N. W. 659; Stone v. Snell, 86 Neb. 581, 125 N. W. 1108.

N. J.—Condit v. Neighbor, 13 N. J. L. 83.

N. Y.—Harbeck v. Sylvester, 13 Wend. 608 (but the lessee's guarantor is not liable to transferee for rent on failure of lessee to pay it); Van Wicklen v. Paulson, 14 Barb. 654; Bowman v. Keleman, 65 N. Y.

598; *Noble v. Thayer*, 19 App. Div. 446, 48 N. Y. Supp. 302; *Bernstein v. Koch*, 52 Misc. 550, 102 N. Y. Supp. 524 (and a monthly tenant who is required to give thirty days' notice to terminate the lease is not relieved of that requirement by a transfer of the reversion); *Myers v. Burns*, 35 N. Y. 269.

N. C.—*Mixon v. Coffield*, 24 N. C. (2 Ired. L.) 301; *Bullard v. Johnson*, 65 N. C. 436; *Wilcoxon v. Donnelly*, 90 N. C. 245.

Pa.—*Johnston v. Smith*, 3 Penr. & W. 496, 24 Am. Dec. 339; *Newbold v. Comfort*, 2 Clark (Pa.) 331; *Hoskins v. Houston*, 2 Clark (Pa.) 489; *Barker v. Deuser*, 49 Pa. Super. Ct. 215.

Tenn.—*Gibbs v. Ross*, 2 Head, 437; *Hudson v. Fuller*, — Tenn. —, 35 S. W. 575. And the fact that executors of lessor sold the land under a power in the will does not work a conversion of the land into personality in such sense as to interfere with the rule that subsequently accruing rents passed to the purchaser.

Tex.—*Shultz v. Spreain*, 1 Tex. App. Civ. Cas. (White & W.) 516; *Faulkner v. Warren*, 1 Tex. App. Civ. Cas. (White & W.) 362; *Hearne v. Lewis*, 78 Tex. 276, 14 S. W. 572; *Vogel v. Zuercher*, — Tex. Civ. App. —, 135 S. W. 737 (the lessee, in an action for rent, cannot attack the deed of transfer on the ground of transferor's mental incapacity, as that would be a collateral attack upon a deed that was merely voidable, but not void); *Lester v. Zink*, — Tex. Civ. App. —, 154 S. W. 1161.

Wis.—*Leonard v. Burgess*, 16 Wis. 42.

Canada—*Wittrock v. Hallinan*, 13 U. C. Q. B. 135; *Pepper v. Butler*, 37 U. C. Q. B. 253.

The proposition is supported by cases like *Garber v. Gianella*, 98 Cal. 527, 33 Pac. 458, where the transferee maintained an action for conversion against the transferor, for rent in kind, received by the latter from the tenant.

And by cases such as *Dixon v. Niccolls*, 39 Ill. 372, 89 Am. Dec. 312, where the action was by the tenant against the transferee on a replevin bond, the transferee having replevined the rent in kind, the basis of the decision being the fact that the transferee was entitled to the accruing rent.

And in *Hovey v. Walker*, 90 Mich. 527, 51 N. W. 678, it was held that the transferee of the reversion, who also held an order from the transferor upon the tenant to pay to transferee all rents and moneys in his hands due to transferor, took subject to the terms of the original agreement between transferor and tenant that the latter was to pay the former a certain sum in cash, as well as to pay certain debts of the former, and to charge the same against the rent of the premises, so that the tenant was entitled, as against the transferee, to all expenditures actually made in compliance with the agreement, whether or not the transferee ever had knowledge of the terms of the agreement.

Where rent sufficient to pay lessor's creditor was assigned to the creditor, a L.R.A.1915C.

subsequent transferee of the reversion, with knowledge of the assignment, cannot claim any rent until the creditor's claim is satisfied, even though the rent claimed was earned after the expiration of the original term, the lessee having exercised an option to renew which was granted to him in the lease. *Swan v. Inderlied*, 187 N. Y. 372, 80 N. E. 195.

And it has been held that one of several lessors of the same premises may transfer his interest in the reversion to one of his colessors so that an action for rent upon the contract may thereafter be maintained against the lessee by the owners of the reversion without joining the transferor as a party plaintiff. *Mussey v. Holt*, 24 N. H. 248, 55 Am. Dec. 234.

And it makes no difference that the stipulated rent is not a fixed amount, but is to be a percentage of the net earnings of the lessee, the covenant to pay the same may be enforced by the transferee of the reversion. And a covenant to adjust the shortage or surplus of grain, stored in the leased warehouse, over or under the amount shown by the books at the time of the lease, the lessee at the time of the lease paying for the amount shown by the books, has been held to be in the nature of rent, so that it runs to the transferee of the reversion. *Belden v. Union Warehouse Co.* 11 App. Div. 160, 42 N. Y. Supp. 650.

Where a lessee covenants with a sublessee of part of the premises described in the original lease that the part sublet shall be discharged from all rent other than that reserved in the sublease, and then transfers the reversion in the part sublet to one person, and assigns all of his remaining interest in the original lease to another person, the part not sublet cannot be charged with the whole rent reserved in the original lease in order to fulfil the covenant in the sublease (*Wahl v. Barroll*, 8 Gill, 288; *Cook v. Arundel*, Hardr. 87); but the covenant does run with the land described in the sublease, so that the transferee of the reversion in this particular land must reimburse the subtenant or his legal assigns for any rent involuntarily paid in excess of the amount reserved in the sublease (*Wahl v. Barroll*, supra. In this case this principle was asserted, but not applied, for the reason that the reversion in the part sublet had by mesne conveyances become vested in the owner of the subleasehold interest, thus merging the two estates).

The transferee may distrain for nonpayment of rent. *Moss v. Gallimore*, 1 Dougl. K. B. 279, 18 Eng. Rul. Cas. 404.

And the transferee must allow deductions out of the rent according to the covenant of the transferor, contained in the lease. *Baylye v. Hughes*, Cro. Car. 137.

In *David Bradley & Co. v. Peabody Coal Co.* 99 Ill. App. 427, it was held that serving notice of a foreclosure sale upon the tenant is a prerequisite to his liability to the purchaser of the reversion for rent; hence the tenant, having paid rent in advance to the former owner of the reversion,

is not liable to the purchaser for the same rent, in the absence of proof that he had notice of the sale.

Where the lease for a term of five years contained renewal privileges at the option of the lessee, and provided that the lessee might offset any indebtedness, present or future, of the lessor, against the rent, and hold possession and defend the same for payment and settlement of any such indebtedness, against the lessor, his heirs and assigns, and the lessee held over the term without renewal, it was held, in *Strousse v. Bank of Clear Creek County*, 9 Colo. App. 478, 49 Pac. 260, that as to a transferee of the reversion, the lessee was a tenant from year to year, and that in an action by the transferee for possession for non-payment of rent accruing after the transfer, he could not defend on the ground that the original lessor was indebted to him in an amount exceeding the rent.

But in *Stewart v. Gregg*, 42 S. C. 392, 20 S. E. 193, it was held that the transferee of the reversion, by judicial sale, could not enforce payment of rent from the lessee by distress, under the contract, in the absence of evidence showing an attornment, but that he had the right to the rent, and could maintain an action for use and occupation. See same case under subd. III. a, *supra*. This same position had been taken in *Jacks v. Smith*, 1 Bay, 315.

Although the transfer of the reversion is absolute upon its face, if the transferor makes an agreement with the transferee that the latter will reconvey at any time within three years, upon payment of a certain sum, and that the transferor is to retain possession, collect the rents, etc., and he does actually collect the rents from all the tenants except defendant, who refused to pay him because tenant had an offset to all of the debt, the transferee cannot, after the tenancy expires, collect the rent from the tenant. *Goodwin v. Hudson*, 60 Ind. 117.

And it has been held that where the lessee gave a sublease for a longer period of time than was granted by the original lease the assignee of the original lease could not sue the sublessee upon the covenants in the sublease, for the reason that the plaintiff had no reversion. *Norris v. Craig*, 64 L. J. Q. B. N. S. 432, 43 Week. Rep. 480, 59 J. P. 264.

Rent accruing prior to transfer of reversion.

The transferee of the reversion is not entitled to rent that had accrued prior to the transfer. (On the general question as to liability on breaches of covenants occurring prior to transfer, see subd. IV. c, 2 (i), *infra*; *Flight v. Bentley*, 7 Sim. 149, 4 L. J. Ch. N. S. 262; *Wittrock v. Hallinan*, 13 U. C. Q. B. 135; *Mahoney v. Alviso*, 51 Cal. 440; *Leopold & Baum*, 110 N. Y. Supp. 1054, affirmed in 113 N. Y. Supp. 1136; *Barber v. Watch Hill Fire Dist.* post, 245; *Gibbs v. Ross*, 2 Head, 437; *Kneeland In L.R.A.*1915C.

vest. Co. v. Aldrich, 63 Wash. 609, 116 Pac. 264. On the question as to who is entitled to rent accrued at the time of transfer, see subd. V. c, 2 (b) *infra*).

(3) To renew the lease.

A covenant to renew a lease runs with the land. *Roe ex dem. Bamford v. Hayley*, 12 East, 464, 11 Revised Rep. 455 (a statement by way of argument); *Leiter v. Pike*, 127 Ill. 287, 20 N. E. 23; *Leominster Gaslight Co. v. Hillery*, 197 Mass. 267, 83 N. E. 870; *Leppla v. Mackey*, 31 Minn. 75, 16 N. W. 470; *Blount v. Connolly*, 110 Mo. App. 603, 85 S. W. 605.

And upon the ground that a covenant to renew runs with the land, it has been held:

—that a covenant by the lessor to renew may be enforced, by way of defense, in an action by the transferee of the reversion to recover possession from the lessee, *Parker v. Gortatowsky*, 127 Ga. 560, 56 S. E. 846; *Simon v. Schmitt*, 118 N. Y. Supp. 326, reversed in 137 App. Div. 625, 122 N. Y. Supp. 421, on the ground that the trial court did not have jurisdiction to decide the facts without a jury;

—that such covenant is necessarily divisible, and that the transferee of a part of the reversion will be liable upon the covenant to renew the lease only as to the part conveyed to him, *Leiter v. Pike*, 127 Ill. 287, 20 N. E. 23;

—that while a general covenant to renew would be enforced against the transferee of the reversion, a condition inseparable from the covenant is carried with it, so that a covenant to renew unless the party of the first part, lessor, wishes the piece of land for building purposes, is not enforceable against the transferee of the reversion if he wishes the piece of land for building purposes, *Leppla v. Mackey*, 31 Minn. 75, 16 N. W. 470;

—that where the covenant gave lessor an option to either renew the lease or take and pay for the tenants' improvements, and he notifies tenant of his willingness to renew, the tenant cannot refuse to accept the renewal and come into a court of equity to have the improvements sold for his benefit, *Bailie v. Rodway*, 27 Wis. 172;

—that a renewal by the lessor after the transfer of the premises by him, of a lease or license to quarry and remove cement stone, in fulfillment of a covenant in the lease to renew the same, is no protection to the lessee against an injunction restraining the operation of the quarry, the injunction being issued at the instance of the transferee of the reversion, for the renewal should be by the transferee, and he should have the right that was exercised by the transferor of selecting appraisers, as well as the right to receive the consideration for the renewal, *Norton v. Snyder*, 2 Hun, 82;

—that a covenant to renew at the expiration of the lease carries with it an agreement for a method of fixing the valuation of the premises as a basis for the

amount of rent to be paid during the renewal period, *Worthington v. Hewes*, 19 Ohio St. 66;

The lessee, after asking for a renewal, can maintain a bill for an injunction restraining the transferee of the reversion from ejecting him, and for a decree ordering the execution of a renewal of the lease. *Leominster Gaslight Co. v. Hillery*, 197 Mass. 267, 83 N. E. 870; *Blount v. Connolly*, 110 Mo. App. 603, 85 S. W. 605; *Piggot v. Mason*, 1 Paige, 412; (but he is not entitled to have a covenant for renewal inserted in the new lease, as that would create a perpetuity).

(4) To repair.

As a general proposition, it may be said that covenants to repair run with the land, whether they are made on the part of the lessor or the lessee; but the rule is very difficult of practical application because of the rule that the covenantor is not liable for breaches occurring prior to the transfer. Cases involving that question in regard to covenants to repair are cited and discussed under *infra*, subd. IV. c. 2 (i).

The transferee of the reversion takes the same burdened with lessor's covenant to repair, and is liable thereon, while he owns the reversion, to the same extent as though he were the original lessor. *Rising Sun Lodge v. Buck*, 58 Me. 426; *Gerzebek v. Lord*, 33 N. J. L. 240; *Myers v. Burns*, 35 N. Y. 269, affirming 33 Barb. 401; *Silberberg v. Trachtenberg*, 58 Misc. 536, 109 N. Y. Supp. 814; *Allen v. Culver*, 3 Denio, 284 (even to the extent of rebuilding in case the building is totally destroyed by fire); *McCardell v. Williams*, 19 R. I. 701, 36 Atl. 719.

And he may maintain an action on lessee's covenant to repair if there has been a breach thereof by the lessee or his successors after the transfer. *Scaltock v. Harston*, L. R. 1 C. P. Div. 106, 45 L. J. C. P. N. S. 125, 34 L. T. N. S. 130, 24 Week. Rep. 431; *Brett v. Cumberland*, 3 Bulstr. 163, 1 Rolle, Rep. 359; *Bristow's Case*, Godb. 161; *Mascal's Case*, Leon, pt. 1, p. 62; *Matures v. Westwood*, Cro. Eliz. pt. 2, p. 599; *Kitchen v. Buckley*, 1 Lev. 109; *Lougher v. Williams*, 2 Lev. 92; *Dowse v. Cale*, 2 Vent. 126, 3 Lev. 264; *Vivian v. Champion*, 2 Ld. Raym. 1125, 1 Salk. 141, Holt, 178; *Hayes v. New York Gold Min. Co.* 2 Colo. 273 (an indirect holding on this point); *Harris v. Goslin*, 3 Harr. (Del.) 338; *Scheidt v. Belz*, 4 Ill. App. 431; *Myers v. Burns*, 33 Barb. 401; *Magoon v. Eastman*, 86 Vt. 261, 84 Atl. 869.

And the transferee of the reversion may, at the close of the term, sue for breach of covenant to give up the premises in good repair. *Morgan v. Hardy*, L. R. 17 Q. B. Div. 770; *Hayes v. New York Gold Min. Co.* 2 Colo. 273 (an indirect holding); *Scheidt v. Belz*, 4 Ill. App. 431; *Lehmaier v. Jones*, 100 App. Div. 495, 91 N. Y. Supp. 687; *Magoon v. Eastman*, 86 Vt. 261, 84 Atl. 869.
L.R.A.1915C.

(5) To pay for tenants' repairs or improvements.

The question as to the running of lessor's covenant to pay for tenant's improvements upon the premises was covered in the note to *Willcox v. Kehoe*, 4 L.R.A.(N.S.) 466.

(6) To sell premises to tenant if requested.

A covenant in a lease giving to the lessee the right to purchase the premises at any time during the term runs with the land and is binding upon the transferee of the reversion (the English courts appear to hold that such covenant does not run; see *Woodhall v. Clifton* [1905] 2 Ch. 257, 74 L. J. Ch. N. S. 555, 54 Week. Rep. 7, 93 L. T. N. S. 257, 21 Times L. R. 581, cited under subd. IV. c. 3, (g) *infra*). *Dietz v. Mission Transfer Co.* 95 Cal. 92, 30 Pac. 380 (an incidental holding); *Page v. Hughes*, 2 B. Mon. 445 (this decision had the effect of enforcing such an option in favor of lessee against the heirs of lessor, but it is not based upon the ground that the covenant runs with the land. It was proved in a bill in equity that the lease containing the option to purchase was, in fact, an absolute sale, but made in the form of a lease for the purpose of better securing the purchase money); *Maughlin v. Perry*, 35 Md. 352; *Harper v. Runner*, 85 Neb. 343, 123 N. W. 313; *Race v. Groves*, 43 N. J. Eq. 284, 7 Atl. 667 (but in this case lessee was estopped by subsequent conduct from enforcing the covenant against the transferee of the reversion); *Van Horne v. Crain*, 1 Paige, 455; *Lazarus v. Heilman*, 11 Abb. N. C. 93; *Millard v. Martin*, 28 R. I. 494, 68 Atl. 420 (hence, such an option does not prevent a sale by the lessor to a third party; and a sale by the lessor to the lessee at a sum less than that named in the option will not prevent a decree of specific performance of a contract of sale to a third party by the lessor, made prior to the sale to the lessee, for such sale to the lessee was not an exercise of the option in the lease); *Hagar v. Buck*, 44 Vt. 285, 8 Am. Rep. 368; *Prout v. Roby*, 15 Wall. 471, 21 L. ed. 58 (and in this case it was held that if the covenant is not limited to the term of the lease, the fact that the leasehold estate is terminated does not affect the covenant; it can be enforced the same as if it had been a separate agreement to convey).

(7) For quiet enjoyment.

A covenant for quiet enjoyment runs with the land and is binding upon the transferee of the reversion. *Derisley v. Custance*, 4 T. R. 75; *Hartcup v. Bell*, Cab. & El. 19; *Coulter v. Norton*, 100 Mich. 389, 43 Am. St. Rep. 458, 59 N. W. 163.

An implied covenant for quiet enjoyment terminates with the estate upon which it is created, so that where the owner of a life estate leases the premises and dies within the term, the tenant, after eviction

by the remainderman, cannot maintain an action against the lessor's personal representative for breach of an implied covenant for quiet enjoyment. *Swan v. Stransham*, 3 Dyer, 257; *Adams v. Gibney*, 6 Bing. 656, 4 Moore & P. 491, 8 L. J. C. P. 242, 31 Revised Rep. 514, 15 Eng. Rul. Cas. 743. This, of course, is a different situation. Here the leasehold estate is completely terminated by operation of law, and no reversion passes. See subd. III. e, supra.

But it has been held that if the life tenant had power of appointment by the exercise of which he could have protected his tenant for the full term, and neglected to do so, his personal representatives are liable for breach of an implied covenant for quiet enjoyment. *Hamilton v. Wright*, 28 Mo. 199.

(8) To terminate the lease.

A covenant in a lease giving either party the right to terminate the tenancy at certain times during the term runs with the land, and the transferee of the reversion may exercise the right. *Roe ex dem. Bamford v. Hayley*, 12 East, 464, 11 Revised Rep. 455; *Roberts v. McPherson*, 62 N. J. L. 165, 40 Atl. 630, affirmed in 63 N. J. L. 352, 43 Atl. 1098.

So, the right to terminate the lease for subletting without the consent of the lessor, when embodied in a covenant in the lease, passes to the transferee of the reversion. *Cordeviollé v. Redon*, 4 La. Ann. 40.

But it was held in *McClintock v. Lovelless*, 5 Pa. Dist. R. 417, that a covenant in a lease giving the lessor (heirs and assigns were not mentioned), the right to arbitrarily terminate the lease by giving to lessee thirty days' notice is a personal covenant, and does not pass with the reversion to the transferee. But see *infra*, subd. IV. c, 3 (j).

(9) To conduct business in a proper manner.

A covenant, by the lessee of premises to be used as an inn, to conduct the business in an orderly and proper manner, has been held to run with the lands, so that the transferee of the reversion may sue for a breach thereof. *Fleetwood v. Hull*, L. R. 23 Q. B. Div. 35, 58 L. J. Q. B. N. S. 341, 60 L. T. N. S. 790, 37 Week. Rep. 714, 54 J. P. 229.

And the same is true of a covenant by the lessee of a farm to harvest the hay in a "husbandlike manner." *Magoon v. Eastman*, 86 Vt. 261, 84 Atl. 869.

(10) To insure.

It has been held that a covenant by the lessee to insure runs with the land, so that the transferee of the reversion may maintain an action for a breach occurring after the transfer. *Vernon v. Smith*, 5 Barn. & Ald. 1, 24 Revised Rep. 257 (where a statute, 14 Geo. III. chap. 78, compels the use of the insurance money in rebuilding); L.R.A.1915C.

Masury v. Southworth, 9 Ohio St. 340 (where the agreement was to use the insurance money in rebuilding).

(11) To pay taxes or assessments.

A covenant that lessee will pay the taxes or assessments on the property runs with the land to the transferee of the reversion. *Hayes v. New York Gold Min. Co.* 2 Colo. 273; *Hendrix v. Dickson*, 69 Mo. App. 197; *Post v. Kearney*, 2 N. Y. 394, 51 Am. Dec. 303.

And if the property is sold for the taxes which the lessee, in violation of his covenant, neglected to pay, the transferee of the reversion can collect from the lessee the amount of the taxes if the breach occurred after the transfer of reversion to the plaintiff. *Fontaine v. Schulenburg & B. Lumber Co.* 109 Mo. 55, 32 Am. St. Rep. 648, 18 S. W. 1147.

(12) To furnish heat.

A covenant to furnish heat to the buildings upon the leased premises, for the use of the lessee during the term, runs with the land, so that the transferee of the reversion is liable to the lessee for a breach of the covenant. *Storandt v. Vogel & B. Co.* 140 App. Div. 671, 125 N. Y. Supp. 568, order reversed on other grounds in 149 App. Div. 928, 133 N. Y. Supp. 1146, and reversal affirmed in 157 App. Div. 902, 141 N. Y. Supp. 1147; *GLIDDEN v. SECOND AVE. INVEST. CO.*

(13) To leave improvements upon premises.

A covenant that lessee will leave upon the premises, at the close of the term, certain fixtures which otherwise he would have during the term the right to remove, runs with the land to the transferee of the reversion. *Hayes v. New York Gold Min. Co.* 2 Colo. 273 (an indirect holding).

(14) To leave all manure on farm.

A covenant to use up all feed raised on the farm, and leave all the manure produced therefrom upon the farm, runs with the land, and can be enforced by the transferee of the reversion. *Chapman v. Smith* [1907] 2 Ch. 97, 76 L. J. Ch. N. S. 394, 96 L. T. N. S. 662.

(15) To leave cotton seed on land.

A covenant that lessee will leave a certain amount of cotton seed upon the premises when the term ends or when he leaves the premises runs with the reversion. *Cobb v. Johnson*, 126 Ga. 618, 55 S. E. 935.

(16) To buy from lessor all goods to be sold upon the premises.

A covenant, by lessee of a liquor saloon, to buy all of the liquor sold on the leased

premises from the lessors during the term, if possible, at a reasonable price, runs with the land, and may be enforced by the transferee of the reversion, who also succeeded to the business of lessors as brewers and wholesale liquor dealers. *Clegg v. Hands*, L. R. 44 Ch. Div. 503, 59 L. J. Ch. N. S. 477, 62 L. T. N. S. 502, 38 Week. Rep. 433, 55 J. P. 180; *Manchester Brewery Co. v. Coombs* [1901] 2 Ch. 608, 82 L. T. N. S. 347, 16 Times L. R. 299, 70 L. J. Ch. N. S. 814; *White v. Southend Hotel Co.* [1897] 1 Ch. 767, 66 L. J. Ch. N. S. 387, 76 L. T. N. S. 273, 45 Week. Rep. 434. The validity of such covenants, of course, presents another question. But see *infra*, subd. IV. c, 3 (b).

(17) To grind all grain grown upon premises.

In *Vyryan v. Arthur*, 1 Barn & C. 410, 2 Dowl. & R. 670, 1 L. J. K. B. 138, 25 Revised Rep. 437, it was held that a covenant by the owner of a mill to grind all the grain grown on certain premises he had leased runs with the land, so that the person to whom he sold the mill and transferred the reversion in the leased premises was liable upon the covenant.

(18) Not to remove straw.

A covenant by the lessee that he will not remove the straw from the premises will inure to the benefit of the transferee of the reversion, but the rule that parol evidence is not admissible to vary a written instrument is not applicable where the lessee has held over the original term, and in an action against the transferee of the reversion for preventing him from removing straw, testimony is admitted proving a verbal agreement with the lessor, at the time the lease was executed, that in case there was a holding over, the lessee was to leave upon the premises only the same amount of straw that was in the barn when he took possession, and that he had been compelled by the transferee to leave much more. *Mace v. Wilson*, 49 Pa. Super. Ct. 378.

(19) To compensate way-going tenant for extra labor.

A lessee may maintain an action against the transferees of the reversion, who had served the notice of termination upon him, on a contract or custom of the country by which he is entitled to receive, on the termination of his tenancy upon notice by the landlord, reasonable allowance for the value of his labor bestowed on the land, of the benefit of which he is deprived by the termination, notwithstanding the fact that he had paid all the rent to the former landlord, and had also received a notice of termination from the former landlord, possession having been given to the defendants in conformity to their notice, which was merely a renewal of that served upon him by the former landlord. *Womersley v. Dally*, 26 L. J. Exch. N. S. 219. L.R.A.1915C.

(20) Giving to lessor discretion to re-let in case he had to re-enter

A covenant in a lease for a term of years, giving to the lessor in case of re-entry for nonpayment of rent, a discretion to re-let the premises at the risk of lessee, inures to the benefit of the transferee of the reversion. *Weeks v. International Trust Co.* 60 C. C. A. 236, 125 Fed. 370, writ or order dismissed for want of jurisdiction in 193 U. S. 667, 48 L. ed. 839, 24 Sup. Ct. Rep. 853, and order affirmed on appeal after second trial in 203 U. S. 364, 51 L. ed. 224, 27 Sup. Ct. Rep. 69, the case in the Supreme Court turning upon other questions.

(21) To give up possession at end of term in good repair.

It has been held that a covenant to leave the premises in good tenantable repair at the expiration of the term runs with the land, so that the transferee of the reversion may sue for a breach thereof; but of course he cannot sue until the expiration of the term, since there is no breach until that time. *Shelby v. Hearne*, 6 Yerg. 512. In this case it was held that if the term expired before the transfer there could be no recovery by the transferee; but in *Indianapolis Natural Gas Co. v. Pierce*, 25 Ind. App. 116, 56 N. E. 137, it was held that under a similar set of facts there could be a recovery by virtue of a statute making a chose in action transferable. As to transferor's right to sue upon such covenant if he reserved the right in the transfer, see *Payne v. James*, cited *infra*, subd. V. c. 1.

(22) To indemnify lessor against loss.

A covenant in a lease by a railway company to an elevator company of part of the lessor's right of way to be used for elevator purposes, that lessee will indemnify the lessor or its assigns for any damages caused to property that may be upon the leased premises, caused by fire set by engines upon the railroad, runs with the reversion, so that the assignee of the lessor may recover from the lessee damages which it was forced to pay to a licensee of the lessee for injuries to property on the premises, caused by fire from its engines. *Northern P. R. Co. v. McClure*, 9 N. D. 73, 47 L.R.A. 149, 81 N. W. 52. The court referred to the fact that the rent was nominal, and that this covenant was really part of the compensation for the use of the land.

(23) To terminate lease in case of sale of premises.

The question here raised, as well as the further question as to whether such a provision in a lease is a covenant, a condition subsequent, or a special limitation, is covered in the note to *Diepenbrock v. Luis*, post, 234.

(f) Lease of an incorporeal hereditament.

A covenant in the grant of an incorporeal

hereditament such as a right of way over land, or the use of land for a particular purpose for a term of years, is within the statute of 32 Hen. VIII. chap. 34, so that an action thereon may be maintained by or against the grantee's successor in title as reversioner. *Hastings v. North Eastern R. Co.* [1898] 2 Ch. 674, affirmed in [1899] 1 Ch. 656, 68 L. J. Ch. N. S. 315, 80 L. T. N. S. 217, 15 Times L. R. 247, and in [1900] A. C. 260, 69 L. J. Ch. N. S. 516, 82 L. T. N. S. 429, 16 Times L. R. 325; *Bally v. Wells*, 3 Wils. 25 (not a direct holding as to reversioner, but there was a statement of the principle); *Hooper v. Clark*, L. R. 2 Q. B. 200, 8 Best & S. 150, 36 L. J. Q. B. N. S. 79, 16 L. T. N. S. 152, 15 Week. Rep. 347 (the same considerations govern the question as to whether the covenant runs with the land as govern that question as to covenants in a lease of land); *Martyn v. Williams*, 1 Hurlst. & N. 817, 26 L. J. Exch. N. S. 117, 5 Week. Rep. 351.

In *Hastings v. North Eastern R. Co.* supra, the covenant was in a grant for years of a way-leave for a railroad company to build a road and haul coal over grantor's land, payment to be made by the ton for all coal hauled over certain roads, some of which did not pass over the grantor's land. The right to sue on the covenant for the payment passed to grantor's successor.

In *Hooper v. Clark*, supra, an exclusive right to take and kill game on certain land, together with the use of a cottage thereon, was granted for a term of years, and the covenant was that grantee would leave the land at the end of the term as well stocked with game as it was when the grant was made. It was held that this was the grant of an incorporeal hereditament, and that the lessor's successor in title could sue for breach of the covenant at the expiration of the term.

(g) *In lease of personal chattels.*

See also *infra*, subd. IV. c, 3 (d).

In *Allen v. Culver*, 3 Denio, 295, the court said: "In *Spencer's Case*, 5 Coke, 17, 15 Eng. Rul. Cas. 233, it is resolved that 'if a man lease sheep, or other stock of cattle, or any other personal goods, for any time, and the lessee covenants for him and his assigns at the end of the time to deliver the like cattle or goods, as good as the things letten were, or such price for them, and the lessee assigns the sheep over, this covenant shall not bind the assignee; for it is but a personal contract;' and it is added: 'The same law, if a man demises a house and land for years, with a stock or sum of money, rendering rent, and the lessee covenants for him, his executors, administrators and assigns, to deliver the stock or sum of money at the end of the term, yet the assignee shall not be charged with this covenant, for although the rent reserved was increased in respect of the stock or sum, yet the rent did not issue out of the stock or sum, but out of the land L.R.A.1915C.

only, and therefore, as to the stock or sum, the covenant is personal and shall bind the covenantor, his executors and administrators who represent him, and not the assignee; and because it is not certain that the stock or sum will come to the hands of the assignee, for it may be wasted, or otherwise consumed or perished, through the lessee; and, therefore, the law cannot determine, at the time of making the lease, that such covenant shall bind the assignee." It should be observed here that *Spencer's Case*, cited by the court, as to facts, is not within the scope of the present note, for the reason that the court was passing upon the right of an assignee of lessee against the original lessor. But the case was decided upon the broad question as to what covenants run with the land, and the resolutions there adopted have ever since formed the basis for decisions on that question, whether the case before the court was that of an assignee of the lessee against the original lessor, or that of a transferee of the reversion against the tenant. Only cases of the latter class are cited in this note.

And it was held in *Allen v. Culver*, supra, that a covenant by the lessee of land to take in connection with the land certain personal property, and return the same or equally valuable property at the end of the term, does not run with the land, so that the transferee of the reversion cannot recover damages for the breach thereof, notwithstanding the fact that it was set out in the lease that the personal property in question was to be considered as part of the premises leased.

But the fact that, in a lease of land, personal property is included, does not prevent the other covenants in the same lease from running with the land so as to be binding upon the transferee of the reversion, or from running in his favor against the lessee. *Allen v. Culver*, supra; *Magoon v. Eastman*, 86 Vt. 261, 84 Atl. 869.

And rent may be apportioned as between personal property and real estate where both are included in the lease without a designation of the amount of rent to be paid for each, the transferee having been deprived of his right to the rent from the real estate by the interference of one holding paramount title. *Salmon v. Matthews*, 8 Mees. & W. 827.

But it was held in *Jones v. Smith*, 14 Ohio, 606, that rent reserved in a lease of premises and personal property combined, with no separation or apportionment as between the two kinds of property, so that the rent for the realty is increased by that for the personal property, does not pass to the transferee of the reversion of the real estate if the title to the personal property was not also transferred to him.

(h) *Transfer of part of the reversion.*

The owner of the reversion may sell and convey part thereof to one purchaser and the balance to another, and each reversioner may sue upon the covenant. *Leiter v. Pike*,

127 Ill. 287, 20 N. E. 23; Crosby v. Loop, 13 Ill. 625 (arguendo); Worthington v. Cooke, 56 Md. 51; West v. Laasels, Cro. Eliz. pt. 2, p. 851; Ards v. Watkin, Cro. Eliz. pt. 2, pp. 637, 651; Tuynam v. Pickard, 2 Barn. & Ald. 105, 20 Revised Rep. 368.

Or he may transfer part of the reversion, retaining a distinct part of the premises, and the rent will thereafter be apportioned in proportion to the rental value of the parts. Roberts v. Snell, 1 Mann. & G. 577; Biddle v. Hussman, 23 Mo. 597; Farley v. Craig, 11 N. J. L. 262; Gribbie v. Toms, 70 N. J. L. 522, 57 Atl. 144, affirmed in 71 N. J. L. 338, 59 Atl. 1117 (in this case the court explains Ryerson v. Quackenbush, 26 N. J. L. 236, saying that the court, merely for the sake of argument, conceded the law to be the opposite of the rule here enunciated, and that the headnote of that case misrepresents the holding); Linton v. Hart, 25 Pa. 193, 64 Am. Dec. 691; Doyle v. Longstreth, 6 Pa. Super. Ct. 475 (but there was in this case a provision in the lease permitting sale of part at the option of the lessor); Reed v. Ward, 22 Pa. 144.

And in Dreyfus v. Hirt, 82 Cal. 621, 23 Pac. 193, it was held that a lessor who had sold part of the premises could maintain an action against the tenant for the whole rent, if no apportionment had been agreed upon between him and his vendee, and leave it to the jury to decide upon what amount was proper as between the landlords.

And the fact that the transferee illegally evicts the tenant from the part so conveyed furnishes no defense in an action by the lessor for his proportion of the rent (Gribbie v. Toms, 70 N. J. L. 522, 57 Atl. 144, affirmed in 71 N. J. L. 338, 59 Atl. 1117; Reed v. Ward, supra), even if lessor advises his transferee to evict the tenant from the part transferred. This might give rise to a suit for damages, but it cannot deprive the lessor of his right to rent for the part not transferred (Linton v. Hart, supra), even though the lessor assisted in the eviction of the tenant from the part transferred.

And where the lessor grants the reversion in separate moities to two reversioners, they may join in an action on the lessee's covenant to repair (Kitchen v. Buckley, 1 Lev. 109), or on his covenant to pay rent (Midgley v. Lovelace, Carth. 289, Holt, 74, 12 Mod. 45).

But where tenants in common are the original joint lessors, the covenants run with the entire reversion, so that the several reversioners, separate transferees of the original lessors, must sue jointly upon the covenants. Thompson v. Hakewill, 19 C. B. N. S. 713, 35 L. J. C. P. N. S. 18, 11 Jur. N. S. 732, 13 L. T. N. S. 989, 14 Week. Rep. 11, 15 Eng. Rul. Cas. 436, citing and approving Foley v. Addenbrooke, 4 Q. B. 197, 3 Gale & D. 64, 12 L. J. Q. B. N. S. 163, 7 Jur. 234.

However, where lessor has transferred the whole reversion to two or more persons as tenants in common, any one of the owners may, independent of the others, sue upon L.R.A.1915C.

the covenants in the lease. Roberts v. Holland [1893] 1 Q. B. 665. In this case the court distinguishes Thompson v. Hakewill, supra, pointing out that the covenants were originally made by tenants in common, says that Foley v. Addenbrooke, supra, shows that where the original covenant was joint nothing will make it into separate covenants, and quotes from Platt on Covenants, p. 130, as follows: "Where there is no express contract with all, and their legal interest is several, the covenantees must sue separately; yet where the contract is entered into with the covenantees jointly, and the estate taken by them is several, they may, at their option, sue jointly or severally; jointly in respect of the joint contract, severally in respect of the interest."

In Stavely v. Allcock, 16 Q. B. 636, 20 L. J. Q. B. N. S. 320, 15 Jur. 628, where four out of six reversioners, holding as joint tenants, conveyed their interests to a third party, it was held that the right to distrain for rent accrued before the four had transferred, was gone.

A grantee of a separate parcel of the reversion cannot dispossess the tenant by sufferance of the lessor under the Michigan statute providing the method for dispossession of tenants; at least, without some prior notice to quit, or some demand for possession. Abeel v. Hubbell, 52 Mich. 37, 17 N. W. 231.

(4) For breaches prior to transfer.

The question here raised is considered in note to Barber v. Watch Hill Fire Dist. post, 245.

3. Under covenants that do not run with the land.

(a) In general.

In Spencer's Case, 5 Coke, 16a, 1 Smith, Lead. Cas. (Hare & W.) 68, 15 Eng. Rul. Cas. 233, the court enunciated the rule that a covenant will not run with the land "if it is merely collateral to the land, and does not touch or concern the thing demised." See IV. c, 2(e), (1), supra, where the rule that "if the covenant in the lease will be of benefit either to the landlord or tenant by reason of his relation to the particular land, then it touches or concerns the land so as to run." Generally speaking, this same rule, stated conversely, defines the class of covenants that do not run. The rule is followed by the courts in a general way, but it is too general to produce harmony among the decisions when it comes to be applied to particular cases. So most of the cases cited here should be carefully compared with those cited under similar headings, under subd. IV. c, 2 (e), supra, in order to find holdings on similar subjects under different conditions, or possible adverse holdings.

Where the construction of the whole lease shows a clear intent to make the covenant a purely personal one, the covenant does not run with the land either in favor of or

against the reversioner. *Kemp v. Bird*, L. R. 5 Ch. Div. 549, affirmed on appeal in L. R. 5 Ch. Div. 974, 46 L. J. Ch. N. S. 828, 37 L. T. N. S. 53, 25 Week. Rep. 838.

(b) Giving lessee a monopoly in trade.

In *Taylor v. Owen*, 2 Blackf. 301, 20 Am. Dec. 115, in connection with *Taylor v. Mofatt*, 2 Blackf. 304, where the lessor, who owned all the land in a town, covenanted with the lessee of one of the houses that the lessee, should have the exclusive right to vend merchandise in the town during the term of the lease, and later leased another house to another person without any restrictions as to the selling of merchandise, it was held that the sublessee of the second lessee, the sublease containing no restrictions, was not bound by the covenant in the first lease. The holding was based upon the broad statement by the court that the covenant to protect lessee's monopoly was a purely personal covenant, and would not have run with the land had the lessor sold the reversion without restrictive covenants.

And in *Hebert v. Dupaty*, 42 La. Ann. 343, 7 So. 580, the lessor stipulated in the lease of premises that he had been using as a livery stable, at the same time selling the business to the lessee, that "the lessor binds and obligates himself not to keep a public stable during the term of said lease, either directly or indirectly, within a radius of 6 miles" of the town where the leased premises were located. Later the lessor sold the reversion, together with some adjoining property which he owned at the time of the lease. It was held that the covenant was purely personal to the lessor, and that although the transferee knew of the terms of the lease, he was in no way prevented by the covenant from erecting and maintaining a public stable on the adjoining property during the term of the lease. But see *supra*, subd. IV. c. 2 (e) (16) (17).

(c) To pay a collateral sum.

It was held in *Chaworth Miles v. Phillips*, F. Moore, 876, that a covenant in a lease to pay to lessor a collateral sum cannot be enforced by the transferee of the reversion.

(d) Relating to personal property.

On this question generally see subd. IV. c. 2 (g), *supra*.

Where there was a quantity of hay in the barn when the premises were leased, and the lessee covenanted to leave a similar quantity there when he should vacate the premises at the expiration of the lease, it was held in *Kingsley v. Sauer*, 4 App. Div. 507, 40 N. Y. Supp. 7, that the one who purchased the premises during the term and received a warranty deed therefor was not entitled to the hay that the tenant left in the barn in fulfillment of the covenant, as against the lessor or one to whom he had L.R.A.1915C.

assigned his right to receive the hay subsequent to the transfer of the reversion. The syllabus of this case is misleading, as it conveys the impression that the transfer of the right to the hay was prior to the transfer of the reversion; but the contrary appears in the opinion.

And in *Magoon v. Eastman*, 86 Vt. 261, 84 Atl. 869, a similar covenant in regard to leaving hay was held to be a covenant that does not run with the land, so that the transferee has no right of action against the tenant for breach of the covenant.

It has been held that a covenant by the lessor, to take the tenant's chattels at the termination of the tenancy, and pay him the difference between their value and the value of those of lessor, replaced by them, does not run with the land, so as to be binding upon the transferee of the reversion. *Gorton v. Gregory*, 3 Best & S. 90, 31 L. J. Q. B. N. S. 302, 6 L. T. N. S. 656, 10 Week. Rep. 713.

But the decision in *Mansel v. Norton*, L. R. 22 Ch. Div. 769, 52 L. J. Ch. N. S. 357, 48 L. T. N. S. 654, 31 Week. Rep. 325, is based upon the theory that the owner of the immediate reversion is liable upon the lessor's covenant to take and pay for tenant's personal property at the close of the term. The owner of a life estate had fulfilled the covenant, and attempted to compel the lessor's estate to reimburse him, but the court decided that he could not maintain the action either against the lessor's estate or against the remainderman, and states that there is no doubt but what plaintiff was primarily liable on the covenant.

(e) Concerning land not included in the lease.

A covenant in a lease or a sublease cannot run with land not included in the instrument containing the covenant. *Cook v. Arundel*, Hardr. 87; *Wahl v. Barroll*, 8 Gill, 288; *Thruston v. Minke*, 32 Md. 487. And in *Dewar v. Goodman* [1908] 1 K. B. 94, the lessee of premises containing a number of houses had covenanted to repair under penalty of forfeiture. He sublet part of the premises containing two houses, covenanting in the sublease to fulfil all the covenants in the head lease so as to protect the original leasehold estate from forfeiture, and then assigned the head lease, which assignment necessarily carried with it the immediate reversion as to the subleasehold estate. The assignee of the head lease was held to be not liable as transferee of the reversion of the subleasehold for failure to repair houses not included in the sublease, which failure caused a forfeiture of the head lease, in consequence of which the subtenant was ousted. It was held that while the transferee had broken the covenant in the sublease, the breach was in respect to property not included in the sublease, hence collateral thereto, so that the covenant in respect to the breach did not run with the reversion.

A covenant that the lessor might re-enter in case the owner of the leasehold should in the future be legally convicted of any offense against any of the present or future game laws was held in *Stevens v. Copp*, L. R. 4 Exch. 20, 38 L. J. Exch. N. S. 31, 19 L. T. N. S. 454, 17 Week. Rep. 166, not to run with the reversion because collateral to the land. It was said, however, that if the covenant had restricted the violations to those committed upon the land, the rule might be otherwise.

(f) Concerning interest not owned by lessor.

A transferee of the reversion in a limited estate, although he later acquires the fee, is not bound by any covenants in the lease except those concerning the reversion in the limited estate which was owned by the lessor at the time of the lease. Thus it has been held that the assignee of a leasehold interest that was subject to a sublease, who later acquired, not through his assignor, the fee in the premises, was not bound by a covenant in the sublease binding the sublessor to extend the length of the term in case he succeeded, either by renewal or otherwise, in obtaining the right to possess the premises for a longer time than was granted by the terms of the head lease. *Muller v. Trafford* [1901] 1 Ch. 54, 70 L. J. Ch. N. S. 72, 49 Week. Rep. 132.

(g) Giving tenant an option to purchase.

It has been held by an English court that a covenant, by the lessor in the form of an option to the lessee to purchase the land at any time during the term is not such a covenant as runs with the land, hence cannot be enforced against the transferee. *Woodall v. Clifton* [1905] 2 Ch. 257, 74 L. J. Ch. N. S. 555, 54 Week. Rep. 7, 93 L. T. N. S. 257, 21 Times L. R. 581. But this does not appear to be the rule with American courts. See *supra*, subd. IV. c, 2 (e) (6).

(h) To find subtenants for lessee.

It has been held that an agreement by the lessor, not embodied in the lease, but contained in a letter of even date therewith, that the lessor would, on behalf of the lessee, find suitable subtenants for part of the leased premises, was a mere collateral personal undertaking which did not run with the land so as to bind lessor's subsequent grantee, who purchased without notice thereof. *Henck v. Barnes*, 84 Hun, 546, 32 N. Y. Supp. 840.

(i) To repair.

On this point, see subd. IV. c, 2 (e) (4) *supra*, and subd. IV. c, 2 (i), *supra*.

It has been held that an oral covenant by lessor to repair, made contemporaneously with the lease, and as an inducement to the making thereof, is a personal covenant, and does not run with the land so as to L.R.A.1915C.

bind the transferee of the reversion. *Tobey v. Mattimore*, 54 Misc. 231, 104 N. Y. Supp. 393.

(j) To terminate the lease.

Generally, a covenant whereby the lease may be terminated runs with the land. See subd. IV. c, 2 (e) (8), *supra*.

But it has been held that a covenant in a lease that the lessor may arbitrarily terminate the lease by giving to the lessee thirty days' notice is to be construed strictly because of its harshness; and that since there was no mention of heirs and assigns in connection with this covenant, it did not run with the land, and could not be enforced by the transferee of the reversion. *McClintock v. Loveless*, 5 Pa. Dist. R. 417.

(k) Affected by stipulation against implied covenants.

In *Eccles v. Mills* [1898] A. C. 360, there was a particular covenant in the lease that the lessor, his heirs and assigns, should finish laying down 1,000 acres of the leased land in grass in a certain manner, etc., and it was held (the holding was not necessary to the decision, however), that because of a declaration in the lease that there should be no implied covenants or provisions, this particular express covenant did not run with the reversion. The court said: "He does not agree to break up the land, or to lay it down, or to do anything on the land in fulfilment of the apparent intention of the covenant. He has reserved no power of entry, nor is he given any authority to enter for that purpose. Still, if the operation is not found finished on the prescribed day, he must be answerable in damages." It is submitted that this reasoning can properly be applied only to the question of the lessor's liability, and not to the question as to the covenant's running with the reversion, in case it be found that the covenant was binding upon the lessor. If the lessor was bound notwithstanding the fact that he had no power to fulfil it, and the court apparently so held, there would seem to be no reason why the devisee of the premises should not also be answerable in damages for its breach.

d. Availability by transferee of lessor's remedy for possession.

The general rule is that statutes giving to lessors the right to bring actions of unlawful detainer or other actions to dispossess the tenant where he holds over the time when the lease is terminated, either by reason of expiration of term, or because of nonpayment of rent, include the transferee of the reversion, who has taken the place of the original landlord. *Bradley v. Hume*, 18 Ark. 284 (the court disapproved of the broad language in *McGuire v. Cook*, 13 Ark. 448, indicating a rule contrary to this); *Ish v. Morgan*, 48 Ark. 413, 3 S. W. 440; *Morrow v. Sawyer*, 82 Ga. 226, 8 S. E. 51 (a statutory proceeding called the issu-

ing of a "dispossessionary warrant"); *Fisher v. Smith*, 48 Ill. 184 (on a forfeiture for nonpayment of rent); *Geiger v. Brown*, 167 Ill. App. 534; *Chambers v. Irish*, 132 Iowa, 319, 109 N. W. 787; *Mason v. Bascom*, 3 B. Mon. 269; *Smith v. Hardwick*, 28 Ky. L. Rep. 615, 89 S. W. 731; *Herndon v. Bascom*, 8 Dana, 113 (but transferee must prove a valid transfer); *McMurtry v. Adams*, 3 Bush, 70 (but this was not the case prior to the enactment of § 501 of Civil Code); *Smalley v. Mitchell*, 110 Mich. 650, 68 N. W. 978 (an action in ejectment for possession); *Rabe v. Fyler*, 10 Smedes & M. 440, 48 Am. Dec. 763; *Kaulleen v. Tillman*, 69 Mo. 510; *Topping v. Davis*, 67 Mo. App. 510; *Sullivan v. Lueck*, 105 Mo. App. 199, 79 S. W. 724 (on failure of tenant to pay rent, and the fact that tenant paid the rent to transferor after notice to pay it to transferee is no defense to the action); *State ex rel. Carter v. Votaw*, 13 Mont. 403, 34 Pac. 315 (an administrator of lessor, proceeding under a statute); *State, Watson, Prosecutrix, v. Idler*, 54 N. J. L. 467, 24 Atl. 554 (under a local statute, upon failure to pay rent); *Gatti v. Meyer*, 9 N. J. L. J. 271; *Birdsall v. Phillips*, 17 Wend. 464; *Duff v. Fitzwater*, 54 Pa. 224; *Tilford v. Fleming*, 64 Pa. 300; *Mortimer v. O'Reagan*, 10 Phila. 500; *Marley v. Rodgers*, 5 Yerg. 217; *Barton v. Learned*, 26 Vt. 192; *Kneeland Invest. Co. v. Aldrich*, 63 Wash. 609, 116 Pac. 264 (the point was not raised in this case, but appears to have been assumed).

In *Cook v. McDevitt*, 6 Phila. 131, a court of common pleas held that under the act of 1863, the transferee of the reversion was not entitled to the remedy given by that statute for dispossessing the tenant of the transferor, who held over his term, since "heirs and assigns" are not mentioned in that statute. But this is error, as in both *Tilford v. Fleming*, 64 Pa. 300, and *Mortimer v. O'Reagan*, 10 Phila. 500, the contrary was held to be the case on the ground that the statute was enacted with a knowledge of the fact that all rights of the lessor pass to his transferee without attornment by the tenant.

But in *Dwine v. Brown*, 35 Ala. 596, it was held that the owner of the reversion, having acquired the same by voluntary transfer, could not maintain an action of unlawful detainer against the tenant holding over the term, but this decision is based upon the lack of jurisdiction to try title of the only court having jurisdiction of actions for unlawful detainer. This case was cited with approval in *Cooper v. Gambill*, 146 Ala. 184, 40 So. 827, where it was held to be proper in such case for the lessor to bring the action for the benefit of the transferee.

And it has been held that a statute giving the landlord a right of action in forcible entry and detainer against a tenant holding over, etc., gives no such right to one who never was in possession of the premises; hence the transferee of the reversion does not have the right. *Blount v. Win-L.R.A.1915C.*

right, 7 Mo. 50; *Hatfield v. Wallace*, 7 Mo. 112; *Holland v. Reed*, 11 Mo. 605. In these cases the court mentions the fact that the court trying the cases would not have jurisdiction to try title; but that is not made the basis of the decisions. But a later Missouri statute seems to be so worded as to reverse the rule here enunciated. *Kaulleen v. Tillman*, 69 Mo. 510; *Topping v. Davis*, 67 Mo. App. 510; *Sullivan v. Lueck*, 105 Mo. App. 199, 79 S. W. 724.

And the same court has held that one holding the same title as the original lessor can dispossess the tenant, holding over, by a landlord's warrant. *Fanning v. Voelker*, 40 Mo. 129.

And the transferee of the reversion cannot by injunction prevent the tenant from removing property from the premises during the tenancy, if the lessor had no right to such remedy, for the former merely takes the rights which belonged to latter as landlord, and no more. *Macdonough v. Starbird*, 105 Cal. 15, 38 Pac. 510.

Under a clause in a lease providing for forfeiture of the tenancy for nonpayment of rent, the transferee of the reversion cannot oust the tenant before the end of his term for refusing to pay rent to transferee before the tenant had any notice of the transfer. *O'Connor v. Kelly*, 41 Cal. 432.

V. Rights and liabilities of transferor.

a. In general.

The rights and liabilities of lessor, after he has transferred the reversion so as to sever the relation of landlord and tenant between himself and his lessee, must necessarily be to a certain extent correlative to those of the transferee, as considered under subd. IV., supra. But such general observation must not be considered in any sense a rule for practical application. It must always be remembered that the lease is a contract between the parties thereto which creates not only the relation of landlord and tenant, but many mutual rights and duties, some of which are directly, some indirectly, and some not at all dependent upon the relation of landlord and tenant. While the law substitutes in place of the original landlord anyone who acquires ownership in the reversion, he being the only person in position to act as such, yet the lease remains a binding contract between the original parties. Theoretically, the contract, as between the original parties, is still a valid, binding one, but practically the greater part of it is no longer operative.

See cases cited under subd. II. b, 1, supra, to the point that transferor may be liable to transferee on his covenant of warranty if he does not except the lease from the encumbrances against which he gives his warranty.

b. Based upon privity of estate.

A transfer of the reversion, whether voluntary or by operation of law, breaks the privity of estate between the transferor and

the lessee. All rights and liabilities, as between these parties, based upon privity of estate, necessarily terminate. *Walker's Case*, 3 Coke, 22a (this was an assignment by the lessee, but the court, on page 22b, stated the rule as to the transferor of the reversion). *Black v. Davis, Batty*, 80; *Hand v. Liles*, 56 Ala. 143; *Peck v. Northrop*, 17 Conn. 217; *Stout v. Kean*, 3 Harr. (Del.) 82; *Boyd v. Sametz*, 17 Misc. 728, 26 N. Y. Civ. Proc. Rep. 29, 40 N. Y. Supp. 1070.

c. Based upon privity of contract.

1. Right of action in general.

The statute of 32 Hen. VIII. chap. 34 (see discussion of this statute under IV. c, 2 (a), *supra*), does not continue the privity of contract between lessor and lessee after the lessor has transferred the reversion. Editor's note (N) to *Walker's Case*, 3 Coke 23a (citing *Beely v. Parry*, 3 Lev. 154; *Webb v. Russell*, 3 T. R. 395, 1 Revised Rep. 725, and 1 Wms.' Saund. 241b, referring, no doubt, to where the court in *Thursby v. Plant*, cites *Brett v. Cumberland, Cro. Jac.* 521); *Vernon v. Smith*, 5 Barn. & Ald. 1, 24 Revised Rep. 257; *Green v. James*, 6 Mees. & W. 656, 10 L. J. Exch. N. S. 73. But it should be remembered that the transfer of the reversion does not sever the privity of contract so as to enable the transferor to avoid liability upon his express covenants. See V. c, 3, *infra*.

And American courts hold that the transferor can maintain no action on covenants that run with the land for breaches thereof occurring after he has transferred the reversion. *Hayes v. New York Gold Min. Co.* 2 Colo. 273; *Peck v. Northrop*, 17 Conn. 217; *Cobb v. Johnson*, 126 Ga. 618, 55 S. E. 935; *Raines v. Hindman*, 136 Ga. 450, 38 L.R.A. (N.S.) 863, 71 S. E. 738, Ann. Cas. 1912C, 347; *Scheidt v. Belz*, 4 Ill. App. 431; *Purdy v. Rakestraw*, 13 Ill. App. 480; *Abbott v. Hanson*, 24 N. J. L. 493; *West Shore Mills Co. v. Edwards*, 24 Or. 475, 33 Pac. 987; *Stoddard v. Emery*, 128 Pa. 436, 18 Atl. 339; *Moore v. Turpin*, 1 Speer, L. 32, 40 Am. Dec. 589.

And where either party to the lease may, by the terms thereof, terminate it by giving thirty days' notice to the other, a notice by the lessor, after he has transferred the reversion, will not support a summary proceeding by the transferee for possession of the premises. *Griffin v. Barton*, 22 Misc. 228, 49 N. Y. Supp. 1021, affirmed in 27 App. Div. 632, 50 N. Y. Supp. 1127.

But it has been held that a transferor of the reversion, who, because of his liability to his transferee under his warranty against encumbrances, for the taxes assessed against the property, paid the same, may maintain an action against the lessee on the latter's covenant in the lease "to pay all rates, taxes, or assessments on the premises during the continuance of the lease," the taxes having become a lien before the transfer, but having been later paid by transferor. L.R.A.1915C.

Wills v. Summers, 45 Minn. 90, 47 N. W. 463 (the court here admitted the general rule as above stated, but refused to apply it under the circumstances of this case).

It has been held that a covenant in the lease imposing restrictions upon the use of the leased premises, clearly intended to benefit other property owned by the lessor, and not for the benefit of the leased premises, does not pass to the transferee of the reversion, the lessor retaining the property benefited by the covenant, so that the lessor, after transferring the reversion, may restrain the lessee, by injunction, from violating the terms of the covenant. *Thruston v. Minke*, 32 Md. 487. See subd. IV. c, 3 (e) *supra*.

It has been held that a lessor who expressly reserved in his transfer of the reversion all his rights and claims as lessor, including in terms the right to sue for the recovery from the lessees of all damages which the premises have sustained during the term, could maintain an action after the expiration of the term against the lessees for breach of their covenant to deliver up the premises at the end of the term in the same good repair that they were in when leased. *Payne v. James*, 42 La. Ann. 230, 7 So. 457. The ground of this holding is very unsatisfactory. While it was alleged that the sale price was much lower than it would have been if the premises had been in good repair at the time of the sale, it is admitted by the court that the covenant was not broken at that time, for if the tenant had repaired between that time and the end of the term, there never would have accrued any cause of action against him. Hence, the question which the court did not answer is, how can one by a reservation in his deed legally obtain the right to maintain a suit for subsequent breaches of covenant the keeping of which would have inured wholly to the benefit of an estate which he no longer owned? See subd. IV. c, 2 (i), *supra*.

2. Right of action for rent.

(a) Accrued subsequent to transfer.

In the absence of a reservation of rent by the transferor, the right to collect the same passes from him with the transfer of the reversion, and he cannot maintain an action for rent accruing after the transfer. *McDougall v. Young, Draper* (U. C.) 111; *Doe ex dem. Palmer v. Andrews*, 4 Bing. 356 (not a direct holding, but a statement by way of argument); *English v. Key*, 39 Ala. 113; *Hand v. Liles*, 56 Ala. 143; *Steed v. Hinson*, 76 Ala. 298 (in this case the rent was reserved; hence the rule was not applied); *Garber v. Gianella*, 98 Cal. 527, 33 Pac. 458 (this action was by the transferee against the transferor for conversion of the rent which was reserved in kind and received by the latter); *Stout v. Kean*, 3 Harr. (Del.) 82; *Neill v. Chesson*, 15 Ill. App. 266; *Page v. Lashley*, 15 Ind. 152;

Hammond v. Jones, 41 Ind. App. 32, 83 N. E. 257 (an incidental holding); Van Wagner v. Van Nostrand, 19 Iowa, 422; Welch v. Horton, 73 Iowa, 250, 34 N. W. 840; Hall v. Hall, 150 Iowa, 277, 129 N. W. 960; Epperson v. Blakemore, 2 Bush, 241 (assigning a title bond is sufficient to transfer the reversion so as to deprive the assignor of his right to rent subsequently accruing); Roumage v. Blatrier, 11 Rob. (La.) 101; Gale v. Edwards, 52 Me. 363; Grundin v. Carter, 99 Mass. 15 (statement *arguendo*); Hansen v. Prince, 45 Mich. 519, 8 N. W. 584 (and an oral agreement that the transferor is to have the rents accruing for a certain time after the transfer, although consented to by the tenant, does not enable the transferor to enforce payment thereof by the tenant by any remedy founded upon the provisions in the lease); Wolf v. Johnson, 30 Miss. 515; Watkins v. Duvall, 69 Miss. 364, 13 So. 727 (a rent note in the hands of the transferor for rent that accrued after the transfer is carried with the transfer as an incident thereto); Gray v. Rogers, 30 Mo. 258 (but it was here held that the transferor could maintain the action unless it were shown that the transferee had actually claimed the rent from the tenant; this is not good law, and the court in *Silveira v. Ah Lo*, 16 Haw. 702, criticized it and said that "it is contrary to the general run of authorities and inconsistent with the reason upon which the rule that the rent goes with the reversion is based"); Loomis v. Shriner, 165 Mo. App. 25, 145 S. W. 865 (garnishee proceedings served upon the tenant before the transfer by a creditor of the lessor create no lien upon the rent that accrues after the transfer); Culverhouse v. Worts, 32 Mo. App. 419; Allen v. Hall, 66 Neb. 84, 92 N. W. 171; Abbott v. Hanson, 24 N. J. L. 493; Simers v. Saltus, 4 Denio, 214 (even though the tenant refuses to attorn to the purchaser at a judicial sale upon a lien prior to the lease, and vacates the premises so that he is not liable to the purchaser of the reversion); Pollock v. Cronise, 12 How. Pr. 363; Kornegay v. Collier, 65 N. C. 69 (transferor's creditor cannot attach the rent, for it does not belong to the transferor); Bullard v. Johnson, 65 N. C. 436; Lancashire v. Mason, 75 N. C. 455; Martin v. Royer, 19 N. D. 504, 125 N. W. 1027 (and if the transferor receives the rent, he is liable to the transferee for money had and received); West Shore Mills Co. v. Edwards, 24 Or. 475, 33 Pac. 987; Johnston v. Smith, 3 Penn. & W. 496, 24 Am. Dec. 339; Jones v. Laturmus, — Tex. Civ. App. —, 40 S. W. 1010; *Silveira v. Ah Lo*, supra; Blake v. Grammer, 4 Cranch, C. C. 13, Fed. Cas. No. 1,496 (in this case the tenant did not attorn to the purchaser, was not disturbed in possession for five years or notified of the sale, and it was held that the transferor could not maintain use and occupation against him for the rent).

On the question as to the right to rent of real estate sold on contract, see note to *Speicher v. Lacy*, 35 L.R.A.(N.S.) 1066, L.R.A.1915C.

supplemented by note to *Re Boyle*, 38 L.R.A.(N.S.) 420.

(b) *Accrued prior to transfer.*

The transferor of the reversion may, after the transfer, maintain an action upon the lessee's contract to pay rent, if the same had fully accrued prior to the transfer. *Midgley v. Lovelace*, Carth. 289, Holt, 74, 12 Mod. 45; *Anonymous*, Skinner, 367; *Dollen v. Batt*, 4 C. B. N. S. 760, 27 L. J. C. P. N. S. 281, 4 Jur. N. S. 835; *Thornton v. Strauss*, 79 Ala. 164; *Page v. Lashley*, 15 Ind. 152; *Van Driel v. Rosierz*, 26 Iowa, 575; *Martin v. Dickson*, 35 La. Ann. 1036; *Fox v. Corey*, 41 Me. 81; *Damren v. American Light & P. Co.* 91 Me. 334, 40 Atl. 63; *Loomis v. Shriner*, 165 Mo. App. 25, 145 S. W. 865 (lessor's creditor may attach by garnishment such rents in the hands of the lessee, and payment of the same thereafter by the garnishee to the transferee does not release his liability to the creditor); *Big Black Creek Improv. Co. v. Kemmerer*, 162 Pa. 422, 29 Atl. 739; *Dobbs v. Atlas Elevator Co.* 25 S. D. 177, 126 N. W. 250; *Johnson v. Muzzy*, 42 Vt. 708 (the transfer here was by quitclaim deed to the lessee).

But it has been held that the transferor cannot distrain for rent that accrued prior to the transfer of the reversion. *Dauphinais v. Clark*, 3 Manitoba L. Rep. 225.

On the question as to right to rent of real estate sold on contract, see notes to which reference is made, *supra*, subd. V. c, 2 (a).

The question as to whether the purchaser at sheriff's sale or the former owner is entitled to the rent accruing before the title of purchaser has been perfected is largely governed by local statutes. See note to *Schaeppi v. Bartholomae*, 1 L.R.A.(N.S.) 1079. On general question of sales of this nature, see subd. III. b, *supra*.

(c) *Where he reserves the rent.*

The transferor of the reversion may in the transfer expressly reserve the rent for part or all of the term granted by the lease, in which case he may sue the lessee upon the contract the same as if there had been no transfer. *Steed v. Hinson*, 76 Ala. 298; *Crosby v. Loop*, 13 Ill. 625; *Neill v. Ches- sen*, 15 Ill. App. 266 (the reservation may be by an agreement separate and apart from the deed of transfer); *Dixon v. Niccolls*, 39 Ill. 372, 89 Am. Dec. 312; *Binford v. Thomas*, 18 Ind. App. 330, 47 N. E. 1075 (and by a separate agreement it may be provided that the transferee shall collect the rent subsequently accruing, and pay the same over to the transferor, in which cases the latter may maintain an action against the former for rents collected); *Winn v. Murehead*, 52 Iowa, 64, 2 N. W. 949 (but if not reserved in the written transfer parol evidence is not admissible to prove the reservation); *Hall v. Hall*, 150 Iowa, 277, 129 N. W. 960 (reserving the right of possession until the rent accrued is equivalent to reserving the rent); *Bourne*

v. Bourne, 92 Ky. 211, 17 S. W. 443, affirming 12 Ky. L. Rep. 467 (it was here held that oral testimony is admissible to prove that rent for one year was reserved when the transfer of the reversion was made, that such reserved rent was part of the consideration paid for the premises, and that such reservation of rent when so proved is valid; see *Applegate v. Kilgore*, *infra*); *Gale v. Edwards*, 52 Me. 363 (but where the transfer was made "subject to the lease," a clause in the covenant of warranty indemnifying the transferee against the lawful claims and demands of all persons "except said lessees or assigns" does not amount to a reservation of rent, since the purpose of the exception is merely to exclude the claims of the lessee and his assigns from the warranty covenant); *Eiseley v. Spooner*, 23 Neb. 470, 8 Am. St. Rep. 128, 36 N. W. 659 (but the words "subject to a lease which expires March 1, 1885," in a general warranty deed is not a reservation of rent, but merely a limitation upon the covenant of warranty); *Allen v. Hall*, 66 Neb. 84, 92 N. W. 171; *Pollock v. Cronise*, 12 How. Pr. 363 (excepting and reserving tenant's rights do not amount to a reservation of the rent); *Childs v. Clark*, 3 Barb. Ch. 52, 49 Am. Dec. 170 (a reference, in the deed of transfer, to a previous assignment of rent, operates as a reservation); *Applegate v. Kilgore*, — Tex. Civ. App. —, 91 S. W. 238 (oral testimony is admissible to prove an oral reservation of the rent as part of the consideration, although not mentioned in the deed; see *Bourne v. Bourne*, *supra*); *Kyles v. Tait*, 6 Gratt. 44 (where the rent for the full term is calculated and the vendee given credit for that amount upon the purchase price of the property, and the conveyance shows the credit and specifies the basis thereof, there is a reservation of the rent to the vendor); *Pheasant v. Hanna*, 63 W. Va. 613, 60 S. E. 618; *Leonard v. Burgess*, 16 Wis. 41 (an order outstanding upon the tenant, to be paid out of future rents, and accepted by the tenant, and notice to the purchaser before the transfer, operates as a reservation of the rent to the amount of the order as between tenant and purchaser); *Silveira v. Ah Lo*, 16 Haw. 702 (it was held in this case that a clause in the transfer, or in a separate paper, indicating that the transfer is "subject to the lease," does not amount to a reservation; it merely protects vendor against vendee's action for breach of covenant).

(d) On rent note.

The transfer of the reversion by the lessor transfers the future rents and all notes held by lessor representing the same. *Beebe v. Coleman*, 8 Paige, 392.

An assignment of the rent note by the lessor after the transfer of the reversion by him is subject to the rule that the rent passes with the reversion, the transfer of the reversion or the pendency of a suit involving the title to the premises being no-L.R.A.1915C.

tice to the assignee of the rights of the transferee of the reversion. *Alabama Gold L. Ins. Co. v. Oliver*, 78 Ala. 158, second appeal, 82 Ala. 417, 2 So. 445, citing *Westmoreland v. Foster*, 60 Ala. 448, and *Tubb v. Fort*, 58 Ala. 277; *Hatch v. Sykes*, 64 Miss. 307, 1 So. 248 (in this case the note was sold before the transfer, by the agent of the transferor, who claimed to have purchased it, and the suit was by the transferee against the agent; it was held that the transferee could not maintain the action, but must look to the occupants of the land); *Watkins v. Duvall*, 69 Miss. 364, 13 So. 727; *Keesee v. Sloan*, 69 Miss. 369, 11 So. 631; *Allen v. Smith*, 72 Miss. 689, 18 So. 579.

And where the transferor agreed with the transferee of the reversion to retain possession of the rent notes for future rent, collect them as they mature, credit the transferee with the amount collected, and account for the same, he cannot maintain an action on the notes in his own name, there being no evidence that transferee owed him anything. In such case he is the mere agent of the vendee. *Moses v. Ingram*, 99 Ala. 483, 12 So. 374.

But where the lessor retained in his possession the rent note with the knowledge of the lessee and the consent of the vendee of the reversion, it was held in *Steed v. Hinson*, 76 Ala. 298, that, in an action thereon against the lessee, the lessor would be permitted to prove by oral testimony the fact that the future rent represented by the note was part of the consideration paid him for the reversion, although it was not mentioned in the deed of transfer; and upon such proof it was held that there was in effect a reservation of the rent, so that the lessor could maintain the action for the rent accruing after the transfer.

And in *Finch v. Mishler*, 100 Md. 458, 59 Atl. 1009, where a rent note was given by the lessee at the instance of the lessor, to one who held a mortgage on the premises prior in date to the lease, and the mortgagee, before the expiration of the term, sold the premises subject to the lease, it was held that, upon proof by the mortgagee (and oral testimony was held admissible) that the note had no relation to the mortgage debt, its consideration being another debt of the mortgagor to the mortgagee, and that lessee had been fully protected against injury resulting from the sale, the mortgagee was entitled to collect the full amount of the note.

And an assignment of the rent note by the lessor to a bona fide purchaser for value, before the transfer of the reversion by him, operates as a severance of the rent from the reversion; hence, in such cases, the rent cannot pass to the transferee of the reversion. *Alabama Gold L. Ins. Co. v. Oliver*, 78 Ala. 158, second appeal, 82 Ala. 417, 2 So. 445; *Cheatham v. J. W. Beck*, 96 Ark. 230, 131 S. W. 699 (the notes in this case were transferred as collateral); *Jones v. Laturnus*, — Tex. Civ. App. —, 40 S. W. 1010. (But if the note on its face is

not negotiable, by reason of its being made subject to uncertain offsets, this rule will not apply.)

And where the rent note was made payable to a third party and delivered to him for a valuable consideration, there was held to be a severance of the rent so that it did not pass with a subsequent transfer of the reversion. *Kimball v. Walker*, 71 Ill. App. 309; *Childers v. Smith*, 10 B. Mon. 235.

(c) Apportionment of rent, with respect to time.

The scope of this note is limited to cases where the reversion was transferred.

At common law there could be no apportionment between the transferor and the transferee; all of the rent goes to the person who owns the reversion at the time the rent falls due, regardless of the question of ownership during the earning period (this does not refer to apportionment where only part of the reversion was transferred; on that question see subd. IV. c, 2 (h), supra); *Clun's Case*, 10 Coke, 128; *Beer v. Beer*, 12 C. B. 60, 21 L. J. C. P. N. S. 124, 16 Jur. 223; *Cattley v. Arnold*, 5 Jur. N. S. 361, 1 Johns. & H. 551, 28 L. J. Ch. N. S. 352, 7 Week. Rep. 245; *Flinn v. Calow*, 1 Mann. & G. 589 (evidence of an oral agreement at the time of transfer that the rent shall be apportioned is not admissible, since it would change the terms of the written transfer); *McDougall v. Young*, Draper (U. C.) 111; *English v. Key*, 39 Ala. 113; *Wilson v. Delaplaine*, 3 Harr. (Del.) 499; *Anderson v. Robbins*, 82 Me. 422, 8 L.R.A. 569, 19 Atl. 910; *Martin v. Martin*, 7 Md. 368, 61 Am. Dec. 364; *Adams v. Bigelow*, 128 Mass. 365; *Emmes v. Feeley*, 132 Mass. 346 (a tenancy at will terminated by a sale between two rent days); *Vaughn v. Locke*, 27 Mo. 290; *Page v. Culver*, 55 Mo. App. 606; *Culverhouse v. Worts*, 32 Mo. App. 419; *Marshall v. Moseley*, 21 N. Y. 280 (rent reserved in leases made by the testator before his death cannot, upon the death of the life tenant under the will between rent days, be apportioned between the administrator of the life tenant and the remainderman, as the latter takes the rent for the whole quarter if it was not due until the end of the quarter); *O'Neill v. Morris*, 28 Misc. 613, 59 N. Y. Supp. 1075; *Moore v. Turpin*, 1 Speer, L. 32, 40 Am. Dec. 589 (but in this case the purchaser had claimed only his proportion which was allowed to him, the whole rent having accrued after the transfer, and the court intimated that possibly the rent should be apportioned by virtue of Stat. 11 Geo. II. chap. 19); *Snyder v. Riley*, 1 Speer, L. 272, 49 Am. Dec. 602 (but the court, after referring to *Moore v. Turpin*, holds that it has been the custom in South Carolina to apportion the rent in case of sheriff sales); *Porter v. Sweeney*, 61 Tex. 213; *Tremont-Windsor Hotel Co. v. Gammon*, 41 Tex. Civ. App. 1, 91 S. W. 337 (rule not applied because, under the lease, the rent became due as fast as earned); L.R.A.1915C.

Lester v. Zink, — Tex. Civ. App. —, 154 S. W. 1161.

But some statutes change this rule so that when a transfer of the reversion takes place between two rent days the rent is apportioned so that vendor and purchaser each receive the rent earned while he was the owner of the reversion. *Re Eddy*, 10 Abb. N. C. 396; *Anderson v. Carrell*, 1 N. Y. Civ. Proc. Rep. N. S. 140, 114 N. Y. Supp. 198; *O'Neill v. Morris*, supra; *Kinnear v. Aspden*, 19 Ont. App. Rep. 468.

Where rent was by the lease made payable in advance on the first of each month, the lessee must pay the full month's rent to the lessor on that date; so the fact that the lessor had contracted to sell the reversion on the 15th, and apportion the month's rent between himself and the purchaser, and that lessee had paid one half the month's rent to the vendee without the consent of the lessor, cannot be set up as a defense to an action for the half month's rent by the lessor against the lessee. *Mohr v. Quigley*, 30 Misc. 753, 63 N. Y. Supp. 149.

And where, under the terms of a lease, a sale of the reversion terminates the leasehold estate, a sale between rent days, followed by tenant's immediate vacation of the premises, has the effect of absolving the tenant from the payment of any rent from the last rent day up to the time of the termination of the lease. *Nicholson v. Munigle*, 6 Allen, 215. And the same result will be produced if the purchaser at once leases to the same tenant, making the lease take effect at the date of the purchase, for no rent ever accrued under the old lease since the last rent day. *Fuller v. Swett*, 6 Allen, 219, note. And a termination of a tenancy at will by lessor's conveying the land between rent days has this effect. *Emmes v. Freeley*, 132 Mass. 346.

And the general rule will not apply where the lessee has the option of purchasing the premises at any time during the term, and exercises his option between rent days, for in such case the statute providing for apportionment of rent if the leasehold is terminated upon the happening of a contingency applies, so that the lessor is entitled to rent from the last rent day up to the time of the exercise of the option by lessee. *Withington v. Nichols*, 187 Mass. 575, 73 N. E. 855.

Rent accruing between the date of the sheriff's sale and the date of redemption belongs to the judgment debtor. *Kaston v. Paxton*, 46 Or. 308, 114 Am. St. Rep. 871, 80 Pac. 209. But this class of cases is largely governed by statute. See note to *Schaeppie v. Bartholomae*, 1 L.R.A.(N.S.) 1079.

3. Liabilities.

Notwithstanding the fact that the lessor cannot sue upon the covenants in his lease for breaches occurring after he has transferred the reversion, he continues to be liable upon his express covenants in the lease after he has transferred the reversion

to another, although the covenants are such that the transferee is also liable thereon (this rule is based upon the theory that one who makes an express covenant is bound thereby until released by the other party to the contract; it is the same principle by which an original lessee is held liable for rent upon his express covenant, even after he has assigned the leasehold; see note to *Kanawha-Gauley Coal & Coke Co. v. Sharp*, 52 L.R.A. (N.S.) 968, subsection II. b, 3). *Stuart v. Joy* [1904] 1 K. B. 362, 73 L. J. K. B. N. S. 97, 90 L. T. N. S. 78, 20 Times L. R. 109; *Hazen v. Hoyt*, — Iowa, —, 75 N. W. 647 (in this case the lessor was held liable to the tenant in the sum of \$250, after the tenant had peaceably given up possession to the purchaser of the reversion, pursuant to a notice from the purchaser that possession was required, the lease containing a provision that the tenant should give up possession if required to do so by the purchaser, "and in case said second party has to give possession and terminate this lease, by reason of any such sale, before termination of same, said first party is to pay said second party the sum of \$250;") the court did not say whether this was a covenant, a condition or a limitation; on that question, see note to *Diepenbrock v. Luiz*, post, 234; *Carpenter v. Pocasset Mfg. Co.* 180 Mass. 130, 61 N. E. 816; *Jones v. Parker*, 163 Mass. 564, 47 Am. St. Rep. 485, 40 N. E. 1044 (this was a bill in equity by lessee against lessor for specific performance of his covenant to heat the premises); *GLIDDEN v. SECOND AVE. INVEST. Co.* The case in *Carpenter v. Pocasset Mfg. Co.* supra, involved a covenant to purchase lessee's improvements at the end of the term, and the court said: "It is suggested that the defendant's covenant ran with the reversion under Stat. 32 Hen. VIII. chap. 34, § 2, and that if that be so, the defendant was exonerated by its conveyance to Mrs. O'Hearn. We do not inquire into the premise because we cannot admit the conclusion. The expression in Mr. Dicey's early work on Parties, 236, relied on by the defendant, seems to us too broad, and does not lead us to doubt the correctness of the decision on that point in *Jones v. Parker*, 163 Mass. 568, 47 Am. St. Rep. 485, 40 N. E. 1044. However, it may be as to the benefits (compare *Rawle, Covenants for Title*, 5th ed. § 215), lessors cannot get rid of the burden of their contracts by conveying their land. In the case of the tenant, as in that of the landlord, 'it cannot be endured that he should afterwards be deprived of his action on the covenant to which he trusted by an act to which he cannot object.' *Auriol v. Mills*, 4 T. R. 99. The 'privity of contract in respect of the estate,' as it was called by *Shepherd, arguendo*, in *Webb v. Russell*, 3 T. R. 394, does not put an end to the 'privity of contract which is created by the contract itself, and subsists forever between the lessor and lessee.' *Ibid.*, cited in *Bickford v. Parson*, 5 C. B. 929, 17 L. J. C. P. N. S. 192, 12 Jur. 377; *Sims, Covenants*, 91, 92."

L.R.A.1915C.

In *Wagner v. Van Schaick Realty Co.* 163 App. Div. 632, 148 N. Y. Supp. 736, the court, while not denying this rule, apparently made an exception thereto that is not warranted by sound rules of construction. The lease contained a stipulation which amounted to a covenant on the part of the lessee to not assign the lease without the written consent of the lessor. An assignment of the lease was made after the transfer of the reversion, with the consent of the transferee of the reversion, but without the consent of the original lessor. In an action by the assignee of the lease against the original lessor, for a breach of an implied covenant for quiet enjoyment, it was held that since the lessor never consented to the assignment, there was no privity of estate or contract between him and the plaintiff, and there could be no recovery. *Hotchkiss, J.* (dissenting), pointed out that both the covenant for quiet enjoyment and the covenant against assignment run with the land, so that consent by the transferee made the assignment valid. The dissenting opinion is in harmony with the authorities on this subject. See supra, subd. IV. c, 2 (e) (7). Inasmuch as the decision is not based upon the fact that the covenant was only an implied one, and not an express covenant, the final conclusion does not lessen the force of the criticism.

It was further held in *GLIDDEN v. SECOND AVE. INVEST. Co.* that the transferor of the reversion was not liable, upon his express covenant to heat the premises, to an employee of the lessee who was injured by a breach of the covenant after the transfer of the reversion, although the transferee of the reversion was liable. Such holding places a limitation upon the rule of transferor's liability, as above stated and conceded by the court in this case. The reasoning of the court to sustain the limitation is not convincing. It is first said: "The liability of the original lessor has become the liability of a surety only." But, while that may be the case, according to the cases above cited (and for analogy, see cases cited in note in 52 L.R.A. (N.S.) 971), an action by the lessee for breach of the covenant, or a suit for specific performance thereof, could be maintained directly against the transferor without first proceeding against the transferee. Next it is said: "The tort liability of a landlord who covenants to heat or repair the leased premises is predicated on his right and duty to enter the premises and to exercise there a measure of control." This reason would not be controlling in a jurisdiction where it has been held that the action is allowed in order to avoid circuity of action, the lessee being primarily liable with the right of action over. See cases cited in note in 50 L.R.A. (N.S.) 289. This theory may not be the correct one and the court had previously rejected it (see 124 Minn. 101, L.R.A. —, 144 N. W. 428), but one is led to speculate as to what the decision would have been had the action been brought by the lessee for breach of the covenant, alleging, as an ele-

ment of damage, a judgment recovered by an employee for injuries caused by the breach. But, assuming that this theory should be rejected, and that the court stated the correct ground of a landlord's liability, the decision appears to be in conflict with the decisions above cited, the correctness of which is conceded by the court. Those decisions would appear to establish facts inconsistent with the court's reasoning, i. e., it was the "duty" of the transferor to fulfil the covenant, and he could not, by divesting himself of his estate, avoid liability for failure in the performance of his duty. The decision would seem to imply that where tort liability is based upon defendant's contractual duty, coupled with power to perform the duty, the liability may be avoided by a voluntary divestiture of the power to perform the duty.

VI. Rights and liabilities of lessee.

a. In general.

Most of the questions as to the rights and liabilities of the lessee as affected by a transfer of the reversion have been considered as incident to those of the transferor and of the transferee, so that further discussion is needed upon but a few points. Generally speaking, the main duty of the lessee is to take care of the premises and pay the rent to the party entitled thereto. His most important rights are, to be unmolested in his enjoyment of the premises, and be protected against double payment of rent.

b. Rent paid in advance.

The general rule seems to be that where rent is paid in advance of the time stipulated in the lease for its payment, and a transfer of the reversion takes place thereafter, but before the stipulated time for its payment, such payment does not protect the tenant against the claims of the transferee who purchased without knowledge of the fact. *De Nicholls v. Saunders*, L. R. 5 C. P. 589, 39 L. J. C. P. N. S. 297, 22 L. T. N. S. 661, 18 Week. Rep. 1106 (in this case the transfer was by way of mortgage after the lease, and the mortgagee permitted payments to be made to the lessor. Lessee, without knowledge of the mortgage, paid rent in advance to the lessor. After the payment in advance, but before the rent so paid was due, the mortgagee served notice upon the lessee); *Cook v. Guerra*, L. R. 7 C. P. 132, 41 L. J. C. P. N. S. 89, 26 L. T. N. S. 97, 20 Week. Rep. 367 (in this case the transfer was by way of mortgage after the lease and after payment in advance to the lessor. Lessee was held liable to the mortgagee for all rent that accrued after he had been served with notice of the mortgage, despite his payments in advance); *Martin v. Martin*, 7 Md. 368, 61 Am. Dec. 364 (this was a case of transfer by sheriff's L.R.A.1915C.

deed, and the discussion is devoted largely to the question as to the priority of the lien over the lease. See same case III. b, 2, supra. But the court clearly states the general rule as to payment of rent in advance); *Winfrey v. Work*, 75 Mo. 55 (this was not a direct holding as to the tenant, as it was held that the transferee could deduct the amount of the rent paid in advance from the amount of his bid at the partition sale at which he bought); *Lester v. Zink*, — Tex. Civ. App. —, 154 S. W. 1161; *Contra: Stone v. Patterson*, 19 Pick. 476, 31 Am. Dec. 156, citing *Farley v. Thompson*, 15 Mass. 18, as decisive of the question.

But payment to the lessor of rent in advance of the time stipulated in the lease will protect the tenant against the claims of the transferee of the reversion if the latter had notice of such payment at the time of the transfer (*Bouker v. Spicer*, — Mich. —, 6 N. W. 117; *American Exch. Nat. Bank v. Smith*, 61 Misc. 49, 113 N. Y. Supp. 236; or if tenant gets no notice of the transfer prior to the time stipulated for the payment of the rent in question (*Dreyfus v. Hirt*, 82 Cal. 621, 23 Pac. 193).

On the general question as to possession being notice to the purchaser of the existence of the lease and the rights of the tenant, see II. b, 2, supra. The courts appear to be divided on the question as to whether or not actual possession by the tenant is notice to the purchaser that the tenant has paid rent to the lessor in advance of the time stipulated in the lease.

In the following cases it was held that actual possession and occupancy by the tenant is constructive notice to the transferee of the fact that the tenant has paid rent in advance of the time for such payment under the terms of the lease: *Bouker v. Spicer* and *American Exch. Nat. Bank v. Smith*, supra (an oral agreement made after the date of the lease, that the rent was to be applied on a debt of the landlord which he owed to the tenant for his share of the cost of a building which the lease provided they should erect, and which was erected by the tenant alone).

But in the following cases the courts took the opposite view: *Winfrey v. Work*, supra; *Lester v. Zink*, — Tex. Civ. App. —, 154 S. W. 1161 (an oral agreement that the tenant was to have a lien upon the lessor's share of the crop, the rent, to indemnify the tenant against loss on an indorsement of the lessor's note, the agreement and indorsement having been made subsequent to the lease).

c. Right to prove that lessor had parted with title.

On the question as to the right of the tenant to show that the landlord parted with or lost his title to a third person during the tenancy, see note to *Raines v. Hindman*, 38 L.R.A.(N.S.) 863.

d. Right to show that transfer is ineffectual.

As against the transferee of the reversion, the lessee is not estopped to show that the transfer is ineffectual to pass the lessor's title. *Hilbourn v. Fogg*, 99 Mass. 11; *Ross v. Kernan*, 31 Hun, 164; *Despard v. Walbridge*, 15 N. Y. 374. In both New York cases it is stated that the tenant is not estopped from denying anything except that which he has admitted.

e. Right to avoid payment of rent by proving a merger.

The doctrine of merger is not considered here in its general aspect. Only cases that have in some degree involved the question of tenant's right to prove a merger to avoid his liability to his former landlord are here included.

Where tenant acquires title in fee to the leased premises, there is a merger of the two estates, and if nothing is said in the conveyance about rent, it operates as an extinguishment thereof for the remainder of the term, and tenant may prove such merger in any action that may be brought against him for after-accrued rents (*Martin v. Searcy*, 3 Stew. [Ala.] 50, 20 Am. Dec. 64; *Higgins v. California Petroleum & Asphalt Co.* 109 Cal. 304, 41 Pac. 1087; *Carson v. Crigler*, 9 Ill. App. 83; *Hardin v. Forsythe*, 99 Ill. 312; *Starr v. Starr Methodist Protestant Church*, 112 Md. 171, 76 Atl. 595; (this rule applies where lessor devises the fee to lessee) *Zeysing v. Welbourn*, 42 Mo. App. 352; *Gunn v. Sinclair*, 52 Mo. 327; *Higgins v. Turner*, 61 Mo. 249, cited with approval in *Silvey v. Summer*, 61 Mo. 253; *Culverhouse v. Worts*, 32 Mo. App. 419; *York v. Jones*, 2 N. H. 454; *Nellis v. Lathrop*, 22 Wend. 121, 34 Am. Dec. 285; *Mixon v. Coffield*, 24 N. C. [2 Ired. L.] 301; *Jolly v. Bryan*, 86 N. C. 457; (but rents accrued before the conveyance was made do not pass, and the vendee remains liable to lessor therefor.)

And where the owners of adjoining properties signed a joint lease of minerals, and later one sold his property in fee to the lessee, there was a merger so far as his interest was concerned, and the lessee was no longer liable for the vendor's share of the rent. *Higgins v. California Petroleum & Asphalt Co.* 109 Cal. 304, 41 Pac. 1087.

But, of course, a conveyance of the fee by the lessor to the lessee after an attachment has been levied thereon creates no merger of the two estates so as to affect the attachment creditor. *Buffum v. Deane*, 4 Gray, 385.

On the right of a tenant to acquire title inconsistent with the title the landlord had at the commencement of the tenancy, see note to *Smith v. Newman*, 53 L.R.A. 934.

J. W. M.

L.R.A.1915C.

**CALIFORNIA SUPREME COURT.
(In Banc.)**

M. H. DIEPENBROCK, Resp.,
v.

FRANK J. LUIZ, Appt.

(159 Cal. 716, 115 Pac. 743.)

Landlord and tenant — provision for termination of lease — covenant or condition.

1. A condition, and not a covenant, is created by a provision in a lease for five years that the lessor may sell at any time, and, when sold, this lease shall cease, provided that the lessor shall then pay the lessee for improvements placed upon the premises, with a provision for arbitration in case of disagreement as to their value, so that the lease does not terminate without payment.

Same — termination of lease — continued possession — liability for rent.

2. A lessee who continues in possession after the reversion is sold, which, by the terms of the lease, terminates it provided payment is made for improvements, is, in case the sale is only a few days before the termination of a rental period, liable for the rent accruing for such period.

(May 2, 1911.)

Note. — Construction of provision in lease as to termination of leasehold in case of sale of premises.

- I. In general, 234.
- II. Right to terminate given by inference, 235.
- III. Is provision a condition subsequent or a special limitation, 236.
- IV. Colorable sales, 240.
- V. Who enforces provision, 241.
- VI. Miscellaneous holdings, 243.

I. In general.

The question as to whether a covenant to terminate a lease in case of sale of the premises runs with the reversion so as to be mutually binding between the purchaser and the tenant was raised in the note to *Glidden v. Second Ave. Invest. Co. subdiv.*, IV. c, 2 (e) (23), ante, 190, and referred to this note. The question assumes that such a provision is a covenant, but it is more correctly classed as a special limitation, or perhaps a condition subsequent (see *infra*, III.). Some courts have permitted the lessor to enforce the provision, others the purchaser, in his own right, others the lessor, to the use of the purchaser, and still others have said that either the lessor or the purchaser could enforce it. Naturally, the question depends somewhat upon the wording of the provision. See *infra*, V.

There are cases however, in which provisions in leases for the surrender of pos-

A PPEAL by defendant from a judgment of the Superior Court for Sacramento County in plaintiff's favor in an action brought to recover rent alleged to be due under the terms of a lease of premises which had been conveyed to plaintiff. Affirmed.

The facts are stated in the opinion.

Messrs. J. Frank Brown and C. E. McLaughlin, for appellant:

Stipulations in a contract are not construed as conditions precedent unless that construction is made necessary by the terms of the contract.

Deacon v. Blodgett, 111 Cal. 418, 44 Pac. 159; Front Street, M. & O. R. Co. v. Butler,

50 Cal. 577; Cullen v. Sprigg, 83 Cal. 64, 23 Pac. 222; Witmer Bros. Co. v. Weid, 108 Cal. 578, 41 Pac. 491; Bishop, Contr. § 418; Antonelle v. Kennedy & S. Lumber Co. 140 Cal. 315, 73 Pac. 966.

The word "provided," and that which follows it, create a covenant on the part of the lessor to pay the amount of the improvements, when ascertained as therein provided, and such clause bears no earmark of a condition precedent.

Stewart v. Pier, 58 Iowa, 16, 11 N. W. 711; Morton v. Weir, 70 N. Y. 248; 1 McAdam, Land. & T. 48; 3 McAdam, Land. & T. 157; Miller v. Levi, 44 N. Y. 493; Taylor

session by the tenant upon sale of the premises and notice by lessor have been held to be covenants running with the land. Dierig v. Callahan, 35 Misc. 30, 70 N. Y. Supp. 210, second appeal in 36 Misc. 854, 74 N. Y. Supp. 1124, is an example of one class of cases of this sort. But cases of this class refer to an assignment of the lease by the lessee, and for that reason are not in point on the question as to whether the provision is a covenant running with the reversion, although they are analogous. And it has been held that such a provision is a covenant running with the reversion in the broader sense; i. e., where the reversion was transferred without terminating the lease (see III., *infra*, as to manner in which this may be accomplished), the transferee of the reversion may, by a sale with notice of termination to the tenant, terminate the lease so that the second purchaser of the premises takes the same free from the leasehold estate. Hadley v. Bernero, 97 Mo. App. 314, 71 S. W. 451, second appeal in 103 Mo. App. 549, 78 S. W. 64.

And in McClung v. McPherson, 47 Or. 73, 81 Pac. 567 (rehearing denied in 47 Or. 85, 82 Pac. 13), a similar provision was held to be, in the narrower sense, in the nature of a covenant running with the land; but see same case, *infra*, V., on the point that lessor can also enforce the provision.

In Sloan v. Cantrell, 5 Coldw. 571, such a provision was held to be a mere covenant on the part of the lessee unless there was some provision for re-entry by lessor in case of a breach thereof. As lessor's notice failed to even imply a desire to sell, it was held to be insufficient, so the question as to the right of the transferee to the benefit of the provision was not raised.

It should be observed that in all these cases the provision was not that the lessor could terminate the lease, but that in case of sale with notice by lessor, the tenant would give up possession; and the form of the provision is that of a covenant on the part of the lessee.

II. Right to terminate given by inference.

In Johnston v. King, 83 Wis. 8, 53 N. W. 28, the only provision regarding a sale was L.R.A.1915C.

"that, in case of sale of said property by the said party of the first part at any time during said term, he shall forfeit to the party of the second part as damages the sum of \$21;" and it was held that by inference the lease gave the lessor the right to terminate it by a sale of the premises.

And a like inference was, in Wallace v. Bahlhorn, 68 Mich. 87, 35 N. W. 834, drawn from a provision in a lease for a term of years, "reserving the right to sell part or all."

In Lunke v. Egeland, 46 Mont. 403, 128 Pac. 610, it was held that a termination of the lease by sale of the reversion was contemplated where it was provided in the lease that, in case of sale, the tenant was to be paid by the lessor a certain amount per acre for breaking the land in case the sale should be made after breaking and before seeding, and a less amount per acre for all plowed but not seeded at time of sale, and although the tenant was to have by the terms of the lease the first chance to purchase the premises, he could not by injunction prevent the lessor from selling the land. If he had asked to have the lessor enjoined from selling "without first giving lessee the chance to purchase at the same price," a different question would have been presented.

But a contrary, and it would seem a somewhat unreasonable, rule, was adopted in Randolph v. Helps, 9 Colo. 29, 10 Pac. 245, where it was held that no inference of a right to terminate the lease should be drawn from a provision as follows: "And it is further stipulated and agreed by the second party that if the first party should sell or dispose of his interest in said premises, said first party shall pay to said second party the appraised value of all the improvements of said second party on said premises, and, in the event of said appraisement, each of the two parties to this contract are to appoint a disinterested man; and if said two men cannot agree on the price of said improvements, said two men are to choose a third man, and a decision of a majority of said three men is to be the price of said improvements."

And where there is no provision in the lease for its termination on a sale, and nothing that gives rise to that right by

v. Frohock, 85 Ill. 584; Conover v. Smith, 17 N. J. Eq. 51, 86 Am. Dec. 247; Vanatta v. Brewer, 32 N. J. Eq. 286, 6 Mor. Min. Rep. 358; Taylor, Land & T. 8th ed. §§ 273, 276, 277, 279, 524; Tallman v. Coffin, 4 N. Y. 134; Jackson ex dem. Hardenburgh v. McClallen, 8 Cow. 295; Gear, Land. & T. § 871; 24 Cyc. 1108, 1109, notes 15-27; Berry v. Van Winkle, 2 N. J. Eq. 390; Oliver v. Bredl, 25 Pa. Super. Ct. 653; Douglaston Realty Co. v. Hess, 124 App. Div. 508, 108 N. Y. Supp. 1036; Handschy v. Sutton, 28 Ind. 159; Bartlett v. Greenleaf, 11 Gray, 98; Parsons v. Miller, 15 Wend. 561; McVicar v. Denison, 81 Mich. 348, 45 N. W. 659; Batchelder v. Dean, 16 N. H. 265; Bales v. Gilbert, 84 Mo. App. 675; Willcox v. Kehoe, 4 Ann. Cas. 437, and note, 124 Ga. 484, 4

L.R.A. (N.S.) 466, 52 S. E. 896; Gardner v. Samuels, 116 Cal. 84, 58 Am. St. Rep. 135, 47 Pac. 935; Bresler v. Darmstaetter, 57 Mich. 311, 23 N. W. 825; Hood v. Hartshorn, 100 Mass. 117, 1 Am. Rep. 89; Hansen v. Meyer, 81 Ill. 321, 25 Am. Rep. 282; Green v. Wick, 4 Ohio Dec. Reprint, 301; Butler v. Manny, 52 Mo. 497; Hartung v. Witte, 59 Wis. 285, 18 N. W. 175; Stanley v. Colt, 5 Wall. 119, 18 L. ed. 502; Woodruff v. Woodruff, 44 N. J. Eq. 349, 1 L.R.A. 380, 16 Atl. 4; Carroll v. State, 58 Ala. 396; Boston Safe Deposit & T. Co. v. Thomas, 59 Kan. 470, 53 Pac. 472; Heaston v. Randolph County, 20 Ind. 398; Holladay v. Frisbie, 15 Cal. 635; 8 Cyc. 556; Easterbrook v. Farquharson, 110 Cal. 317, 42 Pac. 811; Wheeler v. Dascomb, 3 Cush. 285; Knowles v. Hull, 97 Mass. 206.

necessary implication is contained therein, oral testimony is not admissible to show such an agreement at the time the lease was made, as that would vary the terms of a written lease by oral testimony. Ibid.

III. Is provision a condition subsequent or a special limitation.

See I., supra, as to how provision may be a covenant in the broader sense.

The distinction between a condition subsequent and a special limitation is that, in the former, the words creating the condition do not originally limit the term, but merely permit its termination upon the happening of the contingency; while, in the latter, the words creating it originally limit the term to the time of the happening of the contingency; hence, when the contingency happens, the estate is terminated as if the term had expired. For a general discussion of this distinction, see note to Hanley Falls Creamery Co. v. Milton Dairy Co. 52 L.R.A. (N.S.) 718.

The courts have not with any degree of satisfaction indicated the nature of provisions in leases for the termination of the leasehold estate in case of sale of the reversion. In some cases, cited *infra*, they have classified particular provisions as special limitations. In at least one case the provision was so classed notwithstanding the fact that it also required a thirty-day notice to terminate the lease. The result in many other cases is inconsistent with any theory except that of a special limitation. The theory that the particular provision is a special limitation appears to have been readily adopted in cases where no injustice would result by the holding. But in cases where the tenant, notwithstanding a sale of the reversion, has not been disturbed or injured, there would be a palpable injustice to the landlord if the tenant were allowed to plead an *ipso facto* termination of the lease when sued for breach of the covenants, or if he were allowed to collect the bonus provided by the lease as compensation for injury caused by the termination, or if he were al-

lowed in any way to enjoy possession and at the same time profit by a technical termination of the lease. Cases of this sort have led some courts into inconsistencies; *i. e.*, they have held that the lease was *ipso facto* terminated by the sale, and in the same case refused to permit the tenant to profit by the fact that the lease had been terminated. See Childs v. Skillen, 39 Misc. 825, 81 N. Y. Supp. 348, *infra*, for a good example of this. In other cases the courts have held that the landlord alone has the right to elect to terminate the lease or to waive his right, thus giving the provision the force of a condition subsequent to a certain extent, but it is also given some of the characteristics of a special limitation, for it is held that when the landlord elects to terminate, he is not required to fulfil all of the conditions in order to accomplish that end. See cases cited, *infra*, to the point that tenant must give up possession and then sue for the bonus. The courts appear to be seeking for a sound rule of construction that will permit the landlord to elect whether or not he will terminate the lease, and at the same time to give to the provision only in case he elects to terminate the force of a special limitation.

It is here suggested that a reasonable rule of construction for these provisions is that they are enabling, and are not restrictive of lessor's legal rights. The lease is made with presumed knowledge of the fact that, independent of any such provisions, and without the consent of the lessee, the lessor has the legal right to sell and transfer the reversion without terminating the lease (see note to Glidden v. Second Ave. Invest. Co. *ante*, 190). Where a sale is made without anything done by either lessor or his transferee to indicate that he acted by virtue of the provision in the lease, the presumption is that he did not so act, but that he acted upon his legal right, independent of the provisions. Words used in the provision giving the right to sell are merely declaratory of the lessor's legal rights. In such case, the situation is exactly the same as if the lease had contained no provision

Upon the sale of leased premises or an assignment of the lease by the lessor, the lessor is entitled to rent accrued up to the time of such sale or assignment, his grantee or assignee being only entitled to rent accruing after title to the premises became vested in such grantee.

Dreyfus v. Hirt, 82 Cal. 627, 23 Pac. 193; Wise v. Pfaff, 98 Md. 576, 56 Atl. 816; 24 Cyc. 1173; Mahoney v. Alviso, 51 Cal. 441; 12 Am. & Eng. Enc. Law, 733; Devlin, Deede, 1st ed. 311; Evans v. Enloe, 70 Wis. 345, 34 N. W. 918, 36 N. W. 22; Re Eddy, 10 Abb. N. C. 396; Spruill v. Arrington, 109 N. C. 192, 13 S. E. 779; Dixon v. Niccolls, 39 Ill. 372, 89 Am. Dec. 312; Outtoun v. Dulin, 72 Md. 536, 20 Atl. 134; Dart, Vend. & P. of Real Estate, p. 386; Jolly v. Bryan, 86 N. C.

457; Page v. Lashley, 15 Ind. 152; Burden v. Thayer, 3 Met. 76, 37 Am. Dec. 117; Keesee v. Sloan, 69 Miss. 369, 11 So. 631; Van Driel v. Rosierz, 26 Iowa, 575; Kennedy v. Kennedy, 66 Ill. 190.

Mr. R. Platnauer, for respondent:

The proviso in the lease creates a condition precedent.

Stockton v. Weber, 98 Cal. 433, 33 Pac. 332; Friar v. Grey, 15 Jur. 816, 5 Exch. 597; Porter v. Shephard, 6 T. R. 665, 3 Revised Rep. 305; Robertson v. Caw, 3 Barb. 410; Rich v. Atwater, 16 Conn. 409; Ormsby v. Phenix Ins. Co. 5 S. D. 72, 58 N. W. 301; Devitt v. Kaufman County, 27 Tex. Civ. App. 332, 66 S. W. 224; Brewer v. Rust, 20 Okla. 776, 95 Pac. 233; Gibert v. Peteler, 38 N. Y. 165, 97 Am. Dec. 785; Raley v.

regarding a sale, for the provision has not been called into operation. The provision needs no construction. But if either the lessor or his purchaser notify lessee to quit the premises, offer him the bonus provided, or do any other act that, independent of the provision, would have no legal effect, instantly the provision is brought into operation and may, *ipso facto*, terminate the leasehold estate. In such case, the provision is before the court for construction, and from the wording of the particular provision the court will determine whether the lease was *ipso facto*, terminated or continued because of unfulfilled conditions on the part of the landlord.

On this principle of construction, the first inquiry should be: Did the lessor sell independently of the provision, or did he exercise some power which he possessed solely by virtue of the provision? If the former alternative is true, the lease is not terminated and the provision needs no construction. But if the latter alternative is proved, then the court must construe the provision as to whether it has the force of a special limitation or of a condition subsequent.

By this rule of construction the evident intent of the parties is given full effect; the legal right of the lessor to sell without terminating the lease is preserved; no sound legal principle is violated; no injustice is done to either party; and the court is not required to adopt inconsistent theories to reach a just conclusion.

This principle was the basis of the decision in Callaghan v. Hawkes, 121 Mass. 298, where it was held that a clause in the lease providing: "And the said Hawkes shall have the right to sell and dispose of the farm and buildings at any time covered by this lease, by giving said Calaghans two months' notice thereof, and also by giving them the privilege of purchasing at the same price any other person may offer," did not prevent lessor from selling the reversion subject to the lease, without notice and offer to tenant, since he had that right independent of any provisions in the lease, and the clause is enabling, and not L.R.A.1915C.

restrictive,—that the whole effect of the clause was to enable him to terminate the lease by notice and offer to sell to the tenant.

And it appears to have been the basis of the holding in Allenspach v. Wagner, 9 Colo. 127, 10 Pac. 802, where the provision was that the lease should terminate if the lessor sold the premises, but the lessor sold subject to the lease, and the purchaser offered to continue the lease. The court said: "He (lessee) could not complain that the defendant sold subject to the lease, as his right to sell remained unbridged."

But among the decisions generally there is no consistency as to the underlying principle, although there are but few decisions that could not be reconciled with the principle above stated.

The court in DIEPENBROOK v. LUIZ does not classify the provision for termination as a condition, as distinguished from a covenant, but directs the inquiry to the proviso contained in the provision. The main provision was: "Whenever sold (meaning the reversion) this lease shall cease and be at an end." The court seems to have assumed that if there had been no proviso added, the provision, if interpreted literally, would be a special limitation, and a sale of the premises without any act to indicate that lessor acted under the provision would *ipso facto* terminate the lease. If that assumption is correct, it could be reconciled with the above-stated rule of construction, on the theory that the language used in the provision is such that it was restrictive of lessor's legal rights, hence, not within the rule.

In Baxter v. Providence, —R. I. —, 40 Atl. 423, a provision in a lease, which read: "And the parties of the first part, for themselves, their heirs and assigns, further reserve the right to sell said demised premises at any time during the said term of this lease, and in case of such sale, the said party of the second part, for himself, his heirs, legal representatives, and assigns, agrees to surrender and deliver possession of said premises at once to said parties

Umatilla County, 15 Or. 172, 3 Am. St. Rep. 142, 13 Pac. 890; Huggins v. Daley, 48 L.R.A. 320, 40 C. C. A. 12, 99 Fed. 606, 20 Mor. Min. Rep. 377; Smith's Appeal, 103 Pa. 559; Dakin v. Williams, 11 Wend. 67; Mecum v. Peoria & O. R. Co. 21 Ill. 533.

The provision in the lease that it terminate on a sale of the property is for the benefit of the landlord.

Foley v. Constantino, 43 Misc. 91, 86 N. Y. Supp. 780.

The acceptance by the defendant of the new lease constituted a surrender of the old lease, which thereby became terminated by operation of law at the commencement of the new term.

Jungerman v. Bovee, 19 Cal. 354; Enyeart v. Davis, 17 Neb. 228, 22 N. W. 449; Fleischner v. Citizens' Real Estate & Invest. Co. 25 Or. 119, 35 Pac. 175.

But such surrender did not operate as a discharge of the rent already due.

Donnellan v. Wood, 4 Cal. App. 192, 87 Pac. 235.

A grant of the reversion carries with it all rents that subsequently become due.

Burden v. Thayer, 3 Met. 76, 37 Am. Dec. 117; Hammond v. Thompson, 168 Mass. 531, 47 N. E. 137; Dixon v. Nicolls, 39 Ill. 372, 89 Am. Dec. 312; Kennedy v. Kennedy, 66 Ill. 190; Van Wicklen v. Paulson, 14 Barb. 654; Marshall v. Moseley, 21 N. Y. 280; Mahoney v. Alviso, 51 Cal. 441.

of the first part, and release any further claim on said demised premises," was held to be in the nature of a conditional limitation, so that the consummation of a sale *ipso facto* terminated the lease, and an entry by the landlord was unnecessary to effect that result. But the action was by the lessor, so the action would be evidence that lessor acted under the provision.

In Miller v. Levi, 44 N. Y. 489, it was held that a provision in a lease for a term of years that the lessor may "terminate the lease at the end of any year, by giving sixty days' previous notice, in case he should sell or desire to rebuild," is not a condition subsequent, but a limitation of the term, so that a bona fide sale by the lessor, followed by notice three months before the end of the current year, terminated the lease without any further action, and that summary proceedings could be started at the close of the year for possession on the ground that the tenant was holding over without the lessor's consent. This holding is wholly consistent with the rule of construction suggested supra.

In Ronginsky v. Grantz, 39 Misc. 347, 79 N. Y. Supp. 839, it was held that a provision in a two-year lease that if the lessor sold the premises before the expiration of the first year of the lease, the tenant should vacate and surrender the premises," "on receiving a three months' notice and the equivalent of three months' rent," was a limitation of the term so that notice of the sale, followed three months later by a tender of the equivalent of three months' rent by the lessor, terminated the lease, and that summary proceedings could at once be started for dispossessing the lessee. This holding is in harmony with the suggested rule of construction, but no mention is made of that rule.

And in Bruder v. Geisler, 47 Misc. 370, 94 N. Y. Supp. 2, the provision was that upon the happening of the contingency (the report does not reveal what the contingency was), the tenant "agrees to cancel said lease;" and the court, following Miller v. Levi, supra, held that this was a special limitation, and that it did not require the consent of the tenant to cancel L.R.A.1915C.

the lease when the contingency happened.

In Morton v. Weir, 70 N. Y. 247, the lease before the court contained this clause: "In the event of the said party of the first part selling or agreeing to sell and convey said described premises to any purchaser thereof, this lease shall be canceled and at an end; but the purchaser thereof, or the party of the first part thereto, or their assigns, shall pay to the party of the second part a fair and just price or consideration for all permanent improvements on said premises, and in case the parties hereto or their assigns cannot agree upon such valuation, then the same is to be submitted to arbitration under and in accordance with the provisions of the statute in such case made and provided." In a suit by the tenant against the lessor to recover the value of his improvements, the court said: "By the terms of the demise the defendant reserved the right to sell the demised premises, and the parties covenanted that upon such sale or agreement to sell, the lease should be determined and the term ended, and that defendant would pay the lessee a fair and just price or consideration for all permanent improvements erected on said premises by the tenant. It was also stipulated that in case the parties could not agree upon the value of the improvements, the same should be submitted to arbitration. The defendant availed himself of the right reserved, and sold and conveyed the premises absolutely, without reservation or exception, and the grantee thereby acquired a title to the premises unencumbered by the lease, and perfect as against the tenant. The latter had no right to occupy under the lease after the sale of the premises. He would not have been bound to attorn to the grantee and occupy under him if the latter had been willing to regard the lease as still in force, and the tenancy as continuing, of which there is no evidence. Upon the sale the term ended by force of the agreement, and the right of the tenant to compensation became absolute; and upon the refusal of the defendant to submit the value to arbitration, a present right of action arose, and the right to recover by action was perfect." The court did not say

Melvin, J., delivered the opinion of the court:

This cause was decided by the district court of appeal of the third appellate district, and a rehearing was granted in order that we might further examine the authorities applicable to the lease involved in the litigation. After careful examination of the authorities cited and of the arguments of counsel presented in their briefs, we have adopted the opinion of the district court of appeal, written by Mr. Justice Burnett, which is as follows:—

"The action, based upon a lease of agricultural lands from one R. W. Brown to defendant, is to recover the rental which, under the terms of said lease, became due

on November 15, 1906. The lease was executed on November 11, 1905, and on November 10, 1906, Brown conveyed the premises, together with 'the reversion and reversions, remainder and remainders, rents, issues, and profits thereof,' to plaintiff.

"The main controversy is over the proper construction of the following clause in said lease: 'It is agreed by and between the parties hereto, that the party of the first part may sell the demised premises at any time during the said term. Whenever sold this lease shall cease and be at an end, provided that the party of the first part shall then pay to the party of the second part, for all improvements placed upon the demised premises to the time of such sale, in-

that this provision was a special limitation, but it gave to it that force.

In *Childs v. Skillin*, 39 Misc. 825, 81 N. Y. Supp. 348, the lease provided that if the premises were sold at any time before the end of the term, then from the date of the sale all further payments of rent should cease, and all money paid as rental should be refunded before the lessee could be required to deliver up possession, and "possession shall be given upon the receipt of thirty days' notice;" and it was held that although a sale took place during the term, yet, if the tenant was not disturbed in his possession and enjoyment of the premises before the end of his term, he was not entitled to any refund of rent, and if he held over the term he could be dispossessed by the purchaser by summary proceedings the same as if the lease had contained nothing about a sale of the premises. The court held that by force of the provisions a sale of the premises terminated the lease *ipso facto*, and cited *Morton v. Weir* and *Miller v. Levi*, supra; but it is not very apparent how such holding was reconciled with the principal holding in the case. It would appear that the tenant was, after the sale, in possession under a terminated lease, with the right to hold such possession until he received his refund. By exercising his right until the end of the original term, he lost his right to both the refund and the possession. The court appears to have given effect properly to the evident intent of the parties contrary to, and not because, of its incidental holding. If the court had based its decision upon the principle stated supra, and had held that the lease was not terminated by the sale for the reason that the sale was made independently of the provision, instead of attempting to construe a provision that was not properly before it for construction, the same conclusion would have been reached consistently.

The decision in *Foley v. Constantino*, 43 Misc. 91, 86 N. Y. Supp. 780, is very similar to that rendered in *DIEPENBROCK v. LUIZ*, it being held that the condition (it appears to have been assumed that the provision was a condition, and not a cove-

nant) was solely for the benefit of the lessor and his successors in title. The lessee had been notified of the sale, but had not been notified to vacate, and he remained in possession. When suit was brought by the transferee for possession because of non-payment of rent, it was held that the lessor and transferee had waived their right to terminate the lease under the condition, and that the tenant could not successfully claim the benefit thereof. The lease contained two provisions: one for a deposit of \$265 to secure the payment of rent and the performance of covenants, and the other was a provision: "That should the party of the first part sell the said premises she shall give to the said party of the second part (tenant) sixty days' notice in writing, said sum of two hundred and sixty-five dollars (\$265) together with five hundred dollars (\$500) to surrender said premises, and the said party of the second part on receiving said sixty (60) days' written notice, said sum of two hundred and sixty-five dollars (\$265) together with five hundred dollars (\$500) will surrender said premises to the said party of the first part and not otherwise."

In *Dudley v. Estill*, 6 Leigh, 562, the lessee covenanted that if the lessor should make a fair sale of the premises during the term for \$10,000, one half cash and the other half in four annual instalments, then the lessee should give up possession at the end of the year in which the sale was made, and it was held that this provision was made wholly for the benefit of the lessor, and that a sale at a price and on terms more favorable to the lessor than were contained in the covenant would have enabled the lessor to terminate the lease at the end of the year if he had wished to do so, but that such sale did not *ipso facto* terminate the lease; *i. e.*, a sale that would enable the lessor to terminate the lease did not of itself work a termination, for the reason that lessor could waive the right to terminate. The same conclusion would be reached by holding that the sale was made independently of the provision.

In *Stewart v. Pier*, 58 Iowa, 15, 11 N. W. 711, the clause in the lease was as follows:

cluding the cost of all ditches, built thereon by the latter and all crops then growing thereon, the value thereof to be agreed upon by the parties hereto, and if they do not agree the value thereof shall be fixed by two disinterested persons selected for that purpose, by the parties, hereto, and if they fail to agree by a third person selected by them for that purpose, and a majority of the three shall fix the value of such improvement, and the cost of such ditches, and the value of such crops, and as so fixed shall be paid by the party of the first part to the party of the second part."

"It is the contention of appellant that the lease was terminated the instant a bona fide sale was effected by the lessor, while respondent claims that the termination was

subject to the further condition of payment of the value of the improvements. In other words, the parties differ as to whether the clause providing for said payment constitutes a covenant or a condition. Appellant insists that in harmony with the rule of construction that every word is to be understood in its ordinary and popular sense, we may adopt any of the following definitions of 'provided' as given by Webster, to wit: 'On condition;' 'by stipulation' 'with the understanding.' Substituting these various definitions for 'provided' he argues that 'with the understanding' harmonizes perfectly with the text. 'It creates no discord, and does not limit the meaning and effect of that which precedes or succeeds it, much less nullify and render meaningless important

"That this lease is subject to and is terminated by the sale of said premises herein leased," etc. A contract for sale was made within the term, but, by the terms thereof, the sale was not to be fully consummated until the end of the term; and it was held that there was no such sale as would operate to terminate the lease, and entitle the lessee to the compensation provided in the lease in case of sale. It was said that the parties to the lease contemplated such a sale as would deprive the tenant of possession before the end of the term.

In *Gunsenhiser v. Binder*, 206 Mass. 434, 92 N. E. 705, it was held that a provision in a lease for ten years that "if the lessor at any time after the expiration of the first five years of this lease desires to sell the land, this lease may be terminated on thirty days' notice, in writing, of the lessor's determination, and the payment by the said lessor to the lessee of the sum of \$400 as liquidated damages for the termination of said lease, and upon such termination the lessee shall remove any building within the said thirty days and quietly and peaceably yield up the possession of the premises upon said payment of \$400," constituted a conditional limitation of the lease, and not a mere covenant; that it was not necessary for the lessor (in this case it was the transferee of the reversion, but that fact was not discussed by the court, it being merely stated in connection with a provision in the lease, that "this lease shall bind the parties and their executors, administrators, and assigns") to enter into a binding agreement to convey the premises or to enter upon the land in order to terminate the lease; that a bona fide desire on the part of lessor to sell the premises, with notice to that effect to the tenant, together with a tender of \$400 after five years had expired, terminated the lease thirty days thereafter. And in *Binder v. Gunsenhiser*, 217 Mass. 518, 105 N. E. 459, it was held that the tenant's refusal to accept the tender of the \$400 and to vacate the premises within the thirty days after the notice and until evicted stopped him from recovering the \$400, since the payment of the money was conditional L.R.A.1915C.

upon the lessee's concurrent surrender of the premises within thirty days after notice. Here the facts show that the landlord was acting under the provision.

And in *Outhouse v. Baird*, 121 App. Div. 556, 106 N. Y. Supp. 246, affirmed in 127 App. Div. 917, 111 N. Y. Supp. 1133, it was held that the lessee, who failed to vacate on thirty days' notice, agreeably to a clause in the lease providing that he should do so if the lessor sold the property during the term, and who had to be removed by summary proceedings, was not entitled to recover the value of crops put out before the service of the notice, for which he was to receive compensation, under the terms of the lease, if he gave up possession upon thirty days' notice.

But if lessee does give up possession in compliance with the notice, he has the right to collect the full compensation for which the lease stipulates for the loss of the remainder of his term, and his right to do so is unaffected by the fact that the lessor failed to consummate the sale, or by the fact that the lessee held possession a few days over the time allowed by the notice. *Dierig v. Callahan*, 35 Misc. 30, 70 N. Y. Supp. 210, second appeal in 36 Misc. 854, 74 N. Y. Supp. 1124.

IV. Colorable sales.

The lessee may defend against any action based upon the theory that the lease is or can be terminated by a sale, by proving that the sale was merely a colorable sale; i. e., merely a formal transfer, with no bona fide intent to transfer lessor's estate, made merely for the purpose of terminating the lease (*Ogle v. Hubbel*, 1 Cal. App. 357, 82 Pac. 217; *Dunn v. Jaffray*, 36 Kan. 408, 13 Pac. 781; *Muzzy v. Den*, 25 N. J. L. 471; *Ela v. Bankes*, 37 Wis. 89; *Budlong v. Budlong*, 31 Wash. 228, 71 Pac. 751); but the motive actuating lessor in making a bona fide sale does not affect the question as to the termination of the lease, so he may make a bona fide sale for the express purpose of terminating the lease (*Ela v. Bankes*, 37 Wis. 89).

portions of the paragraph in which it is found. On the other hand, the substitution of the definition "upon condition" creates inconsistency, inharmony, and discord. It practically eliminates succeeding sentences where careful provision is made for the ascertainment and payment of the amount, while its effect on the preceding sentence, "whenever sold this lease shall cease and be at an end," is to convert an absolute, positive, and emphatic declaration into a qualified statement, the effect of which depends upon the will of one of the parties jointly making it.'

"It is undoubtedly true, as claimed by appellant, that stipulations in a contract are not construed as conditions precedent unless that construction is made necessary

by the terms of the contract. Deacon v. Blodget, 111 Cal. 418, 44 Pac. 159; Antonelle v. Kennedy & S. Lumber Co. 140 Cal. 318, 73 Pac. 966. There are also well-considered cases holding that 'provided' does not necessarily impose a condition. In Hartung v. Witte, 59 Wis. 285, 18 N. W. 177, it is said: 'But the words, "upon the express condition," as here used, or the words "if it shall so happen," or provided, however," and the like, do not always make a condition, and it is often a nice question to determine whether it is a condition or a covenant; and courts always construe similar clauses in a deed as covenants rather than as conditions, if they can reasonably do so.' (2 Washb. Real Prop. 4.)

"In Stanley v. Colt, 5 Wall. 119, 18 L. ed.

But it has been held that if the purchaser offers to continue the lease, the premises having been sold subject thereto, the tenant cannot question the good faith of the sale. Allenspach v. Wagner, 9 Colo. 127, 10 Pac. 802.

And it has been held that the tenant cannot, if the purchaser offers to continue the lease, prove that the purchaser's title is imperfect. Dean v. Fails, 8 Port. (Ala.) 491. But this holding would appear to be inconsistent with cases cited in note to Glidden v. Second Ave. Invest. Co. subdiv. VI. d, ante, 190. Such sale, subject to the lease, does not bring the sale clause into operation.

And if the tenant gives up possession in compliance with the landlord's notice that he has sold and desires possession, the tenant is entitled to the stipulated damages or compensation although the sale was merely a colorable one (Davis v. Schweikert, 130 Cal. 143, 62 Pac. 411); or if lessor failed to consummate the sale (Dierig v. Callahan, 35 Misc. 30, 70 N. Y. Supp. 210, second appeal in 36 Misc. 854, 74 N. Y. Supp. 1124).

The question as to whether or not the sale was bona fide is one of fact for the jury upon the evidence. Davis v. Schweikert, supra; Dunn v. Jaffray, 36 Kan. 408, 13 Pac. 781; Muzzy v. Den, 25 N. J. L. 471; Ela v. Bankes, 37 Wis. 89.

If the sale is bona fide, the fact that the purchaser was lessor's wife will not make it colorable, but is to be considered along with other facts as evidence upon the question of good faith in the sale. Davis v. Schweikert, supra; Budlong v. Budlong, 31 Wash. 228, 71 Pac. 751; Ela v. Bankes, 37 Wis. 89.

And the same rule applies where the lessor is a firm, and the sale is made to a member thereof. Dunn v. Jaffray, 36 Kan. 408, 13 Pac. 781.

In Aydtlett v. Pendleton, 114 N. C. 1, 18 S. E. 971, ruling Aydtlett v. Neal, 114 N. C. 7, 18 S. E. 973, where a lease, made by the owner and his wife for the purpose of enabling lessee to erect a building upon the leased premises, provided that the lessee

should have entire control of such building, and that the lease should continue until the lessors should sell the lot, they to give lessee or his assigns thirty days' notice after the sale to remove the building, and after lessor had conveyed a life estate in the lot to his wife, with remainder over to others, and the wife had conveyed to another her life estate, it was held that the purchaser of the life estate was the proper person to give the notice of termination of the lease to lessee, and that there was no necessity for the remainderman to join in the notice; also that such notice of the sale and of the purchaser's intention to terminate the lease was sufficient to terminate it without including a notice to lessee to remove his building.

V. Who enforces provision.

If the principle stated under subdiv. III., supra, is correct, the tenant rarely has the opportunity of enforcing the provision to terminate. Only when the lessor's acts constitute a termination does the tenant become interested, and then his interest is rather in the enforcement of the subsidiary provisions which become operative because of the termination. The cases here cited have reference to the rights, as between lessor and his vendee, to enforce the provision.

Where the lease provides for the termination of the leasehold estate upon a sale by lessor, the purchaser of the reversion may enforce the provision. Miller v. Jenkins, 95 Ark. 144, 128 S. W. 856; McClung v. McPherson, 47 Or. 73, 81 Pac. 567, rehearing denied in 47 Or. 85, 82 Pac. 13; and see other cases, *infra*.

And where the lease provides that lessee must give up possession in case of a sale by the lessor, upon receiving notice for a reasonable time, the vendee of the reversion is the proper person to give the notice. McClung v. McPherson, supra (but it was here held that a notice in the name of the vendor would be good also); and see other cases, *infra*.

502, it is declared that "The word "provided," though an appropriate word to constitute a common-law condition, does not invariably and of necessity do so. On the contrary, it may give way to the intent of the party as gathered from an examination of the whole instrument, and be taken as expressing a limitation in trust."

"Similarly in *Woodruff v. Woodruff*, 44 N. J. Eq. 353, 1 L.R.A. 380, 16 Atl. 6, it is said: "While the words "provided nevertheless" and "upon the following condition" are appropriate words to create a condition,

they do not of necessity create such an estate. They and similar words will give way when the intention of the grantor, as manifested by the whole deed, is otherwise, and they have frequently been explained and applied as expressing simply a covenant or a limitation in trust."

"Indeed, the decisions are uniform to the point that, while ordinarily the word 'provided' indicates that a condition follows, as expressed in *Boston Safe Deposit & T. Co. v. Thomas*, 59 Kan. 470, 53 Pac. 472, 'there is no magic in the term, and the

In *Buhman v. Nickels & B. Bros.* 1 Cal. App. 266, 82 Pa. 85, the lease contained a provision that in case of a sale of the demised premises the lessee "would quit and surrender the demised premises upon thirty days' written notice," and that the lessors would pay to the tenant the cost or actual expense of putting out any crop of hay or grain that he might then have upon the premises. The lessor sold the premises and the purchasers served the notice and offered the compensation. It was held that the lease was terminated, and that an action for unlawful detainer could be maintained at the end of the thirty days by the purchaser against the tenant, who refused to give up possession.

Where the term of a lease of uncleared land was three years, a stipulation in the lease that whatever portion the lessee "clears during the second and third years he is to have and use . . . for the term of three years or for three crops" runs with the land, and is binding upon the transferee of the reversion. *Callan v. McDaniel*, 72 Ala. 96, approved in *McDaniel v. Callan*, 75 Ala. 327.

A provision in a lease that, in the event of a sale of the reversion by lessor during the term, possession by the tenant should be given up peaceably to the purchaser on the lessee's "being paid a reasonable valuation for the unexpired term," does not work a termination of the lease upon merely a sale of the premises by the lessor, but the lessee may hold possession to the end of the term as tenant of the purchaser against the will of the latter, unless the purchaser elects to terminate the lease by paying tenant a reasonable price for the unexpired portion of the term. *McDaniel v. Callan*, supra.

In *Cooper v. Gambill*, 146 Ala. 184, 40 So. 827, the lease before the court contained a provision that if the lessor sold the premises, the lessee would give up possession within a reasonable time thereafter; and it was held that thirty days was a reasonable time; that the purchaser was the proper person to give the notice to vacate; and that a suit for unlawful detainer after the expiration of the time specified in the notice was properly brought in the name of the lessor, to the use of the purchaser.

And where the lease was for one year, and in case the reversion was not sold L.R.A.1915C.

during the year, the tenancy was to continue for a second year, but in case of a sale during the year, and the purchaser's refusal to accept the tenant, the lease was to terminate at the close of the first year, a sale of the premises during the year and a refusal by the purchaser to accept the tenant was held, in *State ex rel. Gillilian v. Municipal Ct.* 123 Minn. 377, 143 N. W. 978, to convert the lease into one for a year only, as if nothing had been said about a second year, so that the purchaser could evict the tenant at the close of the first year.

And where the lease provided that the lessee must give up possession if required to do so by vendee of the reversion in case of sale, in which event the lessor was to pay lessee \$250, the lessee, after giving up possession on notice by the vendee, may maintain an action against the vendor for the \$250, even though the premises were sold "subject to the lease." *Hagen v. Hoyt*, — Iowa, —, 75 N. W. 647.

In *Thomason v. Oates*, 46 Tex. Civ. App. 383, 103 S. W. 1114, where lessee, on renting the property for a year, sent lessor a check for the full year's rent, which was accepted by the lessor upon the condition "that, if I make a sale of the property and have to give possession in order to make the sale, I will reserve the right to terminate the lease at the time; but if purchaser should not demand possession until January 1, 1907, I will not want to terminate the lease," the premises were soon afterwards sold, the purchaser understanding that he was to have immediate possession; it was held that the purchaser had a right to dispossess the tenant, although nothing was said in the transfer about possession.

But it has been held that a notice by the lessor, purporting to terminate the tenancy in ninety days, together with a tender of the stipulated amount of damages therefor, pursuant to the provisions of the lease that, in the event of a sale, the parties of the first part might declare the lease null and void, etc., is sufficient to terminate the lease. *Lewis v. Agoure*, 8 Cal. App. 146, 96 Pac. 327. And see *McClung v. McPherson*, supra, holding that notice by either the vendor or vendee is good.

In *Pepper v. Butler*, 37 U. C. Q. B. 253, the lease before the court contained a provision that "if the lessor at any time shall

clause in a contract is to be construed from the words employed and from the purpose of the parties, gathered from the whole instrument.'

"Respondent, on the contrary, quotes from *Rich v. Atwater*, 16 Conn. 409; *Robertson v. Caw*, 3 Barb. 410, and *De Vitt v. Kaufman County*, 27 Tex. Civ. App. 332, 66 S. W. 224, to the effect that the word 'provided' means 'on condition,' and is the appropriate word for creating a condition precedent.

"It is admitted by appellant that it is an

apt word for that purpose, but he contends that to so interpret it would be against the evident intention of the parties.

"Reflecting, however, that the lease was for the term of five years, and that valuable improvements were likely to be made by the lessee, and that the lessor wanted to be in a position to avail himself of any favorable opportunity to sell the premises to advantage, what is more reasonable than the conclusion that the lessor desired to retain an option to terminate the lease if the would-be purchaser should demand that the premises be

have an opportunity to sell the lot the deed (lease) shall be canceled, and the lessee shall give up the place," the lessor sold the reversion and afterward notified the lessee, who remained in possession until some rent had accrued. In an action by the purchaser against the lessee for the rent, it was held that the lease was not terminated; that the clause gave the lessor the option to terminate the lease when about to sell the reversion, but that, after the sale, he had no longer the right; hence, his notice was not effective; that the lessee was liable to the transferee of the reversion for the after-accrued rent during the full term of the lease.

VI. Miscellaneous holdings.

The holding in *Newell v. Magee*, 30 Ont. Rep. 550, was that the word "tenant," in a provision that in case of a sale the lessee would give up possession and allow any incoming "tenant" to plow the land after harvest, includes the purchaser of the premises.

In *Seaman v. Civill*, 45 Barb. 267, 31 How. Pr. 52, the lease provided that "in case the said Civill shall sell the said premises at any time after the first two years [the term was for five years], he shall pay to to said Seaman \$50, and allow him to gather the crops then sown or planted upon said premises, and Seaman to give up to said Civill." The lessor, after the first two years, sold the premises to the lessee. The action was by lessee against the lessor for the \$50, and it was held that the intention of the parties, as gathered from the whole provision and from the fact that no provisions for the payment of the \$50 had been made in adjusting the purchase price, was that the money was to be paid only in case the tenant should be required to give up possession of the property because of a sale to a third party.

In *Zule v. Zule*, 24 Wend. 76, 35 Am. Dec. 600, where there was a clause in the lease permitting the lessor to sell at any time, and he sold between rent days, it was held that there could be no apportionment of the rent so that lessor could not collect rent for the time between the last rent day before the sale and the latter date. This case was cited and followed in *Nicholson v. Munigle*, 6 Allen, 215. L.R.A.1915C.

The tenant is entitled to emblements as against the purchaser of the reversion when the sale has terminated the leasehold estate by the terms of the lease. *Harwood v. Williams*, 161 Mich. 368, 126 N. W. 475.

In *People's Bank & T. Co. v. Tissier Hardware Co.* 154 Ala. 103, 45 So. 624, a lease containing a stipulation that "at the expiration of their lease, the second party shall have the option of renewing the same, from one to five terms of two years each, subject only to a sale of said property, by giving notice," etc., was construed so that the expression, "subject only to a sale of said property," relates to the word "option," and not to the number of terms for which the lease might be renewed, so that the lease having been renewed before the sale, the purchaser could not oust the tenant until the end of the renewal term.

In *Hickox v. Seegner*, 123 Wis. 128, 101 N. W. 357, a clause in a lease dated October 15, 1899, for a term of five years, which provided that "this lease will expire after three years from October 15, 1899, if the leased property is sold," was construed to mean that if the sale took place after three years from the date of the lease, the lessee's estate terminated at once, and the court refused to adopt the construction that would terminate the lease at the end of the three years, provided the property had been sold prior to that time.

In *Lumbers v. Gold Medal Furniture Mfg. Co.* 30 Can. S. C. 55, it was held that an agreement for a sale of the premises by the lessor, although oral, and therefore within the statute of frauds, was a "disposition" of the premises within the meaning of a clause in a lease of the premises providing "that in the event of the lessor disposing of the factory the lessees will vacate the premises if necessary on receiving six month's notice, or a bonus of \$350;" at least, to the extent that the lessor, who gave the required notice in good faith, cannot be held liable for damages caused to the lessee, who acted upon the notice and vacated the premises at a loss to himself, under a subsequent arrangement with the lessor, before the six months had expired, either upon the theory that the damages were caused by false representations of lessor, or on the theory that there was a breach of the quiet-enjoyment covenant in the lease.

J. W. M.

conveyed free from encumbrance? Of course, it is only in view of such a contingency that there would be any reason for leaving the lessor a choice as to the payment for the improvements. It would hardly be supposed that he was so generous as to chose to pay unless the exigency of a profitable sale made it to his advantage to do so. On the other hand, the lessee would hardly be willing to have his valuable leasehold interest destroyed at any time by a sale without at least some protection for his outlay on the property. And he might, quite naturally, desire more security than the mere personal covenant of the lessor to pay him for his improvements. He would, therefore, as a reasonable man, insist that if the lessor is to have the privilege of selling the property at any time, and desires thereby to terminate the lease, it must be upon the condition that he pay for the improvements. It would immediately occur to the parties, however, that in the case the improvements are to be paid for some question might arise as to their value; and for the purpose of determining this the judgment of two—and, in case of their disagreement, of three—arbitrators, it might be considered expedient to invoke. If the parties had these conditions in mind, would they not with sufficient accuracy express their intention by declaring that 'the lessor may sell the demised premises at any time during said term. Whenever sold the lease shall cease and be at an end, provided that the party of the first part shall then pay to the party of the second part the value of the improvements placed thereon by said party of the second part, to be agreed upon by said parties, and if they cannot agree, said value to be determined by two disinterested parties, and in a case of their disagreement, a third party shall be selected, and a majority of the three shall fix the value of the improvements to be paid by said party of the first part?' This is substantially the language used, and to adopt the construction of appellant, we must depart from the primary meaning of the word 'provided,' and hold that the parties used it in a secondary sense. The argument of appellant is interesting and ingenious, but it cannot change the fact that, attributing the usual and ordinary signification to the language of the parties, a condition is found in the provision in question. Nor, if we bear in mind the contingency already suggested and implied in the terms employed, does the conclusion of the learned trial judge derogate from the force of the seemingly positive promise to pay for the improvements.

"But, accepting appellant's interpretation, how does the case appear? If the lease was L.R.A.1915C.

terminated by the sale, it was the duty of defendant to surrender the premises. It is indeed so provided in these words: 'At the end of said term or early ending of this lease the party of the second part shall surrender possession of the demised premises in good order and condition.' It is the duty of the lessor to pay for the improvements. The lessor failed to pay, and the lessee continued in possession. It is admitted that the lessor's covenant was a personal one, it was not made subject to a lien upon the land, nor, upon appellant's theory, was the lessee authorized to remain in possession until he was paid for the improvements. The lessee's redress, therefore, for the violation of the lessor's promise, is a personal action against the latter for the value of the improvements. The lessee occupied and used the premises to his profit by virtue of no other right than that created by the lease until after the payment of the rent became due, indeed, until the end of the year. It is true that another lease was executed by plaintiff to defendant and his son, but this was on November 17th,—two days after said rent was due,—and it was not to take effect until December 1st. There can be no doubt, then, that defendant, having occupied the premises for the whole year, was burdened with the obligation to pay for the use thereof. The only question that could arise would be whether he should pay the rent prescribed in the lease, or what the use of the premises was reasonably worth. This we need not determine, as, in another view, assuming the termination of the lease by the sale, it would seem that defendant cannot escape the payment of the rent. As already seen, the said sale occurred only five days before the rental was to be paid, and less than a month before the expiration of one year of occupancy by said lessee. This \$1,500 was the balance of the annual rental, and since there was no agreement as to any apportionment or abatement of rent, in the absence of any statutory provision, in case of termination of the lease before the rent was due, the rule would be as stated in § 389 of Taylor's Landlord & Tenant: 'It is well settled that in all cases of periodical payments, accruing at intervals, and not *de die in diem*, there can be no apportionment, for rent will not be apportioned in respect of time, unless by force of a statute or of some special provision of the lease.' But § 1935 of the Civil Code provides the rule in this state as follows: 'When the hiring of a thing is terminated before the time originally agreed upon, the hirer must pay the due proportion of the hire for such use as he has actually made of the thing, unless such use is merely nominal, and of no benefit to him.' As has al-

ready appeared, the defendant actually had use of the property for the entire year under the original lease, but if the computation should be limited to the date of the sale it amounts practically to the same thing, and, under the evidence, it cannot be said that the use was merely nominal or of no value to defendant.

"It was rightly held, we think, that the claim for the rent was transferred to plaintiff, and therefore he was the proper party to institute the action. Indeed, the evidence shows that defendant did not object to paying the rent to plaintiff, but he insisted that he should be reimbursed by the said plaintiff for the value of the improvements. But this cannot be urged as an offset to plaintiff's claim, since plaintiff did not undertake to pay therefor. If there be anything due for said improvements, it must be from original lessor.

"The judgment is affirmed."

Sloss and Lorigan, JJ., concur.

Shaw, J., concurring:

I concur in the judgment of affirmance, and I agree with the conclusion of Justice Burnett that the provision in the lease of 1905, requiring the ending of the term upon a sale of the premises by the lessor, is a condition, and not a mere covenant. I do not think, however, that the opinion fully states the grounds upon which the judgment must rest. The provision for the termination of the lease upon a sale of the premises was solely for the benefit of the lessor. *Foley v. Constantino*, 43 Misc. 91, 86 N. Y. Supp. 780. He could undoubtedly waive the benefit thereof, and, without terminating the lease, he could sell and convey the premises subject to the lease. The grantee, if the lessor did not act in the matter prior to the conveyance, could also waive the right and continue the lease in force. In that case the lessee would have no right to declare the lease terminated and demand payment for his improvements. The part of the provision which was for his benefit was that which gave him the right to demand payment for his improvements as a condition concurrent with the exercise by the lessor or his grantee of the option to terminate the lease. If either attempted to exercise the option, the lessee could demand payment for his improvements, and the lease would not terminate until such payment was made. The evidence shows that the grantee, Diepenbrock, refused to pay for the improvements when the sale to him was made. As neither he nor Brown, the original lessor, paid or offered to pay the lessee for the improvements, the right which they had to terminate the lease upon that sale was L.R.A.1915C.

thereby waived, and the lease continued in force unaffected by the sale. The lessee had the right to continue in possession of the premises for the full term of five years. Instead of doing so, however, the lessee voluntarily executed another lease on November 17, 1906, seven days after the sale and two days after the rent in question became due, whereby he and his son became lessees of the premises upon different terms of rent for the period of one year, beginning December 1, 1906. This transaction abrogated the previous lease for all that part of the original term subsequent to the beginning of the new lease. But it did not relieve the lessee from the obligation to pay the rent already accrued under the old lease at the time the new lease was made, nor did it preserve to him the right to demand payment for his improvements. The making of this new lease may have been unwise, but there is no claim that it was not voluntarily and intelligently made. The lessee must take the consequences of the condition in which he has voluntarily placed himself and pay the rent accrued under the old lease in accordance with his contract to do so.

Henshaw and Angellotti, JJ., concur.

RHODE ISLAND SUPREME COURT.

ORVILLE G. BARBER et al.

v.

WATCH HILL FIRE DISTRICT.

(— R. I. —, 89 Atl. 1056.)

Landlord and tenant — holding over — rights.

1. A tenant for years who holds over after the expiration of the term becomes a tenant from year to year, subject to all the covenants and stipulations in the lease so far as they are applicable to the new condition of things.

Same — assignment of reversion — right to re-enter.

2. An assignee of the reversion of a leasehold cannot enter because of rent which was due and unpaid at the time of the assignment.

On Petition for Rehearing.

Same — effect of statute.

3. A statute permitting re-entry for default in payment of rent does not authorize re-entry by an assignee of the reversion for

Note. — Landlord and tenant: right of transferee of reversion as to breaches of covenant occurring before transfer.

- I. The general rule, 246.
- II. Reasons for rule, 246.
- III. Continuing breaches, 247.

rent overdue at the time of the assignment, the right to which was retained by the assignor.

(March 25, 1914.)

EXCEPTIONS by defendant to rulings of the Superior Court for Washington County, made during the trial of an action brought to recover damages for an alleged trespass in removing plaintiff's building from land which had been conveyed to defendant, which resulted in a verdict for plaintiff. Overruled.

The facts are stated in the opinion.

Messrs. Harry B. Agard and Samuel H. Davis, for defendant:

At the time of the injuries complained

On the general question of transfer of reversion, and its effect upon the rights and liabilities of the parties, see note to *Glidden v. Second Ave. Invest. Co.* ante, 190.

As to transferor's right of action for breach of covenant in the lease, see note to *Glidden v. Second Ave. Invest. Co.* ante, 190, subsec. V. c, 1.

I. The general rule.

The general rule is that there is no liability, as between the transferee of the reversion and the lessee, for a breach of covenant occurring prior to the transfer. *Canham v. Rust*, 8 Taunt, 227, 2 J. B. Moore, 164; *Flight v. Bentley*, 7 Sim. 149, 4 L. J. Ch. N. S. 262; *Lewes v. Ridge*, Cro. Eliz. pt. 2, p. 863; *Johnson v. St. Peter*, 4 Ad. & El. 520, 4 Nev. & M. 186, 1 H. & W. 720, 5 L. J. K. B. N. S. 116; *Morris v. Kennedy* [1896] 2 I. R. 247; *Kent v. Stoney*, 9 Ir. Ch. Rep. 249; *Coey v. Pascoe* [1899] 1 I. R. 125; *Brereton v. Touhey*, 8 Ir. Ch. Rep. 190; *Cohen Tannar* [1900] 2 Q. B. 609, 69 L. J. Q. B. N. S. 904, 48 Week. Rep. 642, 83 L. T. N. S. 64; *Matthews v. Alsworth*, 45 La. Ann. 465, 12 So. 518; *Devlin v. Le Tourneau*, 122 Minn. 184, 142 N. W. 155; *Gerzebek v. Lord*, 33 N. J. L. 240; *Mirick v. Bashford*, 38 Barb. 191; *Coffin v. Talman*, 8 N. Y. 465; *Palmer v. Brooklyn*, 28 N. Y. S. R. 139, 8 N. Y. Supp. 6; *Leopold v. Baum*, 110 N. Y. Supp. 1054, affirmed in 113 N. Y. Supp. 1136; *BARBER v. WATCH HILL FIRE DIST.*; *Shelby v. Hearne*, 6 Yerg. 512.

Under this rule, rent accruing prior to transfer cannot be collected by the transferee of the reversion; but cases involving that question have been cited in note to *Glidden v. Second Ave. Invest. Co.* ante, 190, subsec. IV. c, 2 (e) (2) and are not included here.

And the rule that the personal representatives of an intestate, and not his heirs, are the proper parties to sue for a breach of covenant occurring prior to the death of the decedent, is based upon this principle. See cases cited in note to *Glidden v. Second Ave. Invest. Co.* ante, 190, subsec. III. d. L.R.A.1915C.

of, the tenancy of the plaintiffs, whatever it may have been at one time, had become extinguished by operation of the law, and the defendant had the right to dispossess them and recover possession of the premises. This right had accrued to the defendant by virtue of the provisions of § 7, chap. 334 of the General Laws of 1909.

Mr. Fred C. Olney, for plaintiffs:

The question whether the Barbers were tenants from year to year was purely within the province of the jury, and the jury by its verdict have answered that proposition in the affirmative.

Tenants from year to year are entitled to a notice in writing at least three months prior to the recurrence of the year, in order to discharge the tenancy.

II. Reasons for rule.

The party owning the real estate at the time of the breach is ordinarily the one injured thereby. Prima facie, he is the party to bring the action, even though he has parted with the real estate, since the statute 34 Hen. VIII. chap. 34, and state statutes of a similar import, could not well be construed as taking away from the transferor his right of action for an injury causing loss to him personally in the depreciated value of the property, and giving it to the transferee, who has suffered no loss. This is believed to be the correct reason for the rule as above stated, since it is founded on reason, and its application does not lead to conclusions that have been repudiated.

It has been held, however, that a reason for the rule is the doctrine that a right to sue on a chose in action is not transferable. *Tiffany, Land. & T.* § 149 (9), citing *Lewes v. Ridge*, Cro. Eliz. pt. 2, p. 863, and 2 Platt, Leases, 386. But, as Mr. Tiffany points out, this reason for the rule is unsatisfactory: (1) The doctrine that the right of action is not transferable would, of necessity, yield to the above-mentioned statutes to pass a particular right of action. (2) Even in jurisdictions where statutes make a right of action transferable, it seems that actions for breaches of covenant occurring prior to the transfer do not pass to the transferee unless the language used in the transfer or some circumstance clearly indicates an intention to transfer the right of action. *Indianapolis Natural Gas Co. v. Pierce*, 25 Ind. App. 116, 56 N. E. 137 (here the fact that the term of the lease had expired when transferred, and the lessor had assigned all his "interest, right, and title in the base," was held to show an intention to pass the right of action for a prior breach of covenant); *Outtoun v. Dulin*, 72 Md. 536, 20 Atl. 134 (here it was held that the mere transfer of the reversion entitled the transferee to sue either in covenant or in debt for only the rent subsequently accrued; but, by a separate instrument, there was a transfer to same plaintiff of "all the rents

Providence County Sav. Bank v. Hall, 16 R. I. 154, 13 Atl. 122.

If the jury have found in a particular way, and coupled with that finding there has been a confirmation thereof by the justice presiding at the trial, such finding is conclusive and binding on all.

Wilcox v. Rhode Island Co. 29 R. I. 292, 70 Atl. 913.

Vincent, J., delivered the opinion of the court:

This is an action of trespass brought by Orville G. Barber and Mary T. Barber, his wife, both of Westerly, Rhode Island, against the Watch Hill Fire District, a quasi municipal corporation, also located in said Westerly. It appears from the evi-

due" under the lease, and it was held that this instrument, by virtue of a statute enabling the transfer of a chose in action, entitled plaintiff to include in his claim rents accrued prior to the assignment); see also cases cited in note to Glidden v. Second Ave. Invest. Co. ante, 190, subsec. IV. c, (2) (3). Independent of any statute, the transferee of the reversion may, within certain limitations, sue upon the covenants in the name of the lessor, provided that an intention to pass the benefit of the covenants clearly appears. See note to Glidden v. Second Ave. Invest. Co. ante, 190, subsec. IV. c, 1. This doctrine would not be restricted to breaches occurring after the transfer, if the only reason for the rule were that a chose in action cannot be assigned.

III. Continuing breaches.

A covenant to keep the premises in repair runs with the land and is binding upon the covenantor and upon the transferee after the transfer (see note to Glidden v. Second Ave. Invest. Co. ante, 190, subsec. IV. c, 2 (e), (4).), and the rule is not changed as to transferee by the fact that a breach occurred prior to the transfer if the premises remain out of repair thereafter, as in such case the breach is a continuous one (Bennett v. Herring, 3 C. B. N. S. 370, 6 Week. Rep. 37; Coward v. Gregory, L. R. 2 C. P. 153, 36 L. J. C. P. N. S. 1, 12 Jur. N. S. 1000, 15 L. T. N. S. 279, 15 Week. Rep. 170; Vivian v. Champion, 2 Ld. Raym. 1125, 1 Salk. 141, Holt, 178; Abrams v. Watson, 59 Ala. 524; Harris v. Goslin, 3 Harr. [Del.] 338; Hendrix v. Dickson, 69 Mo. App. 197; Gerzebek v. Lord, 33 N. J. L. 240). As to liability of transferrer, see note to Glidden v. Second Ave. Invest. Co. ante, 190, subsec. V. c, 3.

And right of a transferee to sue upon a covenant to repair has been made to turn upon the time of notice, i. e., where lessor was to notify the tenant to repair, the transferee, after serving notice upon the tenant, can sue for breach upon tenant's subsequent failure to repair, although the tenant had failed to repair before the transfer, presum-

dence that Walter Price, late of said Westerly, was the owner of a certain lot or parcel of land situate in that portion of said town of Westerly called Watch Hill, and, being so possessed, leased the same, by an indenture duly executed, to the plaintiff Orville G. Barber, for the term of five years from February 1, 1895, at an annual rent of \$50, payable on the 1st day of August in each and every year succeeding said 1st day of February, 1895. On February 21, 1898, the said Orville G. Barber, by an instrument duly executed, assigned, transferred, and set over to his wife, Mary T. Barber, all his interest in said lot or parcel of land acquired under said lease for the remainder of the term therein mentioned. Upon this lot the plaintiffs erected a frame

ably this rule is based upon the theory that there was no breach until after notice, even though the premises were in disrepair prior to that time). Mascal's Case, Leon, pt. 1, p. 62.

But a covenant to put the premises in repair in certain specified ways, which covenant can be broken but once, is not binding upon the transferee of the reversion if the breach occurred prior to the transfer, and a reasonable time for action upon the same elapsed between the time of breach and the time of the transfer. Coward v. Gregory, L. R. 2 C. P. 153, 36 L. J. P. C. N. S. 1, 12 Jur. N. S. 1000, 15 L. T. N. S. 279, 15 Week. Rep. 170; Gerzebek v. Lord, 33 N. J. L. 240.

Where there is a covenant to make certain improvements upon the premises within a definite specified time, and the transfer is subsequent to that time, the transferee cannot sue for breach of the covenant. Morris v. Kennedy, [1896] 2 I. R. 247; Kent v. Stoney, 9 Ir. Ch. Rep. 249; Coey v. Pascoe, [1899] 1 I. R. 125; Brereton v. Touhey, 8 Ir. Ch. Rep. 190.

And if repairs are to be made by the lessor, such as painting the house inside and out, or other repairs that were evidently intended to be done preparatory to or at about the time lessee took possession of the premises, and no time is set for performance, it will be presumed that they were to be done within a reasonable time after the date of the lease; hence, a transferee of the reversion by a transfer dated after a reasonable time has elapsed is not liable to lessee for breach thereof, since the breach will be regarded as having occurred prior to the transfer (Gerzebek v. Lord, supra; two years was regarded as ample time in which to perform), or, if circumstances and the action of the parties show that the repairs were to be made prior to the date of the transfer, the transferee of the reversion is not liable for breach of the covenant (Mirick v. Bashford, 38 Barb. 191).

In Sampson v. Easterby, 9 Barn. & C. 505, 4 Mann. & R. 422, 5 L. J. K. B. 291, affirmed in 6 Bing. 644, 5 Moore & P. 601, 1 Crompt. & J. 105, the lease referred to a prior contract wherein lessees were to build

building which was used by them in the summer season as a candy and confectionery store and restaurant. Upon the expiration of the lease on the 1st of February, 1900, the same was not renewed. The plaintiffs continued to occupy the premises upon the understanding with the owner, Walter Price, that they might do so as tenants from year to year. Further than this there was no new agreement or understanding between the parties as to future occupancy. Under these conditions, the plaintiffs remained in possession of the lot and carried on business there down to and including the summer of 1909. During this period the plaintiffs did not pay the annual rental of \$50 on the 1st day of August; but, through the indulgence of Mr. Price, made such payments at such time or times in the fall, usually between September 1st and November 1st, as might best suit their convenience. On the 30th of December, 1909, Walter Price conveyed the lot in question, upon which the plaintiffs' building was situated, to the defendant, the Watch Hill Fire District, by deed of that date. The defendant, through its attorneys, had several conversations with Mrs. Barber, both before and after it acquired title to the lot, and finally, under date of March 28, 1910, addressed a letter to the plaintiff Mary T. Barber, notifying her of its purchase of the lot from Price, and that, unless the building was removed by April 2, 1910, the defendant, the Watch Hill Fire District, would proceed to remove it or dispose of it at her expense. There is no claim, on the part of the defendant, that any attempt was made to give the plaintiff Mrs. Barber a legal notice to quit the premises in question. All communications or conferences with her, whether oral or written, appear to have been directed to the making of some arrangement for the removal of the building. The plaintiffs not having removed the building by the 2d of April, 1910, as requested by the defendant, the defendant, later in said month, or in the following month of May, had it taken to pieces and the lumber placed upon a vacant lot near by, the contents of the building being stored. This removal of the

a mill in connection with the use of the premises leased, and contained a covenant by lessees to keep the mill in repair, and leave it in good repair at the expiration of the term. It was held that the transferee of the reversion could maintain an action for breach of the implied covenant to build the mill. The court does not discuss the question as to the breach prior to the transfer, but, even if the mills should have been built before the transfer, the building of the mill would be necessary to the keeping of the covenants to repair and leave it in L.R.A.1915C.

building was effected in spite of the protest of the plaintiffs.

In entering upon the discussion of the questions involved, it is first desirable to determine the rights of the plaintiffs as to the possession of this lot, as tenants, at the time of the alleged trespass. The law seems to be well settled, as stated in 24 Cyc. 1033, that "where a lessee for years holds over after the expiration of his term, and becomes a tenant from year to year, the tenancy is subject to all the covenants and stipulations contained in the original lease, so far as they are applicable to the new condition of things." *Evertson v. Sawyer*, 2 Wend. 507; *Gardner v. Dakota County*, 21 Minn. 33; *Laguereenne v. Dougherty*, 35 Pa. 45; *Goldsborough v. Gable*, 140 Ill. 269, 15 L.R.A. 294, 29 N. E. 722; *Vrooman v. McKaig*, 4 Md. 450, 59 Am. Dec. 85.

In the second place, it is necessary to determine whether or not the entry of the defendant upon these premises was justified under the provisions of § 7, chap. 334, of Gen. Laws of 1909, which provides that the landlord or reversioner, where the rent is due and in arrear for a period of fifteen days, may re-enter and repossess himself of the lands, etc. That is to say, was there any rent due from the plaintiffs to the defendant and in arrear for fifteen days at the time of the alleged trespass? According to the terms of the original lease from Price to the plaintiffs, which we have already found are controlling in the absence of any other or different agreement between the parties, the annual rent was due and payable on the 1st day of August in each year. This brings us down to the single question as to whether the transfer of the reversion carried to the assignee the right to rents already accrued. We do not think it did. The great weight of authority is that the transfer of the reversion will not carry rents already accrued, but only such as have not yet become due. *Coffey v. Hunt*, 75 Ala. 236; *Bordereaux v. Walker*, 85 Ill. App. 86; *Van Driel v. Rosierz*, 26 Iowa, 575; *Damren v. American Light & P. Co.* 91 Me. 334, 40 Atl. 63; *Williams v. Williams*, 118 Mich. 477, 76 N. W. 1039; *Burden v. Thayer*, 3 Met. 76, 37 Am. Dec.

good repair, so that breach was probably regarded as continuous.

Where lessor has waived the breach of a covenant not to sublease the premises, and has conveyed the reversion subject to the rights of all tenants now in possession, the same sublessee's remaining in possession after the transfer does not constitute a new breach or a continuing breach that will give the transferee the right to forfeit the lease. *Devlin v. Le Tourneau*, 122 Minn. 184, 142 N. W. 155. J. W. M.

117; *Farmers' & M. Bank v. Ege*, 9 Watts, 436, 36 Am. Dec. 130.

The rent of the premises for the year beginning February 1, 1909, and ending February 1, 1910, was due August 1, 1909, and did not pass to the defendant by the deed from Price under date of December 30, 1909. At the time when the defendant entered upon the premises and razed and removed the plaintiffs' building, there was no rent due from the plaintiffs to the defendant, and the defendant had no standing as a landlord or reversioner who may re-enter on the ground that rent is in arrear for fifteen days, nor were the plaintiffs the recipients at any time of any statutory notice to quit. The defendant was clearly a trespasser.

At the trial the defendant took exception to the ruling of the court admitting in evidence the lease from Price to the plaintiffs covering a period of five years from February 1, 1895, and also to the denial of his first request to charge, relating to the right of the defendant to re-enter, the rent being in arrear, etc. Inasmuch as the conclusions which we have already reached show the importance of the lease as evidence, and that the defendant had no right of re-entry for nonpayment of rent, a particular discussion of those exceptions would be but a repetition of what we have already said upon those points.

All of the defendant's exceptions are overruled, and the case is remitted to the Superior Court, with direction to enter judgment on the verdict.

Petition for rehearing denied.

A petition for rehearing having been filed, the following *Per Curiam* response was handed down April 15, 1914 (— R. I. —, 90 Atl. 161):

Since the opinion of this court in the above-entitled case, defendant has filed a motion for reargument.

In its former opinion the court reached the conclusion, after a careful examination of the question, that the rent due from the plaintiffs to Walter Price for the year beginning February 1, 1909, and ending February 1, 1910, was due August 1, 1909, and also that the right to collect such rent did not pass to the defendant under the deed from Walter Price of December 30, 1909. The deed from Price to the defendant does not purport to convey any interest in rent already accrued, and therefore the right to collect such rent from the plaintiffs did not pass to the defendant, but remained in Price. The authorities recognize a distinction between rent that has already accrued and rent which becomes due after the re-

version, holding that in the one case the right remains in the grantor, and in the other passes to the grantee, without being specifically mentioned in the conveyance.

The main question argued by the defendant in its motion for reargument is that the right of the reversioner to re-enter for nonpayment of rent still exists unimpaired, although it has no claim to the unpaid rent. In other words, that the right to re-enter passes to the reversioner independently of the right to the rent. As before stated, the deed from Price to the defendant of December 30, 1909, does not purport to convey any right or interest in the rent of the premises in question, which accrued on August 1, 1909. The statute (Gen. Laws of 1909 § 7, chap. 334) is, of course, intended for the protection of landlords and reversioners, and to enable them to regain prompt possession of their premises where tenants are unwilling or unable to pay the stipulated rent. It would be futile to discuss what might have been the situation of the parties had the conveyance from Price to the defendant of December 30, 1909, transferred the right of Price to the accrued rent to the defendant. The defendant, in its motion for reargument, asks us to construe the statute above referred to as giving the defendant, as reversioner, the right to re-enter for nonpayment of rent due to its predecessor in title while the right to collect the same still remains in him. We do not think that the statute in question warrants such a liberal construction. The purpose of the statute, as we have already said, is to protect the landlord. Mr. Price, by his deed, surrendered the title and possession of the property to the defendant, retaining his right to demand and receive the rent already accrued. We do not think that the defendant, who has no claim for rent against the plaintiff, can avail himself of the right of re-entry under the statute when such right wholly depends upon a default in payment of rent. The plaintiffs were not in default, so far as the defendant was concerned, and it would be going too far to hold that the defendant could avail itself of the nonpayment of rent to Price without succeeding to his right to collect it.

We notice the defendant's citation from *Taylor's Landlord & Tenant*, 9th ed. § 440. It is doubtless true that the conveyance to the defendant would have carried the right to rents accruing after the date thereof, although no express mention of such rents was contained in the conveyance; but, there being no mention of accrued rents in the deed, there is abundant authority for the finding of the court that such rents do not pass to the reversioner. Under these con-

ditions, the claim resolves itself into one of a personal character between Mr. Price and the plaintiffs. The defendant saw fit to take a conveyance of the premises, which did not embrace rents already accrued, without ascertaining what might be the rights of the plaintiffs who were in possession, and without seeking to dispossess them by any arrangement or agreement.

We do not see the defendant's motion for reargument any questions which we have not already considered in arriving at the conclusions contained in our former opinion, and therefore the defendant's motion for reargument is denied and dismissed.

MISSISSIPPI SUPREME COURT.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, Appt.,

v.

G. Y. CRAWFORD.

(— Miss. —, 65 So. 462.)

Railroad — contract for loading logs — monopoly.

1. An exclusive contract between a railroad company and a private corporation to load the logs of private shippers between

Note. — Validity of monopoly or special privilege granted to third persons, of providing facilities to shippers at place of shipment or destination.

The question here raised may generally be determined by the consideration of the further question as to whether or not the contract involved is discriminatory. The question as to the right of a carrier to discriminate between shippers has been treated in the following L.R.A. notes: 5 L.R.A.(N.S.) 783, as to the right of a railroad to give exclusive or preferential facilities; 32 L.R.A.(N.S.) 1181, as to the right of a carrier to give exclusive train privileges to baggage or passenger transfer company; 12 L.R.A.(N.S.) 506, as to the right of a carrier to discriminate with respect to special or unusual service; 43 L.R.A.(N.S.) 965, as to the right of a railroad to discriminate as to wharf privileges.

As shown in the foregoing notes, it is unlawful for a common carrier to discriminate between shippers. On the question as to what constitutes a discrimination, YAZOO & M. VALLEY R. CO. v. CRAWFORD is a valuable case, in that it brings out clearly the distinction between conferring an exclusive privilege relating to a matter outside the legal duties of the carrier, and conferring a grant with reference to a matter within the legal duties of the carrier to perform under its contract of carriage. Upon this point the holding is that where a carrier as a matter of accommodation is performing

stations along the railroad right of way is not invalid as creating a monopoly or granting special privileges to such corporation, since the loading between stations is not a service which the railroad company is bound to undertake, and if it does undertake it for the convenience of shippers it may place such restrictions on it as it sees fit.

Estoppel — to withdraw permission to load logs.

2. That an individual has built up a log loading business between stations along a railroad right of way on the faith of permission granted by the railroad company does not prevent the railroad company from withdrawing the permission and entering into an exclusive contract with another for such service.

Railroads — contract to load logs — liability for neglect.

3. A railroad company which enters into an exclusive contract with a private corporation for the loading of logs tendered for shipment between stations along its right of way is liable for injury to the business of a shipper by the negligence of the contractor to load with reasonable promptness logs tendered.

(June 15, 1914.)

A PPEAL by defendant from a judgment of the Circuit Court for Bolivar Coun-

some service to shippers which at law it is under no obligation to perform, it may impose any reasonable restriction on such performance without thereby being guilty of discriminating or creating a monopoly. For example, since a common carrier is under no obligation to receive shipments between stations, if it does so, it may validly contract that a third party shall receive and load such shipments without discrimination between shippers, and the contract is not unlawful, although a charge is imposed upon the shippers by this third party for the service performed. This holding, however, can be sustained only upon the ground that the receiving of these shipments between stations was not within the legal duty of the carrier.

In this regard the case is distinguishable from Covington Stock Yards Co. v. Keith, 139 U. S. 128, 35 L. ed. 73, 11 Sup. Ct. Rep. 461, which in effect holds that it is the duty of a railroad company to furnish stock yard facilities to shippers, and while it may validly contract with a third person to perform this duty for it, if no extra charge is imposed on the shipper, it cannot, however, give exclusive stock yard privileges to a particular yard where this yard imposes on the shipper a charge for the facilities afforded. In such case the railroad company cannot be said to have performed its legal duty by delivering stock to such a stock yard, and hence will be required to deliver stock to the stock yard of the shipper if reasonably accessible.

ty in plaintiff's favor in an action brought to recover damages for alleged unjust discrimination by defendant in denying plaintiff the right to operate log loaders on defendant's line of railroad between stations. Reversed.

The facts are stated in the opinion.

Messrs. Mayes & Mayes, with Messrs. Charles N. Burch, H. D. Minor, and F. A. Montgomery, for appellant:

Defendant had the right to regulate and control by exclusive contract the instrumentalities operating on its road for profit, so long as all shippers were treated alike.

Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 119, 52 L. ed. 712, 28 Sup. Ct. Rep. 493; Merchants Cotton Press & Storage Co. v. Illinois C. R. Co. 17 Inters. Com. Rep. 98; Interstate Commerce Commission v. Baltimore & O. R. Co. 3 Inters. Com. Rep. 192, 43 Fed. 50; Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700.

The contract with the Valley Log Loading Company is one which the defendant had the legal right to make exclusive.

Southwestern Produce Distributors v. Wabash R. Co. 20 Inters. Com. Rep. 458; Express Cases, 117 U. S. 24, 29 L. ed. 801,

6 Sup. Ct. Rep. 542, 628; Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co. 139 U. S. 79, 35 L. ed. 97, 11 Sup. Ct. Rep. 490; Railroad Commission v. Louisville & N. R. Co. 10 Inters. Com. Rep. 173; Central Stock Yards Co. v. Louisville & N. R. Co. 192 U. S. 568, 48 L. ed. 565, 24 Sup. Ct. Rep. 339; Louisville & N. R. Co. v. Central Stock Yards Co. 212 U. S. 132, 53 L. ed. 441, 29 Sup. Ct. Rep. 246; Butchers' & D. Stock-Yards Co. v. Louisville & N. R. Co. 14 C. C. A. 290, 31 U. S. App. 252, 67 Fed. 44.

The railroad company never was under any obligations as a common carrier to permit the loading of logs at points along its lines between stations.

4 Elliott, Railroads, 2d ed. § 1411.

Messrs. T. S. Owen, Bedford & Allen, and Sillers & Sillers for appellee.

Harris, Special Judge, delivered the opinion of the court:

This is an appeal from a judgment rendered in the circuit court of Bolivar county against the railroad company in favor of G. Y. Crawford, from which the railroad company appeals.

The facts which led to the institution of the suit are substantially as follows: Owing to the peculiar topography of the

And also on this point the case may be distinguished from *Richmond v. Dubuque & S. C. R. Co.* 26 Iowa, 191, sustaining the validity of a contract by a common carrier with an elevator company to handle all through grain transported over its lines, where such transfer was within the line of the duty of the carrier. Upon the question as to the validity of this contract, especially as affected by the question of monopoly, the court said: "Without deciding what the law is upon the question of monopoly, suppose it to be conceded as claimed, what then? The defendants, as common carriers of grain over their line of road, were bound to unload it from their cars when they reached the terminus of the line on the bank of the river, which there formed a barrier to their being run further. To unload the grain with ordinary shovels and manual labor was necessarily tedious, expensive, and wasteful. The manner or means of discharging the grain was legitimately and properly within the discretion of the carrier, and the shipper or consignor could not rightfully control the carrier in that particular (providing no prejudice resulted to him) any more than he could control as to the structure of the steam engine or the fuel to be used in the hauling of the cars over the road. While the consignor has most unquestionably the right to direct and control as to which of the two or more connecting lines shall receive his consignment, yet that is a very different question from controlling the manner in which the L.R.A.1915C.

carrier shall perform his undertaking. And if the carrier shall make his contract with one laborer or with a certain number of laborers, whereby, in consideration of having the unloading of all the grain, he or they will do it at a certain price, such contract could hardly be called the giving of a monopoly. Whether the employee be one or many laborers, or be the proprietors of an elevator, can make no difference upon the question of monopoly."

Upon this general question, as to the validity of such a contract, the remarks of Judge Taft in *United States v. Addyston Pipe & Steel Co.* 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271, are apt. Speaking as to the validity of sleeping car and stock yard delivery contracts, he says: "The main purpose of such a contract is to furnish sleeping car facilities to the public. The railroad company may discharge this duty itself to the public and allow no one else to do it, or it may hire someone to do it, and, to secure the necessary investment of capital in the discharge of the duty, may secure to the sleeping car company the same freedom from competition that it would have itself in discharging the duty. The restraint upon itself is properly proportioned to, and is only ancillary to, the main purpose of the contract, which is to secure proper facilities to the public. . . . There is hardly more objection on the ground of public policy to such a restriction upon a railway company in cases like these, than there would be to a restric-

country, and the difficulties attendant upon carrying logs for shipment to the established stations of the railroad company, the railroad company for some years undertook to receive logs for shipment at points along its right of way between stations, for the mutual convenience of itself and shippers of logs, requiring the shippers to load their logs; but extended to persons owning log loading machinery the privilege of loading logs at any point along the road where the same might be accumulated, the company furnishing flat cars, engines, and crews for moving the logs when loaded, and also for moving the log loading machinery from place to place as it became necessary for the loading of logs, and allowed the owners of log loading machinery, not only to load logs for their own mills where they were owners of mills, but also to load logs for other parties owning mills, who did not own log loading machinery, and to charge the parties served for the loading. The log loader is a device which is put upon a flat car, and, by means of a derrick and other appliances, the logs are lifted from the ground and deposited upon the flat cars. This privilege and arrangement were confined entirely to one portion of the railroad company's line, and were altogether exceptional, and due to the peculiar conditions existing, and were intended by the railroad company to foster the log-shipping industry, and to facilitate shippers in getting their logs to market or to their mills.

The plaintiff was engaged in the manufacture of staves, and had two mills, one at Boyle and one at Dean on the line of the

defendant's road, and he was also the owner of a log loader, and had been for some years engaged in loading his own logs for his own mills, and also in the independent business of a log loader, loading logs for other shippers who did not own log loaders. After trying this arrangement for several years, the railroad company concluded that it was altogether unsatisfactory, that it led to confusion, and interfered more or less with the general operation and movement of trains on its road in its general business, and also in the handling of logs, as there were several other parties beside the plaintiff engaged in the business of log loading, using the trains, engines, crews, and tracks of the railroad company. In order to systematize the business and render it more satisfactory to the shippers of logs and the owners of mills, and to prevent confusion and delays, arising from allowing a number of independent owners of log loading machinery on the road at the same time, and some at the same place, the railroad company had a conference with the mill owners who were served from this district, both in Memphis and in Mississippi, and also with the shippers of logs, and it was concluded that it was best to abolish the practice of extending this privilege indiscriminately to a number of owners of log loaders, and to place the loading under one responsible head, and as a result of this conference what is known as the Valley Log Loading Company was organized. This log loading company was not a shipper of logs nor interested in mills, but was simply organized as a log loading agency, and the railroad company's con-

tion upon a lessor not to allow the subject-matter of the lease to be enjoyed by anyone but the lessee during the lease. The privilege, when granted, is hardly capable of other than exclusive enjoyment. The public interest is satisfactorily secured by the requirement which may be enforced by any member of the public, to wit, that the charges allowed shall not be unreasonable, and the business is of such a public character that it is entirely subject to legislative regulation in the same interest." And see same case modified and affirmed in 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96.

In this connection attention may properly be called to the cases considering the question of the right of a common carrier to deliver telegraph and telephone poles between stations on its line for one shipper, and refuse to do so for another. The holding in these cases, that it amounts to discrimination for a carrier to perform such a service for one shipper, and not for another, although it was under no legal duty to perform the service for either, is not necessarily inconsistent with the holding in *YAZOO & M. VALLEY R. CO. v. CRAWFORD*. The distinction between the cases is obvious. L.R.A.1915C.

In the telegraph and telephone cases the carrier was performing for one shipper a service it refused to perform for another. In the *YAZOO CASE*, however, the carrier did not discriminate between shippers,—it placed the same restriction upon each and all of them, and required them to turn their shipments over to a third person appointed by the company, to be loaded by such third person apparently at some cost to the shipper, although this feature of the arrangement is not clear. It is to be noted, however, that this loading company was held to be an agency of the carrier, and that hence the latter was responsible to the shippers for any discrimination or neglect in loading or in affording facilities for loading.

In addition to the cases herein referred to, reference is made to the note in 12 L.R.A.(N.S.) 506, for other cases involving the question of the legality of contracts by a common carrier granting exclusive privileges to third persons, and thereby in effect creating a monopoly. These cases, however, were disposed of by the test as to whether or not the contract was discriminatory, rather than on the question of monopoly.

A. G. S.

tracts with it gave it the exclusive right to load all logs along the line of its road. It seems that this Valley Log Loading Company divided the territory into certain districts, and employed log loaders to load logs in particular districts, so as to prevent conflicts and confusion. The plaintiff made a contract with the Valley Log Loading Company under which he operated for some seven or eight months, hauling logs to his own mills, and also loading logs for other persons, at a profit, paying the Valley Log Loading Company 25 cents per 1,000 for all logs hauled for other persons, but paying nothing for logs loaded for his own mills. He terminated this contract and brought suit against the railroad company. There were two declarations filed, an original and an amended declaration. Each declaration contains two counts. These declarations are very long; but the ground of complaint in each is practically the same, the basis of the action being the claim of the plaintiff that the contract made by the railroad company with the Valley Log Loading Company was illegal, as being unjustly discriminatory against him, in that it denied him the right to load logs, and extended it to the Valley Log Loading Company, and that it was an illegal restraint of trade, and created an illegal monopoly.

In the first count of each declaration, the plaintiff claims that he had established an independent log loading business profitable to him, and that, by reason of the alleged illegal contract, his business had been destroyed; that he had incurred considerable expense; that he lost the benefit of certain contracts for loading logs which were then existing, and also the opportunity of making other contracts. In other words, that he had established a profitable loading business which had been destroyed by this alleged illegal contract; the claim being that he had established this business relying upon an alleged established custom of the railroad company, which had the force of law, and that the railroad company was liable to him in damages for destroying his business.

In the second count of each declaration, the claim set up is that the plaintiff was damaged in his relation as shipper of logs and a manufacturer of staves, claiming that the railroad company did not furnish facilities at its stations or elsewhere reasonably sufficient to handle the logs intended for shipment; that the Valley Log Loading Company was not only inadequately equipped, but would not load logs for the plaintiff when demanded; and that, by reason of that, the plaintiff's business as a staff manufacturer was so greatly crippled that he had to close his two mills at Boyle L.R.A.1916C

and Dean and move them to other localities where timber was more convenient.

We think this statement will be sufficient for a practical understanding of the decision of the court.

It will be seen that the plaintiff is claiming damages of the railroad company in two aspects, one for destroying his business as an independent log loader, and the other in destroying his business and damaging him as a shipper and a mill owner; and one of the underlying questions is as to the validity of the contract made with the railroad company and the Valley Log Loading Company.

The railroad company set up as a special defense in this case the facts which we have set forth, claiming that it derived no profit whatever under this contract which it had made with the Valley Log Loading Company; that the contract was not intended to favor the Valley Log Loading Company or to discriminate unlawfully against the plaintiff or anyone else, but was rendered necessary by the exigencies of the case,—what the railroad company considered as being in the interest of the public, that is to say, the mill owners and log owners and log shippers, and the general public as passengers and shippers of freight. It was claimed that it was under no legal obligation to furnish the plaintiff or anyone else with a train of cars for loading logs anywhere, and particularly at places between stations, and that in doing this it was acting purely in a private capacity, and as a private carrier, and not as a common carrier, and that it had a right to terminate this arrangement or adjust it, or to make any other arrangement that it considered best for the interest of all parties concerned, it not being the purpose of the railroad company under this contract to give any undue preference to any competitor of the plaintiff; that the Valley Log Loading Company was not in existence, and not a competitor of the plaintiff, but was organized solely for the purpose of loading logs; that the arrangement was not in any sense in restraint of trade, but intended to foster and promote the interest of the shippers; that it was not an illegal monopoly, but was the doing of an act which the railroad company had a legal right to do.

It is well enough to say here that it is admitted, both in the argument and in the briefs, that the railroad company was under no legal obligation to make the arrangement which had theretofore existed, and that it had a right to abolish it at any time, and that the plaintiff would have had no right of action; but it is claimed that, as the railroad company did not entirely

abolish its arrangement, but had made a contract with the Valley Log Loading Company to carry on a log loading business, its contract, being exclusive, was illegal as extending a right to the Valley Log Loading Company which it denied to the plaintiff and all other parties doing a loading business.

We are of opinion that the contract made with the Valley Log Loading Company under the circumstances was not an illegal contract. The arrangement which the railroad company had made with reference to the loading of logs and furnishing to parties its cars, engines, and crews was not in any sense a function or duty required of the company in its capacity as a common carrier. There was no legal obligation resting upon the railroad company to furnish its cars, engines, and crews to individuals carrying on a log loading business, or to receive logs to be loaded on its cars along the right of way between stations. The railroad company could itself have undertaken this to the exclusion of everybody else. This is not controverted. It would then monopolize the business in a sense, but not illegally.

In the case of *Houck v. Wright*, 77 Miss. 483, 27 So. 617, this court says: "The legislature, by the chapter on trusts and combines, did not intend to debar a person from conducting his own private business according to his own judgment."

It was not the purpose to limit either the term used in the Constitution or in the statute by any narrow definition, but leave it to the courts to look beneath the surface, and, from the methods employed in the conduct of his business, to determine whether the association or combine in question, no matter what its particular form should chance to be, or what might be its constituent elements, is taking advantage of the public in an unlawful way. This case and this extract from it were cited with approval of this court in the case of the *Cumberland Teleph. & Teleg. Co. v. State*, 100 Miss. 116, 39 L.R.A.(N.S.) 277, 54 So. 670.

This court further held in the case of *Cumberland Teleph. & Teleg. Co. v. State*, supra, that our anti-trust statute was only intended to embrace within its provisions those contracts in restraint of trade, those monopolies and attempts to monopolize, which were invalid as against public policy before the enactment of the statute; that a contract in reasonable restraint of trade was valid before the enactment of the statute, where its design and purpose was not to create a monopoly, and that such contract is valid now, where it is only such as to afford a fair protection to the interest of the party in favor of whom it is given, L.R.A.1915C.

and not so large as to interfere with the interest of the public. See also *Yazoo & M. Valley R. Co. v. Searles*, 85 Miss. 520, 68 L.R.A. 715, 37 So. 939; *Sivley v. Cramer*, 105 Miss. 13, 61 So. 653.

In the case of *Cumberland Teleph. & Teleg. Co. v. State*, supra, it was contended on the part of the state that a contract made between the Cumberland Telephone & Telegraph Company and the Oxford Telephone Company, a local company, containing the provision that the local company would not extend its line so as to conflict with the business or interest of the Cumberland Telephone & Telegraph Company, and would not make any connection with any other telephone line, and would not extend its lines outside of Lafayette county, and give its long distance business exclusively to the Cumberland company, was not an illegal contract, and that it was a contract made in good faith on the part of the companies for the purpose of protection to their interests, and in the interest of the public, and that this contract improved the efficiency of both systems, and made both more valuable to the public, as well as to the owners. In the case at bar the reasons for upholding the contract as valid are, if anything, stronger than in the *Cumberland Telephone Case*, for the reason that the railroad company has the right, as was admitted, and as must be admitted, at any time to abolish the whole arrangement, and assume itself the duty of loading logs to the exclusion of everyone else, if it saw fit to do so; and if it has the right to do this, it certainly had the right to make the contract with another corporation or individual to perform that service for it. See *Covington Stock Yards Co. v. Keith*, 139 U. S. 128, 35 L. ed. 73, 11 Sup. Ct. Rep. 461. In that case the railroad company had a contract with the stock yard company to furnish facilities for the loading and unloading of live stock. The court said: "It did not concern them [the shipper] whether the railroad company itself maintained stock yards, or employed another company or corporation to supply the facilities for receiving and delivering live stock it was under obligation to the public to furnish."

In other words, it is not unlawful for the railroad company to employ another to do that which it could itself lawfully do. That is what was done in the case at bar. It was for the railroad company to determine whether the existing arrangement was inconvenient, confusing, or dangerous,—that was a matter of its own concern. It could have abolished the arrangement, without assigning any reason for it, if it saw fit to do so, as it was under no legal obligation to continue it.

It is claimed, however, by the plaintiff, that he had built up a business upon the faith of the arrangement existing, and that the taking from him the right to do a log loading business, and not furnishing him with facilities for that purpose, had destroyed his business. We think the plaintiff cannot claim that he had established a business of a permanent nature, based upon the doing by the railroad company of an act which it was under no legal obligation to perform, and whatever he did in this regard must have been done subject to the right of the railroad company to abolish the arrangement at any time. We do not see that there is anything in the record which would support the claim of the plaintiff that there was an established custom which had ripened into the force of law.

In the case of *Vicksburg & M. R. Co. v. Dixon*, 61 Miss. 119, the court held that the fact that the railroad company had for thirty years maintained and repaired a stock gap where its road entered the plaintiff's field did not impose upon the railroad company any legal obligation to continue to repair and maintain the stock gap, and that it was not liable for having neglected repairing it, although by reason of such neglect cattle had entered plaintiff's field and had destroyed his crop. The court, through Justice Campbell, said: "A repetition of favors for accommodation cannot constitute a foundation for a valid claim to their enjoyment as a right. The course of dealing between the parties about the cattle gaps did not affect the question of right or liability with respect to them."

. . . The law imputes to him a knowledge of the nonliability of the company for the maintenance of the cattle gaps, and it is his misfortune to have relied on the appellant to render him a service for which he had no legal claim on it. . . . Unless the appellant was legally bound to repair the [cattle] gap, it was not liable for not doing it. It certainly was not originally bound to construct these appliances for the benefit of the appellee."

We cannot see why the principle announced in this case does not apply here, so we hold that the contract in this case was not illegal, and that the railroad company had a legal right to abolish the course of dealing, and therefore the plaintiff could not recover for the interruption of his business as a loader of logs, and the court below erred in allowing him to recover damages under the first count of the declaration.

It will be seen that the relation which the plaintiff bore to the railroad company as a loader of logs for a profit, and that of a mill owner and shipper of logs, are quite

distinct. While we hold that the contract is valid, yet as a common carrier of logs, which the railroad company certainly was, it owed to the plaintiff as a shipper certain duties which it was legally bound to perform. The railroad company could have abolished the practice of receiving logs for shipment between stations. We will not go so far as to say that it might have, owing to the exceptional character of the commodity, required the owners and shippers to load their own logs at stations; but the railroad company would have been bound by law to have furnished stations, at least facilities, for loading logs if it undertook to receive logs for shipment. In this case the complaint is that the railroad company did not furnish any facilities directly for the loading of logs; but it did contract with an agency, the Valley Log Loading Company, to load the logs between stations and elsewhere, and we hold that the Valley Log Loading Company was merely an agency of the railroad company, for the performance of whose duties the railroad company was responsible. The railroad company could not say to the shipper: "You shall not load logs for yourself, and we will not furnish any facilities for loading logs, although we hold ourselves out as carriers of logs."

It must either load the logs itself or furnish proper facilities to the owners of logs for shipment. The plaintiff had a right to demand this of the railroad company. It was conceded on the argument that the railroad company would be responsible for any dereliction of duty on the part of the Valley Log Loading Company, and, aside from this admission, we think the law would impose this liability upon the railroad company, and treat the log loading company as an agent of the railroad company in this respect, and treat the railroad company as having assumed the duty of loading logs.

Under the second count of the declaration, the plaintiff claims that no facilities were offered to him at stations, and that the Valley Log Loading Company did not load his logs, that is to say, the logs intended for his business as a shipper and as a mill man, when he called upon it so to do, at least they were negligent in this regard, and that he was unable to carry on his business at Dean and Boyle profitably, and to fill contracts for staves which he had made, or to make other contracts.

In the case of *Covington Stock Yards Co. v. Keith*, supra, the Supreme Court of the United States says that, while it was held that the railroad company had a right to make an exclusive contract with the Covington Stock Yards Company, the contract providing that it would make the yards of the

stock yard company its depot for delivering all live stock during the term of the contract, and not to build or allow to be built on its right of way any other depot or yards for the reception of live stock, yet the stock yards company was bound to accord to Keith all privileges that he was entitled to from its principal as a common carrier, and, as the common carrier did not offer to establish stock yards of its own, the court did not err in requiring the railroad company to receive and deliver live stock at the stock yard of the plaintiff. See also Hutchinson, Carr. 3d ed. §§ 509 et seq.

In the case at bar the railroad company adopted an agency for the loading of logs; it is a common carrier of logs; it denies to the plaintiff the right to load his own logs, and, while it has a legal right to make the contract in question, it must see that the rights of the shipper, the plaintiff, are protected as fully as if the railroad company itself was undertaking to load logs for shipment directly. The plaintiff was entitled to recover any damage which he may have sustained as the proximate result of the failure of the log loading company to discharge this duty to him; and, for this reason, the court did not err in refusing to give a peremptory instruction asked by the railroad company under the state of the testimony in the record. The judgment of the court below must be reversed, because the court erred in allowing the plaintiff to recover damages on account of the loss of the log loading business; but the plaintiff will be entitled to recover such damages as he may be able to show by proper proof to have sustained in his capacity as shipper and mill man. The railroad company must be treated in this case as having undertaken itself to load logs for shippers through an agency employed by it, that is, the Valley Log Loading Company. The plaintiff's right to recover damages, of course, will be determined by the ordinary rules of law applicable to such cases.

The railroad company cannot hold itself out as a common carrier of logs, and refuse the shipper the right to load his own logs, and escape the responsibility of a wrongful performance of duty by an agency employed by it to discharge this function. It must either provide for loading logs itself, or it must allow the shipper to load them, and furnish the facilities for that purpose. We do not consider that this phase of the case is affected in any way whatever by the fact that the railroad company has published its tariffs according to law, or that it was necessary for the plaintiff, as a condition to maintaining this action, to go before either the Mississippi Railroad Commission or the L.R.A.1915C.

Interstate Commerce Commission to correct his grievance. The duties which are imposed upon the carrier here are the duties which the law imposes independently of the Interstate Commerce Commission and the Mississippi Railroad Commission, but arise from the nature of the functions performed by the railroad company and the duty which the law imposes upon it in this regard.

Reversed and remanded.

Suggestion of error overruled October 12, 1914.

NEW YORK COURT OF APPEALS.

KELLY ASPHALT BLOCK COMPANY,
Respt.,
v.
BARBER ASPHALT PAVING COMPANY,
Appt.

(211 N. Y. 68, 105 N. E. 88.)

Principal and agent — contract with agent — suit by undisclosed principal — defense.

One who has entered into a contract with an agent cannot, if there was no fraud, such as denial of the principal's existence, defeat liability for breach to an undisclosed principal by establishing that he would not have entered into the contract with the principal had he been disclosed, even though the principal suspected that he could not secure the contract himself.

(April 14, 1914.)

A PPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Second Department, affirming a judgment of a Trial Term, Part I., for Kings County, in plaintiff's favor, and from an order denying a motion for new trial,

Note. — The holding in *KELLY ASPHALT BLOCK CO. v. BARBER ASPHALT PAVING CO.*, that an undisclosed principal whose agent purchased property carrying an implied warranty of quality may sue for breach of the warranty where the property has been delivered by the seller and paid for by the purchaser, even though it appears that the seller would not have sold the property to the undisclosed principal, had he known that he was the real purchaser, and that such undisclosed principal at least suspected this fact, is in line with the general rule applicable to the right of the undisclosed principal to sue upon an executed contract. The distinction in this regard between executed and executory contracts is pointed out in the notes in 39 L.R.A.(N.S.) 324, and 29 L.R.A.(N.S.) 472, on the question as to the character of the contract as affecting the right of the undisclosed principal to sue thereon.

in an action brought to recover damages for breach of an implied warranty. Affirmed.

The facts are stated in the opinion.

Mr. Franklin Nevius, with Messrs. Kellogg & Rose, for appellant:

If, for any reason, the defendant would not have sold its blocks to the plaintiff, there could be no contractual relationship between them, and plaintiff could not recover on the theory that Booth was agent for it as an undisclosed principal.

Wald's Pollock, Contr. 3d Am. ed. pp. 590, 591; Boston Ice Co. v. Potter, 123 Mass. 28, 25 Am. Rep. 9; Winchester v. Howard, 97 Mass. 303, 93 Am. Dec. 93; Kelly Asphalt Block Co. v. Barber Asphalt Paving Co. 136 App. Div. 22, 120 N. Y. Supp. 163; Kling v. Irving Nat. Bank, 21 App. Div. 373, 47 N. Y. Supp. 528, 160 N. Y. 698, 55 N. E. 1096; Barcus v. Dorries, 64 App. Div. 109, 71 N. Y. Supp. 695; Arkansas Valley Smelting Co. v. Belden Min. Co. 127 U. S. 379-387, 32 L. ed. 246-248, 8 Sup. Ct. Rep. 1308; Consumers' Ice Co. v. E. Webster Son & Co. 32 App. Div. 592, 53 N. Y. Supp. 56; A. S. Holmes Ref. Co. v. United Refiners' Export Oil Co. 33 App. Div. 62, 53 N. Y. Supp. 81; Moore v. Vulcanite Portland Cement Co. 121 App. Div. 667, 106 N. Y. Supp. 393, 204 N. Y. 680, 98 N. E. 1108; Cowan v. Curran, 216 Ill. 598, 75 N. E. 322; Pancoast v. Dinsmore, 105 Me. 471, 134 Am. St. Rep. 582, 75 Atl. 43; Menger v. Ward, 87 Tex. 626, 30 S. W. 853; New York Bank Note Co. v. Hamilton Bank Note Engraving & Printing Co. 180 N. Y. 280, 73 N. E. 48; American Colortype Co. v. Continental Colortype Co. 188 U. S. 104, 47 L. ed. 404, 23 Sup. Ct. Rep. 265.

The fact that Booth represented to the Barber Asphalt Paving Company that he was getting the blocks for himself, or did not disclose to it at the time that he was getting them for the plaintiff, was conclusive.

Raabe v. Squier, 148 N. Y. 81, 42 N. E. 516.

Plaintiff, having had an opportunity to inspect the blocks, and having retained them in its possession for practically nine months after their receipt, could not claim that if any implied warranty existed it survived for such a period of time.

Waeber v. Talbot, 167 N. Y. 48, 82 Am. St. Rep. 712, 60 N. E. 288; Chambers v. Lancaster, 160 N. Y. 342, 54 N. E. 707; Brown v. Foster, 108 N. Y. 387, 15 N. E. 608.

Mr. James F. McKinney, with Messrs. Edward M. Grout and Paul Grout, for respondent:

Booth throughout the transaction was plaintiff's agent. If he was not the agent of plaintiff, it could not recover.

Greenwood v. Schumacker, 82 N. Y. 615; Franklin Bank Note Co. v. Mackey, 83 Hun, L.R.A.1915C.

511, 31 N. Y. Supp. 1057, 155 N. Y. 685, 50 N. E. 1117.

An undisclosed principal of an oral or a written agreement not under seal may enforce the contract in his own name.

Nicoll v. Burke, 78 N. Y. 580; Briggs v. Partridge, 64 N. Y. 357, 21 Am. Rep. 617; Brady v. Nally, 151 N. Y. 258, 45 N. E. 457; Ludwig v. Gillespie, 105 N. Y. 653, 11 N. E. 835; Henderson, H. & Co. v. McNally, 48 App. Div. 137, 62 N. Y. Supp. 582, 168 N. Y. 646, 61 N. E. 1130; Sears v. Conover, 33 How. Pr. 324; Tyler v. Barrows, 6 Robt. 104; Devlin v. New York, 63 N. Y. 8; Hunter v. Giddings, 97 Mass. 41, 93 Am. Dec. 54; Lerner v. Johns, 9 Allen, 419; Huntington v. Knox, 7 Cush. 371; Eastern R. Co. v. Benedict, 5 Gray, 561, 66 Am. Dec. 384; Foster v. Graham, 166 Mass. 202, 44 N. E. 129.

Defendant is liable upon its implied warranty as a manufacturer, that the blocks would be free from secret or latent defects rendering them unfit for the use for which they were intended.

Carleton v. Lombard, A. & Co. 149 N. Y. 137, 43 N. E. 422; Hoe v. Sanborn, 21 N. Y. 552, 78 Am. Dec. 163; Bierman v. City Mills Co. 151 N. Y. 482, 37 L.R.A. 799, 56 Am. St. Rep. 630, 45 N. E. 856; Kellogg Bridge Co. v. Hamilton, 110 U. S. 108, 28 L. ed. 86, 3 Sup. Ct. Rep. 537; Prentice v. Fargo, 53 App. Div. 608, 65 N. Y. Supp. 1114; Van Wyck v. Allen, 69 N. Y. 61, 25 Am. Rep. 136; White v. Miller, 71 N. Y. 118, 27 Am. Rep. 13; Heath Dry Gas Co. v. Hurd, 124 App. Div. 68, 108 N. Y. Supp. 410; Cooper v. Payne, 103 App. Div. 118, 93 N. Y. Supp. 69.

Cardozo, J., delivered the opinion of the court:

The plaintiff sues to recover damages for breach of an implied warranty. The contract was made between the defendant and one Booth. The plaintiff says that Booth was in truth its agent, and it sues as undisclosed principal. The question is whether it has the right to do so.

The general rule is not disputed. A contract not under seal, made in the name of an agent as ostensible principal, may be sued on by the real principal at the latter's election. Henderson, H. & Co. v. McNally, 48 App. Div. 134, 62 N. Y. Supp. 582, affirmed on opinion below in 168 N. Y. 646, 61 N. E. 1130; Cothay v. Fennell, 10 Barn. & C. 671, 8 L. J. K. B. 302. The defendant says that we should establish an exception to that rule where the identity of the principal has been concealed because of the belief that, if it were disclosed, the contract would not be made. We are asked to say that the reality of the defendant's consent

is thereby destroyed, and the contract vitiated for mistake.

The plaintiff and the defendant were competitors in business. The plaintiff's president suspected that the defendant might refuse to name him a price. The suspicion was not based upon any previous refusal, for there had been none; it had no other origin than their relation as competitors. Because of this doubt the plaintiff availed itself of the services of Booth, who, though interested to the defendant's knowledge in the plaintiff's business, was also engaged in a like business for another corporation. Booth asked the defendant for a price and received a quotation, and the asphalt blocks required for the plaintiff's pavement were ordered in his name. The order was accepted by the defendant, the blocks were delivered, and payment was made by Booth with money furnished by the plaintiff. The paving blocks were unmerchantable, and the defendant, retaining the price, contests its liability for damages on the ground that if it had known that the plaintiff was the principal, it would have refused to make the sale.

We are satisfied that upon the facts before us the defense cannot prevail. A contract involves a meeting of the minds of the contracting parties. If "one of the supposed parties is wanting," there is an absence of "one of the formal constituents of a legal transaction." *Rodliff v. Dallinger*, 141 Mass. 1, 6, 55 Am. Rep. 439, 4 N. E. 805, 807. In such a situation there is no contract. A number of cases are reported where A has ordered merchandise of B, and C has surreptitiously filled the order. The question has been much discussed whether C, having thrust himself without consent into the position of a creditor, is entitled to recover the value of his wares. *Boston Ice Co. v. Potter*, 123 Mass. 28, 25 Am. Rep. 9; *Boulton v. Jones*, 2 Hurlst. & N. 564, 27 L. J. Exch. N. S. 117, 3 Jur. N. S. 1156, 6 Week. Rep. 107; *Gordon v. Street* [1899] 2 Q. B. 641, 69 L. J. Q. B. N. S. 45, 48 Week. Rep. 158, 81 L. T. N. S. 237, 15 Times L. R. 445; *Barcus v. Dorries*, 64 App. Div. 109, 71 N. Y. Supp. 695; *Kling v. Irving Nat. Bank*, 21 App. Div. 373, 47 N. Y. Supp. 528; *Id.*, 160 N. Y. 698, 55 N. E. 1096; *Randolph Iron Co. v. Elliott*, 34 N. J. L. 184, 3 Mor. Min. Rep. 63; 7 *Laws of England* (Halsbury) title Contracts, pp. 354, 355. That question is not before us, and we express no opinion concerning it. We state it merely to accentuate the distinction between the cases which involve it and the case at hand. Neither of the supposed parties was wanting in this case. The apparent meeting of the minds between determinate contracting parties was not unreal or illusory. The defend-

ant was contracting with the precise person with whom it intended to contract. It was contracting with Booth. It gained whatever benefit it may have contemplated from his character and substance. *Humble v. Hunter*, 12 Q. B. 311, 17 L. J. Q. B. N. S. 350; *Arkansas Valley Smelting Co. v. Belden Min. Co.* 127 U. S. 379, 387, 32 L. ed. 246, 248, 8 Sup. Ct. Rep. 1308; *American Colortype Co. v. Continental Colortype Co.* 188 U. S. 104, 47 L. ed. 404, 23 Sup. Ct. Rep. 265. An agent who contracts in his own name for an undisclosed principal does not cease to be a party because of his agency. *Higgins v. Senior*, 8 Mees. & W. 834, 844, 11 L. J. Exch. N. S. 199. Indeed, such an agent, having made himself personally liable, may enforce the contract though the principal has renounced it. *Short v. Spackman*, 2 Barn. & Ad. 962. See also *Briggs v. Partridge*, 64 N. Y. 357, 362, 21 Am. Rep. 617; *Jemison v. Citizens' Sav. Bank*, 122 N. Y. 135, 143, 9 L.R.A. 708, 19 Am. St. Rep. 482, 25 N. E. 264. As between himself and the other party, he is liable as principal to the same extent as if he had not been acting for another. It is impossible in such circumstances to hold that the contract collapses for want of parties to sustain it. The contractual tie cannot exist where there are not persons to be bound; but here persons were bound, and those the very persons intended. If Booth had given the order in his own right and for his own benefit, but with the expectation of later assigning it to the plaintiff, that undisclosed expectation would not have nullified the contract. His undisclosed intention to act for a principal who was unknown to the defendant was equally ineffective to destroy the contract in its inception.

If therefore the contract did not fail for want of parties to sustain it, the unsuspected existence of an undisclosed principal can supply no ground for the avoidance of a contract, unless fraud is proved. We must distinguish between mistake, such as we have been discussing, which renders the contract void *ab initio*, because the contractual tie has never been completely formed, and fraud which renders it voidable at the election of the defrauded party. *Rodliff v. Dallinger*, *supra*. In the language of Holmes, J., in the case cited: "Fraud only becomes important, as such, when a sale or contract is complete in its formal elements, and therefore valid unless repudiated, but the right is claimed to rescind it." If one who is in reality an agent denies his agency when questioned, and falsely asserts that his principal has no interest in the transaction, the contract, it may be, becomes voidable, not because there is a want of parties, but because it has been fraudulently procured. That was

substantially the situation in *Winchester v. Howard*, 97 Mass. 303, 93 Am. Dec. 93. When such a case arises, we shall have to consider whether a misrepresentation of that kind is always so material as to justify rescission after the contract has been executed. *Leake*, Contr. 6th ed. pp. 19, 340. But no such situation is disclosed in the case at hand. Booth made no misrepresentation to the defendant. He was not asked anything, nor did he say anything, about the plaintiff's interest in the transaction. Indeed, neither he nor the plaintiff's officers knew whether the defendant would refuse to deal with the plaintiff directly. They suspected hostility, but none had been expressed. The validity of the contract turns thus, according to the defendant, not on any overt act of either the plaintiff or its agent, but on the presence or absence of a mental state. We are asked to hold that a contract complete in form becomes a nullity in fact because of a secret belief in the mind of the undisclosed principal that the disclosure of his name would be prejudicial to the completion of the bargain. We cannot go so far. *Stoddard v. Ham*, 129 Mass. 383, 37 Am. Rep. 369. It is unnecessary, therefore, to consider whether, even if fraud were shown, the defendant, after the contract was executed, could be permitted to rescind without restoring the difference between the price received for the defective blocks and their reasonable value. It is also unnecessary to analyze the evidence for the purpose of showing that the defendant, after notice of the plaintiff's interest in the transaction, continued to make delivery, and thereby waived the objection that the contract was invalid. *Cincinnati Siemens-Lungren Gas Illuminating Co. v. Western Siemens-Lungren Co.* 152 U. S. 200, 202, 38 L. ed. 411, 412, 14 Sup. Ct. Rep. 523; *Mudge v. Oliver*, 1 Allen, 74.

Other rulings complained of by the defendant have been considered, but no error has been found in them.

The judgment should be affirmed, with costs.

Willard Bartlett, Ch. J., and Werner, Chase, Collin, Cuddeback, and Hogan, JJ., concur.

OREGON SUPREME COURT.
(In Banc.)

STATE OF OREGON EX REL. CLARENCE
H. McLAUGHLIN
v.
ROBERT O. GRAVES.

(— Or. —, 144 Pac. 484.)

Attorney — aiding mob — discipline.

An attorney at law may be suspended
L.R.A.1915C.

from practice for actively participating in the acts of a mob which takes undesirable citizens from a jail, deports them from the town, and forbids their return.

(December 1, 1914.)

PROCEEDINGS for the disbarment of defendant as an attorney at law. Judgment of suspension.

The facts are stated in the opinion.

Mr. C. H. McLaughlin for complainant.
Messrs. C. S. McKnight, A. J. Sherwood, and J. W. Bennett for defendant.

McBride, Ch. J., delivered the opinion of the court:

In August, 1913, one C. H. McLaughlin, as relator, filed a complaint charging Robert O. Graves with conduct unbecoming an attorney, which complaint is as follows:

In the Supreme Court of the State of Oregon.

The State of Oregon, on the Relation of C. H. McLaughlin, against Robert O. Graves, Coos County, Oregon State—ss.:

C. H. McLaughlin, being sworn, on oath says that on June 25, 1913, at the city of Marshfield, Coos county, Oregon, a large concourse of men unlawfully assembled as a mob, and as such mob forcibly and violently took possession of the persons of J. W. Edgeworth, Wesley Everett, and Fred Roberts, and with force and against the will of said persons marched them through the streets of Marshfield, and then put them upon a small gasoline launch and conveyed them down and across the bay, at which place they were by said mob taken off

Note. — Attorneys: acting with mob as a ground for disbarment, suspension, or other discipline.

While but few cases have been found upon this precise question, it has been said, generally, that "an attorney may be suspended or disbarred for such misconduct unconnected with his professional duties as shows him to be an unfit and unsafe person to manage the legal business of others." 4 Cyc. 910. And under this rule, the decision in *STATE EX REL. McLAUGHLIN v. GRAVES*, seems clearly to be correct, and it is supported by the other cases in point.

Thus, the fact that an attorney was present and actively participated in an unlawful, tumultuous, and riotous gathering which took a prisoner from jail and hanged him constitutes a legitimate ground for striking his name from the roll of attorneys. *Ex parte Wall*, 107 U. S. 265, 27 L. ed. 552, 2 Sup. Ct. Rep. 569, affirming 13 Fed. 814.

And in *Dormenon's Case*, 1 Mart. (La.) 129, 2 Wheeler, C. C. 344, it was held to be the duty of the court to strike from its rolls the name of an attorney who, as a

said launch, and assaulted and beaten and kicked, and subjected to many indignities and insults, and were then compelled to leave Coos County, and ordered by said mob to never return. That said Robert O. Graves at all of the time herein mentioned was a member of said mob, acting as its spokesman and leader, and directing its actions. Said Robert O. Graves is and was at all times mentioned herein a member of the bar of the state of Oregon, admitted to practise in all the courts of the state; and I charge that his conduct as herein stated was violative of his duty and his oath as an attorney at law, and was unbecoming a member of the legal profession. Wherefore I request this honorable court to proceed against him for disbarment.

C. H. McLaughlin.

Subscribed and sworn this 14th day of August, 1913, before me.

W. J. Rust,

Notary Public for Oregon. [Notarial Seal.]

The matter was referred for the purpose of taking the testimony, which was submitted and filed in this court December 9, 1913. We have examined the evidence, and find the facts to be that the parties whom it is charged were forcibly deported from Marshfield were persons connected with that society known as Industrial Workers of the World, and that for some time before the alleged deportation they or their associates had been attempting to promote and organize a general strike among the laborers employed in the mills and other industries in and around Marshfield; that in pursuance of this object they had used intemperate and seditious language, denouncing the United States flag and government, and made themselves generally obnoxious to a large majority of the com-

munity, to the extent that upon June 25, 1913, two of them, J. W. Edgeworth and Wesley Everett, were arrested and thrown into jail, the particular charge against them not appearing in the testimony; that a mob composed chiefly of citizens and business men assembled and forcibly took these two from the jail, placed them aboard a launch, and transported them a distance from the city, and, after requiring them to kiss the American flag, ordered them to leave the county and not return, with which order they complied; that on the same day Fred Roberts, an associate of Edgeworth and Everett, began publicly to denounce the deportation of these persons, using profane and boisterous language. Whereupon he was arrested and thrown into jail, for the reason or upon the pretext that he was guilty of disorderly conduct, and in a short time a mob composed in part of the same persons went to the jail, and forcibly took him therefrom, and deported him in the same way that Edgeworth had been deported. Taking the testimony as a whole, although there is some conflict, we are of the opinion that no personal violence was used upon any of these three men beyond actually seizing them and deporting them against their will, and that the allegation that they were kicked and beaten and bruised is not borne out by the testimony.

While the conduct of these men was probably insulting to the feelings of the community, and their denunciation of the government and the flag calculated to provoke decent citizens to wrath and to invite breaches of the peace, this furnishes no legal justification for the course pursued toward them. This is a land where the law is supreme, and entirely adequate to the protection of society, and there is no necessity to override the law under the pretext of

municipal officer, seventeen or eighteen years before, had acted in concert with the negroes and mulattoes (freed slaves) of San Domingo in their murder and massacre of certain whites.

In Jones's Case, 12 Pa. Co. Ct. 229, which was an application to disbar an attorney, although the court accepted the attorney's explanation as to his alleged misconduct, and declined to disbar him, it said that if, as charged, he had, "acting in his capacity as a member of the bar, and exerting the influence given him by being accredited as such, in an excited community, with intent to stir up riot and disorder, proclaimed in a public place as law that which he knew not to be the law, the result being that lawless persons were encouraged, and the officers engaged in preserving the peace were embarrassed and hindered,"—"it could not well be maintained that [he] the respondent had not been guilty of professional misconduct; and no one would deny the L.R.A.1915C.

right of the court to take away from him its certificate of professional standing which gave weight to his words."

Somewhat similarly it has been held to be good cause for striking an attorney from the rolls of the court, that he has accepted, in violation of an express statute, a challenge to fight a duel, or that he has fought a duel in another state and killed his adversary, and stands indicted for murder in the other state for such killing. *Smith v. State*, 1 Yerg. 228.

As to disbarment or suspension of an attorney for misconduct in an official capacity other than his attorneyship itself, see note to *State v. Peck*, L.R.A. 1915A, 663.

For offering to pay witness as a ground for disbarment or suspension of an attorney, see note to *Re O'Keefe*, L.R.A.1915A, 514.

As to other grounds for the disbarment or suspension of attorneys, see Index to L.R.A. Notes, "Attorneys," § 5.

A. C. W.

maintaining it. If the parties deported were actually guilty of such public conduct as threatened the peace and good order of the city, no doubt there existed in the ordinances of Marshfield penalties for disorderly conduct, which would have been an effectual remedy against its repetition. When a man publicly insults the flag and denounces the institutions of his country, he is a disorderly and bad citizen; but it is a mistaken patriotism that seeks to suppress one breach of the public peace by perpetrating another, however great the provocation. In this view of the case, the assembly of persons who deported Edgeworth, Everett, and Roberts, even though it may have been composed of men ordinarily good and law-abiding citizens, was a lawless assemblage.

The defendant was a member of this assemblage, and while not, perhaps, the leader or the most active member, he was not inactive. An attorney is an officer of the court, sworn to obey the laws, and upon occasions of this kind it is his duty, if present at all, to uphold the law and counsel peaceable and lawful methods, and what might be excusable in the conduct of a citizen unacquainted with the law cannot be overlooked in an attorney. This being so, we must find that in the matter at bar he has been guilty of conduct unbecoming his profession. We take into consideration, however, the fact that the testimony of many witnesses shows him to have hitherto been an estimable, law-abiding citizen, and peaceable member of society; that in his relations to his clients he has always demeaned himself as an honorable member of society and of his profession; and we therefore conclude that for this single act committed under excitement and a mistaken sense of patriotism, it would be improper to deprive him altogether of his means of livelihood, which he derives from his profession.

It is the judgment of the court that he be suspended from practice in this court for a period of three months.

WEST VIRGINIA SUPREME COURT OF APPEALS.

CITY OF BENWOOD et al.

v.

PUBLIC SERVICE COMMISSION.

(— W. Va. —, 83 S. E. 295.)

Public Service Commission — power to change rates.

1. The Public Service Commission has

Headnotes by ROBINSON, J.
L.R.A.1915C.

power to change any intrastate rate for service rendered the public, when to do so will conflict with no paramount law or constitutional inhibition.

Public service corporation — rates — power of legislature.

2. The rate-making power is inherent in and belongs primarily to the legislature. The presumption is against exclusive delegation of the power. Unless there has been such delegation by clear and unmistakable terms, the power remains in the legislature, which can exercise the same when it sees fit.

Public water supply — rates — power of municipality.

3. A grant of power by the legislature to a municipal corporation "to erect, or authorize or prohibit the erection of, . . . waterworks," does not vest the municipal corporation with power to fix water rates by franchise or agreement beyond the control of the legislature.

Municipal corporation — power to contract — fixing rates.

4. The general provision in a municipal charter authorizing the municipal corporation to "contract and be contracted with" does not delegate beyond the state's control the power to fix public service rates.

Same — implied powers.

5. Impliedly from general powers, a municipal corporation may have the power to contract in the matter of public service rates, as long as the legislature does not exercise its reserved power in that particu-

Note. — Right to reduce rates of public service corporation fixed by franchise or charter.

I. Introduction, 262.

II. Power to make binding contract as to rates of public service corporations.

a. Power of the state, 262.

b. Power of a municipality, 264.

III. What amounts to contract precluding subsequent regulation by public.

a. In general, 268.

b. Conferring power to charge for service, 270.

c. Conferring power to fix charges, 271.

d. Effect of naming maximum rates.

1. View that designation of maximum rate gives contract right to charge that rate, 273.

2. View that designation of maximum rate does not give contract right to charge that rate, 274.

e. Miscellaneous, 276.

IV. Regulation of rates as exercise of reserved power to alter charter, 277.

V. Loss of privilege of exemption from regulation of rates.

a. By assignment and consolidation, 279.

b. By waiver, 281.

lar, but any contract so made is only permissive, and is subject to future legislative action.

Public Service Commission — rates fixed by municipality — change.

6. The Public Service Commission may change a public service rate which was fixed for a municipality by franchise ordinance prior to the enactment of the law creating the Commission, where authority to fix such rate was not expressly delegated to the municipal corporation by the legislature.

Contract — change of water rates — impairing obligation.

7. Where, by franchise or ordinance, public service rates within a municipality have been fixed and accepted as between a public service corporation and the public,

As to power of municipality apart from contract to regulate the rates to be charged by public service corporations, see notes in 33 L.R.A.(N.S.) 759, and 43 L.R.A.(N.S.) 994.

As to power of municipality to fix gas rates as an incident of its power to authorize the laying of gas mains, see note to *Boerth v. Detroit City Gas Co.* 18 L.R.A.(N.S.) 1197.

As to effect of contracts with patrons to preclude regulation of rates of public service corporations, see note to *Pinney & B. Co. v. Los Angeles Gas & Electric Corp.* post, 282.

I. Introduction.

It is clear that a valid contract made by the state or a municipal corporation with a public service corporation as to the rates to be charged for services is within the constitutional provision against impairing the obligation of a contract, so as to preclude subsequent legislation attempting to change or reduce the rates during the period of the contract, 8 Cyc. 959.

But to come within the protection of the constitutional provision against impairing the obligation of a contract, the contract must be valid and within the power of the state or municipality to make.

As shown hereafter, the great majority of the cases hold that the state may make a binding contract so as to preclude future legislation regulating rates; though a few cases have taken the position that it is beyond the power of the state to contract away a governmental function such as the power to regulate the rates to be charged for public services.

Likewise, the legislature may authorize a municipal corporation to make a binding contract not to regulate rates during a reasonable term of years, unless it is against the declared policy of the state to grant such right.

But the power of a municipal corporation to make such a contract must be clearly conferred, and cannot be inferred by implication.

L.R.A.1915C.

without express delegation of power in such particular by the legislature to the municipality, a change of the rates by the Public Service Commission does not impair the obligation of a contract.

(October 13, 1914.)

PETITION by the City for the suspension of an order made by the Public Service Commission upon application of a water company for a change in rates for water furnished by it to the public in the City. Petition dismissed.

The facts are stated in the opinion.

Messrs. Martin Brown and T. S. Riley, for petitioners:

No exercise of the police power was in-

So, a contract purporting to fix charges, or to authorize the corporation to regulate its charges without interference by the public authorities, must be by clear and unmistakable language, which in case of doubt will be resolved in favor of retaining in the public the right to regulate and provide reasonable charges for public service from time to time.

It is held in numerous cases that the regulation of rates is a proper exercise of the reserved power to alter or amend a charter.

It has been held that the exemption from legislative regulation cannot be assigned, and does not pass by judicial sale. So, the privilege of exemption from regulation of rates may be lost by waiver.

II. Power to make binding contract as to rates of public service corporations.

a. Power of the state.

The great majority of the cases, including those passed upon by the Supreme Court of the United States, sustain the view that, in the absence of constitutional prohibition, it is competent for the state to contract with a public service corporation as to the rates to be charged for services, and that such a contract under legislative authority is within the constitutional guaranty against impairment.

Thus, it is held that the right of the state to regulate the rates of transportation on railroads is not such a governmental function that it cannot be transferred to the corporation so as to preclude subsequent interference by the state. *Sloan v. Pacific R. Co.* 61 Mo. 24, 21 Am. Rep. 397.

Accordingly, it was held that a provision in a statute changing the charter of a railroad company giving it power to fix rates, and declaring that it shall not be subject to future legislation until 10 years afterward, operated to exempt the company from a subsequent act of the legislature prohibiting a charge for transportation for

involved in the ordinance granting the water franchise to Kenny and others.

New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252.

The holding of the Public Service Commission results in impairing a contract of the kind which, by both the United States and State Constitution, is forbidden to be impaired by legislative enactment.

Welch Water, Light, & P. Co. v. Welch, 64 W. Va. 373, 62 S. E. 497; State ex rel. St. Louis v. Laclede Gaslight Co. 102 Mo. 472, 22 Am. St. Rep. 789, 14 S. W. 974, 15 S. W. 383; Clarksburg Electric Light Co. v. Clarksburg, 47 W. Va. 740, 50 L.R.A. 142, 35 S. E. 994; New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U.

S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; Spring Valley Waterworks v. Schottler, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48; Vicksburg v. Vicksburg Waterworks Co. 206 U. S. 496, 51 L. ed. 1155, 27 Sup. Ct. Rep. 762; Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 369, 46 L. ed. 595, 22 Sup. Ct. Rep. 410; Cleveland v. Cleveland City R. Co. 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. Rep. 756.

Messrs. A. A. Lilly, Attorney General, and Frank Lively, Assistant Attorney General, for respondent:

The police power is so important and essential to government that it has been held not within the power of a state to grant it away to a corporation, or cut it

any distance to exceed a charge made for any longer distance. The court pointed out that the state may part with its right of taxation,—one of the most important attributes of sovereignty,—and as the right to regulate the rates of transportation was a matter of inferior importance to the state, it was difficult to perceive why such right may not be transferred to a corporation. Ibid.

Likewise, in State ex rel. St. Louis v. Laclede Gaslight Co. 102 Mo. 472, 22 Am. St. Rep. 789, 14 S. W. 974, 15 S. W. 383, it was held that the regulation of the price of gas did not constitute such a police governmental power as was beyond the power of the state, or a municipality created by it, to contract away by inserting in a city ordinance granting to a gas company the privilege of furnishing gas to the city and to private consumers for a period of 30 years, the maximum rates to be charged.

And in Iron R. Co. v. Lawrence Furnace Co. 29 Ohio St. 208, the court denied the contention that the power to regulate charges for transportation by a common carrier of freight and passengers is such a police power as the legislature cannot part with, and held that the acceptance by a railroad company of a charter under the Ohio act of 1848 and the Constitution of 1802, which provides that no reduction should be made in the specified rates of charges for transportation until its net profits for 10 consecutive years should amount to 10 per cent per annum upon its capital, operates to form a contract between the company and the state so as to preclude legislative regulation by the state until the happening of the named contingency. Reaffirmed in 49 Ohio St. 102, 30 N. E. 616.

And in Pingree v. Michigan C. R. Co. 118 Mich. 314, 53 L.R.A. 274, 76 N. W. 635, it was held that the legislature may confer upon a railroad company the exclusive power to fix its rates for the transportation of passengers and freight within a certain maximum; and a subsequent attempt by the legislature to fix such rates is invalid as the impairment of the obliga-

tion of a contract. To the same effect is Stone v. Yazoo & M. Valley R. Co. 62 Misc. 607, 52 Am. Rep. 193.

It has been held in numerous cases that a state legislature, unless prohibited by constitutional provision, may authorize a municipal corporation to establish by an inviolable contract the rates to be charged by a public service corporation (or natural person) for a reasonable term of years; and the effect of such a contract is to suspend, during the life of the contract, the governmental power of fixing and regulating the rates. Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 271, 53 L. ed. 181, 29 Sup. Ct. Rep. 50 (telephone); Vicksburg v. Vicksburg Waterworks Co. 206 U. S. 496, 51 L. ed. 1155, 27 Sup. Ct. Rep. 762 (water supply); Los Angeles v. Los Angeles City Water Co. 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736 (water supply); Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410 (street railway); Freeport Water Co. v. Freeport, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493 (water supply); Danville Water Co. v. Danville City, 180 U. S. 619, 45 L. ed. 696, 21 Sup. Ct. Rep. 505 (water supply); Omaha Water Co. v. Omaha, 12 L.R.A.(N.S.) 736, 77 C. C. A. 267, 147 Fed. 1, 8 Ann. Cas. 614 (water supply); Shreveport Traction Co. v. Shreveport, 122 La. 1, 129 Am. St. Rep. 345, 47 So. 40 (street railway). In this case the franchise was for fifty years.

It will be observed that the power of the state to make a binding contract precluding legislation regulating rates is also assumed in the numerous cases contained in subdivision III. of the present note.

But it has been held that the right to fix and regulate the charges of common carriers is so clearly a governmental power, a matter of internal police, that the legislature cannot irrevocably give the right to charge certain fixed rates so as to preclude future legislatures from interfering with such rates. Laurel Fork & S. H. R. Co. v. West Virginia Transp. Co. 25 W. Va. 324; West Virginia Transp. Co. v. Sweetzer, 25 W. Va. 434.

self off from future exercise, or in any way control or bargain it away.

Laurel Fork & S. H. R. Co. v. West Virginia Transp. Co. 25 W. Va. 324; Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989; Com. v. Douglass, 100 Ky. 116, 66 Am. St. Rep. 328, 24 S. W. 233; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; New York & N. E. R. Co. v. Bristol, 151 U. S. 567, 38 L. ed. 272, 14 Sup. Ct. Rep. 437.

The municipalities of the state are mere governmental agents, and their powers, rights, and duties are subject to modification or abolishment at any moment by the legislature.

New Orleans v. New Orleans Waterworks

In Griffin v. Goldsboro Water Co. 122 N. C. 206, 41 L.R.A. 240, 30 S. E. 319, it is said that water rates prescribed in a charter granted by the legislature since the adoption of the Constitution of 1868 (art. 8, § 1) would be subject to revocation, and would be subject to such revocation independently of the provision of that Constitution.

And in Dillon v. Erie R. Co. 19 Misc. 116, 43 N. Y. Supp. 320, the court said that if the legislature had undertaken to preclude its successors from regulating the rates of fare and charges of a railroad company and its successors in interest, it was open to serious question whether such act in that respect would be operative; and that the legislature had no power to divest the state of its police power.

So, it has been held that a constitutional provision to the effect that "the legislature is invested with full power to pass laws for the correction of abuses, and to prevent unjust discriminations and excessive charges by persons and corporations" performing services of a public nature, becomes a part of every contract made by public authorities stipulating for certain rates to be charged by public service corporations, and by implication denies the authority of the legislature to bind itself by contract, or to authorize a municipality to bind itself, not to exercise the power to regulate rates whenever in its judgment it should think necessary to do so. Tampa v. Tampa Waterworks Co. 45 Fla. 600, 34 So. 631, subsequent appeal in 47 Fla. 338, 36 So. 174, affirmed in 199 U. S. 241, 50 L. ed. 170, 26 Sup. Ct. Rep. 23. And see also to the same effect Pocatello v. Murray, 21 Idaho, 180, 120 Pac. 812, which is set out in subdivision I. b.

Mr. Justice Holmes in Tampa Waterworks Co. v. Tampa, supra, in affirming the judgment of the supreme court of Florida, and commenting on the constitutional provision, said: "It says that the power shall be 'full power,' and the adjective may be read as meaning a power which cannot be cut down. When it goes on to require that the legislature 'shall' provide for enforcing

Co. 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142; East Hartford v. Hartford Bridge Co. 10 How. 511, 13 L. ed. 518.

The power of a municipal corporation to regulate rates and lay taxes is peculiarly a public and governmental power, and is always subject to revocation, modification, and control by legislative authority.

Williamson v. New Jersey, 130 U. S. 200, 32 L. ed. 919, 9 Sup. Ct. Rep. 453; 1 Dill. Mun. Corp. 3d ed. §§ 61, 63.

Municipal charters are not contracts, but are granted for public purposes, and amended or repealed at the discretion of the legislature.

Probasco v. Moundville, 11 W. Va. 501.

The charter may give the city power to fix rates and regulate charges, but that

the laws which it is expected to pass for the correction of abuses and the prevention of excessive charges, the argument is strengthened that it means to impose a duty which the legislature is not at liberty to give up. Such was the opinion of the supreme court of Florida, and we have yielded to the judgment of the state court upon more doubtful questions than this. . . . Although the 14th Amendment is invoked, no case is made out under it on any other ground than that the obligation of a binding contract is impaired."

b. Power of a municipality.

A municipality has no power to limit by contract its right to regulate rates of public service corporations unless expressly authorized. The authority to make such contracts cannot be upheld by mere implication, but must clearly and unmistakably appear. Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. Rep. 50; Portland R. Light & P. Co. v. Portland, 201 Fed. 119; Bessemer v. Bessemer City Waterworks, 152 Ala. 391, 44 So. 663; BENWOOD v. PUBLIC SERVICE COMMISSION.

To authorize an irrevocable contract by a municipality as to rates to be charged consumers for water furnished by a water company, legislative power to make it must be unquestionable. Knoxville v. Knoxville Water Co. 107 Tenn. 647, 61 L.R.A. 888, 64 S. W. 1075.

In the absence of express legislative authority, a municipal corporation has no power to make a contract with a street railroad company which will prevent the legislature from regulating its rates of fare. Indianapolis v. Navin, 151 Ind. 139, 41 L.R.A. 337, 47 N. E. 525, 51 N. E. 80.

In Brummitt v. Odgen Waterworks Co. 33 Utah, 302, 93 Pac. 828, it is held that in Utah no power has been either expressly or by necessary implication conferred upon municipalities to suspend the power to regulate rates of public service corporations, and that municipalities in that state

does not empower it to enter into a contract to abandon the governmental power itself.

Home Teleph & Teleg. Co. v. Los Angeles, 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. Rep. 50.

Mr. J. W. Ritz also for respondent.

Robinson, J., delivered the opinion of the court:

The Benwood and McMechen Consolidated Water Company made application to the Public Service Commission for a change in rates for water furnished by the company to the public in the city of Benwood. The city and certain of its citizens appeared to the proceeding before the Commission and resisted the application, claiming that

cannot enter into binding contracts respecting rates.

In *Home Teleph. & Teleg. Co. v. Los Angeles*, 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. Rep. 50, affirming 155 Fed. 554, it was held that charter authority to regulate telephone service, and to fix and determine the charges therefor, does not empower a municipality to enter into a contract fixing unalterably, during the term of franchise, the charges for such service, so as to preclude subsequent change of rates.

In *Ft. Smith Light & Traction Co. v. Ft. Smith*, 202 Fed. 581, it was held that a city having authority to inquire into and fix reasonable rates to be charged by public service corporations upon finding that the rates charged were exorbitant had no power to divest itself of such power by a stipulation in a franchise fixing the rates to be charged during the life of the franchise.

A municipal corporation has no authority to contract with a public service corporation as to the fares such corporation might charge and collect during the life of the franchise, so as to deprive itself of exercising during that time the governmental power of rate regulation, by virtue of a charter authorizing it to grant franchises for the use of the streets, and providing that every franchise which provides for the charging of rates should contain a provision fixing the maximum rate which the grantee may charge for services during the life of the franchise, where the charter also provides that "at all times the power and right reasonably to regulate in the public interest the exercise of the franchise or right so granted shall remain and be vested in the council." *Portland R. Light & P. Co. v. Portland*, 201 Fed. 119.

A municipal corporation, was not authorized to limit its power by contract to fix reasonable gas rates for the future, by virtue of a statute (Kan. Laws 1903, chap. 122, §§ 2, 51, 169, 176) empowering cities of the first class to "make all contracts and do all other acts in relation to the property and concerns of the city necessary to the exercise of its corporate or administrative powers," to "prescribe and fix" maximum gas rates which shall "at all times be reasonable and just," to make contracts and grant franchises, etc., concerning light, heat, and power, and to "fix a reasonable schedule" of maximum gas rates, "at all times during the existence of any such grant, contract, or privilege." *Wyandotte County Gas Co. v. Kansas*, 231 U. S. 622, 58 L. ed. 404, 34 Sup. Ct. Rep. 226, affirming 88 Kan. 165, 127 Pac. 639.

the Commission was without power to change the rates, since, at the time of the city's grant of the franchise under which the company operated, the rates for water to be furnished under the franchise were fixed and contracted for therein. The Commission overruled this ground of objection and ordered a hearing on the merits of the application. Thereupon, the city and the citizens, further insisting upon their objection, brought the proceeding into this court, pursuant to the process prescribed in the act creating the Public Service Commission.

The case presents squarely the question: May the Public Service Commission alter a rate that was fixed by franchise ordinance prior to the enactment of the law by which the Commission was created and given pow-

Legislative authority conferred upon a municipality, to grant permission to construct and operate railways in the streets "upon such terms as the proper authorities shall determine," does not include authority to make a binding contract as to rates of fare with which the state cannot interfere through a Public Service Commission without violating the constitutional provision against impairing the obligation of contracts. *Milwaukee Electric R. & Light Co. v. Railroad Commission*, 153 Wis. 592, L.R.A.—, 142 N. W. 491.

Legislative authority conferred upon a municipality, "to erect, or authorize or prohibit the erection of, . . . waterworks," does not include authority to make a binding contract as to water rates with which the state cannot interfere through a Public Service Commission without violating the constitutional provision against impairing the obligation of contracts. *BENWOOD v. PUBLIC SERVICE COMMISSION*.

The general provision in a municipal charter authorizing the municipal corporation to "contract and be contracted with" does not delegate beyond the state's control the power to fix public service rates. *Ibid*.

A city has no authority to fix by ordinance rates to be charged by public service corporations by virtue of an amendment to its charter adopted by the legal voters of the city at a time when a general law of the state was in force known as the public utility act, which vested the Railroad Commission with the power and jurisdiction to supervise and regulate every public utility in the state, and gave such Commission the exclusive authority to investigate any rates charged by public utilities,

ers? If it may not, summary prohibition, under the original jurisdictional powers of this court, will lie in the premises. *United Fuel Gas Co. v. Public Service Commission*, — W. Va. —, 80 S. E. 931.

That the Public Service Commission may change any intrastate rate for service rendered to the public, when to do so will conflict with no paramount law or constitutional inhibition, we have no doubt. The very spirit and purpose of the act by which the Commission is established and performs its functions affirm that it may do so. The broad and general powers prescribed for it by the statute include that of general rate regulation. A reading of the act fully discloses that the legislature meant to delegate to the Public Service Commission the ad-

ministrative supervision and regulation of all service rendered to the public throughout the whole of the state. That it did this for the general welfare is most apparent. Modern conditions giving rise to such legislation in the interest of all are so well known as to need no recounting here. Moreover, the language of the act is so plain that all doubt as to the power of the Commission for general and state-wide administration of rates for service rendered by corporations or individuals to the public must be eliminated. The act does not exclude, but expressly includes, the supervision and regulation of service to the public in municipalities. The following provisions are here pertinent:

"Every person, firm, or corporation en-

and if found unreasonable to fix and order substituted therefor such rates as shall be just and reasonable. *Portland R. Light & P. Co. v. Portland*, 210 Fed. 667. The court said: "Now, the right to regulate rates of public service corporations is a governmental power vested in the state in its sovereign capacity. It may be exercised by the state directly or through a Commission appointed by it, or it may delegate such power to a municipality. But I do not understand that a municipality may assume to itself such power without the consent of the state, where there is a general law on the subject emanating from the entire state. It is true that under the Oregon system the legal voters of every city or town are given power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the state. But this does not authorize the people of a city to amend its charter so as to confer upon the municipality powers beyond what are purely municipal or inconsistent with a general law of the state constitutionally enacted."

In *Tampa v. Tampa Waterworks Co.* 45 Fla. 600, 34 So. 631, subsequent appeal in 47 Fla. 338, 36 So. 174, affirmed in 199 U. S. 241, 50 L. ed. 170, 26 Sup. Ct. Rep. 23, it was held that, conceding the fact that the statutory powers of a city were broad enough to authorize the city to contract with a water company for a public and private supply of water for a period of 30 years, and to fix the rates to be paid by the city and its inhabitants for the entire contract period, the subsequent passage of an ordinance before the expiration of the contract period reducing the rates for the supply of water to the city and its inhabitants to a reasonable charge, in pursuance of the power conferred by a subsequent statute, does not violate any contract right of the water company, nor deprive it of its property without due process of law, where the constitutional provision then in force, and at the time the city and water company were incorporated, and at the time the contract was made, reserved to the legislature the power to regulate by its own act, L.R.A.1915C.

or through the instrumentality of a municipality, corporations performing services of a public nature.

So, in *Pocatello v. Murray*, 21 Idaho, 180, 120 Pac. 812, it was held that the constitutional provisions (Idaho Const. § 1, art. 15) that "the use of all waters" within this state that may, "be sold, rented, or distributed is a public use, and subject to the regulation and control of the state in the manner prescribed by law," and (§ 2, art. 15) that "the right to collect rates or compensation for the use of water supplied to any county, city, or town or water district, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law," and (§ 6, art. 15) that "the legislature shall provide by law the manner in which reasonable maximum rates may be established to be charged for the use of water sold, rented, or distributed for any useful or beneficial purpose," must be read into every contract or franchise for a public water supply, and that an ordinance which prescribed a schedule of rates which a water company might charge for supplying water to the inhabitants of the city for a fixed period of time, and which also provided the method and manner of thereafter appointing a Commission to establish rates at the expiration of such period, construed in the light of the provision of the Constitution, must be understood as providing only a temporary method of ascertaining and fixing rates, to remain in force and effect until the legislature, in the exercise of the duty imposed upon it by the Constitution, shall prescribe the manner and method of determining such rates.

Accordingly, it was held in the above case that a subsequent statute providing a different method for the appointment of commissioners and the fixing of rates than that prescribed by the ordinance was not an impairment of the obligation of a contract, and was therefore not in violation of § 10, art. 1, of the Constitution of the United States. *Ibid.*

It has been held that the power given to

gaged in a public service business in this state shall establish and maintain adequate and suitable facilities, and shall perform such service in respect thereto as shall be reasonable, safe, and sufficient, and in all respects just and fair. All charges, tolls, fares, and rates shall be just and reasonable." Acts 1913, chap. 9, § 4 (Code 1913, chap. 150, § 639).

"The Commission is hereby given the power to investigate all methods and practices of public service corporations, and to require them to conform to the laws of the state. . . . The Commission may change any intrastate rate, charge, or toll which is unjust or unreasonable, and may prescribe such rate, charge, or toll as would be just and reasonable, and change or prohibit any

practice, device, or method of service in order to prevent undue discrimination or favoritism as between persons, localities, or classes of freight." Acts 1913, chap. 9, § 5 (Code 1913, chap. 150, § 640).

"The commission shall have general supervision of all persons, firms, or corporations having authority under any charter or franchise of any city, town, or municipality, county court, or tribunal in lieu thereof, to lay down and maintain wires, pipes, conduits, ducts, or other fixtures in, over, or under streets, highways, or public places for the purpose of furnishing and distributing gas, or for furnishing and transmitting electricity for light, heat, or power, or maintaining underground conduits or ducts for electrical conductors, or for telegraph or

a municipal corporation to contract for a water supply "at such rates as may be fixed by ordinance, and for a period not exceeding 30 years," does not include power to make a binding contract as to rates for the whole time. *Freeport Water Co. v. Freeport*, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493, affirming 186 Ill. 179, 57 N. E. 862; *Danville Water Co. v. Danville*, 180 U. S. 619, 45 L. ed. 696, 21 Sup. Ct. Rep. 505, affirming 186 Ill. 326, 57 N. E. 1129, which reaffirmed 178 Ill. 299, 69 Am. St. Rep. 304, 53 N. E. 118; *Rogers Park Water Co. v. Fergus*, 180 U. S. 624, 45 L. ed. 702, 21 Sup. Ct. Rep. 490, affirming 178 Ill. 571, 53 N. E. 363; *Carlyle v. Carlyle Water, Light & P. Co.* 52 Ill. App. 577. But the rate in such case may be changed from time to time. *Ibid.*

It was pointed out that under the rule requiring strict construction of such grants, the phrase "for a period not exceeding 30 years" qualified the words "construct and maintain," but does not qualify the words "at such rates as may be fixed by ordinance." *Freeport Water Co. v. Freeport*, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493; *Danville Water Co. v. Danville*, 180 U. S. 619, 45 L. ed. 696, 21 Sup. Ct. Rep. 505.

On the other hand, it has been held that the authority granted to a municipal corporation to contract for a water supply includes the power to agree upon the rates to be charged for a definite period, notwithstanding the power to regulate rates is recognized as legislative or governmental. *Bessemer v. Bessemer City Waterworks*, 152 Ala. 391, 44 So. 663 (30 years), followed in *Birmingham Waterworks Co. v. Birmingham*, 211 Fed. 497, affirmed in 213 Fed. 450 (30 years); *Vicksburg v. Vicksburg Waterworks Co.* 206 U. S. 496, 51 L. ed. 1155, 27 Sup. Ct. Rep. 762 (30 years); *Los Angeles City Water Co. v. Los Angeles*, 88 Fed. 720 (30 years); *Ashland v. Wheeler*, 88 Wis. 607, 60 N. W. 818 (50 years); *Omaha Water Co. v. Omaha*, 12 L.R.A. (N.S.) 736, 77 C. C. A. 267, 147 Fed. 1, 8 Ann. Cas. 614 (25 years), appeal to United States Supreme Court dismissed for L.R.A.1915C.

want of jurisdiction in 207 U. S. 584, 52 L. ed. 351, 28 Sup. Ct. Rep. 262.

In *Bessemer v. Bessemer City Waterworks*, 152 Ala. 391, 44 So. 663, supra, the city was authorized by its charter to make all needful provisions by contract for a water supply for itself and citizens, and to regulate the rates to be charged, and it was held that it could lawfully contract for a water supply for a period of 30 years and agree upon the rates for that period; that the effect of such contract was to suspend its charter power in respect to the regulation of rates during that period, and that an ordinance which attempted to reduce the rates before the termination of the contract was void as impairing the obligation of the contract.

In *Vicksburg v. Vicksburg Waterworks Co.* 206 U. S. 496, 51 L. ed. 1155, 27 Sup. Ct. Rep. 762, supra, the city was authorized by statute to provide for the erection and maintenance of a system of waterworks to supply the city with water, and to that end to contract with a private party or parties to build and operate the waterworks, and it was held that a contract fixing maximum water rates to private consumers for a period of 30 years was binding and protected against impairment by the contract clause of the Federal Constitution.

In *Omaha Water Co. v. Omaha*, supra, it was held that power given to a city to contract for the construction and operation of waterworks "on such terms and under such regulations as may be agreed on" confers authority upon the municipality to agree with the contractor upon the rates which he may collect of private consumers during a reasonable term of years.

So, it has been held that a city was empowered to agree with a street railway company upon rates of fare for passengers for a definite period, under legislative authority to fix the "terms and conditions" for the construction, operation, and consolidation of street railways. *Cleveland v. Cleveland City R. Co.* 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. Rep. 756.

The power of a city to contract with a

telephone purposes, and for the purpose of furnishing water either for domestic or power purposes and of oil and gas pipe lines." Acts 1913, chap. 9, § 10 (Code 1913, chap. 150, § 645).

Though the grant and acceptance of the franchise wherein certain rates were fixed created a contract between the water company and the city of Benwood, the rates thereby fixed are nevertheless cognizable for revision by the Public Service Commission under the broad powers delegated thereto, unless prior to the delegation of those powers the legislature had expressly delegated power to the city of Benwood which authorized the city to contract inviolably for the rates mentioned in the franchise for the period stated therein. Rate making is a

legislative act. It is inherent in and belongs primarily to the legislature. The rate-making power is a power of government,—a police power of the state. The city of Benwood, at the time of the granting of the franchise, had no rate-making power that could bind the state, if the legislature of the sovereign state had not theretofore delegated the same to the city. And if such delegation or grant of rate-making power was made to the city prior to the delegation of general and state-wide powers in the same particular by the legislature to the Public Service Commission, the language relied upon as evidence of such delegation or grant to the city must be clear and express. The presumption is against exclusive delegation of the legislature's sovereign

gas company for a period of 10 years under the Ohio statute authorizing cities to regulate the price of gas, and providing that they may fix and agree upon a price for a period not exceeding 10 years, is upheld in the following cases: *Foster v. Findlay*, 5 Ohio C. C. 455, 3 Ohio C. D. 224; *Toledo v. Northwestern Ohio Natural Gas Co.* 5 Ohio C. C. 557, 3 Ohio C. D. 273; *Manhattan Trust Co. v. Dayton*, 8 C. C. A. 140, 16 U. S. App. 588, 59 Fed. 327; *Logan Natural Gas & Fuel Co. v. Chillicothe*, 65 Ohio St. 186, 62 N. E. 122.

In *Des Moines v. Des Moines Waterworks Co.* 95 Iowa, 348, 64 N. W. 269, it was said that a contract binding a city to the initial rate for a water supply specified in a contract, for the entire period covered by the contract (40 years), probably would be held to be so unreasonable that it could not be enforced.

In *Omaha Water Co. v. Omaha*, 12 L.R.A. (N.S.) 736, 77 C. C. A. 267, 147 Fed. 1, 8 Ann. Cas. 614, appeal dismissed for want of jurisdiction in 207 U. S. 584, 52 L. ed. 351, 28 Sup. Ct. Rep. 262, it is held that the making of a municipal contract to suspend for 25 years the power of the city to regulate the rates which a water company shall collect from private consumers, in consideration of the construction and operation of waterworks, is not an unreasonable exercise of the power to contract therefor.

In *Vicksburg v. Vicksburg Waterworks Co.* supra, it is held that a contract made by a city with a waterworks company, fixing maximum water rates to private consumers for 30 years, unless so grossly unreasonable as to suggest fraud or corruption, is binding, and as such is protected against impairment by the contract clause of the Federal Constitution.

In *Reed v. Anoka*, 85 Minn. 294, 88 N. W. 981, it is held that contracts made by a city for a water supply and for electric lights for the use of the city and its inhabitants are not prima facie void, nor beyond the power of municipal authorities, as unreasonable and unfair because of the fact that they cover a period of 31 years, L.R.A.1915C.

and definitely and finally fix the rates and charges to be paid for such utilities for the full period, but, in the absence of a showing of unreasonableness, must be upheld.

In *Creston Waterworks Co. v. Creston*, 101 Iowa, 687, 70 N. W. 739, it was held in an action to recover water rents that a city ordinance granting a water company the right to collect during the continuance of its privilege the rates specified, "or other rates that may be established" by it and approved by the city council, was not invalid under a statute conferring power upon cities to regulate water rates, but forbidding the making of any contract whereby the power to regulate water rates was abridged, where it was not shown that the rates were unreasonable. The court pointed out that by the ordinance the city counsel established the rates therein specified, and as they have not since established any other rates, or alleged or shown that those rates are unreasonable, the rates are therefore authorized and binding until other reasonable rates are established, and that the right and power of the city to fix reasonable rates when those specified are found to be unreasonable cannot be doubted.

III. What amounts to contract precluding subsequent regulation by public.

a. In general.

In order that a charter provision may operate as an exemption from legislative regulation of rates, the exemption must appear by such clear and unmistakable language that it cannot be reasonably construed consistently with the reservation of the power by the state. *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47; *Indianapolis v. Navin*, 151 Ind. 139, 41 L.R.A. 337, 47 N. E. 525, 51 N. E. 80; *Stone v. Yazoo & M. Valley R. Co.* 62 Miss. 607, 52 Am. Rep. 193; *Tal-lassee Falls Mfg. Co. v. Commissioners' Ct.* 158 Ala. 203, 48 So. 354.

A contract exemption from legislative

rate-making power to a municipality. Unless there has been such delegation by clear and express terms, the power is reserved in the state, which can exercise it at such times and to such extent as may be found advisable. *Bluefield Waterworks & Improv. Co. v. Bluefield*, 69 W. Va. 1, 33 L.R.A. (N.S.) 759, 70 S. E. 772; *Judy v. Lashley*, 50 W. Va. 628, 57 L.R.A. 413, 41 S. E. 197; *State ex rel. Webster v. Superior Ct.* 67 Wash. 37, post, 287, 120 Pac. 861, Ann. Cas. 1913D, 78; *Milwaukee Electric R. & Light Co. v. Railroad Commission*, 153 Wis. 592, L.R.A. —, 142 N. W. 491; *Home Teleph. & Teleg. Co. v. Los Angeles*, 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. Rep. 50.

The franchise was granted by an ordi-

power to fix railway rates will not be presumed. *Ruggles v. Illinois*, 108 U. S. 526, 27 L. ed. 812, 2 Sup. Ct. Rep. 832.

In *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198, it was held that if a contract with a state relating to the exercise of franchises is susceptible of two meanings, the one restricting and the other extending the powers of a corporation, that construction of it should be adopted which works the least harm to the state.

Likewise, contracts affecting the right of a city to regulate rates of public service corporations must be strictly construed; and such right cannot be held to have been stipulated away by doubtful or ambiguous provisions. *Rogers Park Water Co. v. Fergus*, 180 U. S. 624, 45 L. ed. 702, 21 Sup. Ct. Rep. 490; *Freeport Water Co. v. Freeport*, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493; *Omaha Water Co. v. Omaha*, 12 L.R.A. (N.S.) 736, 77 C. C. A. 267, 147 Fed. 1, 8 Ann. Cas. 614, appeal dismissed in 207 U. S. 584, 52 L. ed. 351, 28 Sup. Ct. Rep. 262; *Home Teleph. & Teleg. Co. v. Los Angeles*, 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. Rep. 50.

In *Freeport Water Co. v. Freeport*, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 498, it is said: "This power of regulation is a power of government continuing in its nature; and if it can be bargained away at all, it can only be by words of positive grant, or something which is in law equivalent. If there is reasonable doubt, it must be resolved in favor of the existence of the power. In the words of Chief Justice Marshall in *Providence Bank v. Billings*, 4 Pet. 514, 561, 7 L. ed. 939, 955, 'Its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear.' "

A franchise which contains no stipulations as to rates to be charged for gas to be furnished to the city or private consumers cannot be construed into a grant of an exclusive privilege to fix rates. *Zanesville v. Zanesville Gaslight Co.* 47 Ohio St. 1, 23 N. E. 53.

In *Louisville & N. R. Co. v. Kentucky*, L.R.A.1915C.

nance of the city of Benwood passed in October, 1897. The charter of the city as it existed at that time is found in Acts 1895, chap. 63. That charter, we find, delegated no express power to the city in relation to rate making, either as to water or any other thing to be furnished to the public. It did grant the power "to erect, or authorize or prohibit the erection of, gas works, electric light works, or waterworks in the city." But this general grant does not give power to fix rates by franchise or agreement beyond the control of the legislature. For a municipal corporation to claim the power to fix rates inviolably, it must show clear and express delegation of the same to it from the legislature. The Supreme Court of the United States in *Home Teleph. &*

183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. Rep. 95, it was held that a railroad company is not entitled to claim that, by the mere force of its legal organization and the construction of its road, it has any implied power to charge reasonable rates for its services, and to differ rates when competition exists from rates applicable where there is no competition, which cannot be impaired by a constitutional enactment prohibiting railroad companies from charging more for a shorter than for a longer haul, except by permission of the Railroad Commission in special cases after investigation; as it must be deemed to have accepted its charter subject to the general right of the state to regulate and control the grant in the interest of the public.

In *Houston & T. C. R. Co. v. Storey*, 149 Fed. 499, it was held that a statute authorizing the legislature to prescribe rates for railroad transportation, with the limitation that no reduction in rates should be made unless the company has realized a profit equal to 12 per cent per annum upon its capital during the previous 10 years, does not create a contract between the state and the railroad companies precluding the state from changing the law as to rates, or exempting such companies from future legislation regulating rates for transportation.

A statute amending the charter of a turnpike company, and changing its rates of toll, does not constitute a contract with the company so as to prevent subsequent changes of the rates. *Covington & L. Turnp. Road Co. v. Sandford*, 14 Ky. L. Rep. 689, 20 S. W. 1031, reversed on other grounds in 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198.

It has been held that a railroad is not exempt from state regulations of its rates by the fact that it has been declared a post and military route and national highway by acts of Congress which granted to it lands for a right of way. *St. Louis & S. F. R. Co. v. Gill*, 54 Ark. 101, 11 L.R.A. 452, 15 S. W. 18.

A statute requiring the city council to fix reasonable rates to be charged by pub-

Teleg. Co. v. Los Angeles, supra, said: "It has been settled by this court that the state may authorize one of its municipal corporations to establish by an inviolable contract the rates to be charged by a public service corporation (or natural person) for a definite term not grossly unreasonable in point of time, and that the effect of such a contract is to suspend, during the life of the contract, the governmental power of fixing and regulating the rates. . . . But for the very reason that such a contract has the effect of extinguishing *pro tanto* an undoubted power of government, both its existence and the authority to make it must clearly and unmistakably appear, and all doubts must be resolved in favor of the continuance of the power."

lic service corporations for services must be read into every contract made by the city after its enactment, and an ordinance fixing rates does not impair the obligation of any contract made by the city after the passage of the statute. Lackey v. Fayetteville Water Co. 80 Ark. 108, 96 S. W. 622; Arkadelphia Electric Light Co. v. Arkadelphia, 99 Ark. 178, 137 S. W. 1093.

And in State ex rel. Ellis v. Tampa Waterworks Co. 56 Fla. 858, 19 L.R.A. (N.S.) 183, 47 So. 358, it is held that provisions as to rates in a municipal contract for a public water supply are to be construed as subject to the constitutional power of the legislature to regulate rates.

To the same effect is Pocatello v. Murray, 21 Idaho, 180, 120 Pac. 812, which held that the constitutional provision that "the legislature shall provide by law the manner in which reasonable maximum rates may be established to be charged for the use of water sold, rented, or distributed for any useful or beneficial purpose" must be read into every contract or franchise for a public water supply, and that an ordinance which prescribed a schedule of rates which a water company might charge for supplying water to the inhabitants of the city for a fixed period of time, and which also provided the method and manner of thereafter appointing a Commission to establish rates at the expiration of such period, construed in the light of the constitutional provision, must be understood as providing only a temporary method of ascertaining and fixing rates to remain in force and effect until the legislature, in the exercise of the duty imposed upon it by the Constitution, should prescribe the method of determining such rates.

A city having authority to inquire into and fix reasonable rates to be charged by public service corporations, upon complaint made by its citizens that the rates charged are exorbitant, does not surrender such power to regulate the rates for gas by a grant in a franchise fixing the maximum rate to be charged for gas, since the statute in force when the franchise was granted became a part of the contract. Ft. Smith L.R.A.1915C.

But the city of Benwood says it had the right given it by the legislative charter to "contract and be contracted with." True, this general provision usually found in municipal charters is in the charter of the city of Benwood. But that provision cannot be construed as delegating beyond legislative control the power to fix public service rates. For, as we have seen, the presumption is against such delegation of the power. The delegation "must clearly and unmistakably appear." It does not so appear in the general provision merely to contract and be contracted with.

We do not say that the contract as to rates contained in the franchise was not good as between the water company and the city as long as the legislature did not ex-

Light & Traction Co. v. Ft. Smith, 202 Fed. 581.

Likewise, where a grant of power to the directors of a railroad company to make by-laws, rules, and regulations for the management of its affairs is made subject to the laws of the state, it does not exempt the company from the operation of laws subsequently enacted, within the scope of legislative power, for the regulation of the business. Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; Stone v. Illinois C. R. Co. 116 U. S. 347, 29 L. ed. 650, 6 Sup. Ct. Rep. 348.

In Pocatello v. Murray, supra, it was said: To deprive one engaged in a public service of the power to charge and collect an unreasonable, extortionate, or unconscionable rate deprives him of no right, natural or acquired, and cannot be the impairment of a contract within the purview and meaning of § 10, art. 1, of the Federal Constitution.

b. Conferring power to charge for service.

In Tallassee Falls Mfg. Co. v. Commissioners' Ct. 158 Ala. 263, 48 So. 354, it was held that the grant of the right to receive and collect reasonable tolls for the use of a bridge does not imply the grant of power to fix the rate of such tolls so as to preclude the state from subsequently authorizing the county commissioners to fix rates of toll to be charged for the use of bridges.

Nor does the failure of the statute to expressly reserve the power in the state to fix the rates to be charged necessarily imply the grant of the power. Ibid.

A mere grant to a corporation of the right to take tolls for transportation of passengers and freight over its line of railroad does not preclude the legislature from subsequently fixing maximum rates of toll, as such action by the legislature does not interfere with the corporation's right to take some toll; it is therefore not unconstitutional as impairing the obligation of any contract between the corporation and the

ercise its superior and supreme power over the subject of the rates. From the general powers to establish waterworks and to contract and be contracted with, impliedly the city had the power to contract in the matter of rates for water furnished the public as long as the legislature did not exercise its reserved power in that particular. But that implied power was inferior to the reserved power. It was subject to the right of the legislature to prescribe different rates at any time. The legislature, not having expressly delegated to the city power by which it could inviolably agree as to the rates, could exercise power in that particular regardless of the franchise provisions. It had withheld supreme power unto itself. Neither by the charter nor by subsequent

legislation did it delegate to the city of Benwood authority to agree unalterably as to the rates for a stipulated period.

The water company and the city in the making of the so-called franchise contract were bound by cognizance of the fact that their dealings were subject to future exercise of the legislature's power over rates for water furnished the general public in the locality. Hence, the franchise was made subject to what the legislature might thereafter do as to the rates dealt with by the franchise. It was subject to the legislature's making use of the inherent power reserved, and not exclusively delegated to the city of Benwood, to supervise all public service charges. And when the legislature in its wisdom saw fit to exercise its reserved pow-

state. *Blake v. Winona & St. P. R. Co.* 19 Minn. 418, Gil. 362, 18 Am. Rep. 345.

A provision that a plank road company may collect the same tolls and enjoy the same privileges granted to other companies by general law does not fix the company's rates according to the general law as it then exists, but makes it subject to changes thereof which apply to other companies. *Snell v. Chicago*, 133 Ill. 413, 8 L.R.A. 858, 24 N. E. 532.

A charter granting a corporation the right to "manufacture and sell gas" together with "the exclusive privilege of supplying a city and its inhabitants with gas" for the term of 20 years, and authorizing the directors to make by-laws and rules for regulating all matters pertaining to the company, not inconsistent with the laws of the state, but containing no provision as to the price to be charged for gas, and no provision upon the subject of meters, does not exempt the corporation from the operation of a statute restricting the right to charge for the use of gas meters. *State ex rel. Atty. Gen. v. Columbus Gaslight & Coke Co.* 34 Ohio St. 572, 32 Am. Rep. 390.

But in *Rushville v. Rushville Natural Gas Co.* 164 Ind. 162, 73 N. E. 87, 3 Ann. Cas. 86, it is held that a city ordinance granting a corporation the use of the streets for supplying the citizens with natural gas, which did not prescribe any limits as to charges for gas, or reserve to the city the right thereafter to do so, when accepted by the corporation, constituted a contract which precluded the city from subsequently attempting to regulate the rates.

And in *Agua Pura Co. v. Las Vegas*, 10 N. M. 6, 50 L.R.A. 224, 60 Pac. 208, it is held that where, by a contract between county commissioners and a water company, the latter is given the right to construct appliances for the purpose of supplying water, and the right to supply water to the inhabitants, such right necessarily includes the right of the company to fix the price at which it will sell the water; and that a subsequent act of the legislature which regulates the price to be charged for water impairs the contract. L.R.A.1915C.

c. *Conferring power to fix charges.*

It has been held that a charter provision authorizing the corporation to fix fares and charges for transportation carries with it an implied restriction that the rates shall be reasonable, and that therefore the legislature has the same power to declare what are reasonable maximum charges as if the charter was silent on that point. *Ruggles v. People*, 91 Ill. 256; *Illinois C. R. Co. v. People*, 95 Ill. 313; *Chicago, B. & Q. R. Co. v. Iowa (Chicago, B. & Q. R. Co. v. Cutts)* 94 U. S. 155, 24 L. ed. 94.

Thus, it is held that a provision in a railroad charter that the company may from time to time fix, regulate, and receive rates to be charged for transportation does not constitute a contract, but leaves the state free within the limits of its authority to declare what shall be deemed reasonable. *Stone v. Farmers' Loan & T. Co.* 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191. The court said: "The right to fix reasonable charges has been granted, but the power of declaring what shall be deemed reasonable has not been surrendered. If there had been an intention of surrendering this power, it would have been easy to say so. Not having said so, the conclusive presumption is there was no such intention."

And in *Stone v. Yazoo & M. Valley R. Co.* 62 Miss. 607, 52 Am. Rep. 193, it was said: "A grant in general terms of authority to fix rates is not a renunciation of the right of legislative control so as to secure reasonable rates. Such a grant evinces merely a purpose to confer power to exact compensation which shall be just and reasonable."

To the same effect are the following cases:

—*Stone v. Illinois C. R. Co.* 116 U. S. 347, 29 L. ed. 650, 6 Sup. Ct. Rep. 348, reversing 20 Fed. 270, holding that the grant of power to the president and directors of a railroad company to establish such rates for transportation as they may deem proper, and to change them at pleasure, leaves the state free, within the limits of its gen-

er of supervision over the matter of public service rates, by the creation of the Public Service Commission and the delegation of the power to the Commission in that behalf, the rates mentioned in the franchise became subject to supervision and regulation by the Public Service Commission. The legislature had withheld the exercise of its power over those rates until that time. It could use the power when it pleased. No length of nonuser affected the state's right thereto. *Chicago, B. & Q. R. Co. v. Iowa* (Chicago, B. & Q. R. Co. v. Cutts) 94 U. S. 155, 24 L. ed. 94. What the supreme court of Wisconsin said in a similar instance is here applicable: "The contract remained valid between the parties to it until such time as the state saw fit to exercise its para-

mount authority, and no longer. To this extent, and to this extent only, is the contract before us a valid subsisting obligation." *Manitowoc v. Manitowoc & N. Traction Co.* 145 Wis. 13, 140 Am. St. Rep. 1056, 129 N. W. 925.

Yet it is most earnestly insisted on behalf of the city that the contract is inviolable, and that to uphold the powers of the Public Service Commission to the extent of allowing the Commission to change the rates would in effect abrogate the contract, contrary to constitutional inhibitions against the enactment of any law impairing the obligation of a contract. In the light of what we have said, this position cannot be sustained. Nothing that was binding in the contract will be impaired. By it the state

eral authority, to make laws as to the reasonableness of such rates;

—*Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702, holding that a general provision in the charter of a railroad company, granting power to the directors to make rules as to the rates to be charged for transportation, does not constitute an irrevocable contract with the company that it shall have the right for all future time to prescribe its rates free from legislative control;

—*Minneapolis Eastern R. Co. v. Minneapolis*, 134 U. S. 467, 33 L. ed. 985, 3 Inters. Com. Rep. 224, 10 Sup. Ct. Rep. 473, holding that a provision in a general statute that a railroad company organized thereunder may charge for transportation such reasonable rates as may from time to time be fixed by the corporation or prescribed by law, and a provision that no company shall demand an unreasonable price, do not constitute such a contract with the corporation as to the fixing of rates that the legislature is deprived of power to regulate those charges;

—*Atlantic & P. R. Co. v. United States*, 76 Fed. 186, holding that a provision in the charter of a railroad company that the directors "shall from time to time fix, determine, and regulate the fares, tolls, and charges to be received and paid for transportation of persons and property" is not a contract that will preclude the government from regulating rates;

—*Stone v. Natchez, J. & C. R. Co.* 62 Miss. 646, holding that a charter provision authorizing the company "from time to time to fix, regulate, and receive tolls and charges by them to be received for transportation of persons and property" carries with it the implied condition that the charges shall be reasonable, and the legislature retains power to compel the establishment of reasonable and proper rates to be charged by the company, through a Commission established for that purpose;

—*Chicago, B. & Q. R. Co. v. Jones*, 149 Ill. 361, 24 L.R.A. 141, 4 Inters. Com. Rep. 683, 41 Am. St. Rep. 278, 37 N. E. 247, holding L.R.A.1915C.

that a statute authorizing a board of directors to establish rates to be charged for railroad transportation from time to time, and also providing that the company's by-laws shall not be repugnant to the Constitution and laws of the state, does not prevent the legislature from providing for the fixing of maximum rates by railroad commissioners, on the ground that the earlier statute was a contract the obligation of which would be impaired by the later statute;

—*Southern P. Co. v. Campbell*, 230 U. S. 537, 57 L. ed. 1610, 33 Sup. Ct. Rep. 1027; *Ex parte Koehler*, 11 Sawy. 37, 23 Fed. 529; *Wells, F. & Co. v. Oregon R. & Nav. Co.* 8 Sawy. 600, 15 Fed. 561; *State v. Southern P. Co.* 23 Or. 424, 31 Pac. 960, holding that the authority of a railroad carrier incorporated upon the Oregon general incorporation law, which provided that every corporation formed thereunder shall have power to collect and receive such tolls or freight for the transportation of persons or property as it may prescribe, is subject to the implied limitation that the charges shall be reasonable; and the power of the state, through its legislature or any agency lawfully constituted thereby, to prescribe reasonable rates to be observed by the carrier, was not thereby withdrawn;

—*Dillon v. Erie R. Co.* 19 Misc. 116, 43 N. Y. Supp. 320, holding that a statute prescribing maximum rates for railroad transportation does not impair the obligation of any contract created by a provision in an existing railroad charter granting the company power "from time to time to fix, regulate, and receive the tolls and charges . . . to be received for transportation of property and persons," without prescribing any limit for such tolls;

—*Peik v. Chicago & N. W. R. Co.* 94 U. S. 164, 24 L. ed. 97, holding that authority given a railroad company by its charter, to demand and receive such rates as the company shall deem reasonable, is not a contract which will prevent the state from fixing maximum rates, where the charter is subject, under the Constitution of the state, to alteration or repeal;

was not bound. The contract related to a subject-matter belonging to the state. The state had not given the city the power or agency to contract away its right thereto for a given time. The contract, having been entered into without express legislative authority, was permissive only. It was conditioned upon the exercise of the sovereign power over the subject-matter. All this the parties to the contract were bound to know when they entered into it. There can be no impairment of the contract by the act of the state in claiming its own, when it is not bound by the contract. The supervision and regulation of the rates by the state, through the Public Service Commission, do not take from either of the parties to the contract any right which they had there-

under. Such supervision and regulation do not therefore impair the obligation of a contract. *Home Teleph. & Teleg. Co. v. Los Angeles*, supra; *State ex rel. Webster v. Superior Ct.* 67 Wash. 37, post, 287, 120 Pac. 861, Ann. Cas. 1913D, 78; *Knoxville Water Co. v. Knoxville*, 189 U. S. 434, 47 L. ed. 887, 23 Sup. Ct. Rep. 531; *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 285; *Wyandotte County Gas Co. v. Kansas*, 231 U. S. 622, 58 L. ed. 404, 34 Sup. Ct. Rep. 226; *Dawson v. Dawson Teleph. Co.* 137 Ga. 62, 72 S. E. 508.

Perceiving that the Public Service Commission is acting within its powers, we decline to interfere. The petition asking for relief here will be dismissed.

—*Laurel Fork & S. H. R. Co. v. West Virginia Transp. Co.* 25 W. Va. 324, holding that a charter granting the corporation the right to demand such sums as the corporation may deem reasonable for carrying freight and passengers, provided they are reasonable, does not preclude the legislature from afterward fixing the maximum rate of charges, even if there is no reserved power to alter or repeal the charter.

Delegation of authority to a city to fix reasonable rates to be charged for gas does not impair the obligation of the contract right of a gas company to charge and collect reasonable rates, as authorized by its charter. *Capital City Gaslight Co. v. Des Moines*, 72 Fed. 829.

A grant by a municipality to certain persons of the exclusive privilege of supplying water and an "unrestrained right to establish such rates for the supply of water to private persons as they may deem expedient, provided that such rates be general," constitutes a contract which is not affected by a Constitution subsequently adopted and legislation under it, providing for the regulation of water rates. *Santa Ana Water Co. v. San Buenaventura*, 56 Fed. 339.

d. Effect of naming maximum rates.

The cases are not in harmony upon the effect of the acceptance of a charter containing a provision designating maximum rates that may be charged. Some courts have held that the acceptance of a charter containing such a stipulation creates a contract right to charge that rate, which cannot afterward be reduced without the consent of the grantee, while other courts have taken the position that such a stipulation is merely a regulation of the right to charge for services, and does not amount to a contract right to charge the amount named during the existence of the franchise.

1. View that designation of maximum rate gives contract right to charge that rate.

Express power in the charter of a railroad company to demand such tolls as it

thinks reasonable, provided they do not exceed a specified maximum, was held in *Philadelphia, W. & B. R. Co. v. Bowers*, 4 Houst. (Del.) 506, to constitute a contract which could not be changed by subsequent legislation, where there was no reservation of power to alter the charter.

A provision in the charter of a railroad company conferring the power to fix rates for transportation that should not exceed a specified maximum amount, when accepted by the company, constitutes a valid and binding contract precluding the state from controlling rates fixed within the prescribed limits of the charter. *Stone v. Yazoo & M. Valley R. Co.* 62 Miss. 607, 52 Am. Rep. 193, followed in *Gulf & S. I. R. Co. v. Adams*, 90 Miss. 559, 45 So. 91.

An ordinance adopted under legislative authority, which provides that the rate of fare to be charged by a street railway company shall not exceed 5 cents, gives the company, when accepted by it, a contract right to charge that rate, which cannot be reduced by the city without the consent of the company, under the right to prescribe from time to time rules and regulations for the running and operation of the road. *Detroit v. Detroit Citizens' Street R. Co.* 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410.

The acceptance of municipal ordinances for the consolidation and extension of street railway lines, which secured to the public, for the limited time during which the privileges therein granted should continue, the benefit of a single fare of not more than 5 cents for a continuous passage over the whole length or any portion of the consolidated and extended lines, created a contract right to charge that rate, which could not afterward be reduced by the municipality over a portion of the consolidated lines, under the authority of a right to regulate fares reserved in an ordinance adopted before the consolidation, which granted a renewal franchise to the corporation which then owned that portion of the lines. *Cleveland v. Cleveland City R. Co.* 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. Rep. 756, affirming 94 Fed. 385.

The acceptance of a grant to operate a street railroad upon streets of a city, which fixed the fare to be charged, created a binding contract which precluded the city from thereafter reducing the fare, or requiring the issuance of transfers to passengers. *Shreveport Traction Co. v. Shreveport*, 122 La. 1, 129 Am. St. Rep. 345, 47 So. 41.

An exclusive power to fix passenger and freight rates within the maximum limit, which could not be impaired by subsequent legislation attempting to fix such rates, was conferred upon the Michigan Central Railroad Company by § 15 of its charter, providing that it shall be lawful for the company to fix the tolls and charges for the transportation of property and persons, subject only to a limitation as to passengers of 3 cents a mile; and such power is not limited by §§ 11, 30, authorizing the company to charge such tolls as shall be lawfully established by by-laws, and to pass such by-laws as shall be necessary to carry into execution the powers vested in it, provided they are not contrary to the laws or Constitution of the United States. *Pingree v. Michigan C. R. Co.* 118 Mich. 314, 53 L.R.A. 274, 76 N. W. 635.

In *State ex rel. St. Louis v. Laclede Gas-light Co.* 102 Mo. 472, 22 Am. St. Rep. 789, 14 S. W. 974, 15 S. W. 383, it was held that an ordinance accepted by a gas company fixing the maximum price of gas was a contract which was protected against an attempt of the city to reduce the price. In summing up the holding of the court it was said that the price could not be diminished by subsequent legislative action, whether state or municipal. To the same effect are *Logan Natural Gas & Fuel Co. v. Chilli-cothe*, 65 Ohio St. 186, 62 N. E. 122; *Newark v. Newark Natural Gas & Fuel Co.* 65 Ohio St. 210, 62 N. E. 1104.

A contract made by a city with a water-works company, fixing maximum water rates to private consumers for 30 years, unless so grossly unreasonable as to suggest fraud or corruption, is binding, and, as such is protected against impairment by the contract clause of the Federal Constitution. *Vicksburg v. Vicksburg Waterworks Co.* 206 U. S. 496, 51 L. ed. 1155, 27 Sup. Ct. Rep. 762.

An ordinance accepted by a water company constructing waterworks, which provided that the company should furnish water to private consumers at such prices as might be agreed upon, not exceeding those specified, created a contract the obligation of which was impaired by an order of the water board reducing the rates below the amount specified in the ordinance. *Omaha Water Co. v. Omaha*, 12 L.R.A.(N.S.) 736, 77 C. C. A. 267, 147 Fed. 1, 8 Ann. Cas. 614, appeal dismissed by United States Supreme Court for want of jurisdiction in 207 U. S. 584, 52 L. ed. 351, 28 Sup. Ct. Rep. 202.

A railroad commission has no power to fix rates to be charged by a railroad company whose charter empowers it to fix its own rates within certain limits; but such L.R.A.1915C.

commission has the right to see that the company keeps within the limits of its charter rights, and for that purpose is entitled to demand the same report from it as from other railroad companies. *Mississippi R. Commission v. Gulf & S. I. R. Co.* 78 Miss. 750, 29 So. 789.

So, in *Louisville & N. R. Co. v. McChord*, 103 Fed. 216, reversed on other grounds in 183 U. S. 483, 46 L. ed. 289, 22 Sup. Ct. Rep. 165, the court thought that where a railroad charter fixed the maximum rates which the company might charge, this provision might not be changed without its consent.

In *Watson v. Delaware, L. & W. R. Co.* 32 Misc. 311, 66 N. Y. Supp. 798, it was held that a statute requiring railroad companies to issue mileage books at 2 cents a mile was unconstitutional as applied to a previously incorporated railroad company authorized by its charter to make a maximum charge of 3 cents a mile, as depriving the corporation of its right to full compensation for services according to its charter, without due process of law.

2. View that designation of maximum rate does not give contract right to charge that rate.

A charter granting a railroad company the exclusive right of transportation over a railroad to be constructed by it, provided the charge of transportation should not exceed a sum specified, does not make the provision as to rates a contract, so as to preclude subsequent legislative regulation. *Georgia R. & Bkg. Co. v. Smith*, 70 Ga. 694, affirmed in 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47.

The charter provision that the charge for transportation should not exceed 5 cents a mile for every passenger is not a contract on the part of the state that passenger fare should never be reduced below that rate. *Dow v. Beidelman*, 49 Ark. 325, 5 S. W. 297.

An ordinance granting an exclusive franchise to a water company with the right to use the streets, requiring the municipality to pay certain rentals, and binding the grantee, among other things, to furnish an adequate supply of water, does not give a contract right to charge the rates named in the ordinance for the whole period of the franchise, by virtue of a provision that the grantee "shall charge the following annual rate to consumers of water during the existence of this franchise," as this is merely a regulation of the right to charge rates, and does not amount to a stipulation that no other regulation will be made during the term of the franchise. *Rogers Park Water Co. v. Fergus*, 180 U. S. 624, 45 L. ed. 702, 21 Sup. Ct. Rep. 490, affirming 178 Ill. 571, 53 N. E. 363.

A reduction by the state of the price of gas to be furnished by a gas company availing itself of the general power to absorb its rivals, conferred upon gas companies by Illinois act of June 5, 1897, was not precluded by the provision of § 11 of that act,

that such corporation should not exceed the rate it had been charging the year immediately preceding the acquisition of the absorbed corporations, since such provision was not intended to fix, and did not fix, a rate unalterable by either party, but simply a rate which the consolidated companies could not exceed. *People's Gaslight & Coke Co. v. Chicago*, 194 U. S. 1, 48 L. ed. 851, 24 Sup. Ct. Rep. 520.

In *Com. v. Covington & C. Bridge Co.* 14 Ky. L. Rep. 836, 21 S. W. 1042, it was held that a provision in the charter of a bridge company authorizing the directors to fix rates to be charged, which were not to exceed an amount that would realize 15 per cent on the investment, did not constitute a contract so as to preclude subsequent regulation of rates by statute, overruling *Hamilton v. Keith*, 5 Bush, 458, which reached a contrary conclusion under a similar charter of a railroad company.

Com. v. Covington & C. Bridge Co. supra, was reversed by the Supreme Court of the United States in 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087, upon the ground that the statute regulating rates was a regulation of interstate commerce beyond the power of the state, without reference to the contract features involved.

Com. v. Covington & C. Bridge Co. supra, was expressly approved and followed in *Winchester & L. Turnp. Road Co. v. Croxton*, 98 Ky. 739, 33 L.R.A. 177, 34 S. W. 518, which held that a charter specification of rates which it shall be lawful for a turnpike company to charge, subject to a certain increase or decrease if necessary to keep the company's dividends within certain limits, does not constitute an irrevocable contract between the state and the corporation, but is merely an indication that such rates are supposed to be reasonable, without precluding the subsequent exercise of legislative power to change the rates.

No contract exemption from legislative power to regulate railway rates is conferred by a charter amendment giving the directors power to fix rates by by-law, where such amendment also provides that no by-law shall be made that conflicts with the law of the state. *Ruggles v. Illinois*, 108 U. S. 526, 27 L. ed. 812, 2 Sup. Ct. Rep. 832.

No contract within the protection of the constitutional provision against impairment, that the state would not thereafter authorize boards of supervisors to reduce water rates so as to yield to the stockholders less than 1½ per cent per month on the capital actually invested by a corporation organized under Cal. Stat. 1853, p. 87, as amended by Cal. Stat. 1862, p. 540, was created by the provision of § 3 of the latter act, that every such company should have power to establish its rates, which should be subject to regulation by the appropriate board of supervisors, but should not be reduced by them below that point, although the language of the latter act be taken as containing a special charter granted to such L.R.A.1915C.

corporation. *Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co.* 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. Rep. 241, reversing 113 Fed. 930. The court said: "There is no promise made in the act that the legislature would not itself subsequently alter that authority. The state simply authorized its agents, the boards of supervisors, to regulate rates, but not to reduce them below a certain point. We do not think that from this language a contract can or ought to be implied that the state might not thereafter authorize the boards to reduce them, or that it might not itself do so directly."

A municipal ordinance granting a franchise to operate a telephone line, which prescribed the rates to be charged, when the municipality had no power to fix telephone rates, will not operate to suspend, during the life of the ordinance, the governmental power of fixing and regulating the rates of the company by the State Corporation Commission, although the ordinance was accepted and acted upon by the corporation. *Pioneer Teleph. & Teleg. Co. v. State*, 33 Okla. 724, 127 Pac. 1073.

Nor is the corporation protected from regulation by art. 9, § 18, of the Constitution, prescribing the powers of the Corporation Commission, and providing that nothing in that section "shall impair the rights which have heretofore been, or may hereafter be, conferred by law upon the authorities of any city, town or county to prescribe rules, regulations or rates of charge to be observed by any public service corporation in connection with any services performed by it under a municipal or county franchise granted by such city, town or county, so far as such services may be wholly within the limits of the city, town or county granting the franchise." *Ibid.*

An order of the Railroad Commission fixing rates in such a case does not violate the provision of the state and Federal Constitutions prohibiting the impairment of the obligations of contracts. *Ibid.*

A statute requiring street railway companies to issue half fare tickets to school children does not impair the obligation of any contract with the municipality fixing the rates which such company may charge, entered into after the adoption of the state Constitution, which subjects to the control of the legislature all privileges and franchises granted by it or created under its authority. *San Antonio Traction Co. v. Altgelt*, 200 U. S. 304, 50 L. ed. 491, 26 Sup. Ct. Rep. 261, affirming — *Tex. Civ. App.* —, 81 S. W. 106.

To the same effect is *Indianapolis v. Navin*, 151 Ind. 139, 41 L.R.A. 337, 47 N. E. 525, 51 N. E. 80, where it was held that a statute regulating rates of street railroads did not unconstitutionally impair the obligation of a contract under which the railroad company took possession of the city streets, which fixed the rates to be charged for transportation, it appearing that the statute authorizing the city to prescribe terms upon which a street railroad

company should occupy the streets was subject to amendment or repeal by the legislature.

In *Manitowoc v. Manitowoc & N. Traction Co.* 145 Wis. 13, 140 Am. St. Rep. 1056, 129 N. W. 925, it was held that the power conferred upon cities to ingraft upon a railway franchise a feature limiting the rate of fare as a condition of using the city streets for railway purposes is that of acting as a state agency in molding the character of corporate franchises, and so subject to the reserved power of the state to alter or amend corporate charters.

The state is not precluded from regulating rates for transportation by a railroad company, by virtue of a statute in force when the corporation was formed which prescribed the maximum rates to be charged, when the Constitution then in force provided that such statutes and the charters of corporations might be altered or annulled by the legislature, subject only to condition that no injustice should be done to the corporations. *St. Louis & S. F. R. Co. v. Ryan*, 56 Ark. 245, 19 S. W. 839; *St. Louis & S. F. R. Co. v. Gill*, 54 Ark. 101, 11 L.R.A. 452, 15 S. W. 18, affirmed in 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484.

A provision in a contract between a water company and a municipality, that the company shall supply water to private consumers at a specified rate, does not amount to an implied undertaking by the municipality not to disturb such rate, the obligation of which is impaired by an ordinance reducing it, where the company was incorporated under an act which, while conferring upon it power to charge such rates as might be agreed upon with its consumers, expressly recognized the power of the municipality to regulate water rates. *Knoxville Water Co. v. Knoxville*, 189 U. S. 434, 47 L. ed. 887, 23 Sup. Ct. Rep. 531, affirming 107 Tenn. 647, 61 L.R.A. 888, 64 S. W. 1075.

A franchise granted by a municipal corporation containing a stipulation fixing the maximum rates that the grantee may charge during the life of the franchise does not constitute a contract suspending the governmental power of regulation during the life of the franchise, where the city charter provides that "at all times the power and right reasonably to regulate in the public interest the exercise of the franchise or right so granted shall remain and be vested in the council, and said power and right cannot be divested or granted." *Portland, R. Light & P. Co. v. Portland*, 201 Fed. 119, followed in *Portland, R. Light & P. Co. v. Portland*, 210 Fed. 667.

The fact that no provision was entered in the franchise reserving to the city the right to change the rate cannot affect its power to do so. *Ibid.*

No vested right is acquired by the owner of a ferry franchise in the rate of tolls fixed by county commissioners, where the charter provides that such ferry shall be subject to the same regulations as other

ferries are, "or may hereafter be," by the laws of the territory; but such rates are subject to change under a subsequent law giving county commissioners authority to alter rates of ferriage. *Stephens v. Powell*, 1 Or. 283.

e. Miscellaneous.

A contract right of a street railway company to charge the rate of fare permitted by a municipal ordinance vests in such company, secure against impairment by subsequent legislation by the city, when ratified by a valid act of the state legislature, notwithstanding the want of power of the city to adopt the ordinance. *Minneapolis v. Minneapolis Street R. Co.* 215 U. S. 417, 54 L. ed. 259, 30 Sup. Ct. Rep. 118.

The right "to regulate" the government of vehicles, passengers, and street cars, contained in a city charter, does not include the right to change the rate of fare fixed by ordinance in a franchise authorizing the operation of a street railway, during the life of the franchise. *Shreveport Traction Co. v. Shreveport*, 122 La. 1, 129 Am. St. Rep. 345, 47 So. 40.

No permission to municipal authorities to reduce street railroad fares without the consent of the company, below the rate at which they were fixed in compliance with the street railway statute (*Michigan act 1867, § 20*) which declares that such rates shall be established by agreement between the municipality and the railway company, can be implied from the further provision of the statute, that the rates of fare agreed upon shall not be increased without the consent of the city authorities. *Detroit v. Detroit Citizens' Street R. Co.* 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410.

A reservation by a city in a lease of its waterworks, of the right to regulate rates provided they be not reduced below the then existing rates, must, if valid, be deemed to be a limitation upon the right of the city as a municipality to regulate water rates, which will preclude it from reducing the rates by ordinance during the term below that standard, and not a mere granting back by the lessees of the right of the city in its proprietary capacity only. *Los Angeles v. Los Angeles City Water Co.* 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736.

A provision in an ordinance granting a renewal of its franchise to a gas company, that, in consideration of the privileges granted, it shall furnish gas at a price not to exceed 1.80 per thousand cubic feet, and 20 cents per thousand cubic feet for discount to consumers paying before the 10th of each month after consumption, is not a contract by the city that the price shall be kept high enough to allow a discount for prompt payment, the agreement being that of the company alone, and subject to the city's power to regulate rates. *Cedar Rapids Gaslight Co. v. Cedar Rapids*, 223 U. S. 655, 56 L. ed. 594, 32 Sup. Ct. Rep. 389,

affirming 144 Iowa, 426, 138 Am. St. Rep. 229, 120 N. W. 966.

A municipality is not precluded from exercising the power to fix and regulate water rates expressly conferred upon it by statute (Ky. act of June 14, 1893, § 3290), by the provisions of a prior municipal ordinance granting the right to construct waterworks, which gave the grantee "power and authority to make and enforce, as a part of the condition upon which it will supply water to its consumers, all needful rules and regulations, not inconsistent with the law or provisions of this ordinance." *Owensboro v. Owensboro Waterworks Co.* 191 U. S. 358, 48 L. ed. 217, 24 Sup. Ct. Rep. 82.

In *Los Angeles City Water Co. v. Los Angeles*, 103 Fed. 711, it was held that, after the expiration of a contract made between a city and a water company for the term of 30 years, which contract requires the company to furnish water free for all municipal, fire, and school purposes, and to supply water for domestic use at specified rates, and make necessary extensions to its system; and further provided that the city, upon payment of the value of the improvement, should be entitled to the plant at the expiration of the term,—the city cannot reduce such rates without unconstitutionally impairing the obligation of the contract, where it still requires the company to furnish water and extend its system, and has failed to pay the company the value of its improvements.

A city ordinance granting a franchise to a street railway company, and fixing the rate of fare to be charged within the city limits, though amounting to a contract when accepted by the company, must be construed to have been made and accepted in contemplation of the rule that ordinances designed to apply to the city at large operate throughout its actual boundaries, including the boundaries as subsequently extended, unless a contrary intention is clearly expressed. *Detroit v. Detroit United R. Co.* 173 Mich. 314, 139 N. W. 56; *People v. Detroit United R. Co.* 162 Mich. 460, 139 Am. St. Rep. 582, 125 N. W. 700, 127 N. W. 748. To the same effect are *Indiana R. Co. v. Hoffman*, 161 Ind. 593, 69 N. E. 399, 15 Am. Neg. Rep. 527; *Peterson v. Tacoma R. & Power Co.* 60 Wash. 406, 140 Am. St. Rep. 936, 111 Pac. 338; *State ex rel. Dennison v. Seattle R. & S. R. Co.* 64 Wash. 167, 116 Pac. 638; *Virginia Pass. & Power Co. v. Com.* 103 Va. 644, 49 S. E. 995; and *St. Louis Gaslight Co. v. St. Louis*, 46 Mo. 121.

Accordingly, it is held that a street railway company operating under such a franchise is bound to carry passengers to the city limits as extended subsequently to the adoption of the ordinance, for the amount of fare therein mentioned, notwithstanding the company had been operating in the annexed territory under earlier franchises granted by the township. *Detroit v. Detroit United R. Co.* and *People v. Detroit United R. Co.* supra.

And in *People ex rel. Chicago v. Chicago Teleph. Co.* 220 Ill. 238, 77 N. E. 245, L.R.A.1915C.

it was held that a telephone company operating under a franchise containing a limitation as to rates to be charged within the city limits was obliged to furnish service at such rates in territory subsequently annexed to the city, notwithstanding the company had been previously operating in such territory under franchises granted by the towns or villages without any limit of time or condition as to rates.

IV. Regulation of rates as exercise of reserved power to alter charter.

It has been held that a statute regulating the rates of a public service corporation is a legitimate exercise of reserved power to alter its charter. *Parker v. Metropolitan R. Co.* 109 Mass. 506 (ferry); *American Coal Co. v. Consolidation Coal Co.* 46 Md. 15 (railroad); *Shields v. State*, 26 Ohio St. 86, affirmed in 95 U. S. 319, 24 L. ed. 357 (railroad); *St. Louis & S. F. R. Co. v. Ryan*, 56 Ark. 245, 19 S. W. 839 (railroad); *Atty. Gen. v. Chicago & N. W. R. Co.* 35 Wis. 425 (railroad); *Capital City Gaslight Co. v. Des Moines*, 72 Fed. 829 (gas).

So, a statute creating a State Corporation Commission, and giving it the right to regulate railroad rates, is an exercise of the reserve power to amend or repeal the charter of a railroad company, giving it the exclusive right to regulate charges. *Matthews v. Corporation Comrs.* 97 Fed. 400. To the same effect are *Louisville & N. R. Co. v. Garrett*, 231 U. S. 298, 58 L. ed. 229, 34 Sup. Ct. Rep. 48; *People ex rel. Delaware & H. Co. v. Public Service Commission*, 140 App. Div. 839, 125 N. Y. Supp. 1000.

And a statute empowering city councils to regulate the price to be charged for gas may constitute a valid exercise of the power of the state to alter the charter of a gas company. *State ex rel. Atty. Gen. v. Cincinnati Gaslight & Coke Co.* 18 Ohio St. 299.

And in the following cases it is held that the regulation of rates is a proper exercise of the reserved power to alter or amend corporate charters:

—*Parker v. Metropolitan R. Co.* 109 Mass. 506, holding that a ferry company whose charter is subject to alteration at the pleasure of the legislature may be required to take lower rates of tolls from passengers on street cars which cross on its boats;

—*Smith v. Lake Shore & M. S. R. Co.* 114 Mich. 460, 72 N. W. 328, holding that a statute requiring railroad companies to issue mileage books good for 2 years, and fixing the maximum price therefor, is within the reserve power to alter, amend, or repeal the charter of a railroad company. Reversed upon other grounds in 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565;

—*Atlantic & P. R. Co. v. United States*, 76 Fed. 186, holding that the reserved power of Congress to alter a railroad charter authorized it to regulate rates for transportation, and that the army appropriation bill of 1892, prescribing a maximum charge for government transportation over land-

grant railroads, was a legitimate exercise of such power;

—*Beardsley v. New York, L. E. & W. R. Co.* 15 App. Div. 251, 44 N. Y. Supp. 175, reversed on other grounds in 162 N. Y. 230, 56 N. E. 488, holding that the legislature, under the power reserved in a railroad charter to "at any time hereafter alter, modify, or repeal this act," has the right to fix the rates of fares which may be charged by such company, without being subject to the charge of impairing the obligation of contracts;

—*Louisville & N. R. Co. v. Garrett*, 231 U. S. 298, 58 L. ed. 229, 34 Sup. Ct. Rep. 48, affirming 186 Fed. 176, holding that a carrier cannot assert, as against the operation of a rate-making order of the State Railroad Commission, made under the authority of a statute, the constitutional protection of a contract right under its charter to charge certain rates, where, subsequently to such statute, but prior to the making of such order, its charter became, by the carrier's own voluntary act, subject to legislative alteration, since the Commission's order fixing rates is a legislative act under delegated power;

—*Com. v. Boston & N. Street R. Co.* 212 Mass. 82, 98 N. E. 1075, holding that the legislature has the right to fix the rates of fare which may be charged for the transportation of pupils attending the public schools, by corporations whose charters were taken subject to the general laws which declared the charters of all corporations subject to alteration or repeal, the court saying: "This reserved power of amendment is not exceeded so long as the object of the grant is not defeated or essentially impaired, and property and rights acquired upon the faith of the charter are not taken away. The charter right to fix fares is subject to amendment within this limitation."

In *People ex rel. Delaware & H. Co. v. Public Service Commission*, 140 App. Div. 839, 125 N. Y. Supp. 1000, it was held that a statute authorizing a railroad company to charge a fare of 25 cents for the transportation of passengers over the whole or any part of its road was in effect an amendment of its charter and a substitution for the provision of the general railroad act under which the company was incorporated, prescribing the rate of fare for transporting a passenger, and that the rate so fixed may be reduced by the Public Service Commission without offending the constitutional provision against impairing contracts, where the Constitution and statutes of the state reserve the right to amend or repeal corporate charters.

In *Manitowoc v. Manitowoc & N. Traction Co.* 145 Wis. 13, 140 Am. St. Rep. 1056, 129 N. W. 925, it was held that the power conferred upon cities to ingraft upon a railway franchise a feature limiting the rate of fare as a condition of using the city streets for railway purposes, is that of acting as a state agency in molding the char-

acter of corporate franchises and so subject to the reserved power of the state to alter or amend corporate charters.

In *Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co.* 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. Rep. 241, reversing 113 Fed. 930, it was held that, assuming that a contract exemption from the reduction by a board of supervisors of water rates below a certain point was created in favor of the company organized under Cal. Stat. 1853, p. 87, as amended by Cal. Stat. 1862, p. 540, by the provisions of § 3 of the latter act, the legislature, in the exercise of its reserved power to alter or repeal, conferred by Cal. Const. 1849, art. 4, § 31, still could enact the provisions of Cal. Stat. 1885, p. 95, § 5, authorizing the supervisors to reduce the rates to not less than 6, nor more than 18, per cent upon the then value of the property actually used in supplying water to the public.

But in *Laurel Fork & S. H. R. Co. v. West Virginia Transp. Co.* 25 W. Va. 324, it was held that a general statute prescribing maximum rates for railroad transportation does not operate to amend a charter granted by a special act which reserved to the state the right to amend the act by a future legislature, where the Constitution provides that "no law shall be amended by reference to its title only; but the law or section amended shall be inserted at large in the new act."

In *Pingree v. Michigan C. R. Co.* 118 Mich. 314, 53 L.R.A. 274, 76 N. W. 635, it was held that a statute requiring a railroad company to issue "family mileage tickets" cannot be deemed an exercise of the power of amendment reserved in its charter subject to the right to compensation for all damages sustained by reason of the amendment, where such statute does not purport to be an amendment of the charter, and contains no provision for compensating the company for the loss of its exclusive power under its charter to fix its rates.

And in *Rochester & C. Turnp. Road Co. v. Joel*, 41 App. Div. 43, 58 N. Y. Supp. 346, it was held that a statute which deprived a turnpike road company of the right granted in its charter to exact toll for bicycles, which had the effect to reduce the revenues of the corporation about 25 per cent, was not a valid exercise of the reserved power of the legislature to amend or repeal a charter, especially where the tolls charged were not exorbitant, and were less than the rates authorized by the charter.

In *Central Trust Co. v. Citizens' Street R. Co.* 82 Fed. 1, appeal dismissed in 27 C. C. A. 580, 53 U. S. App. 658, 83 Fed. 529, a provision in a general incorporation statute empowering street railway directors to make by-laws regulating fares was held to exempt a street railway company organized under that statute from any subsequent attempt of the legislature to reduce such rates in any other way than by a valid amendment of such statute according to the terms of the provision therein that "this

act may be amended or repealed at the discretion of the legislature."

But in *Indianapolis v. Navin*, 151 Ind. 139, 41 L.R.A. 337, 47 N. E. 525, 51 N. E. 80, a case arising under the same statute, the supreme court of Indiana took the view that the right of the legislature to regulate the fare upon street railroads organized under that statute did not depend upon the reservation of the right to amend or repeal, and said: "That power would exist even if the right to amend or repeal the act had not been reserved. In order to exempt a common carrier from legislative control over its rates of fare, it must appear that the exemption was made in its charter by clear and unmistakable language inconsistent with the exercise of such power of the legislature."

On rehearing, however, the court rested its decision upon the ground that the subsequent regulation was a valid amendment of the general incorporation statute under the reserved right to amend or repeal, taking issue on this point with the decision in *Central Trust Co. v. Citizens' Street R. Co.* 82 Fed. 1, *supra*, and said that, such being the case, it was not material whether the legislature would have had the power to regulate the fare upon street railways organized under that statute if that provision had been omitted.

In *Proprietors of Side-Booms v. Haskell*, 7 Me. 474, it was held that a reservation in a charter prescribing rates that might be charged by a boom company, which provided "that the fees aforesaid shall at all times hereafter be subject to the revision and alteration of the legislature," was a perpetual reservation of the right to increase or reduce the fees from time to time, at the pleasure of the legislature, and that therefore a subsequent statute increasing the fees above the rate first established, without any new reservation of the power of revision, did not exhaust the power of the legislature to control rates in the future, but that it still possessed power of reducing the rates at its pleasure.

The reserved power of the legislature to revise or alter the fees or toll specified in a charter granted to a boom company, for logs and timber that were "rafted and secured at said boom," was not transcended by a statute changing the fees to be charged and establishing a rule to fix the price for "sorting and rafting" timber and logs secured at the boom, and establishing a price for boomage or securing the logs, as the term "sorting and rafting" imposed no new or additional duty upon the corporation not included in the word "rafted" in the charter. *Machias Boom v. Sullivan*, 85 Me. 343, 27 Atl. 189.

Water companies chartered by a general law enacted when the state Constitution reserved the right to alter or repeal have no contract right to charge such rates as may be fixed by a Commission made up of persons selected as required by that law, which the state is forbidden to impair by substitution. L.R.A.1915C.

tuting another Commission selected without the co-operation of the company or some other tribunal of a different character, like the municipal authorities, and by that means to regulate the water rates. *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48, affirming 61 Cal. 3; *Spring Valley Waterworks v. Bartlett*, 8 Sawy. 555, 16 Fed. 615. See to same effect *Pocatello v. Murray*, 21 Idaho, 180, 120 Pac. 812.

A provision in the charter of a water company that the municipality "shall have power by ordinance to regulate the price of water" gives the municipality the continuing right to regulate the charges, limited only by a condition that such rates shall not be unreasonable or oppressive. *Knoxville v. Knoxville Water Co.* 107 Tenn. 647, 61 L.R.A. 888, 64 S. W. 1075.

A reservation in an ordinance granting a street railway franchise, of the right from time to time to make such further rules, orders, or regulations as to the common council may seem proper, does not include the right on the part of the city, at its own pleasure, to reduce the rates of fare agreed upon in such ordinance. *Detroit v. Detroit Citizens' Street R. Co.* 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410.

The right of future control reserved to the municipality in a street railway franchise, as respects the "construction, maintenance, and operation" of the line of a street railway company, does not include the power to reduce fares below the rate prescribed in an existing contract between the municipality and the company; but such provision has reference only to the manner of carrying on the business of the road, the laying of its tracks, the use of its streets, the keeping up of the equipment, the safety of the passengers and the public, and similar matters not involving the right to change fares. *Minneapolis v. Minneapolis Street R. Co.* 215 U. S. 417, 54 L. ed. 259, 30 Sup. Ct. Rep. 118.

The reserved power to regulate rates for transportation is not lost or impaired by the failure to exercise it for a long period of years. *Chicago, B. & Q. R. Co. v. Iowa* (*Chicago, B. & Q. R. Co. v. Cutts*) 94 U. S. 155, 24 L. ed. 94.

The reservation of the right to repeal, modify, or amend the charter does not affect an implied right of a corporation authorized by its charter to manufacture and sell gas, to charge a reasonable rate for all gas furnished, which cannot be impaired by subsequent legislation, so long as the state permits the charter to remain, and does not extinguish the corporate existence. *New Memphis Gas & Light Co. v. Memphis*, 72 Fed. 952.

V. Loss of privilege of exemption from regulation of rates.

a. By assignment and consolidation.

It is quite generally held that the exemp-

tion from regulation of rates by the public authorities contained in a charter granting a franchise is personal to the corporation to which it is granted, and cannot be assigned, and does not accompany the property of the corporation in its transfer to a purchaser, in the absence of express authority. *St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484, affirming 54 Ark. 101, 11 L.R.A. 452, 15 S. W. 18; *Chicago Union Traction Co. v. Chicago*, 199 Ill. 484, 59 L.R.A. 631, 65 N. E. 451; *People ex rel. Cohoes R. Co. v. Public Service Commission*, 143 App. Div. 769, 128 N. Y. Supp. 384, affirmed without opinion in 202 N. Y. 547, 95 N. E. 1137.

In *Matthews v. Corporation Comrs.* 97 Fed. 400, it was held that the charter privilege of regulating rates for railroad transportation free from legislative control did not pass with the other property and franchises of the corporation to the purchaser at a mortgage foreclosure sale.

And in *Pittsburgh, C. & St. L. R. Co. v. Moore*, 33 Ohio St. 384, 31 Am. Rep. 543, it was held that the exemption from legislative control of rates to be charged for transportation, contained in the charter of a railroad company, could not be claimed by a corporation operating the railroad as a bailliff.

In *Chicago Union Traction Co. v. Chicago*, 199 Ill. 484, 59 L.R.A. 631, 65 N. E. 451, it was held that the authority of a street car company to lease its franchises and property does not include the right to transfer a privilege to fix the rates of fare to be charged, not exceeding a specified rate.

Applying the rule of strict construction to grants of franchises, it has been held that a grant to each of two new corporations, of "powers, rights, and capacities" which have been granted to a corporation which they succeed, the property of which is divided between them, does not confer on the new companies the exemption which belonged to the original company from legislation changing the rates of toll which it might charge, which would prevent the company from earning at least 14 per cent on its capital stock. *Covington & L. Turnp. Road Co. v. Sandford*, 104 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198, affirming on this point, 14 Ky. L. Rep. 689, 30 S. W. 1031. The court followed the cases which hold that a corporation that succeeds to the rights and powers of another corporation does not thereby necessarily become entitled to an exemption from taxation.

Any contract exemption from state regulation of the price of gas, contained in the charter of a gas company, does not extend to the plants of, and territory occupied by, certain other gas companies not possessing such immunity in their own right, when absorbed by the former company under the general power of consolidation and merger conferred upon gas companies by a statute (Illinois act June 5, 1897) which provided that the consolidated corporation should be subject to the legal obligations of the com-

panies absorbed. *People's Gaslight & Coke Co. v. Chicago*, 194 U. S. 1, 48 L. ed. 851, 24 Sup. Ct. Rep. 520, affirming 114 Fed. 384.

But in *Ball v. Rutland R. Co.* 93 Fed. 513, it was held that the exemption from legislative control of rates to be charged for transportation within certain prescribed limits, contained in the charter of a railroad company, passed with the sale of its property and franchises to another corporation authorized by charter to make the purchase, which was protected from subsequent regulation by the legislature by the constitutional provision against the impairment of the obligation of contract, notwithstanding the charter of the second company was made subject to amendment, alteration, or repeal.

Where an ordinance fixing maximum rates to be charged, which was accepted by the corporation, not only named the corporation, but also its successors and assigns, and conferred upon the corporation the right to transfer its property and franchises, the assignee could rightfully claim the benefit of the contract fixing the rates, against an attempt by the municipality to reduce the rates. *State ex rel. St. Louis v. Laclede Gaslight Co.* 102 Mo. 472, 22 Am. St. Rep. 789, 14 S. W. 974, 15 S. W. 383.

In *Santa Ana Water Co. v. San Buenaventura Water Co.* 56 Fed. 339, it was held that an unrestricted right to fix general water rates, conferred on individuals who undertook to supply a town with water, passes by assignment of the rights and privileges under the contract to a water company duly organized under the general law, which assignment was ratified by municipal ordinance; and such right is not affected by the power reserved to the legislature, to alter or repeal any provisions of the company's charter, which also provided a method for fixing rates.

The exclusive right to fix freight and passenger rates within the maximum conferred upon the Michigan Central Railroad Company by § 15 of its charter has not been lost or surrendered by the company's acceptance of additional privileges, under acts professedly or impliedly amendatory of its charter, and under the general railroad law, or by its absorption of the property and franchises of other railroad corporations. *Pingree v. Michigan C. R. Co.* 118 Mich. 314, 53 L.R.A. 274, 76 N. W. 635.

In *Dow v. Beidelman*, 49 Ark. 325, 5 S. W. 297, affirmed in 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028, it was held that, assuming a charter provision naming a maximum rate for transportation of passengers amounted to a contract on the part of the state that passenger fare should never be reduced below that rate, such privilege did not pass to the purchasers at a mortgage foreclosure sale, notwithstanding the mortgage purported to transfer the charter, especially where the purchasers were not organized as a railroad corporation until after the adoption

of the Constitution, which enjoined upon the legislature the passing of laws to prevent excessive charges by railroad companies for transporting freight and passengers.

In *Shields v. Ohio*, 95 U. S. 319, 24 L. ed. 357, affirming 26 Ohio St. 86, it is held that where a new corporation is formed by consolidation, its charter is taken subject to existing constitutional provisions concerning alteration, amendment, or repeal; and a privilege enjoyed by one of the old corporations as to its right to charge certain rates thereby becomes subject to subsequent laws fixing a maximum lower rate than the rates previously allowed.

So in *San Antonio Traction Co. v. Altgelt*, 200 U. S. 304, 50 L. ed. 491, 26 Sup. Ct. Rep. 261, affirming — *Tex. Civ. App.* —, 81 S. W. 106, it was held that any contract exemption from legislative regulation of rates, possessed by a street railway company chartered before the adoption of the Texas Constitution of 1876, which, by § 17 of the Bill of Rights, subjects to the control of the legislature all privileges and franchises granted by it or created under its authority, is lost by the sale of its property on foreclosure, and the acquisition of its franchise under a municipal ordinance, together with that of another company, by a new corporation incorporated since the adoption of such Constitution, although such ordinance provides that all the rights and privileges previously granted to the old corporations are conferred on the new one, including all the limitations, contracts, and obligations.

And in *Owen v. St. Louis & S. F. R. Co.* 83 Mo. 454, it was held that a corporation formed after the adoption of the Constitution and laws enacted in pursuance thereof, establishing reasonable maximum rates of charges for transportation, was subject thereto, and could not successfully claim exemption therefrom upon the ground that it had acquired by purchase the rights and franchises of a railroad corporation created before the passage of the Constitution and such laws.

The provision of a statute for the creation of a new corporation upon the reorganization of a railroad by the purchasers at foreclosure sale, with all rights, powers, and privileges of the original company, did not create a contract right protected by the Federal Constitution against the enforcement of subsequent statutory regulations respecting railroad rates, existing when the new company was incorporated, though not in force when the mortgage was executed. *Grand Rapids & I. R. Co. v. Osborn*, 193 U. S. 17, 48 L. ed. 598, 24 Sup. Ct. Rep. 310, affirming 130 Mich. 248, 89 N. W. 967.

In *Norfolk & W. R. Co. v. Pendleton*, 156 U. S. 667, 39 L. ed. 574, 15 Sup. Ct. Rep. 413, affirming 86 Va. 1004, 11 S. E. 1062, 88 Va. 350, 13 S. E. 709, it was held that a consolidated company which accepts a charter with a distinct provision that the company shall be subject to general laws cannot claim the benefit of any contract

with an original company against interference with its right to fix and regulate charges.

b. By waiver.

It has been held that a corporation may lose its right to collect rates to a specified amount by waiver, *e. g.*, by failure for a long period of time to charge the maximum rate prescribed in its charter.

Thus, in *San Joaquin & K. River Canal & Irrig. Co. v. Stanislaus County*, 113 Fed. 930, reversed upon other grounds in 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. Rep. 241, it was held that a statutory right embraced in the charter of a corporation must be reduced to possession to secure the constitutional protection against alteration and repeal; that an irrigation company organized under a statute providing that the public authorities should not reduce the water rates "so low as to yield to the stockholders less than 1½ per cent per month upon the capital actually invested," which fixed its own rates for a period of 25 years at an amount that yielded an income less than that authorized, waived its right to an income of 1½ per cent per month, and that a subsequent statute authorizing the board of supervisors to fix rates less than the minimum prescribed by the charter did not impair the constitutional rights of the corporation.

But the acceptance of a municipal ordinance requiring a street railway company to issue transfers does not abrogate an existing contract right secured against impairment by subsequent legislation, to charge a 5-cent fare for one continuous passage not exceeding 3 miles in length. *Minneapolis v. Minneapolis Street R. Co.* 215 U. S. 417, 54 L. ed. 259, 30 Sup. Ct. Rep. 118.

The mere collecting by a turnpike company of tolls in conformity with rates fixed by a statute, which are lower than those fixed by the charter, does not show that the company assented to the exercise by the legislature of the power to amend its charter. *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198.

The taking of a lease by a railroad company of another company's railroad, or the leasing by a railroad company of its own road to another company, as authorized by the general corporation law, is an acceptance of the provisions of such law by a corporation organized before its enactment, within the contemplation of the provision that an acceptance of its provisions shall operate to repeal charter provisions inconsistent with the general law, so that the right to receive and charge the rates of fare specified in its charter free from legislative control is one of the rights relinquished, rendering the company subject to legislative control as to rates to be charged equally as corporations formed under the general corporation law. *Cincinnati, H. & D. R. Co. v. Cole*, 29 Ohio St. 126, 23 Am. Rep. 729.

A. L. R.

CALIFORNIA SUPREME COURT.
(Department No. 2.)

PINNEY & BOYLE COMPANY, Appt.,
v.
LOS ANGELES GAS & ELECTRIC CORPORATION, Respnt.

(— Cal. —, 141 Pac. 620.)

Public service corporation — test of public service.

1. The duty which a producer has undertaken to perform for the public, and not the use which a consumer makes of a commodity furnished by an alleged public service corporation, is the test of public service, so as to bring the charges within public regulation.

Note. — Effect of contract with patrons to preclude regulation of rates of public service corporations.

As to right to reduce rates fixed by franchise or charter, see note to *Benwood v. Public Service Commission*, ante, 261.

It is quite generally held in accordance with *PINNEY & B. Co. v. LOS ANGELES GAS & ELECTRIC CORP.* that rate regulations do not unconstitutionally impair existing contracts between public service corporations and consumers.

In *Knoxville Water Co. v. Knoxville*, 189 U. S. 434, 47 L. ed. 887, 23 Sup. Ct. Rep. 531, it was said, in reply to argument that a city ordinance reducing water rates impaired the obligation of contracts between the company and its consumers: "But such contracts, of course, were made by it, subject to whatever power the city possessed to modify rates. The company could not take away that power by making such contracts." *New Orleans v. New Orleans Waterworks Co.* 142 U. S. 79, 91, 92, 35 L. ed. 943, 947, 948, 12 Sup. Ct. Rep. 142; *Browne v. Turner*, 176 Mass. 9, 56 N. E. 960."

In *Chillicothe v. Logan Natural Gas & Fuel Co.* 8 Ohio N. P. 88, it was held that a gas company was obliged to furnish gas to consumers at the rate fixed by municipal ordinance notwithstanding the fact that it had previously entered into contracts with the consumers to furnish gas for a specified period at advanced rates. It was said that the company could not, by anticipating regulation of rates by the city, make contracts which would defeat the end to be attained by such legislation; that, if it could forestall legislation for one year by contracts with its consumers, it may do so for ten years, or forever.

And in *Southwestern Teleg. & Teleph. Co. v. Dallas*, — Tex. Civ. App. —, 131 S. W. 80, reversed on other grounds in 104 Tex. 114, 134 S. W. 321, it was said in reply to a contention that a city ordinance reducing telephone rates was void upon the ground that it violated existing contracts between the telephone company and its patrons: "That a public service

Same — minimum rate — reasonable-
ness.

2. An ordinance which prohibits a public service corporation from rendering service for less than the prescribed uniform rate is not unreasonable.

Constitutional law — equal protection — application for reduction of rates of public service corporation.

3. Consumers are not denied the equal protection of the laws by permitting public service corporations alone to apply to the proper authorities for a reduction of rates, where the consumer is given a hearing in the original fixing of the rates.

Same — impairment of contract — contemplation of change.

4. An ordinance raising the rates to be charged by a public service corporation

corporation cannot disable itself by private contract from performing the duties imposed by law upon it."

To the same effect is *Portland R. Light & P. Co. v. Railroad Commission*, 56 Or. 468, 105 Pac. 709, 109 Pac. 273, where it was said that if a public service corporation could, by a contract stipulating the continuance of a specified rate of charges for a given time, prevent any interference with such agreement, by invoking the constitutional provision against the passage of laws impairing the obligation of contracts, it would thereby become superior to the legislature, which doctrine will never be acknowledged by the courts.

In *Union Dry Goods Co. v. Georgia Public Service Corp.* — Ga. —, L.R.A. —, 83 S. E. 946, it was held that an order of the state railroad commission raising the rates to be charged by a public service corporation above those at which the corporation had contracted to furnish electricity to a consumer for a period of five years does not impair the obligation of the contract, since the contract must be considered as made in contemplation of the power of the public to prescribe the rates.

Likewise in *Portland R. Light & P. Co. v. Portland*, 200 Fed. 890, it was held that a city ordinance fixing the rates to be charged for gas and electricity did not unconstitutionally impair the obligation of unexpired contracts with consumers, since such contracts were necessarily made subject to the power of the city to modify or change the rates.

The obligation of contracts between a water company and private consumers by which the latter were to pay for the water in accordance with the rates "now or hereafter in force" is not impaired by a municipal ordinance reducing such rates, enacted in the exercise of the power of the municipality to regulate water rates. *Knoxville Water Co. v. Knoxville*, supra.

A city ordinance reducing telephone rates does not unconstitutionally violate existing contracts between the telephone company and its patrons, where the ordinance granting the franchise stipulated that the rights

above those at which it had contracted to render service to a consumer does not impair the obligation of the contract, since it will be presumed that the contract was made in contemplation of the power of the public to fix the rates.

(June 10, 1914.)

APPEAL by plaintiff from a judgment of the Superior Court for Los Angeles County in defendant's favor in an action brought to compel defendant to comply with its contract to furnish electricity to plaintiff. Affirmed.

The facts are stated in the opinion.

Mr. John D. Pope, for appellant:

Plaintiff's use was not public.

McFadden v. Los Angeles County, 74 Cal.

571, 16 Pac. 397; Barton v. Riverside Water Co. 155 Cal. 509, 23 L.R.A.(N.S.) 331, 101 Pac. 790; Colegrove Water Co. v. Hollywood, 151 Cal. 425, 13 L.R.A.(N.S.) 904, 90 Pac. 1053; State ex rel. Harris v. Superior Ct. 42 Wash. 660, 5 L.R.A.(N.S.) 672, 85 Pac. 666, 7 Ann. Cas. 748; Brown v. Gerald, 100 Me. 351, 70 L.R.A. 472, 109 Am St. Rep. 526, 61 Atl. 785; State ex rel. Shropshire v. Superior Ct. 51 Wash. 386, 99 Pac. 3; Miller v. Pulasaki, 109 Va. 137, 22 L.R.A.(N.S.) 552, 63 S. E. 880; Avery v. Vermont Electric Co. 75 Vt. 235, 59 L.R.A. 817, 98 Am. St. Rep. 818, 54 Atl. 179; Re Rhode Island Suburban R. Co. 22 R. I. 457, 52 L.R.A. 879, 48 Atl. 591.

An ordinance regulating the price of elec-

were granted subject to the existing and future charters and ordinances of the city. Southwestern Teleg. & Teleph. Co. v. Dallas, supra.

In the following cases it was held that the enactment of the interstate commerce act which abrogated previously existing contracts by carriers with shippers for special freight rates did not unconstitutionally impair the obligation of contracts: Bullard v. Northern P. R. Co. 10 Mont. 168, 11 L.R.A. 246, 3 Inters. Com. Rep. 536, 25 Pac. 120; Southern Wire Co. v. St. Louis. Bridge & Tunnel R. Co. 38 Mo. App. 191; Fitzgerald v. Grand Trunk R. Co. 63 Vt. 169, 13 L.R.A. 70, 3 Inters. Com. Rep. 633, 22 Atl. 76.

Fitzgerald v. Grand Trunk R. Co. 63 Vt. 169, 13 L.R.A. 70, 3 Inters. Com. Rep. 633, 22 Atl. 76, involved a contract for the transportation of lumber through several states. The supreme court of Vermont said: "Such commerce is solely regulated by Congress, and when parties make contracts to engage in interstate commerce, they are held to do so upon the basis and with the understanding that changes in the law applicable to their contracts may be made. There can, in the nature of things, be no vested right in an existing law which precludes its change or repeal, nor vested right in the omission to legislate upon a particular subject which exempts a contract from the effect of subsequent legislation upon its subject-matter by competent legislative authority."

In Minneapolis, St. P. & S. Ste. M. R. Co. v. Menasha Wooden Ware Co. — Wis.—, L.R.A.—, 150 N. W. 411, it was held that the enactment of the railroad commission act requiring carriers to file a schedule of reasonable freight rates, and forbidding the receiving of a greater or less compensation than those specified, rendered unenforceable a prior contract, valid when made, by which a carrier agreed to transport freight for a business concern at certain designated rates, less than the scheduled rates, and did not unconstitutionally impair the obligation of the contract, especially where the corporate powers granted to the carrier to regulate the compensation to be paid for its services

were subject to the right of the state to amend or annul.

And in Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265, reversing 133 Ky. 652, 118 S. W. 982, it was held that Congress, in the exercise of its power over commerce, could constitutionally enact the provisions of act of June 26, 1906, § 6, containing a prohibition against demanding, collecting, or receiving "a greater or less or different compensation" for the transportation of persons or property, or for any service in connection therewith, than that specified in the carrier's published schedule of rates, which rendered unenforceable a prior contract, valid when made, by which an interstate carrier agreed to issue annual passes for life in consideration of a release of a claim for damages. The court quoted with approval from the Legal Tender Cases, 12 Wall. 550, 551, 20 L. ed. 311, 312, to the effect that "as, in a state of civil society, property of a citizen or subject is ownership, subject to the lawful demands of the sovereign, so contracts must be understood as made in reference to the possible exercise of the rightful authority of the government, and no obligation of a contract can extend to the defeat of legitimate government authority."

In State v. Martyn, 82 Neb. 225, 23 L.R.A.(N.S.) 217, 117 N. W. 719, 17 Ann. Cas. 659, it was held that a constitutional provision requiring the legislature to pass laws to correct abuses and prevent unjust discriminations in all charges of railroad companies enters into all contracts made with such companies; and therefore a statute forbidding the issuance of free passes does not impair the obligation of one who has contracted with the company for such pass before the passage of the statute, but after the adoption of the Constitution.

As to whether a pass issued as part of consideration for contract is within statute prohibiting free transportation of passengers or discrimination in passenger rates, see note to above case in 23 L.R.A.(N.S.) 217.

tric current where it is for public use must be reasonable.

28 Cyc. 762; *Ex parte Whitwell*, 98 Cal. 73, 19 L.R.A. 727, 35 Am. St. Rep. 152, 32 Pac. 870; *Dobbins v. Los Angeles*, 139 Cal. 179, 96 Am. St. Rep. 95, 72 Pac. 970, 195 U. S. 225, 49 L. ed. 171, 25 Sup. Ct. Rep. 18; *Re Smith*, 143 Cal. 368, 77 Pac. 180; *Los Angeles County v. Hollywood Cemetery Asso.* 124 Cal. 344, 71 Am. St. Rep. 75, 57 Pac. 153; *Re Kelso*, 147 Cal. 609, 2 L.R.A. (N.S.) 796, 109 Am. St. Rep. 178, 82 Pac. 241; *Re McCapes*, 157 Cal. 26, 106 Pac. 229.

Section 5 of the ordinance which undertakes to make the maximum and the minimum price of electric current the same is clearly unconstitutional.

Saratoga Springs v. Saratoga Gas, E. L. & P. Co. 191 N. Y. 123, 18 L.R.A. (N.S.) 713, 83 N. E. 693, 14 Ann. Cas. 606.

In *Armour Packing Co. v. United States*, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428, the defense to an indictment for accepting a rebate from the regular published rates, of the carrier was that, prior to the amendment of the carrier's published rates, the defendant had contracted with the railroad to transport the commodities shipped by him at rates which were less than those which were subsequently established under the authority of the interstate commerce act. In sustaining the conviction it was said: "If the shipper sees fit to make a contract covering a definite period for a rate in force at the time, he must be taken to have done so subject to the possible change of the published rate in the manner fixed by statute, to which he must conform or suffer the penalty fixed by law."

An agreement under which a ditch company undertakes to furnish a consumer with a certain amount of water year after year during the irrigation season, so long as he pays the annual rental therefor, is not a contract the obligations of which would be violated by the action of county commissioners, under the statute and at the consumer's request, in fixing a less rate as the reasonable maximum rate which the company could charge such consumer for his water supply, but is a mere option that may be terminated by the consumer at the end of any year, and which he terminated by causing the rate to be fixed under the statute and declining to pay more. *South Boulder & R. C. Ditch Co. v. Marfell*, 15 Colo. 302, 25 Pac. 504.

In *Lanning v. Osborne*, 76 Fed. 319, it was held that an agreement between an irrigation company and consumers that the annual rate for water shall not exceed a specified sum per acre does not deprive it of the right to fix rates, conferred upon it by a statute subsequently enacted. L.R.A.1915C.

Messrs. William A. Cheney, Herbert J. Goudge, Leroy M. Edwards, and Paul Overton, for respondent:

The generation, transmission, and delivery of electric energy to the public for power purposes through and by means of a distributing system located upon and along the public streets and thoroughfares of a municipality is a public use.

Gilmer v. Lime Point, 18 Cal. 251; *Munn v. People*, 94 U. S. 113, 24 L. ed. 77; *Re Johnston*, 137 Cal. 115, 69 Pac. 973; *Rockingham County Light & P. Co. v. Hobbs*, 72 N. H. 531, 66 L.R.A. 581, 58 Atl. 46; *Walker v. Shasta Power Co.* 19 L.R.A. (N.S.) 725, 87 C. C. A. 660, 160 Fed. 856; *Clark v. Los Angeles*, 160 Cal. 30, 116 Pac. 722.

Appellant has no standing in court on the question of reasonableness of the ordinance.

Brooklyn Union Gas Co. v. New York, 188 N. Y. 334, 15 L.R.A. (N.S.) 763, 117 Am. St. Rep. 868, 81 N. E. 141; *Griffith*

The fact that a statute does not in itself prescribe rules of compensation, but merely gives boards of supervisors or other governing bodies the power to fix the maximum compensation to be charged by companies selling, renting, or distributing water upon petition of a certain number of inhabitants, does not prevent the collection of rates fixed by contract between the parties for water for irrigation purposes,—especially where such rates are the customary rates of the company, in view of a further provision of the statute that until action by the boards the rates actually established by water owners shall be legal rates. *Fresno Canal & Irrig. Co. v. Park*, 129 Cal. 437, 62 Pac. 87.

Although not strictly within the scope of the present note, reference is made to the two following cases which involve the same principle:

In *Buffalo East Side R. Co. v. Buffalo Street R. Co.* 111 N. Y. 132, 2 L.R.A. 384, 19 N. E. 63, it was held that a statute making it unlawful for street railway companies in a certain city to charge the rates of fare then received does not impair the obligation of a contract between two of the companies operating street railroads in that city, by which they have agreed not to charge the rates without the consent of each other.

So, it has been held that the power to regulate rates is not barred by the fact that, before the power was exercised, the company had pledged its income for the payment of debts incurred, and had leased its road to a tenant that relied upon the earnings for the means of paying an agreed rent. *Chicago, B. & Q. R. Co. v. Iowa* (Chicago, B. & Q. R. Co. v. Cutts) 94 U. S. 155, 24 L. ed. 94, cited and quoted with approval in *Bullard v. Northern P. R. Co.* 10 Mont. 168, 11 L.R.A. 246, 3 Inters. Com. Rep. 536, 25 Pac. 120.

A. L. R.

v. Vicksburg Waterworks Co. 88 Miss. 371, 40 So. 1011, 8 Ann. Cas. 1130; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 460, 33 L. ed. 970, 982, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702.

It is not the impairment of every contract which can be made the basis for invoking the constitutional prohibition.

Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265; Seattle v. Hurst, 50 Wash. 424, 18 L.R.A.(N.S.) 169, 97 Pac. 454; Portland R. Light & P. Co. v. Railroad Commission, 56 Or. 468, 105 Pac. 709, 109 Pac. 273; Knoxville Water Co. v. Knoxville, 189 U. S. 434, 47 L. ed. 887, 23 Sup. Ct. Rep. 531; Buffalo East Side R. Co. v. Buffalo Street R. Co. 111 N. Y. 132, 2 L.R.A. 384, 19 N. E. 63.

Messrs. Albert Lee Stephens and C. B. Penn, *amici curiæ*:

The city has the right to fix the rate to be charged for electric current for lighting and power purposes.

Clark v. Los Angeles, 160 Cal. 30, 116 Pac. 722; San Joaquin & K. River Canal & Irrig. Co. v. Stanislaus County, 155 Cal. 21, 99 Pac. 365; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Denver & R. G. R. Co. v. Baer Bros. Mercantile Co. 109 C. C. A. 337, 187 Fed. 485; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 460, 33 L. ed. 970, 982, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702.

The rates established by the ordinance must be deemed reasonable and binding upon the consumer.

Brooklyn Union Gas Co. v. New York, 188 N. Y. 334, 15 L.R.A.(N.S.) 763, 117 Am. St. Rep. 868, 81 N. E. 141; Griffith v. Vicksburg Waterworks Co. 88 Miss. 371, 40 So. 1011, 8 Ann. Cas. 1130.

Rate regulations do not unconstitutionally impair existing contracts between public service corporations and consumers.

Chillicothe v. Logan Natural Gas Co. 8 Ohio N. P. 88; Portland R. Light & P. Co. v. Railroad Commission, 56 Or. 468, 105 Pac. 709, 109 Pac. 273; Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265; Knoxville Water Co. v. Knoxville, 189 U. S. 434, 47 L. ed. 887, 23 Sup. Ct. Rep. 531; Buffalo East Side R. Co. v. Buffalo Street R. Co. 111 N. Y. 132, 2 L.R.A. 384, 19 N. E. 63; Southern Wire Co. v. St. Louis Bridge & Tunnel R. Co. 38 Mo. App. 191; Bullard v. Northern P. R. Co. 10 Mont. 168, 11 L.R.A. 246, 3 Inters. Com. Rep. 536, 25 Pac. 120; Fitzgerald v. Fitzgerald & M. Constr. Co. 41 Neb. 374, 59 N. W. 838; Fitzgerald v. Grand Trunk R. Co. 63 Vt. L.R.A.1915C.

169, 13 L.R.A. 70, 3 Inters. Com. Rep. 633, 22 Atl. 76; Armour Packing Co. v. United States, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428; Chicago & A. R. Co. v. United States, 26 L.R.A.(N.S.) 551, 84 C. C. A. 324, 156 Fed. 558; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075.

Henshaw, J., delivered the opinion of the court:

Plaintiff is a corporation which in the conduct of its business uses electrical power to operate its machinery. Plaintiff entered into a contract with the defendant to furnish electricity to be so used. Defendant is a public service corporation engaged, as its name implies, in furnishing gas and electricity to the inhabitants of the city of Los Angeles. During the life of this private contract between the parties litigant the city of Los Angeles regulated and prescribed the rates which defendant, with other public utilities, was permitted to charge for the electricity supplied and the service rendered to consumers. This rate was a higher rate than that fixed by the agreement of plaintiff and defendant. Plaintiff refused to pay the higher rate, insisting that the limit of its liability was the price fixed by contract. Defendant declined to furnish electricity excepting at the rate prescribed by the ordinance of the city of Los Angeles. This litigation followed. Judgment was given in favor of the defendant, and plaintiff appeals.

The propositions advanced on appeal may be thus summarized: (1) That furnishing electricity for power to be used as plaintiff was using it in its private business is not the performance of a public service which can be regulated by the municipality, but is a private use governed solely by convention and agreement of the parties; (2) that the particular ordinance is unreasonable and therefore invalid; (3) that the provision of the ordinance making the maximum and minimum rate the same and at the same time denying consumers the right which it gives to the producer to apply for a change or reduction of rate is unconstitutional and void.

1. The contention advanced by appellant under this head may be summarily disposed of. Its position is, in effect, that it is the use which the consumer makes of the commodity furnished which constitutes the test as to whether or not the regulatory powers of boards and commissions in dealing with public utilities may be invoked. Such, however, is not the test. Generally speaking, the public utility can and does have no interest in or control over the commodity

which it furnishes when it has passed into the possession of the consumer. It is the duty which the purveyor or producer has undertaken to perform on behalf of and so owes to the public generally, or to any defined portion of it, as the purveyor of a commodity, or as an agency in the performance of a service, which stamps the purveyor or the agency as being a public service utility. Of course, it is true that if A has erected a power plant and has agreed to sell a portion of his electricity to his neighbor B, he is not devoting his property to a public service. But if A shall have erected his power plant and shall have offered to sell his power to the whole or a defined portion of the community, he is, to that extent, devoting his property to a public use and has brought it within the regulatory police powers of the state. This we conceive to be not only fundamentally true, but is the declared view of this court in *Clark v. Los Angeles*, 160 Cal. 30, 116 Pac. 722.

No question can exist as to the power of the city of Los Angeles in the matter of the regulation of such public service corporations. It is expressly conferred by article 1, § 2, subdiv. 30, of the charter of the city of Los Angeles. (Amend. March 25, 1911.)

2. Under this head appellant asserts the indisputable proposition that courts will declare void ordinances which are unreasonable and oppressive in their attempted exercise of the police power. We need not refer to the cases which are cited, since no one of them deals with the rate fixing and regulation. Appellant asserts, however, that the only reasonable use of the police power in the matter of rate fixing is to establish the maximum charge which the public utility may make, leaving it open to the public utility by agreement to fix a less charge for an individual consumer. The untenableness of this position, however, must become apparent when a moment's consideration is given to the fact that one of the primary and most important objects to be attained by rate regulation is the prevention of discrimination. It must be quite clear that to hold that the rate-fixing power goes no farther than to name an amount beyond which a charge may not be made leaves the utmost room for abuse by way of favoritism and discrimination within that limit. It is, in practical effect, a denial of the existence of the rate-fixing power itself. Moreover, while the public utility is bound to render the service or furnish the commodity, an individual member of the public is not compelled to accept the service or use the commodity. If he does so, it is conclusively held that his act is an acceptance of the rate fixed, and that he may not thereafter contest the reasonableness of the rate. L.R.A.1915C.

Brooklyn Union Gas Co. v. New York, 188 N. Y. 334, 15 L.R.A.(N.S.) 763, 117 Am. St. Rep. 868, 81 N. E. 141; *Griffith v. Vicksburg Waterworks Co.* 88 Miss. 371, 40 So. 1011, 8 Ann. Cas. 1130. This salutary rule applies with peculiar force to the condition existing in Los Angeles, where the charter itself provides that any person interested in the rate fixing may file his objections and be given a hearing thereon before final action. Charter of Los Angeles, § 155, subdiv. 2; amend. of 1911.

3. Under the third proposition appellant contends that § 5 of the ordinance is unconstitutional. That section provides as follows: "It shall be unlawful for any person, firm, or corporation . . . to charge, demand, collect, or receive any rate or compensation for electric current for lighting or power purposes supplied . . . to the city of Los Angeles, or to any inhabitant thereof, less than the rates fixed by this ordinance, unless an application for a reduction in such rate is made by the person, firm, or corporation so supplying such electric current for lighting or power purposes, and the consent of the board of public utilities thereto is obtained, in the manner herein-after provided."

The argument is that the provision allowing the public service utility to apply for a reduction of rates during the life of the ordinance, and denying that right to the consumer, is clearly discriminatory and a denial to the consumer of the equal protection of the law. Herein reliance is placed upon the decision of *Saratoga Springs v. Saratoga Gas, E. L. & P. Co.* 191 N. Y. 123, 18 L.R.A.(N.S.) 713, 83 N. E. 693, 14 Ann. Cas. 606. The statute under consideration in that action empowered a commission to fix the maximum price to be charged for gas or electricity in the municipality for a term of three years, "and until, after the expiration of such term, such commission shall, upon complaint as provided in this section, again fix the price of such gas or electricity." "No opportunity or right," says the opinion, "is given to the corporation to apply, at the end of three years or at any time thereafter, for a new adjustment of the rates. That right is limited solely to the municipal officials or consumers."

The court of appeals of New York held that such a statute so fixing the rate for a fixed period of three years and for an indefinite period thereafter, which rate could not be modified or disturbed at the instance of the producer, denied to such producer the equal protection of the law. Appellant argues that the ordinance here under consideration presents the exact converse of this proposition; that it allows the purveyor

to make application for reduction within the year's life of the ordinance, but denies that right to the consumer. But the cases are in no real sense parallel, as will appear not only on principle, but from a further consideration of the New York decision. In this case is presented an ordinance fixing the rate for the defined and limited period of one year. Every consumer has been given an opportunity to be heard before the rate was fixed, and the right or privilege, whichever it may be called, that is accorded to the public service utility within the year, is a right or privilege making clearly for the benefit of the consumer himself, since that right or privilege is limited to a request for a reduction of the rate, which reduction, if granted, would benefit, and not injure, every consumer. The New York case, however, was a case where by statute the rate was fixed for an indefinite period of time with no right whatsoever to the public utility to be heard upon application for any modification of the rate. The New York court of appeals found no difficulty in upholding the law in so far as it denied the gas company the right to be heard in the matter of refixing the rates for the fixed period of three years. It was the denial of the right to be heard for the indefinite period thereafter. With the right, however, to the consumer so to be heard, which was held to be a denial of the equal protection of the law. "For," says that court, "we have no difficulty in upholding the provision that the rate shall remain as established for the term of three years. It is urged that circumstances might so alter that before the expiration of three years a rate which was reasonable at the time it was established would become unreasonable. This is possible. Nevertheless we think the legislature was justified in enacting some period of repose during which the rate should remain stable."

To sum up on this matter, therefore, it may be said in conclusion that the period of stability and repose fixed by this ordinance is one year. The consumer had an opportunity to be heard before the rate was finally fixed. The provision allowing the public utility to petition for a reduction of the rate is one as clearly designed for the benefit of the consumer as of the company itself. No want of equal protection of the law is here shown. Quite different would be the case if the company were allowed to petition for an increase of rate during the life of the ordinance without an opportunity to the consumer to be heard upon the question of its maintenance or reduction. It appears clear, therefore, that the contention that the appellant is denied the equal protection of the law under the char. L.R.A.1916C.

ter and ordinance here under consideration is unfounded.

A word, perhaps, should be added touching the asserted violation of the provision of the contract between the company and plaintiff by the enforcement of the terms of the regulatory ordinance. Upon this it is sufficient to say it will be conclusively presumed that the parties contracted in contemplation of the power of the proper board or tribunal to fix rates in every case where such power exists and may have been thereafter legally exercised. *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265; *Seattle v. Hurst*, 50 Wash. 424, 18 L.R.A.(N.S.) 169, 97 Pac. 454; *Portland R. Light & P. Co. v. Railroad Commission*, 56 Or. 468, 105 Pac. 709, 109 Pac. 273; *Knoxville Water Co. v. Knoxville*, 189 U. S. 434, 47 L. ed. 887, 23 Sup. Ct. Rep. 531; *Buffalo East Side R. Co. v. Buffalo Street R. Co.* 111 N. Y. 132, 2 L.R.A. 384, 19 N. E. 63.

For these reasons the judgment appealed from is affirmed.

We concur: **Melvin, J.; Lorigan, J.**

WASHINGTON SUPREME COURT.

STATE OF WASHINGTON EX REL. EDWARD E. WEBSTER

v.

SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR KING COUNTY et al.

(67 Wash. 37, 120 Pac. 861.)

Courts — original jurisdiction of supreme court— inadequacy of remedy.

1. An appeal would be an inadequate remedy where a telephone company has been enjoined from putting into force rates which it has been required to adopt by a State Commission under penalty, within the statutory provision giving the supreme court original jurisdiction in such cases.

Legislature — delegation of power — rightfulness.

2. The legislature may confer upon a Commission authority to regulate the rates of telephone companies.

Note. — Right to raise rates of public service corporation fixed by franchise.

This note is concerned only with the effect of provisions of the franchise in respect of rates upon the right to raise the rates; and is not concerned with other questions affecting such right; as, for example, the reasonableness or unreasonableness of the rates, apart from the effect of the franchise provisions.

Municipal corporation — legislative control — revision of rates.

3. Under constitutional provisions making municipal corporations subject to general laws, the legislature may confer upon a Commission created under constitutional authority the power to revise rates established by a franchise conferred upon a telephone company by a municipal corporation which had not been given express power to fix rates, where under the Constitution all laws relating to corporations may be altered or modified.

Telephone — rates — right of legislature to alter.

4. Where municipal charters are subject to general laws the legislature may direct a telephone company to raise its service rates from those fixed in the franchise granted it by the municipality, if it is necessary to secure effective service.

Contract — impairment — change of rates.

5. No unconstitutional impairment of contract results so far as the city is concerned from a change by the state of rates fixed by a franchise granted by the municipality to a telephone company, if the municipal charter is subject to the general laws of the state.

Same — right to raise question — municipality.

6. A municipal corporation which, in granting a telephone franchise fixing rates

for service, reserves the right to alter or amend the conditions of the franchise, cannot raise the objection that its contract rights are unconstitutionally impaired if the state makes an alteration in rates.

(Morris and Ellis, JJ., dissent.)

(January 27, 1912.)

APPPLICATION for a writ of prohibition to prevent further proceedings in an action to enjoin compliance with an order of the Public Service Commission respecting telephone rates. Writ granted.

The facts are stated in the opinion.

Mr. George D. Emery, for relator:

Where the remedy by appeal is inadequate because the right would expire before an appeal could be heard, prohibition lies, notwithstanding a remedy by certiorari.

State ex rel. Puyallup v. Superior Ct. 50 Wash. 650, 97 Pac. 778; State ex rel. Miller v. Superior Ct. 40 Wash. 559, 2 L.R.A. (N.S.) 395, 111 Am. St. Rep. 925, 82 Pac. 877; State ex rel. McCalley v. Superior Ct. 51 Wash. 572, 99 Pac. 740; High, Extr. Legal Rem. 3d ed. § 773a; Powhatan Coal & Coke Co. v. Ritz, 60 W. Va. 395, 9 L.R.A. (N.S.) 1225, 56 S. E. 257; Ex parte State, 150 Ala. 489, 10 L.R.A. (N.S.) 1129, 124 Am. St. Rep. 79, 43 So. 490; Appo v. Peo-

There seem to be few cases passing upon this question in addition to STATE EX REL. WEBSTER v. SUPERIOR CT., above reported.

In Dawson v. Dawson Teleph. Co. 137 Ga. 62, 72 S. W. 508, it was held that the acceptance by a telephone company of a city ordinance granting a franchise for operating a telephone system, which named maximum rates to be charged, and provided that the telephone company should at all times be subject to city ordinances that may be hereafter passed, "and to such rules and regulations touching telephone companies, their rates, and affairs as may be hereafter ordained, which are just and reasonable," does not prevent the telephone company from increasing such charges if permission to do so is subsequently granted by the State Railroad Commission, especially where it appears that the city was not specifically authorized by its charter, or other legislative enactment, to fix the charges to be made by telephone companies.

Such order permitting an increase in rates does not violate the provisions of the state and Federal Constitutions prohibiting the impairment of the obligations of contracts. Ibid.

In Manitowoc v. Manitowoc & N. Traction Co. 145 Wis. 13, 140 Am. St. Rep. 1056, 129 N. W. 925, it was held that legislative authority conferred upon a municipality to grant permission to construct and operate railways in the streets "upon such terms as the proper authorities shall determine" does not include authority to make a binding

contract as to rates of fare with which the state cannot interfere, though such a contract is valid and binding between the parties to it, and that therefore the railroad company would be enjoined from increasing its rates on complaint of the city, until it received authority from the state to increase its rates.

It has been held that a stipulation in a franchise granted to a water company as to rates that should be charged for water furnished is not binding upon the water company where it is for an unlimited time, but that the rates so fixed may be increased under changed conditions. Turtle Creek v. Pennsylvania Water Co. 243 Pa. 415, 90 Atl. 199; Bellevue v. Ohio Valley Water Co. 245 Pa. 114, 91 Atl. 236. In the above cases the city sought to enjoin the proposed increase of rates by the company.

In White Haven v. White Haven Water Co. 209 Pa. 166, 58 Atl. 159, it was held that a water company incorporated by a special statute authorizing it to purchase and operate the waterworks of a municipality, which provided that it should not charge more than \$10 per annum to any private family, could not relieve itself of such limitation of charges to private families by subsequently accepting the provisions of the general corporation statutes. The court said that the company could not be relieved from the obligation of its contract either by an express enactment of the legislature, or by the acceptance of a general statute.

A. L. R.

ple, 20 N. Y. 541; *State ex rel. Sullivan v. Reynolds*, 209 Mo. 161, 15 L.R.A.(N.S.) 963, 123 Am. St. Rep. 468, 107 S. W. 487, 14 Ann. Cas. 198; *Honolulu Rapid Transit & Land Co. v. Hawaii*, 211 U. S. 232, 53 L. ed. 186, 29 Sup. Ct. Rep. 55; *Texas & P. R. Co. v. Abilene Cotton Oil Co.* 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; *State ex rel. Aberdeen v. Superior Ct.* 44 Wash. 526, 87 Pac. 818; *Wilson v. Seattle*, 2 Wash. 543, 27 Pac. 474; *Seattle & M. R. Co. v. Bellingham Bay & E. R. Co.* 29 Wash. 491, 92 Am. St. Rep. 907, 69 Pac. 1107; *State ex rel. Smith v. Superior Ct.* 30 Wash. 224, 70 Pac. 484.

The power to fix rates, tolls, and charges of public service corporations is originally in the state.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; *Jones, Teleg. & Teleph. Cos. §§ 19-214*; *Nebraska Teleph. Co. v. State*, 55 Neb. 627, 45 L.R.A. 113, 76 N. W. 171; *Delaware & A. Teleph. & Teleph. Co. v. Delaware*, 2 C. C. A. 1, 3 U. S. App. 30, 50 Fed. 678; *Smyth v. Ames*, 169 U. S. 528, 42 L. ed. 842, 18 Sup. Ct. Rep. 418; *Central Union Teleph. Co. v. State*, 123 Ind. 113, 24 N. E. 215; *Central Union Teleph. Co. v. State*, 118 Ind. 194, 10 Am. St. Rep. 114, 19 N. E. 604; *Central Union Teleph. Co. v. Bradbury*, 106 Ind. 1, 5 N. E. 721; *Stone v. Farmers' Loan & T. Co.* 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; *Home Teleph. & Teleg. Co. v. Los Angeles*, 211 U. S. 271, 53 L. ed. 181, 29 Sup. Ct. Rep. 50.

In the absence of the exercise or express delegation of the power to fix rates by the state, the corporation itself may fix its own tolls and charges, subject to the regulative power of the state.

1 *Beach, Priv. Corp. § 28*; 1 *Tiedeman, State & Federal Control of Persons & Property*, § 96; *Long's Appeal*, 87 Pa. 114; *Stone v. Farmers' Loan & T. Co.* 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; *New Memphis Gas & Light Co. v. Memphis*, 72 Fed. 955; *Croswell, Electricity*, § 372; *Joyce, Electric Law*, § 518.

The power of rate regulation is reserved to the state, unless expressly granted or necessarily implied from the powers which are expressly conferred.

St. Louis v. Bell Teleph. Co. 96 Mo. 623, 2 L.R.A. 278, 9 Am. St. Rep. 370, 10 S. W. 197; *Minturn v. Larue*, 23 How. 435, 16 L. ed. 574; *Pennsylvania R. Co. v. Canal Comrs.* 21 Pa. 9; *Lewisville Natural Gas Co. v. State*, 135 Ind. 49, 21 L.R.A. 734, 34 N. E. 702; *State ex rel. St. Louis Underground Service Co. v. Murphy*, 134 Mo. 548; 34 L.R.A. 369, 56 Am. St. Rep. 515, 31 S. W. 784, 34 S. W. 51, 35 S. W. 1132; *Old Colony Trust Co. v. Atlanta*, 83 Fed. 43; L.R.A.1915C.

State ex rel. Wisconsin Teleph. Co. v. Sheboygan, 111 Wis. 23, 86 N. W. 657; *State ex rel. Garner v. Missouri & K. Teleph. Co.* 189 Mo. 83, 88 S. W. 41; *Wisconsin Teleph. Co. v. Oshkosh*, 62 Wis. 32, 21 N. W. 828; *Jones, Teleg. & Teleph. Cos. § 234*; *Dill. Mun. Corp. 4th ed. 683*; *State, Hoboken Land & Improv. Co., Prosecutor, v. Hoboken*, 35 N. J. L. 205; *Philadelphia & T. R. Co's Case*, 6 Whart. 25, 36 Am. Dec. 202; *State ex rel. Jacksonville v. Jacksonville Street R. Co.* 29 Fla. 590, 10 So. 590; *Tacoma Gas & E. L. Co. v. Tacoma*, 14 Wash. 288, 44 Pac. 655; *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 191, 22 Am. Rep. 71; *Cooley, Const. Lim. 577*; *Keasbey, Electric Wire, p. 57*; *Washington Bridge v. State*, 18 Conn. 53; *People v. Jackson & M. Pl. Road Co.* 9 Mich. 307; *St. Louis v. Bell Teleph. Co.* 96 Mo. 623, 2 L.R.A. 278, 9 Am. St. Rep. 370, 10 S. W. 197; *State ex rel. Mathews v. Central Union Teleph. Co.* 7 Ohio C. D. 538; *Home Teleph. & Teleg. Co. v. Los Angeles*, 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. Rep. 50; *State ex rel. St. Louis v. Laclede Gaslight Co.* 102 Mo. 472, 22 Am. St. Rep. 789, 14 S. W. 974, 15 S. W. 383; *Nebraska Teleph. Co. v. State*, 55 Neb. 627, 45 L.R.A. 113, 76 N. W. 171; *State ex rel. Railroad Comrs. v. Western U. Teleg. Co.* 113 N. C. 213, 22 L.R.A. 570, 18 S. E. 389; *State, Duke, Prosecutor, v. Central New Jersey Teleph. Co.* 53 N. J. L. 341, 11 L.R.A. 664, 21 Atl. 460.

While it is true that the state had the power to delegate to the city the right to fix and regulate tolls and charges, it has never yet done so.

State ex rel. Rocky Mountain Bell Teleph. Co. v. Red Lodge, 30 Mont. 338, 76 Pac. 759; *Chamberlain v. Iowa Teleph. Co.* 119 Iowa, 619, 93 N. W. 596; *People v. Eaton*, 100 Mich. 208, 24 L.R.A. 721, 59 N. W. 145; *People v. Kirsch*, 67 Mich. 539, 35 N. W. 157; *Wisconsin Teleph. Co. v. Oshkosh*, 62 Wis. 32, 21 N. W. 828; *State ex rel. Crumb v. Helena*, 34 Mont. 67, 85 Pac. 744; *State ex rel. Latimer v. Henry*, 28 Wash. 38, 68 Pac. 368; *Nathan v. Spokane County*, 35 Wash. 26, 65 L.R.A. 336, 102 Am. St. Rep. 888, 76 Pac. 521; *Tacoma Gas & E. L. Co. v. Tacoma*, 14 Wash. 291, 44 Pac. 655; *Home Teleph. & Teleg. Co. v. Los Angeles*, 211 U. S. 271, 53 L. ed. 181, 29 Sup. Ct. Rep. 50.

The power of regulation, being retained by the state, cannot be contracted away or interfered with by the city.

State ex rel. Wisconsin Teleph. Co. v. Sheboygan, 111 Wis. 23, 86 N. W. 657; *Old Colony Trust Co. v. Atlanta*, 83 Fed. 43; *Portland R. Light & P. Co. v. Railroad Commission*, 56 Or. 468, 105 Pac. 713, 109 Pac. 273; *Home Teleph. & Teleg. Co. v. Los Angeles*, 211 U. S. 265, 53 L. ed. 176,

29 Sup. Ct. Rep. 50; *Keefe v. Lexington & B. Street R. Co.* 185 Mass. 183, 70 N. E. 37; *Wellesley v. Boston & W. Street R. Co.* 188 Mass. 250, 74 N. E. 355.

The state may at its pleasure resume powers which it has granted to municipalities, and their charters and charter powers are always subject to review, amendment, or repeal by the legislature.

Stone v. Mississippi, 101 U. S. 815, 29 L. ed. 1079; *Portland R. Light & P. Co. v. Railroad Commission*, 56 Or. 468, 105 Pac. 709, 109 Pac. 273; *Piqua State Bank v. Knoop*, 16 How. 369, 14 L. ed. 977; *Sloan v. State*, 8 Blackf. 361; *People v. Morris*, 13 Wend. 325; *Armstrong v. Dearborn County*, 4 Blackf. 208; *Cranston v. Augusta*, 61 Ga. 577; *Harmon v. Chicago*, 110 Ill. 400, 51 Am. Rep. 701; *New England Teleph. & Teleg. Co. v. Boston Terminal Co.* 182 Mass. 397, 65 N. E. 835; *United States v. Baltimore & O. R. Co.* 17 Wall. 322, 21 L. ed. 597; *Cooley, Const. Lim.* 4th ed. 231-233; *Wabaska Electric Co. v. Wymore*, 60 Neb. 199, 82 N. W. 626; *La Harpe v. Elm Twp. Gaslight, Fuel & P. Co.* 69 Kan. 97, 76 Pac. 448; *Brummitt v. Ogden Waterworks Co.* 33 Utah, 289, 93 Pac. 834; *State ex rel. St. Paul v. St. Paul City R. Co.* 78 Minn. 331, 81 N. W. 201.

All contracts are made subject to any reserve constitutional power of such alteration of the law as to render their subsequent enforcement impossible.

Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265; *Home Teleph. & Teleg. Co. v. Los Angeles*, 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. Rep. 50.

Messrs. Preston & Thorgrimson also for relator.

Messrs. James E. Bradford and Howard D. Hughes, for respondents:

The legislature did not intend that the act of 1911 should be retroactive as to the franchise theretofore entered into between the city of Seattle and the Independent Telephone Company.

Sultan R. & Timber Co. v. Great Northern R. Co. 58 Wash. 604, 109 Pac. 320, 1020; *Re Day*, 181 Ill. 73, 50 L.R.A. 519, 54 N. E. 646; *State ex rel. City Water Co. v. Kearney*, 49 Neb. 337, 70 N. W. 255; *Bauer Grocer Co. v. Zelle*, 172 Ill. 407, 50 N. E. 238; 26 Am. & Eng. Enc. Law, 2d ed. 693; *Sutherland, Stat. Constr.* 2d ed. § 42; *City R. Co. v. Citizens' Street R. Co.* 166 U. S. 564, 41 L. ed. 1117, 17 Sup. Ct. Rep. 653; *Russell & A Drainage Dist. v. Benson*, 125 Ill. 490, 17 N. E. 816; *Fowler v. Fairchild*, 3 Wash. 748, 29 Pac. 351; *Rogers v. Trumbull*, 32 Wash. 211, 73 Pac. 381.

The legislature is without power to change the rate prescribed in said franchise. L.R.A.1915C.

Cleveland v. Cleveland City R. Co. 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. Rep. 756; *Vicksburg v. Vicksburg Waterworks Co.* 206 U. S. 496, 51 L. ed. 1155, 27 Sup. Ct. Rep. 762; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 2, 42 L. ed. 342, 19 Sup. Ct. Rep. 77, 60 Fed. 957; *Cleveland v. Cleveland Electric R. Co.* 201 U. S. 529, 50 L. ed. 854, 26 Sup. Ct. Rep. 513.

The city had power to contract as to rates.

Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410; *State ex rel. Dennison v. Seattle, R. & S. R. Co.* 64 Wash. 167, 116 Pac. 638; *State ex rel. Linhoff v. Seattle, R. & S. R. Co.* 62 Wash. 124, 113 Pac. 260; 3 Dill. Mun. Corp. 5th ed. § 1326; *Noblesville v. Noblesville Gas & Improv. Co.* 157 Ind. 162, 60 N. E. 1032; *People ex rel. West Side Street R. Co. v. Barnard*, 110 N. Y. 548, 18 N. E. 354; *Clinton v. Worcester Consol. Street R. Co.* 199 Mass. 279, 85 N. E. 507; *Galveston & W. R. Co. v. Galveston*, 90 Tex. 398, 36 L.R.A. 33, 39 S. W. 96; *Detroit v. Ft. Wayne & B. I. R. Co.* 95 Mich. 456, 20 L.R.A. 79, 35 Am. St. Rep. 580, 54 N. W. 958; *Omaha Water Co. v. Omaha*, 12 L.R.A.(N.S.) 736, 77 C. C. A. 267, 147 Fed. 1.

The city can, if authorized, contract as to the rate in granting a franchise, and suspend the power of the state to change such rate during the life of said franchise.

Los Angeles v. Los Angeles City Water Co. 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736; 3 Dill. Mun. Corp. 5th ed. p. 2239; *Home Teleph. Co. v. Los Angeles*, 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. Rep. 50; *Detroit v. Detroit Citizens' Street R. Co.* 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77.

The city had power in granting this franchise to contract as to the rate, and bind the state from thereafter interfering with such rate.

Cleveland v. Cleveland City R. Co. 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. Rep. 756; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 2, 43 L. ed. 342, 19 Sup. Ct. Rep. 77; *Vicksburg v. Vicksburg Waterworks Co.* 206 U. S. 496, 51 L. ed. 1155, 27 Sup. Ct. Rep. 762.

The legislature has not modified and cannot modify this franchise by subsequent agreement with the franchisee.

Illinois Trust & Sav. Bank v. Arkansas City, 34 L.R.A. 518, 22 C. C. A. 186, 40 U. S. App. 257, 76 Fed. 271; *Little Falls Electric & Water Co. v. Little Falls*, 102 Fed. 664; *Safety Insulated Wire & Cable Co. v. Baltimore*, 13 C. C. A. 375, 25 U. S. App.

166, 66 Fed. 143; Illinois Trust & Sav. Bank v. Arkansas City, 34 L.R.A. 525, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271; Knoxville Water Co. v. Knoxville, 189 U. S. 437, 47 L. ed. 891, 23 Sup. Ct. Rep. 531; San Francisco Gas Co. v. San Francisco, 9 Cal. 453; Wagner v. Rock Island, 146 Ill. 139, 21 L.R.A. 519, 34 N. E. 545; Vincennes v. Citizens' Gaslight Co. 132 Ind. 114, 16 L.R.A. 485, 31 N. E. 573; Cincinnati v. Cameron, 33 Ohio St. 336; Tacoma Hotel Co. v. Tacoma Light & Water Co. 3 Wash. 316, 14 L.R.A. 609, 28 Am. St. Rep. 35, 28 Pac. 516; State ex rel. Clausen v. Burr, 65 Wash. 524, 118 Pac. 639; Vicksburg v. Vicksburg Waterworks Co. 206 U. S. 496, 51 L. ed. 1155, 27 Sup. Ct. Rep. 762.

Messrs. W. V. Tanner, Attorney General, and Stephen V. Carey, Assistant Attorney General, *amici curiae*:

The power to fix telephone rates has never been delegated to the city.

Tacoma Gas & E. L. Co. v. Tacoma, 14 Wash. 288, 44 Pac. 655; Mills v. Chicago, 127 Fed. 731; State ex rel. Garner v. Missouri & K. Teleph. Co. 189 Mo. 83, 88 S. W. 41; Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. Rep. 50.

The power to regulate rates is now vested in the Public Service Commission.

Benton v. Seattle Electric Co. 50 Wash. 156, 96 Pac. 1033; Ewing v. Seattle, 55 Wash. 229, 104 Pac. 259; State ex rel. Clausen v. Burr, 65 Wash. 524, 118 Pac. 639; Manitowoc v. Manitowoc & N. Traction Co. 145 Wis. 13, 140 Am. St. Rep. 1056, 129 N. W. 925; State ex rel. Great Northern R. Co. v. Railroad Commission, 52 Wash. 33, 100 Pac. 184; Dawson v. Dawson Teleph. Co. 137 Ga. 62, 72 S. E. 508.

Chadwick, J., delivered the opinion of the court:

The Independent Telephone Company was organized in 1901 under the laws of the state of Washington. Under its general powers and by the warrant of a franchise, it is operating a telephone system in the city of Seattle which has grown in volume from 3,774 service telephones in 1903 to 18,071 in 1910. In June, 1910, a patron of the company made complaint to the then State Railroad Commission, alleging inefficient service on the part of the company, the charge of inefficiency being predicated upon an allegation that relator's rates were insufficient to support a proper service. A hearing was had, and, after a physical valuation of the company's property, an order was made directing the company to inaugurate a new schedule of rates which were somewhat higher than those fixed in the franchise theretofore granted by the city of L.R.A.1915C.

Seattle. The order of the Commission became effective November 1, 1911, and was upon that day and the day thereafter put in force by the company. On the evening of the second day the company was enjoined at the instance of the city of Seattle from collecting the rates fixed by the Commission, which, because of the act of 1911, will be hereafter referred to as the "Public Service Commission." Thereupon relator came to this court, and asked that a writ be made to run against the superior court, prohibiting it from further proceeding in defiance of the order of the Public Service Commission. The attorney general has filed a brief in this court, and has made oral argument in support of the contention of the relator that the state, through its Public Service Commission, had ample and lawful power to raise the service rates of the company above the rates fixed in the ordinance granting its franchise.

A part of the relator's brief is taken up with a discussion of the question of the jurisdiction of this court. Inasmuch as relator is now in a position of extreme uncertainty, being subject to the penalties of the superior court for disobedience of its orders, on the one hand, and to a severe penalty for disobedience of the order of the Commission, if lawfully made, we think this question may be disposed of by saying, without discussion, that a remedy by appeal would be inadequate. We have therefore merely suggested enough to indicate that we are of opinion that we have jurisdiction under the law. Otherwise the stipulation of the parties would be ineffectual to give it to us. The city by demurrer admits that the franchise rates are inadequate, and in the interests of a speedy decision upon the main issues it is stipulated that the sole questions to be determined by us are: (1) "Has the legislature vested in the Public Service Commission authority to increase the rates specified in § 7 of ordinance No. 6,498 of the city of Seattle and ordinances amendatory thereof, under which the company is operating," and (2) "if such power has been vested in the Public Service Commission, whether the legislative acts assuming to grant such powers are unconstitutional and void."

On the first proposition there can be no doubt. The police power of the state is more than an attribute of sovereignty. It, like the power of taxation, is an essential element of government, and exists in every state without express declaration and without limitation, in so far as it is made to apply to the health, peace, comfort, and morals of the people. Formerly applied strictly and directly, it has now, because of changed economic conditions, come to be

more favored, and is frequently relied upon to sustain laws which but indirectly affect the common good. The most modern and perhaps the most striking application of this power is to be found in our own books (*State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 178, 37 L.R.A.(N.S.) 466, 117 Pac. 1101, 2 N. C. C. A. 823, 3 N. C. C. A. 599), where this court said: "The test of a police regulation when measured by this clause of the Constitution [§ 3, art. 1] is reasonableness, as contradistinguished from arbitrary or capricious action. . . . There is no absolute right to do as one wills, pursue any calling one desires, or contract as one chooses. . . . Liberty means absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community." It is unnecessary to dwell upon that case or the authorities upon which it is made to rest. "In its broadest acceptance it means the general power of the state to preserve and promote the public welfare, even at the expense of private rights." *Tacoma v. Boultelle*, 61 Wash. 434, 112 Pac. 661.

The power to regulate and control the rates of common carriers has been held to be a legitimate exercise of the police power of the state. *Home Teleph. Co. v. Los Angeles*, 211 U. S. 271, 53 L. ed. 181, 29 Sup. Ct. Rep. 50; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Chicago, B. & Q. R. Co. v. Iowa* (*Chicago, B. & Q. R. Co. v. Cutts*) 94 U. S. 155, 24 L. ed. 94. The authority of the Public Service Commission was by the legislature of 1911 extended so as to include within its reach all public service corporations. Laws 1911, p. 538, § 1. It is a settled principle of constitutional law that "the government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of affecting the object is excepted, take upon themselves the burden of establishing that exception." *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579. See also *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 38 L. ed. 1047, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125.

Under article 12 of our state Constitution, there can be no doubt of the power of the state to take cognizance of all matters affecting common carriers. Telegraph and telephone companies are made common carriers and subject to legislative control.

The surrender of this control to a properly constituted commission, subject to judicial review, has been sustained as a lawful exercise of the legislative authority. L.R.A.1915C.

State ex rel. Oregon R. & Nav. Co. v. Railroad Commission, 52 Wash. 17, 100 Pac. 179. In *State ex rel. Great Northern R. Co. v. Railroad Commission*, 52 Wash. 33, 100 Pac. 184, the right to fix rates for common carriers was sustained.

The only question remaining is the all-important one of whether the rates fixed by the ordinance granting the franchise may be altered or annulled by the state under its reserved powers; or, to be more exact, its police power. Much has been said in argument as to the power of the city, whether it had any power to fix rates in the absence of controlling legislation, or whether, granting its power, it holds it by express grant, or whether it is implied. Under the great weight of judicial authority, it seems to be certain that a municipality exercising the delegated power of the state has no right to fix rates unless the power be express. "It has been settled by this court that the state may authorize one of its municipal corporations to establish by an inviolable contract the rates to be charged by a public service corporation (or natural person) for a definite term, not grossly unreasonable in point of time, and that the effect of such a contract is to suspend during the life of the contract, the governmental power of fixing and regulating the rates. *Detroit v. Detroit Citizens' Street R. Co.* 184 U. S. 368, 382, 46 L. ed. 592, 605, 22 Sup. Ct. Rep. 410; *Vicksburg v. Vicksburg Waterworks Co.* 206 U. S. 496, 508, 51 L. ed. 1155, 1160, 27 Sup. Ct. Rep. 762. But for the very reason that such a contract has the effect of extinguishing *pro tanto* an undoubted power of government, both its existence and the authority to make it must clearly and unmistakably appear, and all doubts must be resolved in favor of the continuance of the power. *Providence Bank v. Billings*, 4 Pet. 514, 561, 7 L. ed. 939, 955; *Railroad Commission Cases*, 116 U. S. 307, 325, 29 L. ed. 636, 642, 6 Sup. Ct. Rep. 334, 388, 1191; *Vicksburg, S. & P. R. Co. v. Dennis*, 116 U. S. 665, 29 L. ed. 770, 6 Sup. Ct. Rep. 625; *Freeport Water Co. v. Freeport*, 180 U. S. 587, 599, 611, 45 L. ed. 679, 688, 693, 21 Sup. Ct. Rep. 493; *Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co.* 192 U. S. 201, 211, 48 L. ed. 406, 412, 24 Sup. Ct. Rep. 241; *New York ex rel. Metropolitan Street R. Co. v. New York Tax Comrs.* 199 U. S. 1, 50 L. ed. 65, 25 Sup. Ct. Rep. 705, 4 Ann. Cas. 381;" *Home Teleph. Co. v. Los Angeles*, *supra*. See also *St. Louis v. Western U. Teleg. Co.* 149 U. S. 465, 37 L. ed. 810, 13 Sup. Ct. Rep. 990; *Manitowoc v. Manitowoc & N. Traction Co.* 145 Wis. 17, 140 Am. St. Rep. 1056, 129 N. W. 925; *Jones, Teleg. & Teleg. Cos. § 19*; *St. Louis v. Bell Teleph. Co.* 96

Mo. 623, 2 L.R.A. 278, 9 Am. St. Rep. 370, 10 S. W. 197; Chicago Gaslight & Coke Co. v. People's Gaslight Co. 121 Ill. 530, 2 Am. St. Rep. 124, 13 N. E. 169; Bluefield Waterworks & Improv. Co. v. Bluefield, 33 L.R.A. (N.S.) 759, and note (69 W. Va. 1, 70 S. E. 772). But, as we view this case, we may assume that the city of Seattle had lawful authority when it passed an ordinance granting a franchise to the company to fix its tolls.

Section 10, art. 11, of our state Constitution, has played an important part in our jurisprudence. The phrase, "subject to general laws," has been held to be a reservation of a general legislative power in the state, and under it many laws have been passed and many decisions pronounced holding that it was the policy of the state Constitution that freeholders' charters and amendments thereto shall always be subject to the control of general laws. *Hindman v. Boyd*, 42 Wash. 17, 84 Pac. 609; *Benton v. Seattle Electric Co.* 50 Wash. 156, 96 Pac. 1033. To the same effect are: *Re Cloherty*, 2 Wash. 137, 140, 27 Pac. 1064; *State ex rel. Seattle v. Carson*, 6 Wash. 250, 33 Pac. 428; *Seymour v. Tacoma*, 6 Wash. 138, 32 Pac. 1077; *State ex rel. Fawcett v. Superior Ct. (Fawcett v. Pritchard)* 14 Wash. 604, 33 L.R.A. 674, 45 Pac. 23; *Tacoma Gas & E. L. Co. v. Tacoma*, 14 Wash. 288, 44 Pac. 655; *State ex rel. Navin v. Weir*, 26 Wash. 501, 67 Pac. 226. This rule has become so firmly entrenched in our jurisprudence that it was held in *Ewing v. Seattle*, 55 Wash. 229, 104 Pac. 259, that a general law, authorizing cities to grant franchises to street railroads and to prescribe the terms and provisions thereof, superseded the charter provision of the city of Seattle requiring franchises to be sold at public auction to the highest bidder. In that case the court said: "While our Constitution has reserved to the people of cities of the class to which Seattle belongs the power to frame and adopt charters for their own government, it also provides that such charters 'shall be subject to and controlled by general laws.' And this court has repeatedly and uniformly held that where the legislature has enacted laws relating to such cities, or to the powers and duties of their officers, such laws supersede charter provisions in conflict therewith. . . . It having become the settled law of this state by the construction repeatedly placed upon the Constitution that a general law enacted by the legislature is superior to and supersedes all freehold charter provisions inconsistent therewith, it becomes plain that, when the legislature, by the Laws of 1903 and 1907, gave to the legislative authority of the cities of the state the power to grant street L.R.A.1915C.

railway franchises, and also the power to 'prescribe the terms and conditions on which such railways . . . shall be constructed, maintained, and operated,' that power cannot be limited or prescribed by freehold charter provisions."

It may be said that the public utilities act is not a general law within the constitutional meaning of that term; that no law can be a general law unless it actually fixes a uniform rate. If it were not for § 18, art. 12, of the state Constitution ("The legislature shall pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight, and to correct abuses, and to prevent discrimination and extortion in the rates of freight and passenger tariffs on the different railroads and other common carriers in the state, and shall enforce such laws by adequate penalties. A railroad and transportation commission may be established and its powers and duties fully defined by law"), and § 1, art. 12 ("Corporations may be formed under general laws, but shall not be created by special acts. All laws relating to corporations may be altered, amended or repealed by the legislature at any time, and all corporations doing business in this state may, as to such business, be regulated, limited, or restrained by law"), and the construction put upon § 18 in *State ex rel. Great Northern R. Co. v. Railroad Commission*, 52 Wash. 33, 100 Pac. 184,—it might be so held. In the *Great Northern Case* it was contended that the only power the legislature had was to pass a law fixing a maximum rate. But this court held, as all other courts have come to hold, that the power to fix rates does not necessarily compel the legislature to make, by a general law, a just rate which is uniform. This contention was expressly overruled in that case. Rates cannot be arbitrarily fixed, but must be determined with reference to the conditions existing where they are to be put into execution. Manifestly a legislature could not by special acts fix these rates. The only practical method was (and it seems to have been foreseen by the makers of the Constitution) to create a commission with power to ascertain what rate would be just and reasonable in each particular case, and to prescribe and enforce the same. *Interstate Commerce Commission v. Chicago, R. I. & P. R. Co.* 218 U. S. 88, 54 L. ed. 946, 30 Sup. Ct. Rep. 651; *Interstate Commerce Commission v. Chicago, B. & Q. R. Co.* 218 U. S. 113, 54 L. ed. 959, 30 Sup. Ct. Rep. 660.

The power thus exercised by the commission is not a usurpation of legislative and judicial functions, nor does it unite in one body conflicting governmental authority. It

consists simply in the ascertainment of facts upon which the general rule of the legislative body, and of the Constitution prescribing that reasonable rates shall be adopted, operates. Railroad Commission Cases, 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047. It having been heretofore held that the constitutional power can be exercised through a commission with power to fix rates, and that the public is not bound to pass a general law fixing maximum rates, it follows that the public utilities act is a "general law," and, under many decisions of this court, supersedes any ordinance or charter provision of any city which may conflict therewith. The power to fix rates is a mere detail in the execution of the general law, and cannot be insisted upon as the essential letter of the law. State ex rel. Great Northern R. Co. v. Railroad Commission, supra; Marshall Field & Co. v. Clark, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; Buttsfield v. Stranahan, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349; Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367.

It may seem that, when applied to particular instances, the law putting power to fix a schedule of rates in a legislative board infringes some supposed right that might well have been exempted from its operation. But that consideration is for the legislature, and not for the courts. We have no power to negative the will of the legislature because we do not like a law. Within the limits of its constitutional warrant the legislature is supreme. Cities and towns are the creatures of and subordinate to its will; and for us to hold the public utilities act obnoxious to the Constitution, or as offensive to our own notions of governmental policy, would make this court the law-making body, in defiance of the will of the people to enact their own laws in legislative assemblies duly convened. The people, not only of this state, but generally in other states, have gone beyond the original conceptions of local self-government, and to sustain and make practical needed reforms have had to fall back upon the police power of the state as declared by laws general in their application. This rule in many states is the result of judicial construction, but our people left no room for construction. Section 11, art. 11, state Constitution, is a positive declaration: "Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." This section is subject to the same interpretation as § 10, L.R.A.1916C.

and under it a general law becomes controlling. The words, "not in conflict with general laws," as there employed, do not mean that municipal regulations passed in the absence of general laws foreclose the right of the state to assert its sovereignty, but merely that the police power may be exercised until such time as the state acts. They must then give way to the general law. If by its inaction the state has permitted a municipality to assume and exercise its police power, it is not foreclosed of its right, if the legislature afterwards sees fit to exercise it. Cooley, Const. Lim. 7th ed. p. 279. Under this rule concurrent jurisdiction over crimes has been sustained. But where the state, as has this state, asserted its jurisdiction over a given subject-matter, and there is no room for concurrence, the municipal charter or ordinance must give way. Dill. Mun. Corp. 5th ed. 631.

The same question now confronting us was before the supreme court of Wisconsin. A city had granted permission to a railway company to run interurban cars over and along its streets. One of the conditions upon which the right was given was that the fare to be charged between the two cities should not exceed 10 cents for a single trip during the life of the franchise, which was thirty-five years. The franchise was accepted and acted upon. Thereafter the company to which the franchise had been assigned announced that the rate would be increased to fifteen cents. The city brought suit to prevent the increase in fares, and to compel the company to abide by its contract. The company set up as defenses that the city had no power to exact the condition that the ordinance, in so far as it related to interurban fares, was *ultra vires*; that the ordinance had been superseded and repealed by subsequent legislative action; that a fare of 10 cents was not compensatory; and that one of 15 cents was reasonable. The trial court found that a 10-cent fare was not compensatory, and that a 15-cent fare was reasonable, but that the company was bound by the terms of the ordinance, and enjoined it from raising the rate. The supreme court reduced the questions involved to three: (1) Did the parties have the power to make a contract? (2) If so, to what extent is it binding and enforceable? (3) Had it been lawfully superseded or nullified? And now, adopting the language of the court: (1) "That the traction company had the right on its part to make a contract fixing the rate of charge for a given service, provided such contract violated no law, and was not inimical to public policy, is clear enough. By so doing it could not forestall the state, and prevent it from exercising its governmental function

regulating rates. But, until the state sees fit to interpose, the carrier ordinarily may exercise a free hand in fixing rates, subject to the qualification that they must not be unreasonably high and must not be unjustly discriminatory. . . . There was no law inhibiting the making of the contract involved, at the time it was entered into, and there is nothing to show that it was discriminatory or against public policy. . . . We therefore hold that the parties were competent to make the contract entered into." (2) It was held that no special authority had been conferred on the city to enter into the contract, and "the contract remained valid between the parties to it until such time as the state saw fit to exercise its paramount authority, and no longer. To this extent, and to this extent only, is the contract before us a valid subsisting obligation." (3) A public service law enacted in 1905 (Laws 1905, chap. 362), somewhat similar to our own, was next considered by the court. "By that statute (§ 3) it is provided that all charges made by any carrier coming under its provisions 'shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.' Railway companies are required to file their tariffs with the Railroad Commission, and are prohibited from making changes therein except on ten days' notice, and the rates fixed in such tariffs are declared to be the lawful rates until changed as provided by the act. Section 12 of the law provides that the Commission may, on complaint or on its own motion, proceed to determine the reasonableness of any rate, and, whenever such rate is found to be unreasonable, may fix and determine what a reasonable charge shall be, and thereupon the rate so fixed shall be the lawful rate. By subdivision 'c' of § 12 a railway company is given the same right to make complaint that is given to any other person or corporation. It is contended that this law has superseded the contract involved in this suit, and that, therefore, the contract no longer has any binding force or effect. We do not think so. The statute worked no change in existing rates. It simply provided that all rates should be reasonable, and left to the Railroad Commission the power to determine the fact as to whether or not a given rate was reasonable. When that determination was reached, the law became operative upon the particular rate called in question, and the rate arrived at then became the lawful rate, and continued so until set aside in the manner provided by the law. The Railroad Commission has made no determination in the case before us; at least, if it has, it is no part of the record. Until that determi-

L.R.A.1915C.

nation is made, the contract is in force. When it is made, the contract is superseded, if the rate is changed. The Commission has ample authority to proceed upon its own motion. The traction company, under subdivision 'c' of § 12, has power to make the necessary complaint to compel an investigation. This works no hardship on anyone. It may be, as the trial court found, that a 10-cent fare is unreasonable, and that a 15-cent fare is not so. Usually, long-time contracts made under like conditions operate against the public interest, and, if the fare provided for is unreasonably low, the legislature has the same power over it that it would have if it were unreasonably high. It may also be that adequate service cannot be given at the rate fixed, or that conditions have so changed that the road cannot be operated unless rates are increased, and that the public will be better served by raising the rate than by permitting it to remain where it is. This is a question which calls for the exercise of legislative policy and discretion. The court cannot relieve the defendant from an improvident contract, but the contract is of such a character in the present instance that the legislative branch of the government may, in the interest of the public, abrogate it." *Manitowoc v. Manitowoc & N. Traction Co.* 145 Wis. 13, 140 Am. St. Rep. 1056, 129 N. W. 925. The same principles are affirmed in *Home Teleph. Co. v. Los Angeles*, 211 U. S. 271, 53 L. ed. 181, 29 Sup. Ct. Rep. 50, and *Dawson v. Dawson Teleph. Co.* 137 Ga. 62, 72 S. E. 508.

Notwithstanding, it is earnestly contended on behalf of the city that the contract is inviolable, and cannot be abrogated under the contract clause of the Federal Constitution. Counsel relies mainly upon the case of *Cleveland v. Cleveland City R. Co.* 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. Rep. 756, and its kindred cases: *Vicksburg v. Vicksburg Waterworks Co.* 206 U. S. 596, 51 L. ed. 1155, 27 Sup. Ct. Rep. 762; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 2, 43 L. ed. 342, 19 Sup. Ct. Rep. 77; *Id.* (C. C.), 60 Fed. 957; *Cleveland v. Cleveland Electric R. Co.* 201 U. S. 529, 50 L. ed. 854, 26 Sup. Ct. Rep. 513; *Detroit v. Detroit Citizens' Street R. Co.* 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410; *State ex rel. Dennison v. Seattle, R. & S. R. Co.* 64 Wash. 167, 116 Pac. 638; *State ex rel. Linhoff v. Seattle, R. & S. R. Co.* 62 Wash. 124, 113 Pac. 260; *Noblesville v. Noblesville Gas & Improv. Co.* 167 Ind. 162, 60 N. E. 1032; *People ex rel. West Side Street R. Co. v. Barnard*, 110 N. Y. 548, 18 N. E. 354; *Clinton v. Worcester Consol. Street R. Co.* 199 Mass. 279, 85 N. E. 507; *Galveston & W. R. Co. v. Galveston*, 90 Tex. 398, 36

L.R.A. 33, 39 S. W. 96; *Detroit v. Ft. Wayne & B. I. R. Co.* 95 Mich. 456, 20 L.R.A. 79, 35 Am. St. Rep. 580, 54 N. W. 958; *Omaha Water Co. v. Omaha*, 12 L.R.A. (N.S.) 736, 77 C. C. A. 267, 147 Fed. 1. Our answer to this contention is that each of these cases is based upon one of two premises: Either, as said in the *Cleveland Case*, the authority conferred upon the city was "express and unmistakable," or the controversy was between the city and its franchisee, the state being in no sense a party, and having no interest in the result of the litigation. Where the state is a party, and it appears that there has been no express grant or waiver of its constitutional right to fix rates so as to give an ordinance the force of a contract binding upon the state (granting that under our Constitution this could be done), it cannot be held as a matter of either law or policy that a franchise such as the one now under consideration is a contract binding upon the state of Washington, and for several reasons. The power to fix rates, being a right reserved by the people of the state, cannot, in the light of the Constitution; be held to be an incident to the right to frame a freeholders' charter. *State ex rel. Garner v. Missouri & K. Teleph. Co.* 189 Mo. 83, 88 S. W. 41. Such contracts, when entered into without express legislative authority, are permissive only, and subject to the exercise of the sovereign power of the state, and do not partake of the quality of contracts as that term is employed in the contract clause of the Federal Constitution. Instances of a contract valid between parties, but held to be abrogated by the subsequent exercise of the police power of the state, were treated in *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A. (N.S.) 671, 31 Sup. Ct. Rep. 265, and in *Chicago, I. & L. R. Co. v. United States*, 219 U. S. 486, 55 L. ed. 305, 31 Sup. Ct. Rep. 272 (the free pass decisions). In the *Mottley Case* it was contended that "Congress has vast power. It is a potent arm of the government, but it is not omnipotent. When a private citizen has made a lawful contract, has executed that contract fully so far as his obligation is concerned, and has parted with his money or property on the faith of the inviolability of his contract, that contract cannot be confiscated simply because Congress has power to regulate commerce between the states." Justice Harlan, speaking for the whole court, met this contention, saying: "The agreement between the railroad company and the Mottleys must necessarily be regarded as having been made subject to the possibility that at some future time Congress might so exert its whole constitutional power in regulating interstate commerce as to render L.R.A.1915C.

that agreement unenforceable or to impair its value. That the exercise of such power may be hampered or restricted to any extent by contracts previously made between individuals or corporations is inconceivable. The framers of the Constitution never intended any such state of things to exist." He then quoted from jurists and text writers as follows: "That no contract can properly be carried into effect which was originally made contrary to the provisions of the law, or which, being made consistently with the rules of law at the time, has become illegal in virtue of some subsequent law, are propositions which admit of no doubt." Lord Ellenborough, *Atkinson v. Ritchie*, 10 East, 530. "If the legislature had no power to alter its police laws when contracts would be affected, then the most important and valuable reforms might be precluded by the simple device of entering into contracts for the purpose. No doctrine to that effect would be even plausible, much less sound and tenable." Judge Cooley, *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 Inters. Com. Rep. 102, 34 Am. & Eng. R. Cas. 630. "If one agrees to do a thing which it is lawful for him to do, and it becomes unlawful by an act of the legislature, the act avoids the promise." Parsons, *Contr.* 6th ed. 675. Judge Harlan, continuing, says: "We forbear any further citation of authorities. They are numerous, and are all one way. They support the view that, as the contract in question would have been illegal if made after the passage of the commerce act, it cannot now be enforced against the railroad company, even though valid when made. If that principle be not sound, the result would be that individuals and corporations could by contracts between themselves, in anticipation of legislation, render of no avail the exercise by Congress, to the full extent authorized by the Constitution, of its power to regulate commerce. No power of Congress can be thus restricted. The mischiefs that would result from a different interpretation of the Constitution will be readily perceived."

If originally the power of the state of Washington to fix and control rates and tolls for common carriers was more doubtful than the power of Congress to legislate upon the subject-matter of interstate commerce, upon which we rely to sustain our argument, that doubt was entirely removed by the railroad cases decided by this court and to which we have referred. *State ex rel. Oregon R. & Nav. Co. v. Railroad Commission*, 52 Wash. 17, 100 Pac. 179; *State ex rel. Great Northern R. Co. v. Railroad Commission*, 52 Wash. 33, 100 Pac. 184. "The same conclusion is reached in respect to the legislative control over contracts

which a corporation may make with individuals. Such contracts are ever subject to the future exercise of the police power in the promotion of the public welfare. This is particularly true in the case of quasi public corporations such as railroads." 2 Tiedeman, *State & Federal Control of Persons & Property*, p. 961. See also *Chicago, B. & Q. R. Co. v. Nebraska*, 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. Rep. 513; *Jones, Teleg. & Teleph. Cos. § 214*; *Portland R. Light & P. Co. v. Railroad Commission*, 56 Or. 468, 105 Pac. 713, 109 Pac. 273; *Southern Wire Co. v. St. Louis Bridge & Tunnel R. Co.* 38 Mo. App. 191. "The granting of a franchise to a telephone company by an ordinance passed by the municipal authorities of a city, wherein it is provided that the company 'agrees and binds itself by this ordinance that the rates charged shall be \$1.50 per month for residence phones and \$2.50 per month for business phones,' and an acceptance of such franchise by the company, does not prevent the telephone company from increasing such charges, if permission to do so is subsequently granted it by the Railroad Commission, especially as it appears that the city was not specifically authorized by its charter, or other legislative enactment, to fix the charges to be made by telephone companies. . . . The order of the Railroad Commission does not violate the provisions of the state and Federal Constitutions prohibiting the impairment of the obligations of contracts." *Dawson v. Dawson Teleph. Co.* 137 Ga. 62, 72 S. E. 508. "No government can advance in civilization, in wealth, and in influence without an enforcement of these [police] powers. When any corporation acquires a franchise for the purpose of carrying on a corporate business within a state, it is accepted subject to the police power. By giving the franchise [we may say, permitting it to be exercised] the state did not abrogate its power over the public highways; nor in any way curtail its power to be exercised for the general welfare of the people. . . . Neither can this power be alienated, surrendered, nor abridged by the legislature by any grant, contract, or delegation whatsoever, because it constitutes the exercise of a governmental function without which it would become powerless to do those things which it was especially designed to accomplish." *Jones, Teleg. & Teleph. Cos. § 214*. "No doubt the agreement of 1886 constituted a contract in such a sense that the respective parties thereto continued to be bound by its provisions so long as the legislation, in virtue of which it was entered into, remained unchanged. While the agreement lasted, its provisions defined the rights and duties of the city and the railroad companies. But L.R.A.1915C.

was it a contract whose continuance and operation could not be affected or controlled by subsequent legislation? Usually, where a contract, not contrary to public policy, has been entered into between parties competent to contract, it is not within the power of either party to withdraw from its terms without the consent of the other; and the obligation of such a contract is constitutionally protected from hostile legislation. Where, however, the respective parties are not private persons, dealing with matters and things in which the public has no concern, but are persons or corporations whose rights and powers were created for public purposes by legislative acts, and where the subject-matter of the contract is one which affects the safety and welfare of the public, other principles apply. Contracts of the latter description are held to be within the supervising power and control of the legislature when exercised to protect the public safety, health, and morals, and that clause of the Federal Constitution which protects contracts from legislative action cannot in every case be successfully invoked. The presumption is that, when such contracts are entered into, it is with the knowledge that parties cannot, by making agreements on subjects involving the rights of the public, withdraw such subjects from the police power of the legislature. . . . Any other view involves the proposition that it is competent for the city and the railroad company, by entering into an agreement between themselves, to withdraw the subject from the reach of the police power, and to substitute their views of the public necessities for those of the legislature." *Chicago, B. & Q. R. Co. v. Nebraska*, 170 U. S. 67, 42 L. ed. 951, 18 Sup. Ct. Rep. 513.

The supreme court of Oklahoma has held in *South McAlester-Enfaula Teleph. Co. v. State*, 25 Okla. 524, 106 Pac. 962, that municipal corporations in that jurisdiction had no power to fix rates, and that a grant of a franchise conferred no rights save the mere naked permission of the town to the defendants to enter upon the streets and alleys and erect their poles and wires. While this ruling was made upon the statutes and ordinances there in force, the principle applies in this case; for the court found that, where a contract was made in contravention of the power of the state to act over a given subject-matter, an essential element of a contract was wanting; that there was nothing conferred upon the company or reserved by the municipality that the law would regard as a consideration, either valuable or good. Or, as we have said elsewhere in this opinion, the sovereign power of the state cannot be made the subject of a contract so as to defeat the declared right

of the people of the whole state to reserve that power to themselves, and to put its execution in the hand of the particular agency designated by them in their written Constitution.

The power to fix rates, if exercised by a city, unless that power is clearly expressed by legislative grant, is in the nature of a license, and is revocable at the will of the legislature when in its judgment the common good demands its reassertion. The state does not act by contract, but by grant, license, or reservation. It is not usually bound by the contracts of others when exercising its police power. So jealous is it of the sovereignty of its police power that, in the case of *Home Teleph. Co. v. Los Angeles*, the Supreme Court of the United States held that a grant by the legislature of the state of the right "to fix and determine charges for telephone, telephone service, and connections" did not carry with it the right to agree upon rates. In other words, as that court and others have universally held, the delegation of power must be "clear and unmistakable." In dealing with the sovereign power of the people, nothing can be left to inference. The court accordingly said that, the power to fix and determine rates being within the police power, the city might establish rates, but that it could not, under the delegation quoted, contract so as to bind itself or the other party as against the exercise of the police power. In principle its holding could not have been otherwise, for the strength of the police power lies in the fact that it is not a subject of contract; that it cannot be bartered or bargained away.

Reduced to its lowest terms, the contention of the city is, not that it exercised a delegated power, but that it acted at a time when there was no prohibition on the part of the state, and that, this being so, the city acted as an *imperium in imperio*, with power to determine the rates to be charged and the time for the contract to run, and that, having so acted, vested rights of contract and property have attached to the franchise, which the legislature could not thereafter bar or abrogate. These contentions would be meritorious if applied to contracts involving merely private interests, but can have no application where the interests of the state are involved. A similar argument was made in the case of *Chicago, B. & Q. R. Co. v. Iowa* (*Chicago, B. & Q. R. Co. v. Cutts*) 94 U. S. 155, 24 L. ed. 94, where it was held in response to the contention that a subsequent act of the legislature regulating freight rates impaired the obligations of contract between the state and the company, as well as the contracts of the company with its stockholders, bond-

holders, and mortgagees: "It is a matter of no importance that the power of regulation now under consideration was not exercised for more than twenty years after this company was organized. A power of government which actually exists is not lost by nonuser. A good government never puts forth its extraordinary powers, except under circumstances which require it. That government is the best which, while performing all its duties, interferes the least with the lawful pursuits of its people. In 1691, during the third year of the reign of William and Mary, Parliament provided for the regulation of the rates of charges by common carriers. This statute remained in force with some amendment until 1827, when it was repealed, and it has never been re-enacted. No one supposes that the power to restore its provisions has been lost. A change of circumstances seemed to render such a regulation no longer necessary, and it was abandoned for the time. The power was not surrendered. That remains for future exercise, when required. So here, the power of regulation existed from the beginning, but it was not exercised until in the judgment of the body politic the condition of things was such as to render it necessary for the common good. Neither does it affect the case that before the power was exercised the company had pledged its income as security for the payment of debts incurred, and had leased its road to a tenant that relied upon the earnings for the means of paying the agreed rent. The company could not grant or pledge more than it had to give. After the pledge and after the lease the property remained within the jurisdiction of the state, and continued subject to the same governmental powers that existed before."

Without exception, courts have, in the absence of positive limitation, upheld the authority of the state as against municipal corporations when dealing with the problems of public service, and have been careful to warn against the danger of admitting a divided authority either to contract or control.

In the recent case of *Troy v. United Traction Co.* 202 N. Y. 333, 95 N. E. 759, it is said: "The Public Service Commission was established, among other things, for the purpose of promoting uniformity and consistency in authoritative directions to be given to public service corporations, and to constitute a tribunal trained to consider and determine controversies and problems relating to such corporations, and to direct and supervise their relation to and dealings with the public as their patrons. A construction of the Public Service Commissions

law that would permit any municipality to disregard and set at naught the orders of the Public Service Commission in cases like the one now before us would not only cause to be lost some of the work of the Commission for the doing of which it was established."

There is another reason for issuance of the writ which suggests itself to us as of possible worth, and that is whether the city can raise the question of impairment of its contract. The city, it would seem, is in no position to assert this principle, for the state is doing only what it (the city) reserved the right to do,—to alter, amend, or annul the conditions of the franchise; that is, it is exercising the police power, but whether the power be wholly in the state or held to be concurrent, as is generally held in the matter of nuisances and minor crimes, the city should not be heard to raise the question, and the other party to the contract does not.

We might multiply authorities to sustain these propositions, but it would unnecessarily extend the limit of this opinion; for, as said by Justice Harlan, they are all one way. But it would seem that in principle we could not do otherwise than sustain the powers of the Public Service Commission as they have been defined by the legislature. Laws of this character mark the practical solution of those problems which have beset the people since private interests, operating not locally, but generally throughout the state or nation, have become the almoners of public necessities in so far as these necessities touch public service,—transportation, light, power, and kindred subjects. Rich fields of investment have been opened up. Watered stock and stock dividends have concealed the true amount of the investment as well as what would be a fair return upon the actual capital employed from those who were not called upon merely, but forced to bear the burden of sustenance. "Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance. And it must also be conceded that it is a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long-known and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress." *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77.

In its search for remedies and while seriously considering municipal, state, or government ownership, the public, by reference to the police power of the state, has almost

unwittingly—unwittingly in the sense that it is not generally appreciated—solved the problem, and has by the application of fundamental as well as established relative propositions of law gained every advantage of ownership without assuming its burdens. From the time it was held to be within the police power of the state to control public service corporations to the extent of fixing rates, the natural sequences of that holding have followed with a rapidity which may seem to those who have been wedded to the theory that the government could not interfere in the use, or limit the earnings, of property devoted to public service and which was not put to an unlawful use, to be alarming. With the power to fix rates established, the process of elimination of unjust rates became a mere matter of detail based upon mathematical calculation; the only question giving any ground for debate being the basis of calculation. Primarily, as well as logically, the basis for fixing rates for the use of property devoted to a public use is its real value, not its value as returned by those who own or control it, but a fair value fixed by the agents of the state; and, after due allowance for depreciation and up-keep as well as legitimate cost of operation, a rate that will afford a fair interest return on the investment.

Bearing in mind the interest of the public in public service corporations—an interest born of necessity—the justice and sound reasoning of these premises will not be gainsaid or denied. But from the statement of every proposition there must follow in logic its corollary. If we assume the right to lower rates to make the return conform to a fair interest rate upon a fair valuation, it follows that we must in conscience yield the right to those affected to petition for a rate, though it be higher than a present one, that will accomplish the purpose of the law. These principles have their foundations laid deep in the doctrine of common honesty between man and man, between the public and its servants. They are sustained upon the theory that the public is willing to pay a full return and no more, a fair return and no less, to those who have lent their capital for its benefit. Such laws, being honest in their purpose and honestly applied, are within the meaning of the term "general law" as used in our Constitution; for the great aim and object of the law is to balance the scales of justice between all who seek its light and protection. Nor does it follow that, because there may be instances when those to whom the law has intrusted the responsibility of finding the facts ordain or decree that a rate for service be raised, the common good is

not served. It may work hardship to the few, but the working of the general law will in the end surely promote the good of the many. Under these statutes efficiency has been and will continue to be maintained. While rivalry may be promoted, monopoly in the sense of oppression is made impossible. The benefit of ownership is enjoyed, while its dangers—not the least of which is the political activities of great armies of public employees—are no longer a menace to those who, to avoid the hazards of public ownership, have unwillingly subscribed to the conditions prevailing before this and other states entered upon the policy of public control. To hold that the Public Service Commission is without jurisdiction to raise rates to the point of fairness as it finds that point to be would deprive the Commission of the right to lower rates. To dissent from these views would be to hold that the state could not relieve the people of a municipality of an improvident contract or one entered into in defiance of the will of the people, instances of which might be easily multiplied were we called upon to do so.

It should be understood that we are not passing upon the fairness of the new rate. Its fairness is admitted by counsel for the city. We are dealing only with the power of the state to control those properties which exist by its authority, and the attending question whether these powers may by inaction be so surrendered as to estop the state from subsequently asserting them.

For the reasons assigned, it is ordered that the writ issue.

Dunbar, Ch. J., and Fullerton, Parker, Gose, Mount, and Crow, JJ., concur.

Morris, J., dissenting:

Not being able to concur in the views of the majority, I dissent; and as the question is an important one and its principles, if adhered to, determinative of rights of cities of the first class contrary to my conception of the correct interpretation of our Constitution, I desire in a general way to express my reasons for such dissent.

I cannot read § 10, art. 11, of the Constitution, permitting cities of the first class to frame a charter for their own government consistent with and subject to the Constitution and laws of the state, without reaching the conclusion that it was the intention of the framers of the Constitution to invest cities of the first class with the fullest powers of local self-government, intending that within itself the city should be supreme; the only limitation being that the power it sought to exercise should be "consistent with and subject to the Consti-

tution and laws of this state." The only reasonable and sensible construction of this limitation, in view of the power sought to be conferred, is that, while the state was yielding to the city the power to exercise local self-government in all matters purely municipal in their character, the city must recognize the Constitution as the supreme authority of the state, and pass no law under its power of local self-government which would exempt its citizens from obedience to the general laws of the state. In other words, the state said to the city: "So long as you confine yourselves to matters purely municipal in their nature, you may frame your own government. In all other matters, in common with all citizens of the state, you must yield to the Constitution and general laws." The state in exercising its power of general legislation for the benefit of all its citizens reserved the power to control and govern the citizen within the city as it did the citizen without the city, to the effect that in the exercise of its general power of government over the citizens its laws should be uniform. The franchise under which the telephone company exercises its right within the city of Seattle was obtained from the city. Its right to be a corporation and exercise certain powers included within its charter or its franchise "to be" it derived from the state, but the right to exercise those granted powers within the city of Seattle in the manner and to the extent it sought to exercise them it obtained from the city under its franchise "to do." The franchise from the state and the powers therein conferred were not self-executing within cities of the first class. The legal exercise of those powers could be obtained, and obtained only, from the city under proper municipal franchise and regulation, and, unless there is in that franchise some grant of power or regulation inconsistent with or in conflict with the Constitution and laws of this state, the state must recognize it as a valid franchise, and give effect to all its provisions.

I concede that the state cannot divest itself of its police power, and that, once having delegated that power, it may again assume it and exercise it through legislative enactments. But this concession does not establish the right of the Public Utilities Commission to exercise powers granted by the Constitution to cities. Under this concession, if the city should pass an ordinance in the exercise of its police power and the state should subsequently enact a law upon the same subject, the ordinance must yield to the extent of the conflict. But this is not the situation confronting us. Under its constitutional authority, the city has granted a franchise fixing rates to be

charged for telephones, and there is no provision of the Constitution and no general law in conflict therewith. Subsequently the state created a Commission to whom it delegated certain powers. In the exercise of these powers this Commission invalidates the franchise granted by the city; for, if it can change that franchise in one particular, it may change it in all particulars, and thus eventually usurp every function of municipal government. I cannot consent that this may be done, nor can I yield to the announcement of any principle which holds that a Commission created by and deriving its powers from the legislature can control and exercise higher powers than a city created by and deriving its powers from the Constitution. To so hold is to hold that the legislature is the supreme power of the state. I had always understood that the Constitution was the supreme power of the state, to which the legislative and all other departments of the state government must yield. The rule of the majority, if carried to its logical conclusion, means at any time the legislature may so determine it can establish a Commission, exercising every function of municipal government, and deprive all cities of this state of their constitutional birthright,—a situation so abhorrent to my mind that I cannot permit its announcement without an expression of dissent. The purpose of this constitutional provision was undoubtedly the conception that the cities could best rule themselves because they best knew their own needs and the best method to fully supply those needs so as to measure up to the greatest good of its citizens. As now written, the legislators from the rural sections of the state, without experience in the vexing and complicated problems of municipal government, may, because they are in the majority in the legislature, change the whole conception and plan of municipal government as formulated out of the experience of the dweller in the city. This to my mind was the very evil the Constitution sought to guard against. If the rule of the majority be the law, our Constitution-created municipalities have now no greater power and stand in no different light from like municipalities in those states where cities are created by special or general laws, subject at all times to legislative control, notwithstanding the expression of such a strong constitutional intent to place them upon a higher plane. And this is to be done, not by the legislature itself under the guise of some general or special law, but under a delegation of power to a subordinate commission. If the legislature may do this in one phase of constitutional authority, it may do it in another, and thus the legislature becomes in all respects, as L.R.A.1915C.

by this decision it does in municipal matters, the Constitution of the state. Surely it was intended by the language of our Constitution relative to cities of the first class that they should stand upon a different plane from those of a lower class, organized and controlled by general law. Yet, if this decision be the law, I should like to have the distinction pointed out and the plane bounded, as I can see no distinction between the city of the first class exercising its powers under express constitutional authority, and the cities of the second, third, and fourth classes, created by general law, if all alike are to be subject in all things to legislative control. In the cases from this state cited by the majority in support of their position, some general statutory provision has been found conflicting with the ordinance or charter provision there under discussion. As is said in *Ewing v. Seattle*, 55 Wash. 229, 104 Pac. 259, the last expression of this court, relied upon by the majority: "This court has repeatedly and uniformly held that where the legislature has enacted laws relating to such cities, or to the powers and duties of their officers, such laws supersede charter provisions in conflict therewith."

I can readily admit at the outset of this dissent that the charter or ordinances must yield to the general law, but, as I view it, there is here no general law on the same subject that conflicts with this franchise. All there is and all that can be claimed there is, is an attempt on the part of the legislature to create a subordinate branch of the state government invested with a power to inquire into the reasonableness of the rates of public service corporations? If the legislature should pass a law fixing a maximum and minimum rate, then the cases cited by the majority would be in point. It has, however, not attempted to do so. Nowhere in the law can there be found any expression in conflict with what the city of Seattle has done under its grant of franchise to this telephone company; and, until such a law can be found, I must protest against any subordinate branch of the state government exercising powers within cities of the first class that by the Constitution have been conferred on the cities themselves. To magnify an order of the Public Service Commission into a law of the state within the meaning of this constitutional phrase is, to any mind, beyond the power of courts or legislatures. The Constitution cannot thus be amended nor its express provisions abrogated.

Much is said in the main opinion that full control of the public service corporations is within the police power of the state, and that the surrender of this control to a

properly constituted Commission, subject to a judicial review, is a lawful exercise of legislative authority. As an abstract legal proposition that may be readily admitted, but as is said by Peckham, J., in *People v. Gillson*, 109 N. Y. 389, 400, 4 Am. St. Rep. 465, 17 N. E. 343, the police power is not above the Constitution, but is bounded by its provisions, and, when any right or franchise is expressly protected by any constitutional provision, it cannot be destroyed nor its validity impaired by the legislature under any valid exercise of the police power. To my mind this is the fundamental principle here involved.

For these reasons, I dissent.

Ellis, J., concurs with Morris, J.

ARKANSAS SUPREME COURT.

CHARLES MYERS, Appt.,

v.

STATE OF ARKANSAS.

(111 Ark. 399, 163 S. W. 1177.)

Criminal law — consumption of liquor by jury — effect.

1. The consumption by ten of the twelve jurors sitting in a criminal case which results in conviction, of 6½ quarts of whisky during the little more than three and one

half days that the trial lasted, is ground for new trial, although there is testimony that none of them were intoxicated and that the liquor did not influence the verdict, New trial — change of testimony by a prosecuting witness.

2. An affidavit by prosecutrix in a rape case, whose testimony was necessary to support a conviction, that accused was not guilty, but that she testified against him because neighbors who did not like him had coaxed and threatened her, secured after the termination of the trial which resulted in the conviction, is sufficient to support a motion for new trial.

(February 16, 1914.)

APPEAL by defendant from a judgment of the Circuit Court for Poinsett County convicting him of rape. Reversed.

Statement by Wood, J.:

Appellant was convicted at the September, 1913, term of the Poinsett circuit court of the crime of rape, under an indictment which charged him with that crime, and also with the crime of carnal abuse.

The prosecutrix testified on the trial in part as follows: "I am eleven years old; live with my father, Alonzo Johns, and Jeff McCracken and his wife, who is my sister. They have two children, Jessie, who is three years old, and Woodrow, the baby, a year old. I was at home July 18th; re-

Note. — Consumption of liquor by jury as ground for new trial or reversal.

I. Introduction, 302.

II. Prejudice from use.

a. Prejudice presumed.

1. Conclusive presumption, 302.

2. Presumption requiring removal, 305.

b. Rule that prejudice must be shown, 307.

c. Facts held to show prejudice, 309.

d. Facts held not to show prejudice, 312.

III. Discretion of trial court, 317.

IV. When objection must be made, 318.

I. Introduction.

This note does not include cases where intoxicating liquors were furnished by a party to a suit for the purpose of influencing the jury in their behalf (on that point see notes in 19 L.R.A. (N.S.) 733, and 49 L.R.A. (N.S.) 889) but deals only with the effect of the use of intoxicants by a jury upon the validity of their verdict.

All the courts express strong disapproval of the use of intoxicating liquors by jurors, and regard such use as misconduct which is censurable or punishable, but, with a few exceptions, the cases do not regard the mere fact that a juror has indulged in the use of intoxicating liquor during a trial as, L.R.A.1915C.

in itself, ground for setting aside the verdict. While a few cases seem to adopt the rule that any use of intoxicants by a jury will vitiate its verdict, and others adopt such a rule when the liquor was used while the jury was deliberating, the general rule is that a new trial will not be granted because of misconduct in this regard, unless, because of the quantity used or of its noticeable effect upon those using it, prejudice may reasonably be presumed. When it appears that any of the jurors were visibly affected by the intoxicants taken, the verdict will generally be set aside, unless the use was at such a time, as during a recess of the court, that it would not be likely to impair the jurors' ability to give intelligent consideration to the case.

II. Prejudice from use.

a. Prejudice presumed.

1. Conclusive presumption.

In some cases the courts presume that prejudice has resulted from the use of intoxicating liquors by the jury, especially when the use was during their deliberations upon the verdict, and award a new trial without considering the actual effect of such use.

Thus, in *State v. Baldy*, 17 Iowa, 39, the court reversed a judgment and awarded defendant a new trial because one juror,

turned from school about 4:30. When I first saw Myers he was in the field sowing peas west of the house. He came to the house to get a drink at the pump, east or southeast of the house. I was washing the baby's clothes, and Theresa, my sister, was churning when he came. I soon finished washing and sat down and talked with my sister in the yard east of the house. Myers stood there talking to Sister. Sister went for some potatoes, out east of the barn, and Myers said he was going in the house to play the graphophone. Jessie (the little girl) went with Sister. I had Woodrow in my lap while sitting down in the yard. Myers went in the house to play the graphophone. I sat in a chair in the middle of the floor and had the baby in my lap. Myers wanted me to find a record 'They Always Pick On Me' for him. I found it. The record box was on the bed in the northeast corner of the house. I nursed the baby with one hand and found the record with the other. Then Myers played it, and I went back to the chair and sat down. He went to the south door, in the kitchen, and looked out, and then came to the front door, and I started out and he caught me. I started out at the north door. Myers caught me around the waist and put me on the bed in the northeast corner. I still had the baby in my arms. He unbuttoned his pants. Was lying down on top of me. He pulled my clothes up and hurt me. I

didn't say anything to him at all while he was on top of me; I was afraid to. I commenced to halloo and call my sister, and he said if I didn't hush he would kill me. He said he would come to the corner of the schoolhouse ground and kill me. The graphophone was playing. He didn't say anything to me. He got up and went out, out at the south door, down through the field. I just stood there and cried. After he went away I went out in the potato patch and told Sister. I was bleeding then. I had the baby in my arms, and carried him to the potato patch. Sister asked me what was the matter. We went back to the house. She put me in bed, where I stayed until the next day. I could sit up then, but could hardly walk around. A doctor came that night. I was hurting when he came."

Alonzo Johns, the father of the prosecutrix, testified that her mother was dead, and that the prosecutrix was eleven years old. He lived with Jeff McCracken and his family. He was away from home on the 18th of July, the day that his daughter was said to have been raped. He made affidavit for the arrest two weeks after the alleged offense. His daughter had not told him before that time about it. He had heard the next day after the alleged occurrence that Dr. Yarborough had phoned about it, and had tried to get his daughter, Malissa to talk about it, but she would not. Dr. Yar-

while separated from the others by permission for a necessary purpose, went to a grocery store and drank a glass of ale or beer, although a statute provided that no judgment should be reversed except for an error or irregularity which resulted in actual prejudice to the party, the court saying: "The parties have a clear right to the cool, dispassionate, and unbiased judgment of each juror applied to the determination of the issues in the cause, and the use in any degree of that which stimulates the passions and has a tendency to lessen the soundness of judgment, is itself conclusive evidence that the party who has the right to the exercise of that dispassionate judgment has been prejudiced in not having it as perfect as it existed in the juror when accepted, applied to the determination of the cause."

In *Ryan v. Harrow*, 27 Iowa, 494, 1 Am. Rep. 302, the court approved the rule adopted in *State v. Baldy*, saying: "Courts will not assume to determine the limit, and whether, in cases where jurors have indulged in the use of the dangerous liquid, it has been passed. Inasmuch as, in such a case, there can be no certainty of the purity and correctness of the verdict, that it is the result of cool and dispassionate deliberation and the honest exercise of reason, it will be set aside."

In *Bilton v. Territory*, 1 Okla. Crim. Rep. L.R.A.1915C.

566, 99 Pac. 163, it is held that the fact that jurors in a capital case drank intoxicating liquor during the time they were hearing and deliberating upon it should vitiate the verdict regardless of affirmative proof of the effect the intoxicants had upon the minds of the jurors.

In *State v. Strodemier*, 41 Wash. 159, 111 Am. St. Rep. 1012, 83 Pac. 22, the court granted a new trial because a juror, accompanied by a bailiff, went to a saloon and took a drink of whisky, without considering evidence offered to show that the verdict was not prejudiced thereby.

In *People v. Lee Chuck*, 78 Cal. 317, 20 Pac. 719, 8 Am. Crim. Rep. 434, the court holds that where the proof of the drinking is clear and undisputed, and it was done while the jury were actually deliberating upon their verdict in a capital case, a verdict of conviction will be set aside without going into the effect which such drinking had upon the jurors.

In *People v. Schad*, 58 Hun, 571, 12 N. Y. Supp. 695, the fact that one juror in a trial for a felony drank intoxicating liquor during the time the jury were deliberating upon their verdict was held to be ground for new trial, and the court approved *People v. Lee Chuck*, supra, and said that there was no valid ground for distinction in that respect between a capital case and one involving any other felony.

borough talked to witness about it the next day after the alleged occurrence. The day he swore out the warrant four men came out to his house, and they said that they heard that witness had been told it was done with a stick, and the little girl had been telling it; it was Charlie Myers that hurt her. They told witness that if he would have Myers prosecuted the whole neighborhood would stand back of him, but if he let Myers go, some of their own children might be raped.

Theresa McCracken testified that she was the wife of Jeff McCracken and a half-sister to Malissa Johns. Malissa was injured July 18th. Myers was at their house on that day after dinner, went to the field, and came back about 4 o'clock. Witness went to get some potatoes, and at that time Malissa was sitting in the house nursing the baby, and Myers was playing the graphophone. The potato patch was about 125 or 130 yards from the house. Witness was gone about twenty minutes. Before she came back to the house she saw Myers go through the pasture out towards his pea field. After he left it was about five minutes before Malissa came to the potato patch. Her dress skirt was bloody. She was carrying the baby. Her eyes were kind

of red like she had been crying. Witness took her to the house, changed her clothes, and put her in the bed in the southeast corner of the house. The bed in the northeast corner was tumbled up a little bit. Malissa had on just one skirt. The blood spot extended to the bottom of the skirt and was about 8 inches wide. Malissa didn't have on anything except a skirt. She had not arrived at the age of puberty. After the occurrence Myers was the first person witness saw. He was in the field, coming up towards the house, not far away. He got over the fence and came up the road to the gate. Witness asked him about sending for a doctor. He replied maybe she would get all right, and would not need a doctor, and that if she needed a doctor he would try to get one. They saw Mrs. Smith coming up then, and Myers said if he were witness he would not say anything about Malissa getting hurt. It was about a week and a half after Malissa was hurt before she told of how she received her injuries. She stated that she had been hurt on a cane. Witness asked her if she was sure it was a cane, and she said it was, and explained that she stepped on it and the cane flew up and hit her. When witness came back from the potato patch she saw the cane in the

In *Brant v. Fowler*, 7 Cow. 562, the fact that a juror, during a short recess, after receiving the charge of the court, drank a small quantity of brandy for medicinal purposes, was held sufficient ground for setting aside the verdict, though the juror joined the others promptly, conducted himself with great propriety, was chosen foreman, and delivered the verdict, the court saying: "We are satisfied that here has been no mischief; but the rule is absolute, and does not meddle with consequences."

In *People v. Douglass*, 4 Cow. 26, 15 Am. Dec. 332, where there was some evidence that two of the jurors drank intoxicating liquor during the progress of a trial for murder, the court granted a new trial, though the evidence of drinking was unsatisfactory, and it was not at all probable that either juror was in the least under the influence of strong drink, the court saying: "It will not do to weigh and examine the quantity which may have been taken by the jury nor the effect produced."

In *Rose v. Smith*, 4 Cow. 17, 15 Am. Dec. 331, it was held that the drinking of liquor by a jury during a trial in the justice's court is, in itself, fatal error and ground for setting aside the verdict, and that even the consent of the parties to the drinking will not cure the error.

While the strict rule adopted by the New York courts may have been modified to some extent, it seems to be still in force as to the use of intoxicating liquor by the jury while deliberating on their verdict. Thus, in *Hanrahan v. Ayres*, 10 Misc. 435, 31 N. Y. Supp. L.R.A.1915C.

458, the court said: "While the early rule of the courts in this state, which held that drinking liquor during the progress of the trial would avoid the verdict in either a civil or criminal case, has been somewhat relaxed by the more recent decisions, yet it now seems to be well settled that drinking spirituous liquor by jurors without leave of the court, while deliberating on their verdict, is a sufficient ground for setting it aside, whether the party obtaining the verdict is responsible for such misconduct or not, and I have been unable to find any case in this state in which the verdict was sustained where it clearly appeared that the jury had been guilty of drinking intoxicating liquor after the charge of the court and the final retirement of the jury for deliberation. It seems to me that this is the better rule."

In *Hedican v. Pennsylvania F. Ins. Co.* 21 Wash. 488, 58 Pac. 574, though a juror became intoxicated after all the testimony was in and counsel was given opportunity to make complete arguments the next morning after he had become sober, the misconduct was held ground for new trial, the court apparently adopting the rule that prejudice will be presumed from the fact that a juror is intoxicated during the trial, and saying: "The court will not undertake an inquiry into the state or condition of mind of a jurymen who has been intoxicated during the progress of a trial, but will assume that he was incompetent to determine the cause."

In *State v. Bullard*, 16 N. H. 139, where

yard east of the house. It was about the size of witness's finger and about 3½ feet long, maybe longer. There was nothing on the cane at all. Myers lived about ¼ of a mile from witness's house. Johns phoned for the doctor from Myers's house. The doctor came a little after dark that night. He made an examination of Malissa. Mrs. Smith and Mrs. Myers helped him. Johns, her father, was not in the room. The doctor came back the next morning and examined her again. He did not come back any more.

The doctor testified that he examined the prosecutrix on the night of the day she was alleged to have been raped between 5 and 7 o'clock. He had to use a lamp light. The bedclothes and her underclothes were soaked with blood. He found the vagina full of clotted blood. There was a hemorrhage at that time, and a tear between the vagina and the rectum, extending between an eighth and a quarter of an inch towards the rectum. He inserted three fingers. The hymen was broken, and there was none there. He could not say when it had been broken, but there had been some penetration by a blunt instrument. He could insert his fingers 4 or 5 inches, and more than that could not be done in a normal woman. The prosecu-

trix was not suffering any pain until witness went to examine her. He examined the cane that was out on the porch; the little end was about the size of a man's little finger and the other end about the size of a man's thumb. It was 4 or 5 feet long. The large end was trimmed off round. He saw no blood on the cane. The odor when witness examined the prosecutrix was that of fresh blood, and not that peculiar to menstruation.

Several witnesses on behalf of the appellant testified that they were at the house of McCracken, where the prosecutrix lived, on the day following the alleged occurrence and on the second day thereafter. They observed that the prosecutrix was playing around the house in the usual way, and that she brought a full bucket of water out on the porch for certain of the witnesses to drink. She walked about, got up and down, and brought the water, and they observed nothing unusual about her. They observed no trouble or anything the matter with her. One witness testified that he was at the house on the next day after she was injured, in company with another person; that they took dinner at the McCracken home; that Malissa ate dinner at the table with them. They stayed from about 11 o'clock until

refreshments were provided for the jurors, including some spirits that were ordered for some of them who alleged bodily indisposition requiring them, though it did not distinctly appear, but might be inferred, that the spirits were drank by the jurors for whom they were ordered, the court set aside the verdict, saying: "We are of the opinion that the use of stimulating liquors by a jury deliberating upon a verdict in a criminal case, without first showing a case requiring such use, and procuring leave of court for that purpose, is a sufficient cause for setting aside a verdict found against the prisoner in such circumstances, whether the use was an intemperate one or otherwise."

And in *Leighton v. Sargent*, 31 N. H. 119, 64 Am. Dec. 323, the verdict was set aside because brandy was furnished to the jury while they were deliberating, though the quantity was probably small and it was furnished upon complaint of slight illness, the court saying: "The quantity drank was probably small, but we cannot consent that that fact should make a difference. We fully concur in the remark made by the learned judge in *People v. Douglass*, 4 Cow. 36, 15 Am. Dec. 332: 'It will not do to weigh and examine the quantity which may have been taken by the jury, nor the effect produced.' The cause alleged, of slight illness, will not justify the use made of the liquor. The case was not so pressing as not to allow of opportunity for leave to be given for its use, if found to be one properly requiring it."

The mere drinking of intoxicating liquor L.R.A.1915C.

by the jury after retiring to consider their verdict was held to be ground for a new trial in *Jones v. State*, 13 Tex. 168, 62 Am. Dec. 550, the court disapproving of the rule that requires the court to determine whether or not there has been actual prejudice, saying: "Its effect is so very different on different men that it would be dangerous in the extreme to attempt to lay down any rule by which it could or should be determined whether a juror had drank too much or not, and the only safe rule is to exclude it entirely." The later Texas cases, however, adopt a more liberal rule, apparently without considering this case.

2. *Presumption requiring removal.*

Other cases consider the use of intoxicating liquors by jurors as so presumptively prejudicial as to necessitate an affirmative showing of lack of prejudice to prevent the verdict from being set aside.

Thus, a showing that jurors drank intoxicating liquors imposes upon the prosecution the necessity for showing that they were not influenced thereby adversely to defendant, or in any respect rendered less capable of performing their duties. *Creek v. State*, 24 Ind. 151.

So, when no showing is made by the prosecution to offset evidence that two of the jurors, accompanied by the officer in charge, went to a saloon and drank liquor, the verdict will be set aside. *Davis v. People*, 35 Ind. 496, 9 Am. Rep. 760.

In *Gamble v. State*, 44 Fla. 429, 60 L.R.A.

about 3 o'clock, and Malissa, during the time while she was not at dinner, was playing about the house "just like a kid would do" with the other children. She also pumped a bucket of water. This witness stated that Mrs. McCracken on that day told witness that Malissa, after some hesitation, had told her (Mrs. McCracken) just after the occurrence, what Charlie Myers had done, and that Mrs. McCracken told witness that she saw what happened. She didn't say anything about putting Malissa to bed, or about any bloody clothes or any cane.

Mrs. Smith testified that she was at the home of Jeff McCracken on the evening of the day that it was reported that Malissa Johns was hurt. She was there at the same time the doctor was. Malissa was in bed when the doctor got there. Witness stayed all night there. Witness held the lamp for the doctor while he was examining Malissa. Malissa was swelled awfully bad, and there was blood. Witness knew the odor of blood accompanying menstruation, and that was no odor of that kind. Witness could hardly see and could not hear much. While witness was there, about night, Malissa told how she had been hurt with a cane.

Several witnesses testified that the character of the prosecutrix for truthfulness

was bad, and that they would not believe her on oath.

The appellant testified that he was forty years old; he was a married man; had five children; the eldest, if living, would be twenty-one years of age. He had lived in the neighborhood for eleven years; was a farmer and owned the place on which he lived. Had known the McCracken family since he had been there, and Alonzo Johns. Had known the prosecutrix since she was "a little thing." He stated that he was at the McCracken home on July 18th; had sowed some peas on the McCracken place on that day. The first patch was about 30 yards and the second about 100 yards from the house. His son was helping him. He was at the house three times; the first time about 2 o'clock, and he stopped there when he went to the field. Mrs. McCracken was there alone. He got some water in a bucket. When he went back later in the day Malissa and Mrs. McCracken were there at the house. The girl at that time had returned from school. He stated that he went in the house while the girl was washing or doing something at the southeast corner of the house, and Mrs. McCracken was sitting at the northeast corner churning. He stated that he went in the house saying, "I believe I will play my favorite;" that nobody went

547, 103 Am. St. Rep. 150, 33 So. 471, 1 Ann. Cas. 285, 12 Am. Crim. Rep. 638, the court said: "If intoxicants be shown to have been used by the jury, the presumption arises in favor of the convicted defendant that it resulted injuriously to him, and the burden is on the state to show affirmatively, to the entire satisfaction of the court, that its use was to such a limited and moderate extent as to completely and satisfactorily negative any harm to the defendant from its use by the jury or any member of it;" and such an affirmative showing of lack of prejudice was deemed to have been made where it appeared that, though a considerable quantity of liquor was furnished to the jury during the trial, it was used sparingly by them, some being left unconsumed, and that none of the jurors were in the least intoxicated at any time.

The drinking of liquors by a jury while deliberating on their verdict is a gross misbehavior, and raises a presumption that the prisoner was injured thereby, which presumption the state must remove beyond a reasonable doubt. *State v. Greer*, 22 W. Va. 800.

In the eyes of the law the deliberation of the jury continues till their verdict has been returned in open court and until a poll has been taken if one is demanded; so, where the affidavit of the bailiff showed that three bottles of beer which had been sent to the jury room as an exhibit were drunk by the jury before they notified him that L.R.A.1915C.

they had arrived at a verdict, prejudice was presumed, and, there being no proof to overcome the presumption, the judgment was reversed. *STATE v. APFLEGATE*.

The drinking of liquor by a juror during a trial, but before the jury retire to consider the verdict, raises more or less of a presumption against the verdict, which may be rebutted by showing that the juror was not in fact intoxicated, and that the moving party was not in fact prejudiced. *State v. Madigan*, 57 Minn. 425, 59 N. W. 490.

The use of intoxicating liquor by a jury is censurable, but will not vitiate the verdict if it can be affirmatively shown that their deliberations were not injuriously affected. *Russell v. State*, 53 Miss. 367.

In *Dolan v. State*, 40 Ark. 454, the court refused to set aside a verdict because of the use of intoxicating liquor during the trial, where affidavits and testimony taken in court exculpated the jury from any excesses or misconduct that could have resulted prejudicially to appellant. *Eakin, J.*, dissented on the ground that liquors should not be permissible to jurors at all, except in individual cases of sickness, and should then be furnished only under the directions of the court, with safeguards against abuse. This case was approved in *Payne v. State*, 66 Ark. 545, 52 S. W. 276.

And in *McLendon v. State*, 66 Ark. 646, 51 S. W. 1062, where the evidence as to the use of intoxicating liquors by the jury in a capital case was that it was moderate and that none was taken after the case was sub-

in the house with him; that Mrs. McCracken and the girl were out in the yard at that time. Afterwards the girl came in, while the second record was playing, and sat in the middle of the house. Mrs. McCracken walked up to the door at that time and said she was going to dig some potatoes. The little girl went with her, and about the time Mrs. McCracken got to the south door Malissa turned and walked out of his sight. The witness then went out of the south door and down into the field and started home. When he climbed over the fence and walked up in front of the house Mrs. McCracken told witness that Malissa had hurt herself on a cane, indicating by putting her hand on the place where Malissa was hurt. Witness denied specifically that there was any conversation between himself and the prosecutrix after Mrs. McCracken left the house to go and dig the potatoes, and denied specifically that he touched the prosecutrix. He explained in detail the conversations that he had with Mrs. McCracken after the alleged occurrence, acknowledging that he had had some such conversation with her as she had detailed, but explained his reason for what he said. The reason he advised Mrs. McCracken not to say anything to Mrs. Smith about Malissa's injury was because Mrs. Smith was in the habit of talking

"awfully hard when it was not necessary," and everybody knew it, and he didn't think that there was any use of making a public thing of it.

The above are substantially the facts upon which the jury, after receiving the instructions of the court, returned a verdict of guilty.

One of the grounds of the motion for a new trial was "that the jury during the trial was subjected to improper and illegal influences, and indulged in and used intoxicating liquors to an excessive degree, to defendant's prejudice." It was shown that the selection of the jury began October 6th, and the verdict was returned on the afternoon of the 9th. The jury had 9 quarts of whiskey during the trial. One of the jurors testified that he brought a quart with him, which the jury drank, and that Warning, another juror, ordered 2 quarts, which they received, and they ordered 6 quarts while they were on the jury; they drank 7 of them while they were on the case, and the others after the case was over, and after they had returned the verdict. He states that the jury actually drank 6 quarts and a pint while they were on the jury. Two of the jurors didn't drink; that other ten did. They only took one drink at a time, one when they got up in the morning, one at

mitted to them, the appellate court said that, while they could not say the trial judge was in error in refusing to set aside the verdict, they might have set it aside because of their apprehensions as to its perfect purity, were they not convinced that it was correct on the evidence, and that a new trial would not be likely to produce a different result.

Where the trial lasted five days and the liquor furnished to the jury was a small quantity only, for medical purposes, before any testimony for defendant had been introduced, and some hours before they were called upon to listen to the testimony, it may be fairly said that it was affirmatively shown that the verdict was not affected. *Russell v. State*, supra.

A showing that only a small quantity of liquor was furnished to the jury, and that none of the jury were at any time under its influence, fulfilled the duty of the state to show that the prisoner had not been injured by the furnishing of the liquor to the jury. *Westmoreland v. State*, 45 Ga. 225; *Jones v. State*, 68 Ga. 760.

b. Rule that prejudice must be shown.

The rule most generally adopted by the courts is that the mere fact that a jury or some of the jurors have indulged in intoxicating liquors during a trial is not sufficient reason for granting a new trial, but that to have that effect it must be shown that the use of the liquor did in fact have a

prejudicial effect upon the verdict, or that the quantity used was such that it will be presumed to have affected the jurors using it, or that some of the jurors were in fact affected thereby.

The real question is, Has the party to be affected by the verdict been prejudiced by the conduct of the jury, and if it is not shown, or fairly inferable, that the soundness or fairness of the verdict has been impaired, a new trial should not be granted because there had been some use of intoxicating liquor by members of the jury. *Jones v. People*, 6 Colo. 452, 45 Am. Rep. 526; *May v. People*, 8 Colo. 210, 6 Pac. 818.

In answer to the argument that the only safe rule lies in setting aside the verdict in every case where intoxicating liquors have been used by the jury, the court in *Jones v. People*, supra, said: "We cannot assent to this proposition. Would such a rule prevent a repetition of like misconduct by future juries? We say no. And instead of safety, there is manifest danger in the rule, for it would hold out an obvious temptation, and furnish an almost certain opportunity, to secure a new trial in every case by the surreptitious introduction of liquor into a jury room, and would tend to lessen the certainty of conviction in every criminal case."

Neither law nor sound judgment requires that a verdict be set aside because two jurors drank a small quantity of liquor, but were not affected by it. *People v. San-some*, 98 Cal. 235, 33 Pac. 202.

dinner, one at night before supper, and one before they went to bed. If any of the jurors drank oftener than that, witness did not know it. None of the jurors became intoxicated to a visible extent. The use of the whisky, witness stated, did not have anything to do with the verdict returned so far as he was concerned. Two other jurors testified to substantially the same facts as the above. It was shown that there were nine empty quart whisky bottles in the room that had been occupied by the jury. This testimony was given by the man who kept the boarding house where the jury were lodged during the progress of the trial. The witness stated that he knew the jurors drank liquor. The officer in charge of the jury was in there, and witness supposed he drank also. The officer was where he could have seen the jurors drinking. Witness did not know whether the jurors had any more than the 9 quarts or not. No other persons except the jurors occupied the room.

Another ground of the motion for a new trial was "that the defendant had discovered important evidence in his favor since the verdict." On this ground of the motion the defendant prayed that time be given him at some future day to present the testimony in connection therewith. The court granted his request, and adjourned

until October 25th, when the defendant offered affidavits. The defendant presented the affidavit of Malissa Johns, taken before a notary public on the 15th of October, 1913, in which she stated that on July 18, 1913, she was hurt with a cane. She told her sister, Theresa McCracken, and others, that she was hurt with a cane. The neighbors and others who didn't like Charlie Myers had coaxed and threatened her until they had got her to say that she was not hurt with a cane, and that Charlie Myers had raped her. She stated that Charlie Myers didn't rape her, and that she did not want to say that he did, and would never have so stated had she not been scared into saying that he did. And another affidavit, taken on the 24th day of October, 1913, in which she stated that, in addition to the sworn statement made on the 15th of October, she wished to say that Charlie Myers not only did not commit rape on her on July 18, 1913, nor at any other time, but that Charlie Myers did not have sexual intercourse with her, nor did he ever have anything to do with her as a man with a woman, nor did he carnally know her on the 18th of July, 1913, nor at any other time, and never at any time attempted to have any intercourse with her. She states that both these affidavits were made volun-

Where the jury was feasted and wine by the officer in charge at the joint expense of both parties, the verdict will not be disturbed without proof of intoxication to the extent of disqualifying the jury, or some members thereof, for a proper discharge of duty. *Copper Queen Min. Co. v. Arizona Prince Copper Co.* 2 Ariz. 10, 7 Pac. 718.

That the jury, accompanied by the sheriff, visited a saloon during their deliberations, and all, or most of them, took a drink of spirituous liquor, which was paid for by the sheriff, was no valid reason for a new trial, where it did not appear that, in consequence of it, defendant did not receive a fair and impartial trial. *Kee v. State*, 28 Ark. 155, 2 Am. Crim. Rep. 263.

It is only when the jurors or any one of them has so indulged in the use of intoxicating liquors as to be influenced thereby in arriving at his verdict that a new trial should be granted. *Territory v. Hart*, 7 Mont. 489, 17 Pac. 718.

In the absence of proof that jurors became intoxicated by beer drunk in moderate quantities, the judgment will not be reversed. *State v. Taylor*, 134 Mo. 109, 35 S. W. 92.

The fact that a member of the jury did, during the trial, or while deliberating on the verdict, drink intoxicating liquor, is not ground for a new trial unless there is some reason to suppose that such liquor was drunk at such time or in such quantities as to unfit the juror for the performance of his duties, or at least unless the circum-

stances were such as to create a reasonable belief that the drinking may have improperly influenced the verdict. *Alabama Lumber Co. v. Cross*, 152 Ala. 562, 126 Am. St. Rep. 55, 44 So. 563.

The verdict of the jury will not be overturned because some members of it used intoxicating liquors during the trial, unless it appears from the record that defendant was prejudiced by such use. *State v. Corcoran*, 7 Idaho, 220, 61 Pac. 1034.

The mere use of intoxicating liquors by the jury, where it is not claimed or probable that prejudice resulted, is not ground for reversal. *State v. Harrigan*, 9 Houst. (Del.) 369, 31 Atl. 1052.

In *Purinton v. Humphreys*, 6 Me. 379, in denying a new trial the court said that if they had any ground for believing that the liquors furnished to the jury operated upon any one of them so as to impair his reasoning powers, inflame his passions, or have an improper influence upon his opinion, they might have decided differently.

It is necessary for the complaining party to show that a juror drank enough to produce intoxicating effects upon him. *State v. Jones*, 7 Nev. 408.

In *United States v. Gibert*, 2 Sumn. 19, Fed. Cas. No. 15,204, where it appeared that the jurors were permitted to use some intoxicating liquors as medicine, with the consent of counsel for accused, the court said a new trial should not be granted under such circumstances, unless it was shown that the

tarily, and because she did not want to see an innocent man punished. There was also presented the affidavit of Theresa McCracken, to the effect that Malissa never changed her statement about having hurt herself with a cane, and never stated that Myers had raped her until the neighbors had clamored about it, and said that it was Charlie Myers, and had intimidated Malissa into saying that it was Charlie Myers. The neighbors kept up this clamor for about two weeks, two or more of them coming to affiant's house everyday, insisting that Malissa was not hurt with a cane, and insisting that Charlie Myers should be prosecuted, and after this continuous clamor Malissa finally said that Charlie Myers raped her. Affiant knew that Malissa changed her first statement because of the continuous clamor from the neighbors that Charlie Myers be prosecuted. An affidavit of Jeff McCracken also corroborated the statements of Theresa McCracken.

There was testimony from the attorneys representing the defendant, Myers, to the effect that after the verdict was returned and the motion for a new trial was filed, they had received word that Johns and McCracken and his wife were displeased with the verdict, and that they did not want the death penalty inflicted, whereupon they

went to the home of the McCrackens and found that Johns and both the McCrackens were anxious that the death penalty be not enforced as against the defendant, and Johns prepared an affidavit to that effect, in which he requested that the penalty be reduced to twenty-one years in the penitentiary. And the testimony of the attorneys further showed that they were notified that McCracken and his wife and Malissa Johns wanted to make certain affidavits, whereupon the attorneys went to their home. The substance of what they wished the affidavits to contain was stated to the attorney, and he reduced their statements to writing in his office, and went to the home of the affiants, whereupon the affidavits, as before set forth, were made. The attorney did not go to the home when the last affidavit of Malissa Johns was made, but he was told that she wished to make an affidavit to the effect that Charlie Myers not only did not commit rape upon her, but had never had sexual intercourse with her, whereupon he prepared a statement to that effect, and his son and partner went down and Malissa Johns made the second affidavit. It was shown by the witnesses who were present when this affidavit was taken that the prosecutrix, after the affidavit was read over to her, and after she was asked if she wanted

indulgence was grossly abused, and operated injuriously to the prisoners.

To justify the granting of a new trial because of the use of intoxicating liquor by a juror, the complaining party must establish to the satisfaction of the court that the juror was so intoxicated as to impair his faculties and render him unfit for service, and that he was unaware of the condition of the juror till after the verdict was rendered. *State v. Salverson*, 87 Minn. 40, 91 N. W. 1, 12 Am. Crim. Rep. 644.

c. Facts held to show prejudice.

While no very definite rules can be laid down for determining what showing of indulgence in intoxicating liquors by jurors will be sufficient to establish a presumption that prejudice has resulted therefrom, the cases following in this and the next subdivision of the note will be useful by way of illustration of what the courts have considered sufficient or insufficient to raise such presumption.

In the following cases the use by jurors of intoxicating liquors as indicated was held to be sufficiently prejudicial to require that the verdict be set aside:

—where it was shown that large quantities of beer and other liquors were kept in the jury room, and used daily by members of the jury, *People v. Gray*, 61 Cal. 164, 44 Am. Rep. 549;
L.R.A.1915C.

—where a juror was intoxicated during the time the jury was considering the verdict, and the judge was intoxicated during the trial and at the time of ruling on the motion for a new trial, *Repath v. Walker*, 13 Colo. 109, 21 Pac. 917;

—use by a juror of liquor to the point of intoxication though during a night recess of the court, the court saying: "While it does not appear that he was still intoxicated when he took his seat in the jury box on the next morning, we have no means of knowing the extent to which his mental faculties were beclouded by the previous night's debauch. It is enough to say that the appellant was entitled to have this juror consider and pass upon his case with faculties unimpaired by drunkenness during the progress of the trial," *Brown v. State*, 137 Ind. 240, 45 Am. St. Rep. 180, 36 N. E. 1108;

—where a juror was under the influence of intoxicating liquor while in the jury room, *Perry v. Bailey*, 12 Kan. 539;

—where it appeared that members of the jury were furnished an excessive amount of intoxicating liquors while they were considering their verdict, and that most of the liquor was in fact consumed by two of the jurors, *State v. Broussard*, 41 La. Ann. 81, 17 Am. St. Rep. 396, 5 So. 647;

—where any one juror indulged in liquors to an intoxicating extent, though a verdict might legally be rendered upon the concurrence of nine jurors, *Davis v. Cook*, 9 Nev. 134; *State v. Ned*, 106 La. 696, 54

to sign it, and was advised not to sign it if she didn't want to, replied that she wanted to sign it, and did sign it. The witness stated that there was no doubt that the parties at the time they made the affidavits previously set forth knew and understood their meaning.

The testimony of Jeff McCracken was also taken before the court, tending to show that before the prosecutrix had changed her statement to the effect that she was hurt with a cane, the people in the neighborhood had called on Mr. Johns and said to him that if he didn't do something they would; they scared him, and told him that if he didn't do something, they were going to do something to him. He stated that Malissa was scared when these men came, and she knew they were talking to her father. She acted like she was scared; shook like she had a chill. His wife also stated that she was scared all the morning. Before that Malissa had told him and his wife that there was nothing to it. After telling how she was treated at the trial, and about being placed in a cell and nearly starved to death in Memphis, and about having been locked up at the Shepherd's Home, she said that there was nothing to it. Witness asked her why she had told this story before the jury, and she said that they had her scared taking her around, and she didn't know what to do.

The testimony of Johns was to the effect that certain men had come to his house and

said that it was against the law for anybody to know anything and not tell it, and they came to tell the witness, and told him, that if Myers was guilty and was turned loose, that their children might be raped some time. They didn't make any threats against him. He then went to the house and asked Malissa whether it was Myers that hurt her, and she said that it was. He stated that if the neighbors had not come, and he had not heard anything more about it, he might not have asked Malissa any more after she refused to talk to him about it. He kept on inquiring of her day by day until she got better.

Malissa Johns was then introduced and testified substantially that she was induced to change her statement first made, that she hurt herself with a cane, and was induced to swear on the trial that Charlie Myers raped her, because of the way the neighbors had talked and acted, and, further, that she had heard Dr. Yarbrough say that she was undoubtedly not hurt with a cane, and that she thought that if she did not accuse somebody of using force, that it might be said that she was misconducting herself with someone and had got hurt that way. On cross-examination the witness again retracted what she had said in regard to being hurt with the cane, and reiterated that what she said the first time was true. She said that the reason she retracted her sworn testimony on the trial in the affidavits she made

L.R.A. 933, 30 So. 126, 12 Am. Crim. Rep. 655;

—where, besides other misconduct, two jurors drank whisky in a saloon and each carried away a bottle of it with him on the morning before the trial started, it being reasonable to presume that they were under its influence during the day while hearing testimony, *United States v. Spencer*, 8 N. M. 667, 47 Pac. 715;

—where the jurors drank liquors while deliberating upon their verdict, in such quantities that there was good reason to suspect that they were more or less affected thereby, *Patrick v. Victor Knitting Mills Co.* 37 App. Div. 7, 55 N. Y. Supp. 340;

—where the jury purchased and drank liquor while they were deliberating on their verdict, and some of them were under its influence, *State v. Jenkins*, 116 N. C. 972, 20 S. E. 1021;

—where a juror was so under the influence of liquor that his faculties were affected while sitting in the case, *Underwood v. Old Colony Street R. Co.* 31 R. I. 253, 76 Atl. 766, Ann. Cas. 1912A, 1318;

—where it appeared that four or five bottles of beer were taken into the jury room during the deliberations and probably consumed by three of the jurors, *March v. State*, 44 Tex. 64;

—where the officers in charge furnished a considerable quantity of intoxicating

liquor to the jury while they were deliberating, on a pretense merely that it was for medicinal purposes, and the testimony of the officers guilty of such misconduct was the only evidence to show that none of the jurors was affected by the liquor, *State v. Greer*, 22 W. Va. 800.

And where the evidence was conflicting as to whether liquor was taken as a medicine or beverage, and how much was taken, it was not error to grant a new trial. *Hopkins v. Knapp & S. Co.* 92 Iowa, 212, 60 N. W. 620.

In *Hempton v. State*, 111 Wis. 127, 86 N. W. 696, 12 Am. Crim. Rep. 657, the drinking of intoxicating liquor by the jury was one of several acts of misconduct, for all of which a new trial was granted.

In *Com. v. Fisher*, 226 Pa. 189, 26 L.R.A. (N.S.) 1009, 134 Am. St. Rep. 1027, 75 Atl. 204, the fact that the jury was furnished with liquors in unknown quantities was considered by the appellate court as an important factor in showing an abuse of discretion on the part of the trial court in refusing to set aside the verdict.

In *State v. Parrant*, 16 Minn. 178, Gil. 157, while there was other ground upon which the court based its decision to set aside the verdict, it further considered the conduct of a juror in drinking liquors during the progress of the trial, including the night prior to the day when the case was given

after the trial was because she didn't want to see Charlie Myers hung. Her cross-examination shows that she had sworn falsely on the first trial in some particulars, but she finally concluded her cross-examination as follows:

Q. Then your story the first time was partly right and partly not right?

A. Yes, sir. The only thing that I swore wrong was that he went to the door.

Q. That is one thing you swore that is not so?

A. Yes, sir.

The court overruled the motion for a new trial, and sentenced the defendant to be electrocuted December 31, 1913, from which judgment he duly prosecutes this appeal.

Messrs. Mardis & Mardis and Lamb, Caraway, & Wheatley, for appellant:

A new trial should have been granted on account of the misconduct of the jury.

Dolan v. State, 40 Ark. 454; Payne v. State, 66 Ark. 545, 52 S. W. 276; McLendon v. State, 66 Ark. 646, 51 S. W. 1062; People v. Gray, 61 Cal. 164, 44 Am. Rep. 549; March v. State, 44 Tex. 65; People v. Lee Chuck, 78 Cal. 317, 20 Pac. 719, 8 Am. Crim. Rep. 434; State v. Jones, 7 Nev. 408; Brown v. State, 137 Ind. 240, 45 Am. St. Rep. 180, 36 N. E. 1108; People v. Hull, 86 Mich. 449, 49 N. W. 288; State v. Broussard, 41 La. Ann. 81, 17 Am. St. Rep. 396,

5 So. 647; State v. Jenkins, 116 N. C. 972, 20 S. E. 1021; Weis v. State, 22 Ohio St. 486.

The motion for new trial should have been granted on the ground of newly discovered evidence.

Bussey v. State, 69 Ark. 545, 64 S. W. 268; Mann v. State, 44 Tex. 642; State v. Powell, 51 Wash. 372, 98 Pac. 741; State v. Moberly, 121 Mo. 604, 26 S. W. 364; State v. Bailey, 94 Mo. 315, 7 S. W. 425; State v. Curtis, 77 Mo. 267; Dennis v. State, 103 Ind. 142, 2 N. E. 349, 5 Am. Crim. Rep. 469; Casey v. State, 20 Neb. 138, 29 N. W. 264; United States v. Radford, 131 Fed. 378; Keenan v. People, 104 Ill. 385, 4 Am. Crim. Rep. 434; State v. Murray, 91 Mo. 95, 3 S. W. 397; Cooper v. State, 91 Ga. 362, 18 S. E. 303; Brown v. State, 42 Tex. Crim. Rep. 176, 68 S. W. 131; Long v. State, 54 Ga. 564; Wilkerson v. State, 21 Tex. App. 501, 2 S. W. 857; Reed v. State, 27 Tex. App. 317, 11 S. W. 372; Simmons v. State, 26 Tex. App. 514, 10 S. W. 116; Bates v. State, — Miss. —, 32 So. 915.

Messrs. William L. Moose, Attorney General, and John P. Streepey, Assistant Attorney General, for the State.

Wood, J., delivered the opinion of the court:

1. This court, in the case of Dolan v. State, 40 Ark. 454, passed upon the alleged mis-

to the jury, at which time there was reason to believe he drank to excess, and said it would consider such conduct gross misbehavior in a civil case, and in one where life or liberty was involved the case would indeed have to be clear on the merits in which it would sustain a conviction under such circumstances.

In Gregg v. McDaniel, 4 Harr. (Del.) 367, the verdict was set aside because of the introduction of intoxicating liquor into the jury room; no facts are given.

In *Palmore v. State*, 29 Ark. 248, in which the judgment was reversed, the use of intoxicating liquor being apparently one only of several grounds, the court said that the drinking of intoxicating liquor by a jury, although in limited quantities, was very improper, and was aggravated by the statement of the officer that he cautioned the barkeeper to limit the quantity. If a case should occur where stimulants would become absolutely necessary to a juror, the administration of them should not be left to the discretion of a barkeeper in a public saloon.

In *State v. Demarest*, 41 La. Ann. 413, 6 So. 654, in setting aside a verdict where it appeared that the jury was boisterously intoxicated, the court said that it is a safe rule to follow to allow ardent spirits to be furnished only on the order of the judge, L.R.A.1916C.

in case of necessity and in moderate quantities, and that the practice of furnishing them in bottles and flasks is reprehensible.

In *Armour v. Boswell*, 6 U. C. Q. B. O. S. 352, while there was some evidence that the intoxicating liquor which was drunk by jurors was furnished by persons friendly to the prevailing party, the court, in awarding a new trial, said that if even one juror was, by partaking of such liquors, rendered less capable of judging, less firm of purpose, more open to exciting arguments, than he would otherwise have been, then it was not the evidence which decided the case, but a gross impropriety which it is the special duty of the courts to guard against.

In *Kellogg v. Wilder*, 15 Johns. 455, while there was other ground for reversal, the court said it was a gross misconduct on the part of the trial justice to permit the furnishing of whisky to the jury after the evidence was completed, for which the consent of the parties afforded no excuse.

And in *Com. v. Cleary*, 148 Pa. 26, 23 Atl. 1110, the court said that, while the mere fact that a juror has taken a glass of liquor is not of itself sufficient to require that the verdict be set aside, it is the duty of the court, when a juror has indulged in the use of liquor, to scrutinize his conduct, and if it appears that he has been intoxicated to any degree, a new trial should be granted.

conduct of the jury in the use of intoxicating liquors as a beverage during the progress of the trial of a defendant for a capital offense. In that case it was held, after an exhaustive review of the former cases in this court, as well as other jurisdictions, on the subject, that "where it appears from affidavit for a new trial in a criminal case, that the jury drank intoxicating liquor during the trial, the circuit court should set aside their verdict of conviction, unless it further appears from the testimony that the jury were guilty of no excesses or misconduct that could have resulted prejudicially to the defendant." Chief Justice English, who rendered the opinion for the court, quoted liberally from the opinion of the supreme court of Colorado in *Jones v. People*, 6 Colo. 462, 45 Am. Rep. 526, in which the learned justice quoted from Mr. Wharton as follows: "The general rule, as stated by Mr. Wharton in his work on Criminal Law, § 3111, is that the verdict will not be set aside on account of the misconduct or irregularity of the jury, even in a capital case, unless it be such as might affect their impartiality, or disqualify them from the proper exercise of their functions." Continuing, he said: "In the case at bar, it does not appear that the misconduct complained of disqualified any

juror in the proper exercise of his functions in the least, or in any degree whatever impaired the correctness or justness of the verdict, but, on the contrary, the testimony to the point clearly contradicts even a presumption against the verdict. But it is said, on the other hand, that the only safety lies in the rigid rule of setting aside the verdict in every case where intoxicating liquors are used by the jury, regardless of whether the jury were affected by such use or not. We cannot assent to this proposition. Would such a rule prevent a repetition of like misconduct by future juries? We say no. And instead of safety, there is a manifest danger in the rule, for it would hold out an obvious temptation, and furnish an almost certain opportunity, to secure a new trial in every case, by the surreptitious introduction of liquors into the jury room, and would tend to lessen the certainty of conviction in every criminal case." And he concludes by saying: "Such misconduct on the part of the jury certainly deserves condemnation and punishment, . . . but this is a matter entirely apart from the question of setting aside the verdict when its fairness is not impeached."

We approved the doctrine in *Dolan v. State* in the case of *Payne v. State*, 66 Ark. 545, 549, 52 S. W. 276, 277. In the *Dolan*

d. Facts held not to show prejudice.

Under the following circumstances it was held that sufficient presumption of prejudice was not established to require that a new trial be granted:

—where the officer got some whisky for a juror who was sick, which the juror drank while the jury was deliberating, and it appeared that nothing grew out of it prejudicial to the prisoner, *Robinson v. State*, 33 Ark. 185;

—where a juror was somewhat under the influence of liquor during a recess, but all the evidence showed that, during the time he was actually sitting as a juror in the box or deliberating on the verdict, he was sober, intelligent, and in a fit condition to understand and apply the instructions of the court, and form and express a fair opinion as to what the verdict should be, *People v. Deegan*, 88 Cal. 602, 26 Pac. 500; *People v. Romero*, 12 Cal. App. 466, 107 Pac. 709;

—where the amount or character of the liquor drank was not shown, and it was not claimed that any of the jurors were visibly affected thereby, *People v. Bemmerly*, 98 Cal. 299, 33 Pac. 263;

—where, during the early part of the trial, some of the jurors drank small quantities of liquor from flasks in their possession, mainly little swallows before going to meals, none being taken after the jury retired to deliberate upon their verdict, and there being no pretense that any juror became in the least intoxicated or affected by L.R.A.1915C.

the liquor so as to impair his faculties or interfere with the proper discharge of his duties, *People v. Leary*, 106 Cal. 486, 39 Pac. 24;

—where the showing made was amply sufficient to justify the court in finding that not one of the jurors was under the influence of liquor at any time, and no intoxicants at all were consumed after the jury had retired to deliberate upon a verdict, *People v. Emmons*, 7 Cal. App. 685, 95 Pac. 1032;

—when it appeared that the jurors used but little liquor and none were intoxicated to any extent, *State v. Corcoran*, 7 Idaho, 220, 61 Pac. 1034;

—where it clearly appeared that the juror became intoxicated during a recess, and no motion was made at the time that the jury be discharged and a new one selected, or that the particular juror be discharged and another selected, and it further clearly appeared that the trial was not resumed until the juror had recovered his normal condition, *Walsh v. Winston Bros. Co.* 18 Idaho, 768, 111 Pac. 1090;

—where the jurors drank liquors while out to view premises, but it was not shown that any of them became intoxicated or were influenced thereby to the prejudice of appellant, *Sanitary Dist. v. Cullerton*, 147 Ill. 385, 35 N. E. 723; *Bradshaw v. Degenhart*, 15 Mont. 267, 48 Am. St. Rep. 677, 39 Pac. 90;

—where a juror, on his own motion, and while the jury was separated by permission,

Case the facts showed that ten of the jury whose misconduct was called in question made affidavits to the effect that no juror was under the influence of intoxicating drinks, or subjected to any other influences whereby they, or any of them, were controlled or biased. The two jurors whose affidavits were not taken could not be found. The jurors were kept together, and were attended by an officer throughout the progress of the trial, and the bailiff having them in charge testified that "from the time the jury was ordered by the court to be kept together until they returned their verdict and were discharged, there was no juror on the panel under the influence in the least degree, to be perceived by affiant, of intoxicating or other simulants, but that all of the jurors while on the jury conducted themselves in all things with decorum, and were at no time exposed to improper influence whereby their verdict might be controlled or biased to the injury of defendant." Another bailiff testified that two of the jurors in that case, whose conduct was challenged on account of the use of intoxicating liquors, took one drink and no more, and were not influenced thereby in any degree that he could perceive, and they were known to him to be sober citizens of the highest standing in the community, and

that during the trial said jurors were never at any time subjected to any influence whatever prejudicial to defendant.

It thus appears that the facts which influenced the court to refuse to disturb the verdict on account of the alleged misconduct of the jury in the Dolan Case were quite different from the facts in the instant case. Here only three of the jurors out of the twelve whose conduct was called in question made affidavits to the effect that none of the jurors were intoxicated to a visible extent. These jurors said that, so far as they were concerned, the whisky did not have anything to do with the verdict, and they only spoke for themselves, because they were accustomed to taking three drinks of whisky every day. There is no testimony in the record on the part of the other jurors to show that the whisky drunk by them did not have some effect upon them, and that it did not impair their faculties and influence them in their verdict. There was no testimony upon the part of the officers having the jury in charge to the effect that the jury indulged in the use of intoxicating liquors only to a moderate degree, and that they were in no respect under the influence of same.

We are of the opinion that the use of intoxicating liquor by the jury as shown by

drank a small quantity of liquor, and it was shown that he was perfectly sober and attentive during the whole course of the trial, *Pratt v. People*, 56 Ind. 179;

—where one juror drank one glass of beer, by which he was not perceptibly intoxicated, nor in the least disqualified from performing his duties, *Carter v. Ford Plate Glass Co.* 85 Ind. 180;

—where one juror who was not in the habit of drinking was ill, and took for medicinal purposes some brandy combined with a curative agent, without medical advice or prescription, there being no showing that its effects were intoxicating, nor that the facts were not known to defendant at the time, *State v. Morphy*, 33 Iowa, 270, 11 Am. Rep. 122;

—where a juror drank two glasses of beer during an adjournment and eleven hours before another session, *Van Buskirk v. Daugherty*, 44 Iowa, 42;

—where jurors took a small quantity of spirits and ginger at night for medicinal purposes, and a showing was made that none of the jurors were at any time under their influence, *O'Neill v. Keokuk & D. M. R. Co.* 45 Iowa, 548;

—where liquor was used by a juror during adjournment before submission, *State v. Bruce*, 48 Iowa, 530, 30 Am. Rep. 403; *State v. Livingston*, 64 Iowa, 560, 21 N. W. 34;

—where a juror was intoxicated while off duty, but there was much evidence to show that he was not intoxicated while on L.R.A.1915C.

duty, *State v. Kennedy*, 77 Iowa, 209, 41 N. W. 609;

—where some jurors drank beer during the trial, but before submission of the case to them, *Hemmi v. Chicago G. W. R. Co.* 102 Iowa, 25, 70 N. W. 746, 2 Am. Neg. Rep. 128;

—where jurors drank beer while not deliberating, *State v. Minor*, 106 Iowa, 642, 77 N. W. 330;

—where the jury drank two bottles of beer which were in the jury room as evidence, after verdict was found, reduced to writing, and signed by the foreman, *State v. Reilly*, 108 Iowa, 735, 78 N. W. 680;

—where a juror admitted that he took quinine and whisky for a severe cold, *Gorham v. Sioux City Stock Yards Co.* 118 Iowa, 749, 92 N. W. 698;

—where jurors used a moderate quantity of intoxicating liquors when not on duty, *State v. Smith*, 132 Iowa, 645, 109 N. W. 115;

—where a juror drank liquor after the case had been submitted, but while the jury were separated for the night, by permission of the court, *Larimer v. Kelly*, 13 Kan. 78;

—where a juror was under the influence of liquor during a recess of the court, but there was no reason for thinking his conduct improperly influenced the verdict, *State v. Tatlow*, 34 Kan. 80, 8 Pac. 267;

—where liquor was furnished to a jury in moderation, and where none of the jurors were shown to have been at all deranged

the uncontradicted evidence in this case was so excessive as to render all who partook of it absolutely incapable of that calm, dispassionate, and impartial consideration of the case which the law demands. It would be a travesty upon the administration of justice to permit a verdict to stand where the jurors rendering it are subjected to influences so calculated to impair their reason and inflame their passions and prejudices. It would be impossible for jurors who indulged in intoxicating liquors to the extent shown in this record to bring to bear upon the law and the facts in the case that discriminating and impartial judgment required in the proper exercise of their functions as jurors. It is a matter of common knowledge that the use of whisky continuously and in large quantities and to excess stupifies the mental faculties and impairs the reason and judgment. No one who has drunk intoxicants to the extent shown by many of the jurors in this record could pass intelligently upon the issues in

any case, much less in a case where one's life hangs in the judicial balance.

For the error of the court in refusing to set aside the verdict on account of the misconduct of the jury in this particular alone the judgment must be reversed.

2. But it was also reversible error for the court not to set aside the verdict on account of facts developed since the trial in the nature of newly discovered evidence, under the rule announced by this court in *Bussey v. State*, 60 Ark. 545, 64 S. W. 268. In that case we held (quoting syllabus): "Where defendant was convicted of rape almost entirely upon the testimony of the prosecuting witness, who after the trial made an affidavit retracting her testimony, it was error to refuse a new trial upon the ground of newly discovered evidence." The jury would not have been warranted in convicting the defendant upon the testimony alone of the other witnesses. The testimony of the prosecutrix was essential to support the verdict. In view of the developments

by it, *State v. Campbell*, 134 La. 828, 64 So. 765;

—where liquor was furnished in moderation to a jury during a trial lasting five days, none being furnished while they were deliberating on the verdict, *State v. Caulfield*, 23 La. Ann. 148;

—where no apparent injurious consequences followed from the furnishing of a moderate amount of whisky to the jury because they were tired and asked for it, *State v. Dorsey*, 40 La. Ann. 739, 5 So. 26;

—where some wine was furnished to the jury at their meal, but it did not appear that any of the jurors became intoxicated, *State v. Bellow*, 42 La. Ann. 586, 7 So. 782;

—where a small quantity of liquor was taken by one juror as medicine, *Nichols v. Nichols*, 136 Mass. 256;

—where two jurors in a civil suit drank beer during the recesses of the court, which did not unfit them for performing their duties as jurors, *Re Merriman*, 108 Mich. 454, 66 N. W. 372;

—where it appeared that the bailiff merely took a bottle of liquor into the jury room and one juror, who was sick, drank some of it, after which the bailiff carried away the bottle, *Pope v. State*, 36 Miss. 121;

—where a small quantity of liquor was drunk by a juror before any testimony was introduced, and there was no suggestion that he exhibited any effects from it, *Green v. State*, 59 Miss. 501;

—where it was not shown, nor could it reasonably be claimed, that the mind of a juror was in the least affected by a glass of beer that he drank, *State v. Washburn*, 91 Mo. 571, 4 S. W. 274;

—where the liquor was taken during a two-hour suspension of proceedings, and it did not appear that excessive quantities were taken, *Dennison v. Collins*, 1 Cow. 111;

—where one of the jurors drank spirit-

uous liquor while they were separated by permission, and it did not appear that in so doing he violated any express direction of the court, and there was no reason to suppose he drank to excess, *Wilson v. Abrahams*, 1 Hill, 207;

—where a juror, while at the hotel, was taken sick and, on the prescription of a physician, small quantities of champagne and spirits were administered to him from time to time by the attendant, none being given after the jury retired to deliberate, *People v. Pscherhofer*, 64 Hun, 483, 19 N. Y. Supp. 483;

—where it was merely shown that the jury drank liquors after retiring to deliberate, without a showing that so much was drunk as to intoxicate or affect any of the jurors in the least, *Richardson v. Jones*, 1 Nev. 405;

—where one juror, while in an anteroom apart from the others, drank a small quantity of brandy as a remedy for an ailment from which he was manifestly suffering, *Gilmanton v. Ham*, 38 N. H. 108;

—where it was shown merely that a juror drank intoxicating liquors, there being no suggestion that he became in the slightest degree intoxicated, *State v. Miller*, 18 N. C. (1 Dev. & B. L.) 500;

—where a juror was drunk during the progress of the trial, but it did not appear that his mind was obscured by liquor while performing his duties as a juror, *Sharp v. Johnston*, 4 Mo. App. 576;

—where the use by the jury of intoxicating liquor was not excessive, and no member was in the least under the influence of it, *State v. Upton*, 20 Mo. 397; *State v. West*, 69 Mo. 401, 33 Am. Rep. 506; *State v. Baker*, 74 Mo. 292, 41 Am. Rep. 314; *State v. Spaugh*, 200 Mo. 571, 98 S. W. 55; *State v. Cucuel*, 31 N. J. L. 249;

—where the jury drank a small quantity

concerning her evidence, set forth in the statement, we are of the opinion that the appellant should have another opportunity to present his cause to jurors who, during the progress of trial and while deliberating upon their verdict, do not indulge in the excessive use of intoxicating liquors.

The cause is therefore reversed and remanded for a new trial.

NORTH DAKOTA SUPREME COURT.

STATE OF NORTH DAKOTA, Resp.,
v.
ROBERT APPLGATE, sometimes known
as Bob Applegate, Appt.

(28 N. D. 395, 149 N. W. 356.)

Criminal law — consumption of beer by jury — new trial.

The deliberations of a jury in a criminal

Headnote by BRUCE, J.

of liquor after retiring to consider the verdict, and it appeared that no intoxication or any mental or other unfitness resulted, *Territory v. Burgess*, 8 Mont. 57, 1 L.R.A. 808, 19 Pac. 558;

—where a juror drank a small quantity of liquor during a recess for the night, *Ankeny v. Rawhouser*, 2 Neb. (Unof.) 32, 95 N. W. 1053;

—where, after the retirement of the jury, four jurors drank whisky from a flask which one juror had in his pocket, none of them being in any degree under its influence, *State v. Bailey*, 100 N. C. 528, 6 S. E. 372;

—where one juror drank liquor, and it did not appear that accused was injured by the misconduct, *State v. Dougherty*, 1 Ohio Dec. Reprint, 37, 1 West. L. J. 271;

—where some jurors, while separated for the night, drank liquor, but not to excess, and there was no showing that it in any way affected their capacity to serve and deliberate as jurors, *Easterly v. Gater*, 17 Okla. 93, 87 Pac. 853, 10 Ann. Cas. 888;

—where the jurors were furnished with liquors during meals, but not in such quantities as would render it probable that they would be affected thereby, and no effect was in fact observable, *Com. v. Salyards*, 13 Pa. Co. Ct. 470;

—where a juror drank an undisclosed quantity of whisky on two occasions just before being called and accepted as a juror, there being nothing to indicate that he was intoxicated or that he drank any intoxicating liquor thereafter, *State v. Andre*, 14 S. D. 215, 84 N. W. 783;

—where the jurors drank a small quantity of liquor with their meals, and there were other slight irregularities, *Stone v. State*, 4 Humph. 27;

—where several bottles of ardent spirits were furnished to the jurors during the trial, and they drank somewhat freely, L.R.A.1915C.

action are presumed to continue not only up to the time that their verdict is signed and agreed upon, but long enough to allow their polling if a poll is desired, and prejudice will be presumed to the defendant where it is shown that three bottles of beer which were introduced in evidence in a prosecution for maintaining a common nuisance under the liquor laws of North Dakota, and which were taken by the jury into their room, were found empty at the time that such jury reported that they had arrived at a verdict; and where such prejudice has not been overcome by competent evidence, a reversal will be ordered, even though the taking of the exhibits into the jury room was not objected to by counsel for defendant.

(October 22, 1914.)

APPEAL by defendant from a judgment of the District Court for Divide County convicting him of maintaining a common nuisance, and from an order denying a motion for new trial. Reversed.

The facts are stated in the opinion.

but none were intoxicated, *Rowe v. State*, 11 Humph. 491;

—where there was not the slightest evidence that any juror was in any degree rendered incompetent or less capable of an intelligent discharge of his duties, *King v. State*, 91 Tenn. 618, 20 S. W. 169;

—where the use of liquor was moderate and no juror became affected thereby, *Sherman v. State*, 125 Tenn. 19, 140 S. W. 209;

—where the jurors were not so intoxicated as to render it probable that their verdict was influenced thereby, *Tuttle v. State*, 6 Tex. App. 556; *Allen v. State*, 17 Tex. App. 637; *Rider v. State*, 26 Tex. App. 334, 9 S. W. 688; *Stewart v. State*, 31 Tex. Crim. Rep. 153, 19 S. W. 908; *Brown v. State*, 45 Tex. Crim. Rep. 139, 75 S. W. 33;

—where the use is moderate, *Thompson v. Com.* 8 Gratt. 637;

—where the quantity of liquor which the jury drank, and the time when they drank it, were shown, and they furnished no reasonable ground for suspicion that their verdict was influenced or their judgment in any degree affected thereby, *Roman v. State*, 41 Wis. 312;

—where it appeared that two of the jurors partook of intoxicating liquors at their own expense, there being no contention that the quantity taken was sufficient to produce any intoxicating effect, *Reg. v. McClung*, 1 Terr. L. Rep. 379.

Affidavits merely stating that after the jury had retired to deliberate, several bottles resembling beer bottles were seen on a table in the jury room, together with affidavits of members of the jury that during the evening a few bottles of beer were consumed, that only a small quantity was taken by any one juror, and no one was even slightly affected by it, and that shortly after consuming it they retired for the night and agreed upon and rendered their verdict the

Mr. C. E. Brace, for appellant:

The reception by the jury of evidence out of court will, if influential in determining the verdict, require the grant of a new trial; but the verdict will not be disturbed if it was not affected by such improper evidence.

17 Am. & Eng. Enc. Law, 2d ed. 1237; 12 Enc. Pl. & Pr. 584.

If, at any time before an agreement is reached, a juror makes a statement to his fellow jurors based upon his prior personal knowledge, and having a material bearing on the subject of their deliberations, the verdict is vitiated thereby.

Falls City v. Sperry, 68 Neb. 420, 94 N. W. 529, 4 Ann. Cas. 272; Winslow v. Morrill, 68 Me. 362; Bowler v. Washington, 62 Me. 302; Eastwood v. People, 3 Park. Crim. Rep. 25; Flanders v. Mullin, 73 Vt. 276, 50 Atl. 1055; Consolidated Ice-Mach. Co. v. Trenton Hygeian Ice Co. 57 Fed. 898; People v. Conkling, 111 Cal. 627, 44 Pac. 314; Wilson v. United States, 53 C. C. A. 652, 116 Fed. 484; Heffron v. Gallupe, 55 Me. 568; Thompson v. Mallet, 2 Bay, 94.

next day, did not make a showing requiring a new trial, under a statute providing for a new trial "where any juror at any time during the trial, or after retiring, may have become so intoxicated as to render it probable his verdict was influenced thereby. But the mere drinking of liquor by a juror shall not be sufficient grounds for granting a new trial." Levy v. Territory, 13 Ariz. 425, 115 Pac. 415.

While in State v. Reed, 3 Idaho, 754, 35 Pac. 706, the court said: "While the permitting of intoxicating liquors to be furnished to a jury engaged in the trial of a criminal case is strongly disapproved, except in cases of actual necessity, the indulgence therein to a limited extent, under the direction of the judge of the trial court, before the case is submitted, is not, in the absence of any evidence of overindulgence in, or apparent effect from, the use of such liquor by or upon any member of the jury, deemed reversible error," in the later case of Bernier v. Anderson, 8 Idaho, 675, 70 Pac. 1027, the court, though refusing to hold that the furnishing to the jury of considerable liquor was, under the circumstances, ground for a new trial, laid down, as a modification of State v. Reed, supra, a rule that it is error to permit a juror to use intoxicating liquor during the trial or the deliberations of the jury, unless it is done with the permission of the court, upon the prescription of a practising physician.

In People v. Van Horn, 119 Cal. 323, 51 Pac. 538, the court said it would be preposterous to set aside a verdict because some of the jurors took a small drink of whisky at a hotel before supper, when it abundantly appeared that not one of them was intoxicated or affected in any way by what he drank.

L.R.A.1915C.

The rule forbidding the jury to receive evidence out of court renders it improper for jurors to make experiments for the purpose of testing the truth or weight of the evidence, and the making of such experiments will generally be a good ground for a new trial.

12 Enc. Pl. & Pr. 590; Pierce v. Brennan, 83 Minn. 422, 86 N. W. 417; Wilson v. United States, 53 C. C. A. 652, 116 Fed. 484; Galloway v. State, 42 Tex. Crim. Rep. 380, 57 S. W. 658; State v. Reilly, 108 Iowa, 735, 78 N. W. 680; State v. Robidou, 20 N. D. 518, 128 N. W. 1124, Ann. Cas. 1912D, 1015.

Mr. George P. Homnes, for the State:

The questions presented by the moving affidavit upon a motion for a new trial upon the grounds of misconduct of jurors are questions of fact for determination by the lower court, and the supreme court will not reverse the findings of the lower court, except for manifest abuse of discretion in denying the motion.

State v. Salverson, 87 Minn. 40, 91 N. W.

The act of the officer in charge of the jury in permitting them to drink intoxicating liquors is reprehensible and punishable, but will not vitiate the verdict. Davis v. People, 19 Ill. 74.

In Com. v. Roby, 12 Pick. 496, the court refused to set aside a verdict because the jurors were furnished with refreshments, including cider, but said that in a case where ardent spirits were furnished it would be proper to set the verdict aside.

In Jack v. State, 26 Tex. 1, in which no circumstances appear, the court expressed its opinion that the juror in question was not so much under the influence of liquor at any time during the trial as to render it probable that his verdict was influenced thereby, so as to require a new trial.

In Webb v. State, 5 Tex. App. 596, the court disapproved of the permitting of jurors to have and drink several bottles of whisky, and said that had any one of them become intoxicated to such an extent as to render it probable that his verdict was influenced thereby, it would have been the duty of the court below to grant a new trial.

In Henry v. Ricketts, 1 Cranch, C. C. 545, Fed. Cas. No. 6,385, though the bailiff testified that two jurors left the jury room at night and were intoxicated, and that spirituous liquors were sent to the jurors in their blankets, the court refused to grant a new trial.

And in Gordon v. Louisville, St. L. & T. R. Co. 16 Ky. L. Rep. 713, 29 S. W. 321, in denying a new trial because of the intoxication of a juror, the court said: "It does not sufficiently appear that the juror was so drunk as to be incapable of properly deciding the case, and besides it is not likely that the jury were controlled or would be controlled by one drunken juror, if such a juror

1, 12 Am. Crim. Rep. 644; Hewitt v. Pioneer-Press Co. 23 Minn. 178, 23 Am. Rep. 680; State v. Floyd, 61 Minn. 467, 63 N. W. 1096.

Receiving evidence out of court relating to a matter not in dispute would be immaterial, and could in no way prejudice defendant's rights.

Siemsen v. Oakland, S. L. & H. Electric R. Co. 134 Cal. 494, 66 Pac. 672.

When the defendant made no objection to the taking of the exhibits to the jury room, he should make such a showing of the fact of misconduct as would raise the presumption of prejudice, otherwise the court must disregard the alleged misconduct of the jurors.

Ibid.; People v. Rowell, 133 Cal. 39, 65 Pac. 127; 1 Hayne, New Trial & App. § 67, p. 321.

Every irregularity which would subject the juror to censure, whether in drinking intoxicating liquor, separating from his fellows, or the like, should not overturn the verdict, unless there is some reason to sus-

was among their number." The implication contained in this statement of the court, that a verdict might be sustained though a juror was so intoxicated as to be incapable of properly performing his duties as a juror, because it would not be likely that one drunken juror would control the verdict of the others, is certainly remarkable, if so intended, and would seem to ignore the well-established rule that parties are entitled to have their case considered by all of the jurors. It is in strong contrast with Davis v. Cook, and State v. Ned, supra, II. c, holding that intoxication of one juror would be ground for a new trial, though by statute the concurrence of nine jurors only was sufficient.

And in this connection the court in People v. Schad, 58 Hun, 571, 12 N. Y. Supp. 695, said: "Whether it be the intellect of one or more of the twelve which has been clouded or unbalanced by the use of alcoholic stimulants, the effect, in either case, must be equally fatal to the verdict rendered."

In Richmond v. Wise, 1 Vent. 124, the fact that jurors had wine while deliberating upon their verdict was held not ground for a new trial, it not being furnished by parties to the case.

The fact that the jury had liquor in the jury room without drinking any is no ground for a new trial. Gilmer v. Cameron, 1 Ga. Dec. pt. 1, p. 142.

III. Discretion of trial court.

In the absence of evidence of abuse of discretion by the trial judge in determining whether or not to grant a new trial because of the use of intoxicating liquors by the jury, the appellate courts will not ordinarily overrule his decision.

L.R.A.1915C.

pect that the irregularity may have had an influence on the final result.

1 Hayne, New Trial & App. § 70, p. 353; State v. Robidou, 20 N. D. 518, 128 N. W. 1124, Ann. Cas. 1912D, 1015; Wilson v. Abrahams, 1 Hill, 207.

And if it appears that the quantity of liquor was limited, and the court can determine with reasonable certainty that the drinking had no effect whatever upon the verdict, the verdict should not be set aside.

1 Hayne, New Trial & App. § 70, p. 353; Wilson v. Abrahams, 1 Hill, 207; People v. Sansome, 98 Cal. 235, 33 Pac. 202; Jones v. People, 6 Colo. 452, 45 Am. Rep. 526; May v. People, 8 Colo. 210, 6 Pac. 816; Underwood v. Old Colony Street R. Co. 31 R. I. 253, 76 Atl. 766, Ann. Cas. 1912A, 1318.

Bruce, J., delivered the opinion of the court:

Defendant in this case was convicted of the crime of keeping and maintaining a common nuisance under the liquor laws of this state. During the trial of the action the

Thus, in Pelham v. Page, 6 Ark. 535, where a motion for a new trial was made on the ground that three of the jury were intoxicated during the trial, as stated in the affidavit of a bystander, and overruled by the trial court, the appellate court held that the showing was insufficient to warrant their setting aside the verdict, saying that as the jurors were in the presence of the court during the trial, it was to be presumed that if they had been too much intoxicated to comprehend the testimony, the court would not have proceeded with the trial. Furthermore, inasmuch as defendant did not impeach the justice of the verdict, or incorporate the evidence taken during the trial into the record, the appellate court would presume that the verdict was in accordance with justice and affirm it.

Where the trial judge who heard the motion for new trial was an eyewitness of the condition of the juror, his attention being directly called to him at the time it was claimed he was intoxicated, and defendant's attorneys did not even present their own affidavits to establish the facts claimed, the action of the trial court in overruling the motion was sustained. People v. Tucker, 117 Cal. 229, 49 Pac. 134.

Where the evidence as to the intoxication of a juror is conflicting, and the trial judge, who had the best opportunity of observing the condition of the juror, has found that he was not incapacitated, the appellate court cannot disturb the finding. People v. Sullivan, 129 Cal. 557, 62 Pac. 101.

Where a juror became intoxicated during the night while he was off duty, though there was no evidence that he was under the influence of liquor during the session of the court, the discretion of the trial judge in granting a new trial will not be inter-

state offered in evidence three bottles which it claimed contained beer; and which it also claimed were purchased from the defendant as charged in the information. The case comes up on the judgment roll alone, so we do not know what the evidence was, but the record shows a plea of not guilty, which put to issue all of the material allegations of the complaint, and both under the plea and the charge of the court it was necessary for the state to prove, and for the jury to find, that the contents of the bottles were actually beer. When the jury retired to deliberate on the verdict, the court sent to the jury room with the jury the three bottles with their contents, but it did not caution the jury not to open the said bottles or to experiment with them. No objection, however, seems to have been made by the defendant to the court's action in this respect. When the bailiff was notified by the jurymen that they had arrived at their verdict, and when he opened the door of the jury room to obtain the same, he found the three bottles empty. His affidavit is as follows: "John Weeding, being first duly sworn, on his oath says that he was one of

the bailiffs in regular attendance upon the special January, 1914, term of said district court, and that as such he was duly sworn as a bailiff to take charge of the jury impaneled and sworn to try the above entitled action upon their retirement for the consideration of their verdict; that upon the retirement of said jury to the jury room, there was taken with said jury to the said jury room, among the exhibits introduced in evidence in said action, three bottles, commonly known as quart bottles, alleged by the state to contain an intoxicating liquor commonly known as beer, and that the said three bottles were left by the bailiffs in charge of said jury in the jury room with the said jury during their deliberations upon their verdict. That upon his being notified by the said jury that they had arrived at their verdict, and upon the opening of the said jury room by the bailiff in charge of said jury, said affiant, as one of said bailiffs, discovered that the said three bottles had been opened by some of said jurymen during their deliberations upon their verdict, and that he verily believes, from his knowledge of the facts and from the state-

ferred with. *Fairchild v. Snyder*, 43 Iowa, 23.

The affirmative finding of the trial court based partly upon his own observation, that a juror was guilty of misconduct in the use of intoxicating liquors during the trial, will seldom be interfered with. *Carlisle v. Council Bluffs*, 151 Iowa, 181, 130 N. W. 813.

Whether the misconduct of the jury in drinking intoxicating liquor was prejudicial is a question of fact for the trial court, and will not be reviewed by an appellate court, which deals solely with questions of law. *State v. Brunetto*, 13 La. Ann. 45.

Where the evidence was in decided conflict as to whether a juror drank so much as to affect his mental faculties, it is a question of fact for the trial court solely, but he should not hesitate to set aside the verdict in a criminal case when there is even a suspicion that any juror was in the least affected by intoxicating liquor during the progress of the trial or the deliberation upon the verdict. *State v. Jones*, 7 Nev. 408.

IV. When objection must be made.

A party who wishes to take advantage of the fact that the jury has used intoxicating liquors must act promptly upon discovering the misconduct.

He should, upon seeking a new trial, show that he was not aware of the misconduct before the verdict was rendered. *Alabama Lumber Co. v. Cross*, 152 Ala. 562, 126 Am. St. Rep. 55, 44 So. 563.

He cannot, knowing of the intoxication of a juror during the trial, take a chance on a favorable verdict, and then avail himself of it after the rendition of a verdict against him. *Ipswitch v. Fernandez*, 84 Cal. 639, 24 Pac. 298.

self of it after the rendition of a verdict against him. *Ipswitch v. Fernandez*, 84 Cal. 639, 24 Pac. 298.

If a juror is palpably intoxicated during the trial, defendant should object before the jury retires. *People v. Deegan*, 88 Cal. 602, 26 Pac. 500.

An attorney who observes that a juror is intoxicated during the progress of a trial, but does not call the attention of the court to his condition and have him discharged, or the case continued until the juror is in condition, waives the misconduct and cannot have a new trial. *Ewing v. Lunn*, 22 S. D. 95, 115 N. W. 527.

Having proceeded with the trial after knowing that one of the jurors was under the influence of intoxicants, defendant cannot assign error, even though the court knew the facts and punished the juror. *Richardson v. Foster*, 73 Miss. 12, 55 Am. St. Rep. 481, 18 So. 573.

In *Harris v. State*, 61 Miss. 304, the court refused to investigate the drunkenness of a juror before he was called to sit on the jury, where it was not shown that defendant's counsel, as well as defendant, was ignorant of such misconduct before the trial began.

But the right to object to a juror because of his intoxication while the trial was in progress on one day was not waived by waiting till the convening of court on the next day. *Underwood v. Old Colony Street R. Co.* 31 R. I. 253, 76 Atl. 766, Ann. Cas. 1912A, 1318.

And by consenting to take a juror in the morning in his then intoxicated condition, a party does not consent that he should drink any more intoxicants during the trial. *Jackson v. Jackson*, 40 Ga. 150. R. L. S.

ment made to him by the said jurymen thereafter, that the said contents of the said exhibits were drunk by certain of the jurymen impaneled and sworn to try said action during deliberations of the said jury upon their verdict, and while in their jury room for that purpose; and affiant further avers that the said bottles, taken to the said jury room as aforesaid and emptied of their contents as aforesaid, were taken empty into open court by the bailiffs in attendance upon said jury, and when the said jury returned into open court to render their verdict."

If the jury drank the contents of the bottles in order to test its qualities as an intoxicant, they clearly violated the law, as they had no right to try any such experiment. Consolidated Ice-Mach. Co. v. Trenton Hygeian Ice Co. (C. C.) 57 Fed. 898; People v. Conkling, 111 Cal. 627, 44 Pac. 314. Even if they drank it from a spirit of bravado, prejudice will be presumed.

There is no merit in the contention of counsel for the state that in this case there was no proof that the contents of the bottles were drunk during the deliberations of the jury, or before they had signed their verdict. The affidavit of the bailiff clearly shows that it was drunk before the jury notified him that they had arrived at a verdict, and their deliberations in the eyes of the law must be presumed to have continued not only up to such time, but up to the time that their verdict was returned in open court, and in fact until after the jury had been polled if a poll had been demanded. Up to this time, indeed, any jurymen might have withdrawn his signature and repudiated his action. It is not even necessary to decide the case on the ground that the jury wrongfully experimented with the evidence. Both parties have a right to the cool, dispassionate, and unbiased judgment of each juror, and the rule seems to be well established that prejudice will be presumed if liquor is drunk after the jury has retired to consider the case. *State v. Baldy*, 17 Iowa, 39; *Berry v. Berry*, 31 Iowa, 415; *State v. Reilly*, 108 Iowa, 735, 78 N. W. 680; *State v. Bullard*, 16 N. H. 139; *People v. Douglass*, 4 Cow. 36, 15 Am. Dec. 332; *Rose v. Smith*, 4 Cow. 17, 15 Am. Dec. 331; *Gamble v. State*, 44 Fla. 429, 60 L.R.A. 547, 103 Am. St. Rep. 150, 33 So. 471, 1 Ann. Cas. 285, 12 Am. Crim. Rep. 638; *Jones v. State*, 13 Tex. 168, 62 Am. Dec. 550; *Davis v. State*, 35 Ind. 496, 9 Am. Rep. 760; *Leighton v. Sargent*, 31 N. H. 119, 64 Am. Dec. 323; *Ryan v. Harrow*, 27 Iowa, 494, 1 Am. Rep. 302; *Dolan v. State*, 40 Ark. 454; *Creek v. State*, 24 Ind. 151; *State v. Bruce*, 48 Iowa, 530, 30 Am. Rep. 403; *State v. Madigan*, 57 Minn. 425, 59 N. W. 490; *State v. Greer*, 22 W. Va. 800. L.R.A.1915C.

We realize that some authorities hold that prejudice will not be presumed, but must be affirmatively shown. See 12 Cyc. 726. We refuse to follow these cases, however, as it is very difficult for us to see how the defendant can generally, and especially where the misconduct takes place solely within the jury room, furnish the required proof. The rule is well established that a jurymen will not be allowed to impeach his own verdict. Counsel for the defendant in the case at bar produced all the evidence that it was possible for him to obtain and to introduce. It would have been competent, it is true, for the state, the verdict having been once attacked, to have produced evidence in support thereof, even though it came from the jurymen themselves, but this it failed to do. The presumption of prejudice, therefore, prevails, as there is no proof to overcome it.

The judgment of the District Court is reversed and the cause is remanded for further proceedings according to law.

CONNECTICUT SUPREME COURT OF ERRORS.

CURTIS C. COOK, Appt.,
v.

PACKARD MOTOR CAR COMPANY OF
NEW YORK.

(88 Conn. 590, 92 Atl. 413.)

Appeal — proper presentation of questions.

1. Mere certification of the evidence and charge of the court does not properly present the question of wrongful direction of a verdict, or of error in the charge of the court.

Pleading — expunging allegations — immateriality.

2. An allegation in an action for injuring an automobile and depriving the owner of

Note. — Measure of damages for damage to automobile used for pleasure.

Some courts have refused to allow a recovery for the "usable value" of a pleasure automobile while it is being repaired, when the owner did not hire another car to take its place.

Thus, it has been held that no recovery for the rental value of a damaged automobile can be had where it appears that the machine was used only for pleasure, and it is not shown that the plaintiff hired another to take its place while repairs were being made, or that it was an article of constant and daily use whose usable value was known and readily ascertained. *Bondy v. New York City R. Co.* 56 Misc. 602, 107 N. Y. Supp. 31. The court said: "It is urged upon this appeal that such damages are

its use, that defendant sold and delivered the car to plaintiff at a certain time for a certain price, cannot be expunged for immateriality and irrelevancy.

Appeal — harmless error — expunging allegations in complaint.

3. Error in expunging allegations in a complaint is immaterial if evidence is received upon the question.

Damages — injury to automobile — loss of use.

4. Damages for loss of use of an automobile may be allowed against one who negligently injures it, although the owner intended to use it only for pleasure, and not for rent or profit.

Evidence — rental value of automobile — damages.

5. Evidence of the rental value of an

not legally recoverable upon the facts established in this case. That the use of an automobile may, upon being shown to have been used for the purposes of business or as a source of profit, have a marketable value, or a value capable of being estimated without indulging in mere conjecture, is undoubted; but nothing of the kind was proved in the case at bar. The plaintiff, so far as appears, did not incur any expense in hiring a substitute for the three weeks his machine was in the repair shop; nor is there any evidence that it was a source of profit or income to him. The evidence as to the rental value was limited to this particular machine, and it was not shown to be an 'article in constant and daily use, whose usable value, being known and readily ascertained, constitutes a proper element of damages.'

And in *Foley v. 42nd Street, M. & St. N. Ave. R. Co.* 52 Misc. 183, 101 N. Y. Supp. 780, an action to recover for damage to an automobile, it was held that an item allowed for the loss of the use of the machine, based upon expert testimony as to the value of the use of an automobile like the plaintiff's, was speculative, and not allowable where there was no evidence to show that the plaintiff used his automobile for any purpose except pleasure and recreation, and it did not appear that he hired any other machine to take its place.

And in *Murphy v. New York City R. Co.* 58 Misc. 237, 108 N. Y. Supp. 1021, it was held erroneous, in an action to recover for an injury to an automobile, to admit evidence as to the cost of repairs other than those shown to be due to the accident, and as to the rental value of an automobile during the time the plaintiff's was being repaired, where he neither used another, nor showed that he had need of one. In concurring, however, Bischoff, J., said: "As to damages it appears that some items of expense for repairs were allowed which were not traced to the consequences of the accident; but, for the purposes of the new trial, it may be noted that the plaintiff, if deprived of the usable value of his automobile

automobile is admissible upon the question of the compensation to be awarded the owner for being deprived of its use through another's negligence, although he did not intend to rent it or use it for profit.

Damages — injury to automobile — loss of services of chauffeur.

6. The reasonable amount which the owner of an automobile is compelled, under his contract, to pay his chauffeur during the time that his car is out of use through an injury caused by another's negligence, if the owner had no other use for the services of the chauffeur, may be allowed as a part of the damages for the injury to the car.

(Thayer and Wheeler, JJ., dissent in part.)

(December 2, 1914.)

for a time through the defendant's negligence, would be entitled to compensation for the loss, notwithstanding that he did not actually procure another automobile, by hire, during the interval, . . . and although the use of the thing injured may have been for pleasure wholly, and not for profit. . . . To support this item of damage, proof would, of course, be necessary upon the question whether the automobile had a usable value, . . . and what that value was. The mere expense of hiring another vehicle of the same type, where it was not actually incurred, would hardly establish the fact of a known usable value; but that fact would be susceptible of proof by properly qualified opinion. While error may have been committed in the award of damages for loss of use, upon the proofs before the court below, we cannot say that the item may not be established upon a new trial by the production of competent evidence."

The actual expense incurred by the owner of an automobile in hiring another car to take its place while his was undergoing repairs necessitated by the defendant's negligence has been recognized as a legitimate item of damages.

Thus, in *Cardozo v. Bloomingdale, 79 Misc. 605, 140 N. Y. Supp. 377*, it was held that one whose automobile was damaged might recover for the cost of repairs, and also for the reasonable expense of replacing it by hiring another car during the period that his was being repaired.

And in *Wellman v. Miner, 19 Misc. 644, 44 N. Y. Supp. 417, 2 Am. Neg. Rep. 218*, where it was claimed that the plaintiff was improperly permitted to recover the actual, reasonable outlay for the hire of a carriage during the time required to repair his own, the ground of the contention being that "this was not a necessity, but a luxury," the court said that, whatever it was, the plaintiff was entitled to recover for such item, remarking that "if entitled to the use of his carriage at all, he was entitled to the continuous use of it, and the expenses undergone simply to preserve that benefit,

APPEAL by plaintiff from a judgment of the City Court of Hartford directing a verdict in his favor for nominal damages only in an action brought to recover damages for loss of the use of his automobile due to the negligence of defendant, and to recover wages paid to his chauffeur during the time. Judgment set aside.

The facts are stated in the opinion.

Messrs. Lewis A. Storrs and Edward W. Broder, for appellant:

It was not only material but necessary for the plaintiff to allege and prove the value of the property injured.

Taylor v. Keeler, 50 Conn. 349; 1 Chitty, Pl. p. 255; Daly v. New Haven, 69 Conn. 646, 38 Atl. 397, 4 Am. Neg. Rep. 15; Ives v. Goshen, 63 Conn. 79, 26 Atl. 845.

during the period when his carriage was necessarily out of his hands because of the defendant's negligence, formed an item of damage as reasonably consequential to the tort as did the repairs to the breakage itself."

So, in *Banta v. Stamford Motor Co.* — Conn. —, 92 Atl. 665, where the plaintiff sought to recover liquidated damages because of defendant's failure to complete a pleasure boat when agreed, it was held, citing *Cook v. Packard Motor Car Co.*, that, in the absence of the provision for the payment of damages for delay, the plaintiff would have been entitled to have recovered substantial damages, although it was an article of luxury intended solely for the plaintiff's use for his personal pleasure and gratification, and although no direct pecuniary loss through the hiring of a substitute or otherwise was shown.

And it was held that the sum of \$15 a day provided for as liquidated damages was not unreasonable, it appearing that the plaintiff had undertaken to pay \$5 a day for each day the boat was delivered prior to a certain date, and that he desired it for fall cruising purposes of which the defendant had knowledge, and it was held that the plaintiff was under no obligation to show actual damage suffered substantially commensurate with the \$15 a day rate in order to support the provision as one in liquidation of damages. *Banta v. Stamford Motor Co.* supra.

And in this case the court relying upon *Cook v. Packard Motor Car Co.*, held it proper to admit evidence of the rental price of a boat like the one under consideration. *Banta v. Stamford Motor Car Co.* supra.

In a case involving the sinking and total loss of a millionaire's pleasure yacht, for which there was no market value in the ordinary sense of that expression, it was held that the damages should be reached by endeavoring to arrive at the real extent of the loss sustained by the owner, and that, in ascertaining this, every circumstance which might assist in forming a correct estimate, the original cost of the yacht, its L.R.A.1915C.

Plaintiff's right to the use of his automobile was a valuable right, and the deprivation of such right was not properly measured by nominal damages.

Beattie v. New York, N. H. & H. R. Co. 84 Conn. 559, 80 Atl. 709; *Tedder v. Stiles*, 16 Ga. 2; *Bourdette v. Sieward*, 107 La. 258, 31 So. 630; *Michael v. Curtis*, 60 Conn. 363, 22 Atl. 949; *Travis v. Pierson*, 43 Ill. App. 579; *Shelbyville Lateral Branch R. Co. v. Lewark*, 4 Ind. 471; *Hoffman v. Metropolitan Street R. Co.* 51 Mo. App. 273; *Goshen & S. Turnp. Co. v. Sears*, 7 Conn. 92; *Lillard v. Kentucky Distilleries & Warehouse Co.* 67 C. C. A. 74, 134 Fed. 168; 5 Am. & Eng. Enc. Law, pp. 5, 6; *Smith v. Public Service Corp.* 78 N. J. L. 478, 75 Atl. 937, 20 Ann. Cas. 151; *Occidental*

condition at the time of loss, and the sum for which the owner could have got such another yacht built, should be considered; the court remarking that one inquiry of practical value would be what amount any person of sufficient means, desiring to acquire a yacht of her size and character, might reasonably be expected to be willing to pay rather than incur the cost of a new structure, considering, nevertheless, the inducements to secure the new by reason of the probable improvements and the other advantages which the new offers. *The H. F. Dimock*, 23 C. C. A. 123, 33 U. S. App. 647, 77 Fed. 226.

The plaintiff's car in *Cooper v. Knight*, — Tex. Civ. App. —, 147 S. W. 349, was apparently a pleasure car, but no point was made as to its use. It was there held that the measure of damages was the reasonable cost of repairing the automobile and the difference, if any, in the market value of the car after the completion of the repairs and its market value immediately prior to the accident. And to the same effect is *Price v. Newell*, 53 Pa. Super. Ct. 628.

In *Garrett v. People's R. Co.* 6 Penn. (Del.) 29, 64 Atl. 254, where the automobile was apparently used for pleasure, it was held that the measure of damages was the difference between the value of the automobile immediately before and its value immediately after the collision.

In *Dillon v. Mundet*, 145 N. Y. Supp. 975, an action to recover for damage to an automobile in a collision, it was held that no recovery could be had for the amount paid for storage of the machine from the time of the collision until the plaintiff exchanged it, or for the wages that he paid his chauffeur during the same period. The opinion in this case is brief and does not go into the reasoning employed.

See also *The Conqueror*, 166 U. S. 110, 41 L. ed. 937, 17 Sup. Ct. Rep. 510, set out by the court in *Cook v. Packard Motor Car Co.*

J. T. W.

Consol. Min. Co. v. Comstock Tunnel Co. 125 Fed. 244; Gillette v. Western R. Corp. 8 Allen, 560; Keyes v. Minneapolis & St. L. R. Co. 36 Minn. 290, 30 N. W. 888; Brown v. Southbury, 53 Conn. 214, 1 Atl. 819; Moore v. Metropolitan Street R. Co. 84 App. Div. 613, 82 N. Y. Supp. 778; Allen v. Fox, 51 N. Y. 563, 10 Am. Rep. 641; Brewster v. Silliman, 38 N. Y. 429; Butler v. Mehrling, 15 Ill. 488; McGavock v. Chamberlain, 20 Ill. 219; Cook v. Loomis, 26 Conn. 485; Baldwin v. Porter, 12 Conn. 473; Curtis v. Ward, 20 Conn. 204; Seymour v. Ives, 46 Conn. 113; Fritts v. New York & N. E. R. Co. 62 Conn. 509, 26 Atl. 347; 2 Sedgw. Damages, 9th ed. ¶ 435; Atlanta & W. P. R. Co. v. Hudson, 62 Ga. 679.

Plaintiff is entitled to interest upon the value of the property detained by defendant.

Healy v. Fallon, 69 Conn. 236, 37 Atl. 495; Regan v. New York & N. E. R. Co. 60 Conn. 125, 25 Am. St. Rep. 306, 22 Atl. 503; 2 Sedgw. Damages, ¶ 593; Bernhard v. Rochester German Ins. Co. 79 Conn. 389, 65 Atl. 134, 8 Ann. Cas. 298.

Defendant, by its negligence, having deprived the plaintiff of the benefit of the contract, and having detained the subject-matter of the contract from the plaintiff, should repay him, as damages, such sums as he was obliged to pay on account of said contract while the automobile was being repaired and detained.

Stanton v. New York & E. R. Co. 59 Conn. 283, 21 Am. St. Rep. 110, 22 Atl. 300; 5 Am. & Eng. Enc. Law, 5; Barker v. Lewis Storage & Transfer Co. 78 Conn. 198, 61 Atl. 363, 3 Ann. Cas. 889; Noble v. Ames Mfg. Co. 112 Mass. 492; State v. Sebastian, 81 Conn. 1, 69 Atl. 1054.

Evidence of a qualified witness who is in the business of renting automobiles for pleasure purposes is competent for the information of the jury.

Universal Taximeter Cab Co. v. Blumenthal, 143 N. Y. Supp. 1056; Fritts v. New York & N. E. R. Co. 62 Conn. 509, 26 Atl. 347; Murphy v. New York City R. Co. 58 Misc. 237, 108 N. Y. Supp. 1021.

Mr. Clarence S. Zipp, with Messrs. Schutz & Edwards, for appellee:

The allegation in the complaint was irrelevant and immaterial, and properly expunged upon motion.

31 Cyc. 638; Pitkin v. New York & N. E. R. Co. 64 Conn. 482, 30 Atl. 772; Donovan v. Hartford Street R. Co. 65 Conn. 201, 29 L.R.A. 297, 32 Atl. 350; Whitney v. Cady, 71 Conn. 166, 41 Atl. 550; Donovan v. Davis, 85 Conn. 394, 82 Atl. 1025.

Testimony of plaintiff as to the remuneration he had paid his chauffeur between Au-

gust 31 and October 1, 1912, was inadmissible.

The wages of the chauffeur, even if the plaintiff had been legally obligated to pay them, would not have been a proper element of damage, as they were too remote.

Miller v. East School Dist. 26 Conn. 521; Lewis v. Hartford Dredging Co. 68 Conn. 221, 35 Atl. 1127; Newell v. Smith, 28 Misc. 183, 58 N. Y. Supp. 1025; Fisk v. New York, 119 Fed. 256; Oviatt v. Pond, 29 Conn. 479; Gregory v. Brooks, 35 Conn. 437, 95 Am. Dec. 278; Gibney v. Lewis, 68 Conn. 392, 36 Atl. 799; Harper Machinery Co. v. Ryan-Unmack Co. 85 Conn. 359, 82 Atl. 1027.

Testimony as to the rental value of a touring car was inadmissible.

Donnelly v. Poliakoff, 79 Misc. 250, 139 N. Y. Supp. 999; Bondy v. New York City R. Co. 56 Misc. 602, 107 N. Y. Supp. 31; Foley v. 42nd Street, M. & St. N. Ave. R. Co. 52 Misc. 183, 101 N. Y. Supp. 780; Fisk v. New York, 119 Fed. 256; The Conqueror, 166 U. S. 110, 41 L. ed. 937, 17 Sup. Ct. Rep. 510; Powell v. Hill, — Tex. Civ. App. —, 152 S. W. 1125.

Whether evidence is or is not too remote to affect the issue is a question addressed to the discretion of the trial court, whose decision is not in general reviewable on appeal.

Leonard v. Gillette, 79 Conn. 664, 66 Atl. 502; Hoskins v. Saunders, 80 Conn. 19, 66 Atl. 785; Gorman v. Fitts, 80 Conn. 531, 69 Atl. 357; State v. Sebastian, 81 Conn. 1, 69 Atl. 1054; State v. Saxon, 87 Conn. 5, 86 Atl. 590.

Plaintiff, upon the evidence, suffered an injury, but no provable damage, and the court therefore properly directed a verdict for nominal damages.

13 Cyc. 14; Parker v. Griswold, 17 Conn. 288, 42 Am. Dec. 739; Havens v. Hartford & N. H. R. Co. 28 Conn. 69; Carey v. Day, 36 Conn. 152; Excelsior Needle Co. v. Smith, 61 Conn. 56, 28 Atl. 693; Brett v. Cooney, 75 Conn. 338, 53 Atl. 729; Puerto v. Chieppa, 78 Conn. 401, 62 Atl. 664; Dewire v. Hanley, 79 Conn. 454, 65 Atl. 573; Corder v. Hall, 84 Conn. 117, 79 Atl. 55; Hooten v. Barnard, 137 Mass. 36; Todd v. Keene, 167 Mass. 157, 45 N. E. 81; Pearson v. Bailey, 180 Mass. 229, 62 N. E. 265; Beach & C. Co. v. American Steam Gauge & Valve Mfg. Co. 202 Mass. 177, 88 N. E. 924; New York Rubber Co. v. Rothery, 132 N. Y. 293, 28 Am. St. Rep. 575, 30 N. E. 841; Brooklyn Hills Improv. Co. v. New York & R. B. R. Co. 80 App. Div. 508, 81 N. Y. Supp. 187, affirmed in 178 N. Y. 593, 70 N. E. 1096; Berney v. Adriance, 157 App. Div. 628, 142 N. Y. Supp. 748; Sotel v. New York, 81 Misc. 344, 142 N. Y. Supp.

361; Troutwine v. Hoff, 126 App. Div. 556, 110 N. Y. Supp. 295; Warth v. Greif, 121 App. Div. 434, 106 N. Y. Supp. 163, affirmed in 193 N. Y. 661, 87 N. E. 1129; Pardee v. Douglas, 122 App. Div. 395, 106 N. Y. Supp. 775; American Structural Steel Co. v. Rush, 100 N. Y. Supp. 1019; Bruch v. Carter, 32 N. J. L. 554; Bigham v. Wabash-Pittsburg Terminal R. Co. 223 Pa. 106, 72 Atl. 318.

Beach, J., delivered the opinion of the court:

The first count of the complaint alleged that on July 25, 1912, the defendant sold and delivered to the plaintiff an automobile for which the plaintiff paid \$5,096; that it was kept at the defendant's garage; that on August 31, 1912, it was injured through the defendant's negligence; that the plaintiff was thereby deprived of its use and enjoyment from August 31 to October 1, 1912; and that the use and enjoyment of the car was reasonably worth \$10 a day. A second count alleged that before the 31st of August, 1912, the plaintiff had employed one Herman as chauffeur to drive and operate the car under a contract of employment obligating the plaintiff to pay him \$18 a week until October 1, 1912; that the plaintiff was compelled to pay and did pay Herman \$67.50 during the month of September, being his agreed wages, less \$12, which was all that Herman was able to earn from other employment; and that the \$67.50 had been demanded of and refused by the defendant. The first paragraph of the complaint alleging the sale and delivery of the car was expunged on motion, and the defendant then answered denying all the allegations of the complaint, except the demand and refusal to pay \$67.50. The judgment file recites that the cause was tried to the jury; that at the close of the plaintiff's evidence the court, on defendant's motion, directed a verdict for nominal damages only; and that the jury returned a verdict for the plaintiff to recover \$1. The assignments of error relate to the allowance of the motion to expunge, to the exclusion of testimony as stated in the finding, to the direction of a verdict for nominal damages, and to the charge of the court that nominal damages should not exceed \$1.

The evidence and the charge of the court are certified, but there is no assignment of error directed to a correction of the finding, nor is the charge of the court made part of the finding. It follows that the assignments of error for wrongful direction of verdict, and for error in the charge of the court, are not properly presented.

Taking up first the assignment of error for allowance of the motion to expunge: The allowance of this motion was erroneous, L.R.A.1915C.

because it was based solely on the ground of immateriality and irrelevancy. Motions to expunge on these grounds have a very limited scope. *Bitello v. Lipson*, 80 Conn. 497, 503, 16 L.R.A.(N.S.) 193, 125 Am. St. Rep. 126, 69 Atl. 21; *Donovan v. Davis*, 85 Conn. 394, 398, 82 Atl. 1025. The sale and delivery of the car, the date of the transaction, and the price paid were not entirely irrelevant or immaterial in point of logical connection to the plaintiff's case.

But the facts alleged were evidential rather than issuable facts, and the motion might properly have been made and granted on that ground. Moreover, testimony on the point was offered and received, and so the error was quite harmless.

It was conceded at the trial that the defendant had already repaired the injured car at its own expense, and the main issue under the first count of the complaint was whether the plaintiff was entitled to recover for the loss of the use and possession of the car while it was being repaired at the defendant's cost.

In *Brown v. Southbury*, 53 Conn. 212, 1 Atl. 819, we held that the loss of the use of a horse injured by a defect in the highway was a direct and natural consequence of the injury, and was a proper element of damage to be allowed in addition to the depreciation in the market value of the horse. The same rule was recognized, though not applied, in *Fritts v. New York & N. E. R. Co.* 63 Conn. 452, 28 Atl. 529; and is generally received in other jurisdictions. *Wheeler v. Townshend*, 42 Vt. 15; *Shelbyville Lateral Branch R. Co. v. Lewark*, 4 Ind. 471, 473; *Streett v. Laumier*, 34 Mo. 469; *Johnson v. Holyoke*, 105 Mass. 80; *Mizner v. Frazier*, 40 Mich. 592, 595, 29 Am. Rep. 562; *Latham v. Cleveland, C. C. & St. L. R. Co.* 164 Ill. App. 559, 563; *Crosen v. Chicago & J. Electric R. Co.* 158 Ill. App. 42, 44; *The Atlas*, 93 U. S. 302, 23 L. ed. 863; *Williamson v. Barrett*, 13 How. 101, 14 L. ed. 68; 1 Sedgw. Damages, 9th ed. § 195; 6 Thomp. Neg. § 7242.

On this appeal the question arises on an exception to the exclusion of evidence of the rental value of the plaintiff's car, on the ground that the plaintiff used and intended to use his car for pleasure only, and not for rent or profit. Stated more generally, the question is whether the right to recover substantial damages for being deprived of the use and possession of a chattel as the result of a tortious injury to the chattel itself depends on the character of the use which the owner intended to make of it, during the period of the detention. We fail to see why the character of the intended use should determine the right to a recovery, although it

will, of course, affect the amount of recoverable damages.

It is clear, for example, that the plaintiff cannot recover the rental value of his car during the period of detention, for such rental value includes a substantial allowance for depreciation and repairs, to which the plaintiff's car has not, in the meantime, been subjected. It also includes a substantial allowance for the overhead expenses and the profits of carrying on the business of renting motor cars; and the plaintiff was not engaged in that business. Neither is the plaintiff entitled to the rental value of his car less deductions for these items, for, even if he had been engaged in the business of renting motor cars, it would not follow, without evidence to that effect, that the car would probably have been rented every day, or for any given number of days.

On the other hand, it is equally clear that such considerations as these affect only the amount of compensatory damages which ought to be awarded in this case, and do not touch the underlying question whether the plaintiff is entitled to compensatory damages so far as they can be ascertained. We think there can be no doubt on this point. An automobile owner who expects to use his car for pleasure only has the same legal right to its continued use and possession as an owner who expects to rent his car for profit; and the legal basis for a substantial recovery, in case of a deprivation of the use of the car, is the same in one case as in the other. Such an invasion of property right calls for an award of substantial, as distinguished from nominal, damages, and the only difficulty in applying the rule of compensatory damages to cases of this character is the very practical difficulty of estimating the actual damages in money. But the law does not deny substantial damages to one who has suffered a substantial injury, solely on the ground that the injury has not produced or will not produce a pecuniary loss. For example, no one would contend that only those plaintiffs whose incomes depended on their earning capacity could recover substantial damages for injuries to person or character. So in this case the fact that the plaintiff has suffered no pecuniary loss ought not to prevent a recovery proportionate to the actual extent of his injury. It may be admitted that this record does not disclose the extent of the plaintiff's injury sufficiently to warrant any recovery at all; but it does appear that the issues framed by the pleadings were found in the plaintiff's favor. And it may fairly be assumed that except for the ruling of the court which cut off all proof of damages other than pecuniary loss, the jury would have been informed as to what use

the plaintiff was accustomed to make of his car, how far and for what purposes he was dependent on it, and of such other facts as would have assisted them in forming a just conception of the actual extent of the injury naturally and necessarily inflicted on this plaintiff in consequence of the loss of use of this car.

When so informed, the jury would have had no greater difficulty in estimating compensatory damages under the first count of the complaint in this case than in estimating compensatory damages for pain and suffering, or for an injury to character when no special damages are pleaded.

Manifestly, no general rule for this class of cases can be laid down, except that the jury should award fair and reasonable compensation according to the circumstances of each case. If the actual injury is trifling, the damages will be small, but in any event they are in the nature of substantial, and not nominal, damages.

We conclude that evidence of the rental value of the plaintiff's car was admissible under the first count; not as furnishing a measure of damages, but as one of the facts proper to be considered in ascertaining the extent of the injury.

In reaching this conclusion we have not disregarded the fact that there is some apparent conflict of authority upon the allowance of damages for the mere detention of articles not used, or intended to be used, for profit.

The Supreme Court of the United States has held in the case of a yacht (*The Conqueror*, 166 U. S. 110, 41 L. ed. 937, 17 Sup. Ct. Rep. 510), that demurrage for the wrongful detention of a vessel will only be allowed when profits have actually been lost, or may reasonably be supposed to have been lost, and the amounts of such profits is proven with reasonable certainty, and the opinion cites several cases in admiralty in which this rule has been laid down. It should, however, be added that the concrete objection in that case was to the allowance of the total rental value of the yacht, without any proof that the owner would or could have rented it; and, also, that the opinion on page 134 of 166 U. S., distinctly intimates that some allowance might have been made for the detention, if there had been sufficient evidence that the owner desired to use the vessel during the period of the detention.

In New York the appellate division has used expressions which may be interpreted as favoring the doctrine that no damages are recoverable for the loss of the use of an article of luxury. In these cases, also (with one exception), the objection was to the allowance of total rental value. *Foley*

v. 42nd Street, M. & St. N. Ave. R. Co. 52 Misc. 183, 101 N. Y. Supp. 780; Bondy v. New York City R. Co. 56 Misc. 602, 107 N. Y. Supp. 32; Donnelly v. Poliakoff, 79 Misc. 250, 139 N. Y. Supp. 999.

In England the question has been settled by two recent decisions in the House of Lords. In *The Greta Holme* [1897] A. C. 597, 66 L. J. Prob. N. S. 166, 77 L. T. N. S. 23, 8 Asp. Mar. L. Cas. 317, it was held that the trustees of the Mersey Dock and Harbor Board were entitled to recover damages for the loss of the use of a dredger injured by a negligent colliding vessel, although not out of pocket in any definite sum. In *The Mediana* [1900] A. C. 113, 69 L. J. Q. B. N. S. 35, 48 Week. Rep. 398, 82 L. T. N. S. 95, 16 Times L. R. 194, 9 Asp. Mar. L. Cas. 41, the same board was held entitled to substantial damages for the loss of the services of a damaged lightship, during the time that its place was taken by a substituted lightship continuously maintained by the board at its expense for such emergencies. It was argued that the board paid nothing for the hire of the substitute, and that they were really better off than if there had been no accident, because relieved from the cost of maintaining two lightships during the time when the injured vessel was under repair. But Lord Halsbury pointed out the distinction between the attempt to establish a specific loss of profit on the one hand, and a claim for general damages for the unlawful detention of property on the other; saying that an alleged loss of profit must be proved, and by precise evidence, but that when only general damages are asked for, no such principle applies, and that in such case the jury may give whatever they think would be a proper equivalent for the unlawful detention of the thing in question.

The Massachusetts court in *C. W. Hunt Co. v. Boston Elev. R. Co.* 199 Mass. 220, 235, 85 N. E. 446, although the subject-matter of that suit was not an article of luxury, has adopted with approval the reasoning of the judges in *The Mediana*, supra. See also 1 Sedgw. Damages, 9th ed. § 243-b.

Error is also assigned in the exclusion by the court of evidence of the amount which the plaintiff paid to his chauffeur during the period he was deprived of the use of his car while it was being repaired. It was excluded upon the ground that the damage was too remote. On the record before us it appears that the payments were obligatory, that the detention of the car was wrongful, and that the plaintiff had no use or employment for the chauffeur while the car was being repaired. In effect the ruling of the court was that the plaintiff was not entitled in an action for the detention of

an automobile to plead and prove as special damage that he was under contract to pay his chauffeur for the period of the detention, that he did pay him, and that the expense was rendered fruitless by the defendant's tort. We think this ruling was erroneous. The testimony, if admitted, would doubtless have been followed up by evidence that it was customary to employ chauffeurs for stated periods to drive and operate cars such as the plaintiff's, and that the loss of the chauffeur's services was a natural consequence of the detention of the car. In that event the objection of remoteness would have been untenable. It does not follow that the plaintiff would be entitled to recover the agreed wages of his chauffeur, no matter what they were. But he is entitled to recover upon proper allegations any reasonable obligatory expenses which have been rendered fruitless as a natural consequence of the defendant's detention of his automobile. Evidence as to the fact and amount of such expenses is admissible in that connection.

There is error, the judgment is set aside, and a new trial is ordered.

In this opinion Prentice, Ch. J., and Roraback, J., concur.

Thayer, J., dissenting:

The plaintiff appeals from a judgment for nominal damages in his favor. The only finding in the case consists of two short transcripts of testimony which show two rulings of the court to which the plaintiff took exceptions. A transcript of the entire testimony in the case is also made a part of the record. This was improperly made a part of the record, because it does not appear that the court was asked to set aside the verdict as against the evidence or to correct the finding. The appeal assigns error in the charge, error in the two rulings on evidence above referred to, and error in granting a motion to strike out a paragraph of the complaint. I concur in the opinion of the majority of the court that there was no harmful error in the last-mentioned ruling, and that the exceptions to the charge cannot be considered by us because the charge itself is not before us, and there is no finding showing that the jury were charged as claimed by the plaintiff. For a similar reason we cannot find error in the rulings on evidence which were excepted to. It does not appear by the record that those rulings were erroneous. The finding does not show that any testimony was offered tending to prove that the plaintiff was deprived of the use of his automobile by the defendant's negligence. There is nothing in the record tending to show that the car was not capable of use after its

alleged injury, or that the plaintiff hired another car to replace it. He could not, because of a scratch upon its body or some other slight injury or blemish to the car, refuse to use it or supply its place with another car, and recover damages of the defendant for the loss of the use of his own car or the rental of another. So far as appears, the rulings were correct and must be presumed to be so in the absence of facts in the record showing that they were not so.

The objection to the admission of the evidence offered to show the rental value of a touring car was upon the ground that the plaintiff's car was a pleasure car from which he derived no profit, and that he did not use his own car after the accident, nor try to substitute another for it, and the court sustained the objection. Unless deprived of the use of his car by the defendant, if the car was capable of use, he was bound to use it if he needed to use a car, and evidence to prove the rental value of some other car which he had not used or needed would be immaterial and incompetent. The same is true as regards the offered evidence as to the wages which he paid his chauffeur. The plaintiff could not let his car and chauffeur lie idle and charge the use of the former and the wages of the latter to the defendant upon the finding in this case.

I dissent from so much of the majority opinion as holds that the rulings excluding this offered testimony were erroneous.

Wheeler, J., concurring:

I concur in the result, and agree that there was error in the judgment appealed from, but differ with the rule adopted in the majority opinion upon the two questions of evidence passed upon.

The plaintiff sought to recover the value of the use of his automobile which was damaged while in the care of the defendant in its garage by its negligence, together with the wages of his chauffeur during the period of loss of the automobile.

Error is assigned in the exclusion of the testimony of an expert as to the rental value per day of a car similar to the plaintiff's, because the plaintiff used his car for pleasure and not business purposes, and did not try to substitute another car.

As the plaintiff was seeking to recover for having been deprived of the use of his car through the defendant's negligence, the ruling was that loss of use of personal property devoted to personal enjoyment caused by another's negligence could not be recovered where the owner had not in fact rented another car in place of the injured one.

Our law gives just compensation for a L.R.A.1915C.

negligent injury to personal property; it seeks to place the injured person in as nearly his former condition as is practically possible. *Cadwell v. Canton*, 81 Conn. 288, 292, 70 Atl. 1025.

In the event of complete destruction, the measure of damages is the value of the property destroyed at the time of destruction, with interest therefrom. When the injury is less than a complete loss, the measure of damages is the difference in value between the property before and after the loss, with interest from date of loss. *Fritts v. New York & N. E. R. Co.* 62 Conn. 503, 510, 26 Atl. 347; *Cadwell v. Canton*, supra; *McCook v. McAdams*, 76 Neb. 1, 106 N. W. 988, 110 N. W. 1005, 114 N. W. 596; *Louisville & N. R. Co. v. Mertz, I. & Co.* 149 Ala. 561, 565, 43 So. 7; *General Fire Extinguisher Co. v. Beal-Doyle Dry Goods Co.* 110 Ark. 49, 160 S. W. 889, 892; 6 *Thomp. Neg.* § 7242.

There is no difference in the rule for measuring damages in cases of complete and partial loss whether the property be used for profit or pleasure. When the property injured may be repaired, if the repairs will substantially restore the property to its former condition, the cost of such repairs will ordinarily furnish proper proof of the loss. If the repairs will not accomplish this, their cost plus the diminution in value of the injured property will ordinarily furnish proper proof of the loss. *Cooper v. Knight*, — Tex. Civ. App. —, 147 S. W. 349, 351. If the repairs will make the property more valuable than it was before the injury, the cost of the repairs less the increased value will ordinarily measure the loss. *Cadwell v. Canton*, 81 Conn. 288, 293, 70 Atl. 1025. If in addition to the injury to the property the owner has lost its use for a period of time, as for example during the process of repair, he is entitled to the value of the use of the property during this period. Otherwise he will not have received just compensation for his loss, for the use during the period of deprivation is a part of the loss. *Fritts v. New York & N. E. R. Co.* 62 Conn. 503, 507, 26 Atl. 347. In an action for injury to a horse through a defect in a highway, we held that the loss of the use of the horse was the direct and natural consequence of the injury and a proper element of damage. *Brown v. Southbury*, 53 Conn. 212, 214, 1 Atl. 819. This has been the general ruling of the authorities. *New Haven S. B. & Transp. Co. v. Vanderbilt*, 16 Conn. 420; *Wheeler v. Townshend*, 42 Vt. 15; *Shelbyville Lateral Branch R. Co. v. Lewark*, 4 Ind. 471, 473; *Street v. Laumier*, 34 Mo. 469; *Johnson v. Holyoke*, 105 Mass. 80; *Mizner v. Frazier*, 40 Mich. 592, 595, 29 Am. Rep. 562; *Latham*

v. Cleveland, C. C. & St. L. R. Co. 164 Ill. App. 559, 563; Crossen v. Chicago & J. Electric R. Co. 158 Ill. App. 42, 44; The Atlas, 93 U. S. 302, 23 L. ed. 863; *Williamson v. Barrett*, 13 How. 101, 14 L. ed. 68; 1 Sedgw. Damages, 9th ed. § 195; 6 Thomp. Neg. § 7242. A similar rule prevails in replevin (*Adams v. Wright*, 74 Conn. 551, 554, 51 Atl. 537); and in trover (*Lewis v. Morse*, 20 Conn. 211, 217); and in admiralty (*The H. F. Dimock*, 23 C. C. A. 123, 33 U. S. App. 647, 77 Fed. 226).

These and many other authorities establish the rule that for negligent injury to personal property the fullest measure of recovery is the difference in value of the property before and after the injury, plus the average or usual value of the use of the property during the period the owner is deprived of its use. As a whole, the authorities (except in a few admiralty cases) make no suggestion of a difference in the measure of damage for loss of use of an article of profit, and one of luxury. The value of the use is fixed by finding the market value of the use of the property during the period of loss of use. The rental value of the property, if it has one, helps to ascertain the value of the loss of use. *Trout Auto Livery Co. v. People's Gaslight & Coke Co.* 168 Ill. App. 56, 60; *Universal Taximeter Cab Co. v. Blumenthal* (Sup.) 143 N. Y. Supp. 1056; *A. Buchanan's Sons v. Cranford Co.* 112 App. Div. 278, 279, 98 N. Y. Supp. 378.

But rental value, while evidential, is not conclusive; for the rental value may include, for example, a substantial sum for wear and tear and depreciation. The rental value of an automobile, as is well known, is determined not alone by the value of the use, but by adding to this a sum for wear and tear and depreciation.

Since compensation for injury to personal property is the cardinal rule for the measure of the damage, there would seem to be no room for affording a recovery for a deprivation of the use of an automobile devoted to business, and denying it to one devoted to pleasure uses. The value of the use of personal property is not the mere value of its intended use, but of its present use. The value of an article to its owner, as Sedgwick points out, lies in his right to use, enjoy, and dispose of it. These are the rights of property which ownership vests in him, and whether he, in fact, avails himself of his right of use, does not in the least affect the value of his use. 1 Sedgw. Damages 9th ed. § 243a. His right to the use of his property is not diminished by the use the owner makes of it. His right of user, whether for business or pleasure, is absolute, and whoever injures him in the exercise of that right renders himself liable for consequent damage.

cise of that right renders himself liable for consequent damage.

The cases where this point has directly arisen seem to be comparatively few, and, outside of New York, to have been decided in harmony with the general rule. The *Mediana v. The Comet* [1900] A. C. 113, 69 L. J. Q. B. N. S. 35, 48 Week. Rep. 398, 82 L. T. N. S. 95, 16 Times L. R. 194, 9 Asp. Mar. L. Cas. 41; *The Greta Holme* [1897] A. C. 597, 66 L. J. Prob. N. S. 166, 77 L. T. N. S. 23, 8 Asp. Mar. L. Cas. 317; *C. W. Hunt Co. v. Boston Elev. R. Co.* 199 Mass. 220, 236, 85 N. E. 446. In two cases in the supreme court of New York this distinction has been upheld. *Foley v. 42nd Street, M. & St. N. Ave. R. Co.* 52 Misc. 183, 101 N. Y. Supp. 780; *Bondy v. New York City R. Co.* 56 Misc. 602, 107 N. Y. Supp. 31. A later case (*Murphy v. New York City R. Co.* 58 Misc. 237, 108 N. Y. Supp. 1021, 1023) is cited by Sedgw. Damages, § 243b, as reversing these two cases. I think this view is the result of an acceptance of the concurring opinion as the opinion of the court, and overlooks the opinion of the court which supports them. The concurring opinion strongly asserts the right of recovery although the use of the property injured may have been a pleasure use, and attempts to distinguish these cases upon the ground that they furnished no proof that the injured property had a salable value. I think it difficult to clearly see this distinction. Further examination of New York cases would seem to indicate that these two cases were departures from the rule generally adopted in New York and so to impair their authority. *Schalscha v. Third Ave. R. Co.* 19 Misc. 141, 43 N. Y. Supp. 251, 252, 1 Am. Neg. Rep. 330; *Hutton v. Murphy*, 9 Misc. 151, 29 N. Y. Supp. 70; *Wellman v. Miner*, 19 Misc. 644, 44 N. Y. Supp. 417, 2 Am. Neg. Rep. 218; *Moore v. Metropolitan Street R. Co.* 84 App. Div. 613, 617, 82 N. Y. Supp. 778; *A. Buchanan's Sons v. Cranford Co.* 112 App. Div. 278, 279, 98 N. Y. Supp. 378; *Allen v. Fox*, 51 N. Y. 562, 565, 10 Am. Neg. Rep. 641; *Jackson Architectural Iron Works v. Hurlbut*, 158 N. Y. 34, 70 Am. St. Rep. 432, 52 N. E. 665.

I think evidence of the rental value of the car was admissible as tending to prove the value of the use, and that the exclusion of this evidence was erroneous.

Error is assigned in ruling out the evidence of the amount which the plaintiff paid his chauffeur during the period he was deprived of the use of his car while it was being repaired. This offer followed the second count, wherein it was alleged that the plaintiff was under contract to pay and did pay his chauffeur during the period the car was being repaired.

If the owner receives for negligent injury to his property the difference in the value of his property before and after the injury, or the cost of the repairs, if the parties substitute this as the measure of damage to the property, he will receive compensation for the injury to his property. If the injury occasions his loss of its use during the period of its repair, he will receive the equivalent in value of the use, and this sum will enable him to supply himself with other property to take the place of his own. The law thus gives him back his property and pays him the value of the use he has lost. This places him in the position of never having lost the use of his property. If the plaintiff lost the use of his car while it was being repaired and received the value of the use of the car, he may with this procure another car and continue to use the services of his chauffeur as he would have done had his car remained uninjured. If he should be permitted to recover, in addition to the loss to the car and the value of the use lost, the wages paid the chauffeur, he would be the gainer by the accident of the wages of the chauffeur. And this would be penalizing the negligence instead of compensating the injured.

If the case were one where no other car could be hired, there would be more reason in the claim that these wages were special damages consequent upon the negligent injury. But no claim of this character was, or could be, made in this case.

The only instance which I find where a court has passed upon this express claim was in *Dillon v. Mundet et al.* (Sup.) 145 N. Y. Supp. 975, and it was there denied.

The ruling excluding this evidence was in my opinion correct.

ILLINOIS SUPREME COURT.

JOHN E. WALL et al., Plffs. in Err.,
v.

RAY PFANSCHMIDT et al.

(265 Ill. 180, 106 N. E. 785.)

Descent — murder of ancestor — effect.

1. The murder by an heir of his ancestor does not interfere with the operation of the statutory rules of descent; at least

Note. — Homicide as affecting devolution of property.

Earlier cases considering the question under annotation will be found in notes to *McAlister v. Fair*, 3 L.R.A.(N.S.) 726, and *Re Kirby*, 39 L.R.A.(N.S.) 1088.

As to the right of one who murders insured to proceeds of policy on his life, see L.R.A.1915C.

where the Constitution provides that conviction of crime shall not work forfeiture of estate, and the penalty for murder is merely death or imprisonment.

Trust — ex maleficio — murder of ancestor.

2. No trust *ex maleficio* can be imposed upon the title to property which, under the statute, descends to one who murders his ancestor to secure it.

(October 16, 1914.)

ERROR to the Circuit Court for Adams County to review a judgment dismissing a bill filed to partition certain real estate. Affirmed.

The facts are stated in the opinion.

Messrs. John E. Wall, *in propria persona*, Carl E. Epler, and George H. Wilson, for plaintiffs in error:

Ray Pfanschmidt cannot take by inheritance any of the real estate owned by his father, mother, or sister, whom he murdered, for to do so would enable him to profit by his own wrong and crime.

Supreme Lodge, K. L. H. v. Menkhause, 209 Ill. 277, 65 L.R.A. 508, 101 Am. St. Rep. 239, 70 N. E. 567; *Schreiner v. High Court*, I. C. O. F. 35 Ill. App. 576; *Mutual L. Ins. Co. v. Armstrong*, 117 U. S. 591, 29 L. ed. 997, 6 Sup. Ct. Rep. 877; *Schmidt v. Northern Life Asso.* 112 Iowa, 41, 51 L.R.A. 141, 84 Am. St. Rep. 323, 83 N. W. 800; *Cleaver v. Mutual Reserve Fund Life Asso.* [1892] 1 Q. B. 147, 61 L. J. Q. B. N. S. 128, 66 L. T. N. S. 220, 40 Week. Rep. 230, 56 J. P. 180; *Prince of Wales etc. Association Co. v. Palmer*, 25 Beav. 605; *Riggs v. Palmer*, 115 N. Y. 506, 5 L.R.A. 340, 12 Am. St. Rep. 819, 22 N. E. 188; *Ellerson v. Westcott*, 148 N. Y. 149, 42 N. E. 540, 88 Hun, 389, 2 N. Y. Anno. Cas. 118, 34 N. Y. Supp. 813; *Box v. Lanier*, 112 Tenn. 393, 64 L.R.A. 458, 79 S. W. 1042; *Perry v. Strawbridge*, 209 Mo. 621, 16 L.R.A.(N.S.) 244, 123 Am. St. Rep. 510, 108 S. W. 641, 14 Ann. Cas. 92; *Wellner v. Eckstein*, 105 Minn. 444, 117 N. W. 830; *Kreitz v. Behrensmeyer*, 149 Ill. 496, 24 L.R.A. 59, 36 N. E. 983; *Cunigunda's Estate*, 27 Times L. R. 258; *Re Cash*, 30 New Zealand L. R. 577; *McKinnon v. Lundy*, 24 Ont. Rep. 132; *Lundy v. Lundy*, 24 Can. S. C. 650; 4 Harvard L. Rev. 394; 24 Am. L. Rev. 141; 30 Am. L. Rev. 130; *Wunderle v. Wunderle*, 144 Ill. 40, 19 L.R.A.

notes in 3 L.R.A.(N.S.) 727, and 28 L.R.A.(N.S.) 675.

In connection with the discussion in some of the cases as to the effect of the conviction to establish the murder, see notes in 11 L.R.A.(N.S.) 653, and 31 L.R.A.(N.S.) 670, on the general subject of judgment in criminal action as *res judicata* in civil action.

84, 33 N. E. 195; 40 Cyc. 1063, and notes; Shellenberger v. Ransom, 31 Neb. 61, 10 L.R.A. 810, 28 Am. St. Rep. 500, 47 N. W. 700.

Ray Pfanschmidt cannot hold the legal title to said real estate for his own use or benefit, but only as a trustee *ex maleficio* and in trust for the heirs equitably entitled thereto.

Riggs v. Palmer, 115 N. Y. 506, 5 L.R.A. 340, 12 Am. St. Rep. 819, 22 N. E. 188; Ellerson v. Westcott, 148 N. Y. 149, 42 N. E. 540; Wellner v. Eckstein, 105 Minn. 444, 117 N. W. 830; 3 Pom. Eq. Jur. § 1053; 2 Tiffany, Real Prop. 1161, 1162, § 505a; 36 Am. L. Reg. N. S. 229; 30 Am. L. Rev. 130; 4 Harvard L. Rev. 394; Lewin, Tr. 9th ed. 60, 64; 1 Perry, Tr. § 181, note A;

Nebraska Nat. Bank v. Johnson, 51 Neb. 546, 71 N. W. 294; Grouch v. Hazlehurst Lumber Co. — Miss. —, 16 So. 490.

Messrs. Govert & Lancaster for defendants in error:

Carter, J., delivered the opinion of the court:

Plaintiffs in error filed a bill for the partition of certain real estate, in the circuit court of Adams county, to the June term, 1913. A demurrer thereto was sustained, and the bill, which had been amended, was dismissed for want of equity. Plaintiffs in error elected to abide by their bill as amended and the cause was dismissed at their costs. A writ of error was sued out to review that decree.

Public policy doctrine as applied to transfers by devise or operation of common law rule.

Supplementing note in 3 L.R.A.(N.S.) 726.

Where the transfer of property is by will or by operation of common law, the later cases follow the rule applied in similar cases cited in the earlier note, that it is against public policy to permit a person or his personal representative to benefit by his own crime.

Thus, in Hall v. Knight, L. R. [1914] P. 1, 83 L. J. Prob. N. S. 1, 109 L. T. N. S. 587, [1913] W. N. 283, 30 Times L. R. 1, 58 Sol. Jo. 30, it was held that a legatee who was guilty of the homicide of her testator could not take any interest in the estate under the will.

And this rule of law was held to apply although the legatee was convicted of manslaughter, and not of murder, the court stating that it could not see why a legatee should be excluded from taking the testator's bounty when he can be hanged, and not excluded when he can be sentenced only to penal servitude for life; that the distinction seemed to be either one of an undue reliance upon legal classification, or else to encourage what would be very noxious, a sentimental speculation as to the mode and degree of the moral guilt of a person who had been justly convicted and sent to prison. Ibid.

In Crippen's Goods, 104 L. T. N. S. 224, L. R. [1911] P. 108, 80 L. J. Prob. N. S. 47, 27 Times L. R. 258, 55 Sol. Jo. 273, the court, in the exercise of its discretion, granted the application of a sister of decedent for letters of administration, passing over and declining to appoint as administratrix a person named as executrix and universal legatee in the will of decedent's husband, who had been convicted and executed on the charge of murdering decedent.

The court stated that it is clear that the law is that no person can obtain or enforce any right resulting to him from his own crime, and neither can his represen-

tative claiming under him obtain or enforce any such right; that the human mind revolted at the very idea that any other doctrine could be possible in our system of jurisprudence. It will be noted that this decision was as to the right to appointment as executrix, and that the question of the right to the property was not finally decided, but, as pointed out in Re Cash, infra, the decision would have been meaningless if the president of the court had thought that the legatee had a right to recover it, since if it had passed to Crippen she alone would have been interested. It was contended that, as in this case the murder was committed from some other motive than that of acquiring property, the rule should not be applied, but the court stated that where the court refuses to act in such cases on the ground that to do so is against public policy, it does so without reference to the facts of the particular case.

In Re Cash, 30 New Zealand L. R. 577, it was held that the husband was not entitled to succeed to the estate of his wife, whom he had murdered, but that the public trustee should stand possessed of the estate of the deceased wife for her next of kin other than the husband, and that effect could not be given to a bona fide assignment of the value of the wife's estate to the solicitors employed by the husband to defend him, as they had no better claim than the husband had, and as no property passed to the husband by his wife's death, there was nothing to assign.

Exception in case of transfer under positive statutory provision.

Supplementing notes in 3 L.R.A.(N.S.) 726, and 39 L.R.A.(N.S.) 1088.

In view of the contention made in support of the view excluding one who murders his ancestor from taking a benefit under the statutes of descent and distribution, see note to Shellenberger v. Ransom, 25 L.R.A. 564, on the question, How far statutes will be regarded as having abrogated the maxim that one cannot profit by his own wrong.

The amended bill averred that certain real estate was devised under the will of Christian Abel to his daughter, Matilda, for her natural life and at her death to her children; that said Matilda intermarried with one Charles A. Pfanschmidt and to them were born two children, Ray and Blanche; that said Charles A. owned certain real estate adjoining that devised to his wife, Matilda, all of which the family occupied as a farm, residing on that portion devised to the wife; that on or about September 27, 1912, Ray Pfanschmidt, one of said children, murdered his father, mother, and sister and Emma Kaempfen, a school teacher boarding with them, setting fire to the residence and party burning the remains of said four persons so killed, and

that the order of their respective deaths could not be determined; that said Ray Pfanschmidt had been indicted in the circuit court of Adams county for the murder of said four persons and pleaded not guilty; that under the indictment for the murder of his sister said Ray Pfanschmidt was tried and found guilty and his punishment fixed by verdict of the jury at death; and that said criminal cause, at the time of this hearing in the court below, was pending in the trial court on motion in arrest of judgment. The motion in arrest of judgment has since been overruled and the criminal cause brought to this court by writ of error, the judgment of the trial court being reversed and the cause remanded for a new trial. *People v. Pfanschmidt*, 262 Ill.

WALL v. PFANSCHMIDT, is in accord with the numerical weight of authority in holding that the murder by an heir of his ancestor does not interfere with the operation of the statutory rules of descent, and although the decision is based in part on the constitutional provision that conviction of crime shall not work forfeiture of estate, a reading of the opinion furnishes no doubt but that the decision would have been the same in the absence of such provision.

WALL v. PFANSCHMIDT is also a case of importance as being one which expressly denies the right to extend to a case of descent the principle of *Riggs v. Palmer*, cited in note in 3 L.R.A.(N.S.) 729, as explained in *Ellerson v. Westcott*, cited in note in 3 L.R.A.(N.S.) 729, that the heir would hold as trustee *ex maleficio*.

In *Holloway v. McCormick*, — Okla. —, 50 L.R.A.(N.S.) 536, 136 Pac. 1111, it was held that a husband is not precluded from inheriting from his wife by the fact that he murdered her, especially where no intention appears that the murder was committed for the purpose of securing her property, under a statute relating to the descent of property, which provides in plain and peremptory language that a husband shall inherit from the deceased wife, and which makes no exception on account of criminal conduct.

And again in *De Graffenreid v. Iowa Land & T. Co.* 20 Okla. 687, 95 Pac. 624, it was held that the Creek law of descent and distribution did not disqualify a husband from inheriting from his wife because of the fact that he murdered her, the killing not having been done for the purpose of immediate inheritance, and the statute itself containing no provision excluding one from inheriting because of his crime.

In the *Holloway* and *De Graffenreid* Cases, there was no evidence that the crime was committed for the purpose of inheriting, but the court in each case expressly states that its decision is due to the fact that under the statute of descent and distribution one would not be excluded from inheriting because of the fact that he com-

mitted the crime for that express purpose, and *a fortiori* the same would be the rule when no such intention appeared.

So, also, under article 1696 of Texas Revised Civil Statutes, which provides that upon dissolution of the marriage relation by death, all property belonging to the community estate of the husband and wife shall go to the survivor if there be no children or their descendants, the wife is not barred from inheriting her husband's interest by the fact that she murdered him for the sole purpose of investing herself with the title to his property. *Hill v. Noiland*, — Tex. Civ. App. —, 149 S. W. 288. The court said that "the article in plain and unambiguous language designates the person to whom the estate shall descend *eo instanti* upon the happening of death, and there is neither condition nor exception debaring or forfeiting the estate or the right of succession to the wife or husband. As the rule of inheritance is explicit and imperative, and the statute contains no hint that the wife is to be excluded on account of crime or misconduct, the courts would not be warranted in reading into the statute a clause disinheriting her for her alleged crime."

In *Re Wolf*, 88 Misc. 433, 150 N. Y. Supp. 738, where a husband, while in the act of attempting to shoot his wife's paramour, unintentionally killed her, it was held that such fact did not constitute a legal bar to his inheriting from her. The court stated that the statute of distribution had been framed without regard to any such disability, and that the statutory rights of the husband are unaffected by the principle of the public policy doctrine.

And even admitting that a court of equity might consider whether public policy would prevent the enforcement of rights directly resulting from the commission of a crime, that court ought to go further and determine whether or not the crime was committed for the purpose of influencing the succession, and if it was not so committed, then in equity the conviction should not be allowed to influence the succession or take away the convict's right of suc-

411, 104 N. E. 804. The amended bill in this cause further alleged that Ray Pfanschmidt could not acquire any estate, right, or title in and to said real estate through his act of murder; that Charles A. Pfanschmidt died intestate, leaving him surviving his son, Ray Pfanschmidt, the bill naming as other heirs decedent's father, brother, sisters, and children of a deceased brother and sister, and also enumerating the heirs of Matilda Pfanschmidt. It is further alleged that Ray Pfanschmidt executed his promissory note to Fred Pfanschmidt, his uncle, for \$4,000, secured by mortgage on the real estate described in the bill, and another promissory note for \$4,000 to George W. Govert and W. Emery Lancaster, secured by a second mortgage on said real estate;

cession; and so it was held in this case that in equity the husband ought not to be barred from succession under the statute of distribution, because he had not the slightest intention of killing his wife and profiting by her death, which is the very essence of the equitable bar. *Ibid.*

Construction of statute providing that one convicted of causing another's death shall not inherit from victim.

Indiana Acts 1907, p. 136, providing that "no person who unlawfully causes the death of another and shall have been convicted thereof or aids or abets in such unlawful killing of another, shall take by devise or descent any part of the property real or personal owned by decedent at the time of his or her death," do not prevent a widow who has killed her husband from recovering the statutory allowance to the widow of \$500. *Re Mertes*, 181 Ind. 478, 104 N. E. 753. The court stated that such statutory allowance is a preferred claim payable out of the personal estate of the deceased husband if sufficient, and if insufficient then the balance shall be paid out of the real estate, and so does not descend to her as his heir, and therefore the act of 1907 does not control; and further that as there was no pretense in the case that it was given her under the provisions in a will, the provision of the act that she shall not take by devise has no force, as the act in question is confined to devise and descent, and could not be made to apply in this case without reading something into the statute which was not included therein by the legislature.

Nor does such statute prevent a husband from inheriting from his wife, although he may have caused her death, where there has been no conviction thereof. *Bruns v. Cope*, — Ind. —, 105 N. E. 471. The court stated that previously to the act of 1907 no statutory exceptions barred a surviving wife or husband from taking under the statute of descent because of crime, even if that of the murder of the deceased, L.R.A.1916C.

that Charles C. Pfanschmidt, the father of Charles A., quitclaimed to John E. Wall all his interest in said real estate, and said Wall and his wife quitclaimed to E. W. C. Kaempfen an undivided two thirds of said real estate. It is further alleged that said mortgages are null and void except as to the real estate devised to said Ray Pfanschmidt by the will of his grandfather, Christian Abel. The prayer of the bill is for partition, and that the court declare that said Ray Pfanschmidt did not take or acquire any interest in the real estate of Charles A. Pfanschmidt, his father, Matilda Pfanschmidt, his mother, or Blanche Pfanschmidt, his sister, upon their death, because he caused their death for the purpose of inheriting; that he took no other interest

and consequently that, unless barred by the provisions of that act from inheriting his wife's property, he takes it all under the provisions of the decedents' act; but that the act of 1907 by its plain provisions bars no one from inheriting unless he has been convicted as principal or accessory of the unlawful killing of the person whose property he claims through the laws of descent.

The view that, in the absence of an express statutory provision to that effect, one is not precluded from taking under the statute of descent and distribution by the fact that he murdered the decedent, appears to be sustained by the numerical weight of authority. The courts very generally deplore the practical consequences of the adoption of that view, but have felt constrained by the terms of the statute.

It may be doubted, however, whether these courts have allowed sufficient effect to the maxim that no one shall take advantage of his own wrong, as an inherent limitation of the generality of statutory terms employed by the legislature without having consciously in mind the particular mischief incident to an unrestrained application of the literal terms of the statute. Many illustrations of the effect of this maxim as a restraint upon general statutory terms are presented in the note to *Shellenberger v. Ransom*, 25 L.R.A. 564, on the general subject, "How far statutes will be regarded as having abrogated the maxim that one cannot profit by his own wrong." It is difficult to imagine a more fitting case for the application of such a maxim in determining the scope and effect of a statute, than that presented by the case of one claiming, under the statute of descent and distribution, the estate of one whom he has murdered, perhaps, for the very purpose of coming into the inheritance. It would seem that such a case, if not justifying the formulation of a new principle to prevent the consummation of such a flagrant perversion of justice, should at least call for rigid adherence to an established principle of statutory construction adequate to the prevention of such a result.

J. H. B.

than that devised to him in his grandfather's will. The bill further prayed that he be enjoined from conveying, mortgaging, or otherwise encumbering said real estate, and if it should be deemed that he took the naked legal title, by descent, to any part of said real estate, that it be deemed that he was holding said legal title not for his own use and benefit, but only as trustee for such parties equitably entitled thereto, and that partition of the equitable interests be made accordingly.

Both parties agree that the law is that when two or more persons perish in a common disaster there is no presumption under the common law, of survivorship; that if survivorship is claimed it must be proved (*Middeke v. Balder*, 198 Ill. 590, 59 L.R.A. 653, 92 Am. St. Rep. 284, 64 N. E. 1002; *Young Women's Christian Home v. French*, 187 U. S. 401, 47 L. ed. 233, 23 Sup. Ct. Rep. 184; 1 Greenl. Ev. 16th ed. §§ 29, 30); and that this rule would apply whether the common disaster was a wreck or accident on land or sea, or the murder of several persons at practically the same time, as alleged in this case.

Plaintiffs in error concede that defendant in error Ray Pfanschmidt retained and did not forfeit his estate in the remainder devised to him under the will of his grandfather, Christian Abel. The sole question in dispute is whether he could acquire an interest, by inheritance, in the real estate owned by his father, mother, and sister, who under the pleadings in this cause met their death by his acts intentionally committed.

Our statute on descent provides: "That estates, both real and personal, of residents and nonresident proprietors in this state dying intestate, . . . shall descend to and be distributed in manner following, to wit: First—to his or her children and their descendants, in equal parts; . . . Second—when there is no child of the intestate, nor descendant of such child, and no widow or surviving husband, . . . and if there is no parent living, then to the brothers and sisters of the intestate, and their descendants." Hurd's Stat. 1913, p. 907.

This statute has never been construed by the courts of this state as to the question here involved. Counsel for plaintiffs in error admit that under the literal wording of the statute Ray Pfanschmidt would inherit, but their argument is to the effect that in construing this as well as all other statutes the maxims of the common law must be applied, and that according to those maxims no one can be permitted to take advantage of his own fraud or wrong, or acquire property by his own crime; that it must be assumed that the legislature, in passing the statute of descent, had these maxims in

mind, and that the statute should be construed according to such legislative intent; that so construed Ray Pfanschmidt acquired no interest in the estate of his father, mother, or sister.

The authorities on this question in other jurisdictions are not in harmony. The courts of Great Britain do not seem to have been called upon to pass upon it until in very recent years, doubtless because of the ancient common-law doctrine of attainder and corruption of blood. Under the civil law one could not take property by inheritance or will from an ancestor or testator whom he had murdered, but such deprivation plainly was intended in the nature of a punishment, as the property, in such case, escheated to the exchequer. *Domat's Civil Law*, pt. 2, bk. 1, title 1, § 3; *Riggs v. Palmer*, 115 N. Y. 506, 5 L.R.A. 340, 12 Am. St. Rep. 819, 22 N. E. 188. In most states the statutes of descent are based upon the rules of the civil law (14 Cyc. 23,) but each state has its own rules. 3-5 Greenleaf's *Cruise*, Real Prop. 2d Am. ed. 146, note. The English common law of descents had its foundation in principles of feudal policy. *Reeve, Descents*, 1. Forfeiture of lands for felony was a doctrine of the old Saxon law, as a part of the punishment for the offense. The law of feudal escheat was brought into England at the Conquest, and superadded to the ancient law of forfeiture. 2 *Sharswood's Bl. Com.* p. 251. Corruption of blood and forfeiture of lands in ordinary felonies were abolished by 54 Geo. III, chap. 45. 1 *Chitty, Crim. Law*, 735. Later, in 1870, by statute of 33 and 34 Victoria, chapter 23, the entire doctrine of attainder, forfeiture, and corruption of blood was abolished, except forfeiture consequent upon outlawry. 1 *Jarman, Wills* (Bigelow's 6th ed. ** 45, 46; 6 *Enc. Laws of Eng.* 210; *Avery v. Everett*, 1 L.R.A. 264. In recent years the English courts, both in Great Britain and in some of the colonies, have passed on this question.

Before the passage of the forfeiture act of 1870, in *Amicable Soc. v. Bolland*, 4 Bligh, N. R. 194, 2 Dow & C. 1 (1830), it was held that the parties representing and claiming under one convicted (and executed) of a capital felony (forgery) could not recover insurance. The decision was on grounds of public policy. In *Cleaver v. Mutual Reserve Fund Life Assn.* [1892] 1 Q. B. 147, 61 L. J. Q. B. N. S. 128, 66 L. T. N. S. 220, 40 Week. Rep. 230, 56 J. P. 180, it was held that Mrs. Maybrick, who was named as beneficiary in an insurance certificate of her husband, whom she was convicted of murdering, could not recover from the insurance company. The insurance money became a part of the estate of the insured as a resulting trust. The following British

and colonial cases have been decided in harmony with the *Cleaver Case*, all on the ground of public policy, following the maxim that one cannot take advantage of his own wrong: *Lundy v. Lundy*, 24 Can. S. C. 650; *Re Cash*, 30 New Zealand L. R. 577; *Hall v. Knight*, L. R. [1914] P. 1, 83 L. J. Prob. N. S. 1, 109 L. T. N. S. 587, [1913] W. N. 283, 30 Times L. R. 1, 58 Sol. Jo. 30.

In this country the decisions in *Riggs v. Palmer*, *supra*; *Mutual L. Ins. Co. v. Armstrong*, 117 U. S. 591, 29 L. ed. 997, 6 Sup. Ct. Rep. 877; *Ellerson v. Westcott*, 148 N. Y. 149, 42 N. E. 540, and *Perry v. Strawbridge*, 209 Mo. 621, 16 L.R.A.(N.S.) 244, 123 Am. St. Rep. 510, 108 S. W. 641, 14 Ann. Cas. 92, are in harmony with the British and colonial cases above cited. On the other hand, it has been held that, where there are explicit rules governing the descent of property by statute, and there is nothing contained therein to justify exclusion, the one upon whom the law casts the property cannot, because of the murder by him of the ancestor or testator, be divested of it by the court. *Owens v. Owens*, 100 N. C. 240, 6 S. E. 794; *Deem v. Milliken*, 53 Ohio St. 668, 44 N. E. 1134; *Shellenberger v. Ransom*, 41 Neb. 631, 25 L.R.A. 564, 59 N. W. 935; *Carpenter's Estate*, 170 Pa. 203, 29 L.R.A. 145, 50 Am. St. Rep. 765, 32 Atl. 637; *De Graffenried v. Iowa Land & Trust Co.* 20 Okla. 687, 95 Pac. 624.

The first case in this country was that of *Owens v. Owens*, *supra*, decided in 1888. It was there held that a widow convicted as an accessory before the fact in her husband's murder, and confined in the state prison therefor, was entitled to her dower in his lands.

Riggs v. Palmer, *supra*, was decided in 1890. This was an action by the heirs at law of a testator against a beneficiary who had murdered the testator in order to obtain possession of the property given him by the will, to cancel the provisions for said beneficiary's benefit. The court decided that by reason of having committed said crime the beneficiary was not entitled to take under the will, and that the property belonged to the heirs at law.

In *Deem v. Milliken*, 6 Ohio C. C. 357 (1892), it was held that a son who murdered his mother for the purpose of procuring her property succeeded to the title to her real estate by virtue of the statute of descent in that state. This decision was affirmed in 53 Ohio St. 668, 44 N. E. 1134.

Shellenberger v. Ransom, 41 Neb. 631, 25 L.R.A. 564, 59 N. W. 935, which at the first hearing in the supreme court, was decided in 1891, following the reasoning in L.R.A.1915C.

Riggs v. Palmer, *supra*, was on rehearing decided to the contrary, and it was held that, even though it was proved that a father murdered his daughter in order to possess himself of her estate, nevertheless he took the title under the laws of descent of that state.

In *Carpenter's Estate*, 170 Pa. 203, 29 L.R.A. 145, 50 Am. St. Rep. 765, 32 Atl. 637 (1895), a son murdered his father to come immediately into possession of his estate. The son was convicted and hanged, and it was contended that because of his crime the title never vested in him. The court held that under the statute of descent in that state the title had vested in the son immediately upon his father's death.

Ellerson v. Westcott, 148 N. Y. 149, 42 N. E. 540, is cited by counsel for the plaintiffs in error, but the only holding in that case, which was a partition proceeding, was that the killing of the testator by a devisee for the purpose of realizing under the will did not render the devise void, and the court indicated that relief could be had against one committing the murder, in equity.

McAllister v. Fair, 72 Kan. 533, 3 L.R.A. (N.S.) 726, 115 Am. St. Rep. 233, 84 Pac. 112, 7 Ann. Cas. 973 (1906), was a proceeding begun in the probate court to obtain a distribution of the estate of one who had been murdered by her husband for the purpose of obtaining her property. The Kansas statute provided how property should descend, and contained no exception. The court held there was no justification for reading an exception into the statute which would preclude the husband from inheriting because of the crime he committed.

In *Wellner v. Eckstein*, 105 Minn. 444, 117 N. W. 830, decided in 1908, the wife murdered her husband for the purpose of acquiring his real estate. The court was not agreed as to whether a murderer could inherit under the statute of descent in that state, and the case was decided on other grounds.

In *Perry v. Strawbridge*, 209 Mo. 621, 16 L.R.A. (N.S.) 244, 123 Am. St. Rep. 510, 108 S. W. 641, 14 Ann. Cas. 92 (1908), in a petition for partition, it was held that a man who murdered his wife to inherit half of her estate under the statute took no title by reason of his crime. There was no reference in the statute which indicated an exception.

In *De Graffenried v. Iowa Land & Trust Co.* *supra* (1908), it was held that a person was not prevented from inheriting the property of one he murdered, where it did not appear the murder was committed for that purpose; there being nothing in the statute to justify the exclusion. See also

as somewhat analogous to this case, *Mutual L. Ins. Co. v. Armstrong*, supra; *Schmidt v. Northern Life Asso.* 112 Iowa, 41, 51 L.R.A. 141, 84 Am. St. Rep. 323, 83 N. W. 800; *Kuhn v. Kuhn*, 125 Iowa, 449, 101 N. W. 151, 2 Ann. Cas. 657, and *Re Mertes*, — Ind. —, 104 N. E. 753.

In some jurisdictions, as in New York, the conclusion has been reached that while the murderer takes a legal title which is unimpeachable in a court of law, a court of equity will deprive him of the use of the property by enjoining the enforcement of the legal right. In other jurisdictions it has been held that when the statutes make explicit provision for the descent of an intestate's property, and specify the causes for which a will may be annulled or set aside, and neither the statute on descent nor on wills includes the case of a murder committed by an heir or devisee in order to obtain the property, the legal title which passes to the murderer under the statute of descent or by will is indefeasible. 21 Am. & Eng. Enc. Law, 2d ed. 238; 14 Cyc. 61.

While this question has never been passed upon by this court somewhat kindred questions have been decided. In *Holdom v. Ancient Order*, U. W. 159 Ill. 619, 31 L.R.A. 67, 50 Am. St. Rep. 183, 43 N. E. 772, it was decided that the right of recovery by an insane beneficiary under a policy of life insurance was not forfeited by his killing the insured under such circumstances that the killing would be murder if the beneficiary were sane. In *Supreme Lodge, K. L. H. v. Menkhause*, 209 Ill. 277, 65 L.R.A. 508, 101 Am. St. Rep. 239, 70 N. E. 567, it was held that the murder of the insured by the beneficiary named in the benefit certificate precluded recovery of the insurance. In *Collins v. Metropolitan L. Ins. Co.* 232 Ill. 37, 14 L.R.A. (N.S.) 356, 122 Am. St. Rep. 54, 83 N. E. 542, 13 Ann. Cas. 129, the insurance company disputed its liability for payment of insurance on the life of one convicted of murder and executed, on the ground that it was against public policy. There was no stipulation in the policy exempting the company, and it was held liable for the policy on the murderer's life.

The rule of descent in this jurisdiction was first declared in the ordinance of 1787, and the act of March 23, 1819, in force in 1822, was a literal transcript of the 2d section of said ordinance. *Orthwein v. Thomas*, 127 Ill. 554, 4 L.R.A. 434, 11 Am. St. Rep. 169, 21 N. E. 430. The legislature of Illinois, at the same session at which it adopted the statute of descent, passed an act adopting the common law of England of a general nature and all British statutes of a general nature, with a few stated ex-

ceptions made in aid of the common law, prior to the fourth year of James I. Laws of 1819 (2d Sess.) 1; *Hurd's Stat.* 1913, p. 525. This statute, however, provided specifically that only the common law of England of a general nature, so far as the same is applicable to our condition, shall be in force in this state. *Penny v. Little*, 4 Ill. 301; *Lavalle v. Strobel*, 89 Ill. 370. This being so, counsel argue that the same line of reasoning should be applied in construing this statute of descent as has been applied by this court in construing the statute as to the meaning of the word "children" in those cases wherein it has been held that the word "child" or "children" embraces only legitimate children (*Blacklaws v. Milne*, 82 Ill. 505, 25 Am. Rep. 339; *Orthwein v. Thomas*, supra; and has also been applied in construing the statute as to the right of a nonresident alien to inherit (*Wunderle v. Wunderle*, 144 Ill. 40, 19 L.R.A. 84, 33 N. E. 195; *Beavan v. Went*, 155 Ill. 592, 31 L.R.A. 85, 41 N. E. 91; *Meadowcroft v. Winnebago County*, 181 Ill. 504, 54 N. E. 949). Those decisions are not decisive, as the wording of the statute on the questions there involved practically required the conclusions reached. The rules of common law were only invoked as supporting that construction of the statute which, reading all its provisions together, was the reasonable construction.

In discussing the question here under consideration, Wharton on Homicide, 3d ed. § 667, states: "The broad theory has been asserted that all laws must be controlled, in general operation and effect, by the general fundamental maxim of the common law that no one shall be permitted to profit by his own wrong, or found any claim upon his own iniquity, or acquire property by his own crime, and the rule has been asserted that the statutes of descent and distribution are to be considered with reference to these principles, and that a murderer cannot be permitted to take thereunder, either as heir or legatee, the estate of one whom he has murdered for the purpose of obtaining his property. This rule, however, has been either rejected, or limited and confined in its application, and the prevailing, if not the universal, rule would appear to be that where a statute of descent and distribution, or provision for succession, is plain and unambiguous in its terms, there is no room for construction or interpretation, and it operates solely within its own terms, and vests in the heir such estate as he is entitled to immediately upon the death of the intestate from whom the inheritance comes, without reference to any question of criminal responsibility of her heir for the death of the intestate or deviser. This rule finds its

inception in the theory that the public policy of a state is the law of that state as found in its Constitution, its statutory enactments, and its judicial records; and where the intestate law casts the estate of a deceased person upon designated persons, this is absolute and peremptory, and no rule of public policy can take it from the persons designated by statute and give it to others, even for the reason that the designated person killed the intestate, without a violation of the statute."

If in a statute there is neither ambiguity nor room for construction, the intention of the legislature must be held free from doubt. The question as to what the framers of the statute would have done had it been in their minds that a case like the one here under consideration would arise is not the point in dispute. The inquiry is as to what, in fact, they did enact, possibly without anticipating the existence of such facts. This should be determined, not by conjecture as to their meaning, but by the construction of the language used. *Shellenberger v. Ransom*, supra.

"Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of the words, especially in a penal act, in search of an intention which the words themselves did not suggest." Chief Justice Marshall in *United States v. Wiltberger*, 5 Wheat. 76, 5 L. ed. 37.

The statute of descent does not in any way, directly or indirectly, recognize this question. The wrong to be obviated and the remedy for it will guide the court in finding the intention of the legislature, but this rule of law offers no authority for adding an important exception or limitation to a statute which in clear language states a rule of public policy. *Deem v. Millikin*, supra. Knowledge of the principles of statutory interpretation must be imputed to the legislature. In plain language our statute of descent designates the persons who shall succeed to the estates of deceased intestates. That statute provides that in cases like this the son and brother shall take the estate. By what authority can this court say that although there is a son and brother he shall not take, but that relatives who, under the wording of the statute, have no right to these estates, shall take? It is impossible for the court to designate different persons to take such estate without a violation of the law. Under the rules for the interpretation of statutes the courts cannot read into a statute exceptions or limitations which depart from its plain meaning. *Carpenter's Estate*, 170 Pa. 203, 29 L.R.A. 145, L.R.A.1915C.

50 Am. St. Rep. 765, 32 Atl. 637. If there were any ambiguity in this statute, or if it were the province of the court to settle this question with respect to the descent of property, then the argument of counsel for plaintiffs in error would have weight. When the legislature has spoken in clear and unequivocal language the courts are bound thereby. *McAllister v. Fair*, 72 Kan. 533, 3 L.R.A.(N.S.) 726, 115 Am. St. Rep. 233, 84 Pac. 112, 7 Ann. Cas. 973 (1906).

This court has held that the rules of the common law as to descent and devise have been wholly superseded by our statutes on those subjects. *Kochersperger v. Drake*, 167 Ill. 122, 41 L.R.A. 446, 47 N. E. 321; *Collins v. Metropolitan L. Ins. Co.* supra; *North v. Graham*, 235 Ill. 178, 18 L.R.A.(N.S.) 624, 126 Am. St. Rep. 189, 85 N. E. 267; *Re Mulford*, 217 Ill. 242, 1 L.R.A.(N.S.) 341, 108 Am. St. Rep. 249, 75 N. E. 345, 3 Ann. Cas. 986. In the *Collins Case*, supra, while that case did not deal with the exact question here in point, this court quoted with approval the rules as to the proper construction of statutes on descent laid down in *Shellenberger v. Ransom*, 41 Neb. 631, 25 L.R.A. 564, 59 N. W. 935; *Owens v. Owens*, 100 N. C. 240, 6 S. E. 794; *Deem v. Millikin*, and *Carpenter's Estate*, supra. To construe this statute as contended by counsel for plaintiffs in error in this case would in practical effect overrule the reasoning in the cases just referred to. The courts have no concern with the wisdom of a statute unless it contravenes some constitutional provision.

Plaintiffs in error argue that the holdings of the courts heretofore cited, construing statutes similar to ours, are without force in this state because many of them are code states, where, they argue, the common law is not in force. Kansas adopted the common law of England by statute declaring that "The common law as modified by constitutional and statutory law, judicial decisions, and the conditions and wants of the people, shall remain in force in aid of the general statutes of this state." Gen. Stat. [Kan.] 1909, § 9850.

Nebraska has a similar statute. By the decisions of the courts of Ohio and Pennsylvania the same rule has been laid down.

Counsel for plaintiffs in error further contend that, if defendant in error obtained the title under the statute of descent, only the naked legal title passed to him; that he cannot hold it for his own benefit, but only as a trustee *ex maleficio* and in trust for the heirs equitably entitled thereto, as held by the court of appeals of New York (*Riggs v. Palmer*, 115 N. Y. 506, 5 L.R.A. 340, 12 Am. St. Rep. 819, 22 N. E. 188), basing the argument on like principles to those under

which devises or bequests procured by fraud have been held constructive trusts, and applied, in equity, to the benefit of the persons equitably entitled thereto. 3 Pom. Eq. Jur. § 1054; *Larmon v. Knight*, 140 Ill. 232, 33 Am. St. Rep. 229, 29 N. E. 1116, 30 N. E. 318; 2 *Tiffany Real Prop.* § 505a.

Counsel argue that, even though the grounds of public policy would not justify the construction of the statute of descent as contended for by them, public policy will forbid such a construction or enforcement of the statute as will encourage crime or give a reward for its performance. This doctrine was practically invoked in *Supreme Lodge, K. L. H. v. Menkhause*, supra; but there it was as to the construction of a contract, and not of a statute. This court has repeatedly held, in line with the general rule in other jurisdictions, that the public policy of a state must be sought in its Constitution, legislative enactments, and judicial decisions. *Zeigler v. Illinois Trust & Sav. Bank*, 245 Ill. 180, 28 L.R.A.(N.S.) 1112, 91 N. E. 1041, 19 Ann. Cas. 127. In *Collins v. Metropolitan L. Ins. Co.* supra, we said (p. 44): "When the sovereign power of the state has by written Constitution declared the public policy of the state on a particular subject, the legislative and judicial departments of the government must accept such declaration as final. When the legislature has declared by law the public policy of the state, the judicial department must remain silent, and if a modification or change in such policy is desired, the lawmaking-department must be applied to, and not the judiciary, whose function is to declare the law, but not to make it. Limiting their actions to questions left open by the Constitution and the statutes, courts may, no doubt, apply the principles of the common law to the requirements of the social, moral, and material conditions of the people of the state, and declare what rule of public policy seems best adapted to promote the peace, good order, and general welfare of the community; hence arises the rule that the decisions of its courts are to be investigated in determining the public policy of any government."

Statutes of descent and devise are declarations of public policy of this state on this subject. To hold *Ray Pfanschmidt*, obtained the naked legal title, but only held it as trustee, as contended by counsel for plaintiffs in error, would be to hold that by his crime he forfeited the right to inherit.

Section 11 of article 2 of the Constitution of 1870 provides: "All penalties shall be proportioned to the nature of the offense, and no conviction shall work corruption of blood or forfeiture of estate."

The Criminal Code, in fixing the punish-

ment for murder, states: "Whoever is guilty of murder shall suffer the punishment of death, or imprisonment in the penitentiary for his natural life, or for a term not less than fourteen years." *Hurd's Stat.* 1913, p. 835.

It does not state that the guilty person shall forfeit his right to inherit. In *Collins v. Metropolitan L. Ins. Co.* supra, it was said: (p. 42): These provisions are "clear and unequivocal declarations of the public policy of this state to the effect that no forfeiture of property rights shall follow conviction for crime."

Public policy does not demand this forfeiture, for the demands of public policy are satisfied by the proper execution of laws and the punishment of crime. If other punishment be required, the duty to so provide rests upon the legislative branch of the government. Whether this accords with natural right and justice is not for the courts to decide. The laws of descent do not depend upon the ideas of court or counsel as to justice or natural right, but depend entirely upon the provisions of the statute. *Re Kirby*, 162 Cal. 91, 39 L.R.A.(N.S.) 1088, 121 Pac. 370, Ann. Cas. 1913C, 928.

"The line between legislative and interpretation is clear, and for the courts to declare a forfeiture for crime where the legislature has remained silent is legislation by judicial tribunals—a subject with which they have no concern. *Holdom v. Ancient Order*, U. W. 159 Ill. 619, 31 L.R.A. 67, 50 Am. St. Rep. 183, 43 N. E. 772.

The decree of the Circuit Court must be affirmed.

Petition for rehearing denied December 2, 1914.

IOWA SUPREME COURT.

JOHN F. PFARR et al.

v.

STANDARD OIL COMPANY, Appt.

(— Iowa, —, 146 N. W. 851.)

Indemnity — retailer — negligence — neglect to inspect.

1. That a retailer of oil bearing the proper inspector's stamp does not have a rein-

Note. — Right of one liable for damages from defective article to recover over against vendor or manufacturer.

Damages from personal injuries.

As indicated in the title, this note is not concerned with the right of the person injured to recover from the manufacturer or vendor with whom he is not in privity of

spection when the quality of the oil is questioned by customers does not prevent his recovering from the manufacturer the amount he is compelled to pay a purchaser for injury due to an explosion of oil, although the statute provides that whoever sells such oil which has not been inspected and branded, and which emits combustible vapor at less than a certain temperature, shall be liable for all damages caused thereby.

Judgment — effect on stranger alleged to be primarily liable.

2. Notice to a manufacturer of illuminating oil to appear and defend an action by a consumer against a retailer for injuries due to an explosion of the oil will not render a judgment against the retailer binding on the manufacturer, if negligence was al-

leged against the retailer which might render him liable for the injury independent of any wrong on the part of the manufacturer.

(April 14, 1914.)

APPEAL by defendant from a judgment of the District Court for Crawford County sustaining plaintiffs' motion for a directed verdict in their favor in an action brought to recover the amount of a judgment rendered against them in an action for the recovery of damages for injuries caused by an explosion of oil sold by them to a consumer, and to recover expenses, including attorneys' fees, paid in defending such action. Reversed.

contract (on that question, see notes in 10 L.R.A.(N.S.) 923, and 48 L.R.A.(N.S., 213); but only with the right of a third person who is legally responsible for such injury, to recover over against the manufacturer or vendor.

For personal injuries as element of damages for breach of warranty, see note to *Birdsinger v. McCormick Harvesting Mach. Co.* 3 L.R.A.(N.S.) 1047.

In *Mowbray v. Merryweather* [1895] 2 Q. B. 640, 65 L. J. Q. B. N. S. 50, 14 Reports, 767, 73 L. T. N. S. 459, 44 Week. Rep. 49, 59 J. P. 804, it was held that one who had contracted to supply the necessary chains and other gearing for unloading a cargo was liable to the other parties to the contract in an action for breach of implied warranty, for the amount which the latter properly paid in settlement of the claim of a workman who was injured in consequence of a defective chain which broke while being used in the discharge of the cargo. To the same effect is *Alaska S. S. Co. v. Pacific Coast Gypsum Co.* 71 Wash. 359, 128 Pac. 654, which involved a similar state of facts.

It is said in *Mowbray v. Merryweather*, supra, that the workman himself could have recovered in the first instance against the defendant, and the fact that the plaintiffs relied on the warranty and did not examine the chain before using it, and thereby rendered themselves liable to the workman upon the ground of negligence, did not prevent them from recovering over against the defendant, as they owed no duty to the latter to examine the chain.

Following the decision in *Mowbray v. Merryweather*, supra, it was held in *Vogan v. Oulton*, 81 L. T. N. S. 435, 16 Times L. R. 37, that the damages which the employers were obliged to pay under a judgment recovered against them, for injuries to a workman from the breaking of a sack used in unloading a cargo of peas, were recoverable in an action for breach of warranty that the sacks were fit and proper to be used for such purpose, against a manufacturer of sacks, from whom the sacks were hired, who knew the purpose for which they were to be used.

In *Boston Woven Hose & Rubber Co. v. L.R.A.1915C.*

Kendall, 178 Mass. 235, 51 L.R.A. 781, 86 Am. St. Rep. 478, 59 N. E. 657, 9 Am. Neg. Rep. 496, it was held that the damages which an employer was obliged to pay for injuries to an employee caused by the explosion of a boiler which was warranted to withstand the pressure to which it was subjected were not too remote to be included in the recovery of damages against the manufacturer, who was also the seller, whether the false warranty be called a tort or a breach of contract, and that the employer's negligence toward his employees in failing to discover the defect in the boiler by inspection, though making him liable to the employees, will not preclude recovery against the manufacturer of the boiler, where the employer's negligence was induced by the warranty or representations of the manufacturer.

But in *Roughan v. Boston & L. Block Co.* 161 Mass. 24, 36 N. E. 461, it was held that no recovery could be had by a purchaser against his vendor for the amount which the former paid to his servant for an injury occasioned by the breaking of an appliance, where it appeared upon the facts that he was not liable to the servant for the injury, as the injury was caused by a flaw in the appliance which was of such a character that it could not be discovered by inspection, being hidden by other parts, and that the sum was paid without suit and without communication with defendant. The court said that the latter was not liable even if it be assumed that there was an express or implied warranty that the appliance in question was proper and suitable.

In *Merrimac Chemical Co. v. American Tool & Mach. Co.* 192 Mass. 211, 78 N. E. 419, it was held that the manufacturer was not liable to an employer for the amount he was obliged to pay on account of the death of an employee caused by the bursting of a machine driven at excessive speed, the driving pulley of which was less in diameter than designated in the blue print sent employer, where he was aware of the difference and knew that the result would be an excessive speed. It was said that, assuming the representation of the driving

Statement by Deemer, J.:

Action to recover from defendant the amount of a judgment rendered against plaintiffs, with interest, costs, expenses, and attorneys' fees, in an action brought against plaintiffs by one Lee J. Chapman, which judgment, with interest, etc., plaintiffs paid, and they seek indemnity from defendant because of its (defendant's) wrong in selling them a barrel of kerosene which was dangerous, in that it contained a large percentage of gasoline. Plaintiffs, after being sued, notified defendant to appear and defend the action, but it failed and neglected to

do so, and this action followed. The defendant denied that the oil, when sold to plaintiffs, was of a dangerous character, and averred that plaintiffs were held liable in the Chapman Case because of their own negligence, and not because of any negligence of the defendant. It also alleged that, if defendant was negligent at all, it was a joint tortfeasor with plaintiffs, and that plaintiffs are not entitled to indemnity. Other defenses were interposed, and, aside from some admissions, the effect of the answer was a general denial. On the issues joined, the case was tried to a jury, and,

pulley contained in the blue print constituted, under the circumstances, an implied undertaking on the part of defendant that the driving pulley would be of that size, in order to render the defendant liable the plaintiff must not only have relied upon the representation, but the circumstances must have been such as to warrant it in so doing, and exonerate it from negligence on its part. *Boston Woven Hose & Rubber Co. v. Kendall*, supra, distinguished.

Nashua Iron & Steel Co. v. Brush, 33 C. C. A. 456, 50 U. S. App. 461, 91 Fed. 213, sustains the right of a contractor who had been held liable to the owner for damages on account of the defective construction of a beam strap which he had placed upon an engine, to recover over against the manufacturer, who furnished the same upon given specifications: The principal discussion in the case, however, was as to the measure of damages and the effect of the judgment recovered against the contractor, the court reaching the conclusion that where one has a legal claim for indemnification and has, under fear of the consequences, made an adjustment or been compelled to yield to a judgment, under circumstances indicating good faith and a reasonable amount of resistance, the amount thus determined either by the adjustment or by the litigation becomes evidence of the amount of damages to be awarded against the defendant. As to the latter question, see note to *Grant v. Maslen*, 16 L.R.A. (N.S.) 911.

Damages from the inferiority of the goods.

As to right of purchaser to recover costs and other expenses incurred in defending a collateral action, as damages for breach of seller's warranty, see note to *John Deere Plow Co. v. Spatz*, 20 L.R.A. (N.S.) 492.

As to right of purchaser who has resold to recover for breach of warranty as to quantity or quality, where he has not actually made good to his vendees, see note to *Denton v. Fisher*, 3 L.R.A. (N.S.) 465.

As to right of purchaser of chattel to avail himself of breach of warranty made to the seller, see note to *Walrus Mfg. Co. v. McMeen*, 51 L.R.A. (N.S.) 1111.

It has been held that one who has been held liable upon a warranty in the sale of goods may recover from his vendor, who

gave a like warranty, for the loss sustained by the breach. *Hammond v. Bussey*, L. R. 20 Q. B. Div. 79, 57 L. J. Q. B. N. S. 58; *Pennell v. Woodburn*, 7 Car. & P. 117; *Lewis v. Peake*, 2 Marsh. 431, 7 Taunt. 153, 17 Revised Rep. 475; *Reggio v. Braggiotti*, 7 Cush. 166; *Whitaker v. McCormick*, 6 Mo. App. 114; *Lissberger v. Kellogg*, 78 N. J. L. 85, 73 Atl. 67; *Carleton v. Lombard, A. & Co.* 19 App. Div. 297, 46 N. Y. Supp. 120, affirmed without opinion in 162 N. Y. 628, 57 N. E. 1106; *Reese v. Miles*, 99 Tenn. 398, 41 S. W. 1065. To the same effect *Cleveland Linseed Oil Co. v. A. F. Buchanan & Sons*, 57 C. C. A. 498, 120 Fed. 906; *Bagley v. Cleveland Rolling Mill Co.* 22 Blatchf. 342, 21 Fed. 159 (*obiter*).

In *Randall v. Raper*, 4 Jur. N. S. 662, 27 L. J. Q. B. N. S. 266, 6 Week. Rep. 445, El. Bl. & El. 84, it was held in an action for breach of warranty in the sale of barley warranted to be of a certain quality, that plaintiff, who sold the barley with like warranty, was entitled to show the claims of his vendees against him for damages which they had sustained, although such claims had not been paid.

In *Lissberger v. Kellogg*, 78 N. J. L. 85, 73 Atl. 67, supra, it is held that where goods are sold by description for the purpose of resale, and do not answer the description, the vendee may recover, in addition to his anticipated profits, the damages which he is under obligation to pay to his subvendee, when those damages are such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract as the probable result of its breach.

In *S. F. Zaloom & Co. v. Craig*, 149 N. Y. Supp. 911, it was held that the plaintiff was not entitled to recover from his vendor the amount he had paid to the state on the compromise of a claim that he was selling as coffee an imitation not properly labeled, in violation of statute, where defendant gave notice that he was about to compromise the action and requested the plaintiff to notify him of any further action by the state, and it did not appear that there had been a warranty or representation by the defendant that the article of which complaint was made was sold by defendant to the plaintiff as coffee, either pure or adulterated.

A. L. R.

at the conclusion of the testimony, each party moved for a directed verdict. Defendant's motion was overruled, and plaintiffs' motion was sustained, and defendant appeals.

Messrs. Clinton L. Nourse and Carr, Carr, & Evans for appellant.

Messrs. Sims & Kuehnle, for appellees:

Plaintiffs and defendants, although wrongdoers, were not *in pari delicto* and therefore not equally culpable, because the accident was due to the negligence of the defendant in putting on the market a dangerous explosive, thus exposing the plaintiffs to liability in handling and selling the same, and the plaintiffs were negligent simply in failing to discover that the oil in question was a dangerous explosive before the sale to their customer.

Gray v. Boston Gaslight Co. 114 Mass. 149, 19 Am. Rep. 324; Boston Woven Hose & Rubber Co. v. Kendall, 178 Mass. 232, 51 L.R.A. 781, 86 Am. St. Rep. 478, 59 N. E. 657, 9 Am. Neg. Rep. 496; Churchill v. Holt, 127 Mass. 165, 34 Am. Rep. 355; Union Stock Yards Co. v. Chicago, B. & Q. R. Co. 196 U. S. 222, 49 L. ed. 455, 25 Sup. Ct. Rep. 226, 2 Ann. Cas. 525, 17 Am. Neg. Rep. 760; Washington Gaslight Co. v. District of Columbia, 161 U. S. 316, 40 L. ed. 712, 16 Sup. Ct. Rep. 564; Oceanic Steam Nav. Co. v. Campania Transatlantica Espanola, 144 N. Y. 663, 39 N. E. 360; Mayberry v. Northern P. R. Co. 100 Minn. 79, 12 L.R.A.(N.S.) 675, 110 N. W. 356, 10 Ann. Cas. 754; Culmer v. Wilson, 13 Utah, 129, 57 Am. St. Rep. 725, 44 Pac. 833; First Nat. Bank v. Avery Planter Co. 69 Neb. 329, 111 Am. St. Rep. 541, 95 N. W. 622; Central of Georgia R. Co. v. Macon R. & Light Co. 9 Ga. App. 628, 71 S. E. 1076; Austin Electric R. Co. v. Faust, — Tex. Civ. App. —, 133 S. W. 449; Pullman Co. v. Hoyle, 52 Tex. Civ. App. 534, 115 S. W. 315; Scott v. Curtis, 195 N. Y. 424, 40 L.R.A. (N.S.) 1147, 133 Am. St. Rep. 811, 88 N. E. 794; Fakes v. Price, 18 Okla. 413, 89 Pac. 1123; Vandiver v. Pollak, 107 Ala. 547, 54 Am. St. Rep. 118, 19 So. 180; Lowell v. Boston & L. R. Corp. 23 Pick. 24, 34 Am. Dec. 33.

The judgment in the Chapman Case is conclusive upon the defendant herein, because notice to appear and defend was given, and no fraud or collusion was shown between the parties.

Washington Gaslight Co. v. District of Columbia, 161 U. S. 316, 40 L. ed. 712, 16 Sup. Ct. Rep. 564; Oceanic Steam Nav. Co. v. Campania Transatlantica Espanola, 144 N. Y. 663, 39 N. E. 360; Strong v. Phenix Ins. Co. 62 Mo. 289, 21 Am. Rep. 422; Fitzpatrick v. Hoffman, 104 Mich. 228, 62 L.R.A. 1915C.

N. W. 349; Milford v. Holbrook, 9 Allen, 17, 85 Am. Dec. 737; Davis v. Smith, 79 Me. 351, 10 Atl. 56; Littleton v. Richardson, 34 N. H. 179, 66 Am. Dec. 760; Churchill v. Holt, 127 Mass. 165, 34 Am. Rep. 355; Consolidated Hand-Method Lasting Mach. Co. v. Bradley, 171 Mass. 127, 68 Am. St. Rep. 409, 50 N. E. 464; Missouri P. R. Co. v. Twiss, 35 Neb. 267, 37 Am. St. Rep. 437, 53 N. W. 76; Beh v. Bay, 127 Iowa, 248, 109 Am. St. Rep. 385, 103 N. W. 119; 23 Cyc. 1270 et seq., notes 61 and 1274; note 81.

In addition to the judgment with interest and costs, the defendant was also liable for all the necessary expenses, including attorneys' fees paid for defending in the Chapman Case.

Gray v. Boston Gaslight Co. 114 Mass. 149, 19 Am. Rep. 324; Oceanic Steam Nav. Co. v. Campania Transatlantica Espanola, 144 N. Y. 663, 39 N. E. 360; First Nat. Bank v. Avery Planter Co. 69 Neb. 329, 111 Am. St. Rep. 541, 95 N. W. 622; Maney v. Casserly, 134 Mich. 252, 96 N. W. 478; Russell v. Page, 147 Mass. 282, 17 N. E. 536; Vandiver v. Pollak, 107 Ala. 547, 54 Am. St. Rep. 118, 19 So. 180; Cooper v. Brown, 143 Iowa, 482, 136 Am. St. Rep. 768, 122 N. W. 144; Fakes v. Price, 18 Okla. 413, 89 Pac. 1123; Alexander v. Staley, 110 Iowa, 611, 81 N. W. 803; Meservey v. Snell, 94 Iowa, 222, 58 Am. St. Rep. 391, 62 N. W. 767; Harmont v. Sullivan, 128 Iowa, 318, 103 N. W. 951; McGaw v. Acker, M. & C. Co. 111 Md. 153, 134 Am. St. Rep. 592, 73 Atl. 731; Fowler v. Owen, 68 N. H. 270, 73 Am. St. Rep. 588, 39 Atl. 329; First Nat. Bank v. Williams, 62 Kan. 431, 63 Pac. 744; Westfield v. Mayo, 122 Mass. 100, 23 Am. Rep. 296; 2 Sutherland, Damages, pp. 1501, 1734.

Deemer, J., delivered the opinion of the court:

On April 26, 1907, plaintiff was a copartnership, doing business at the town of Pisgah, this state, and through its agent, one Strong, it purchased of defendant, through its traveling salesman, a barrel of kerosene oil (Perfection brand). The oil was shipped on that day in an ordinary wooden barrel from Sioux City, Iowa, via the Chicago & Northwestern Railway, and arrived at the point of destination on May 1st. One end of the barrel bore the state inspector's stamp stenciled in the wood, and reading: "Perfection Oil. 2 flash tests 106 degrees. Apr. 24th, 1907. C. W. Kemp, Inspector. Filed Apr. 24, 1907."

On the day of arrival the oil was taken from the railway station to plaintiffs' store, and unloaded at the back door in the alley, where it remained over night. Thereafter

it was taken inside the building, and when the barrel then in use was emptied (which was within five or six days), the bung of the new barrel was knocked out, the barrel placed on its side in a little hole in the dirt floor of the shed where the oil was kept, and a pump which had been used in other barrels was inserted for the purpose of drawing the oil. The bung was about 3 inches in diameter, and the pump not more than 2 inches. In the same shed plaintiffs kept a gasoline tank, which was to the right of and back of the kerosene barrel, about 8 feet. Separate measures were kept for the oil and gasoline. There were two regular employees about the store, and occasionally another helped them, and all drew oil from the barrel in question by means of the pump, which had been inserted through the bung-hole.

Two thirds of the contents of the barrel had been sold at the time when the accident occurred for which the Chapman suit was brought; and oil was sold to various persons who used it for illuminating and other purposes, without any ill effects. Of the many customers who purchased oil prior to the time of the sale to Mrs. Chapman, of which complaint is made, which was on May 25, 1907, but one had made any complaint or, so far as known, had noticed anything wrong with the oil. That complaint was from a Mrs. Bryson, who stated that there was something wrong with the oil. Strong, the plaintiffs' agent, then made a superficial test of some of the oil taken from the barrel, and did not find anything wrong with it. The complaint came to Strong from ten days to two weeks before the accident.

On May 25, 1907, Mrs. Chapman came to plaintiffs' store for a gallon of oil, and Strong, the agent, sold it to her, drawing it, as he said, from the barrel in question. On the evening of the day on which the oil was purchased, Mr. Chapman assisted his wife in starting a fire in a cook stove. He put in some cobs, and his wife poured on some of the oil she had purchased from plaintiffs, and then put the can down on the floor of the kitchen. He took a match, struck it, and applied the match to the cobs and oil, causing an explosion which resulted in the death of Mrs. Chapman and three children, and severe injuries to the husband. An investigation was made immediately as to the character of the oil remaining in the barrel, and also of oil that had previously been sold from the barrel to other customers, and it is claimed that, as a result thereof, the oil was found to contain something like 20 per cent of gasoline, and that it did not test more than 67° Fahrenheit. Action was then brought by Chapman.

man, the husband, against the plaintiffs herein, to recover the damages sustained by him in person, and for the loss of the service and society of his wife and the other members of the family.

Notice was given the defendant of this suit, and it was requested to appear and make defense to the action. This the present defendant failed to do, and consequently plaintiffs were compelled to make defense, and, at the end of several trials, the case having twice reached this court, judgment was rendered for Chapman in the sum of \$1,084, which was affirmed in this court. Plaintiffs paid the judgment, with interest, and also attorneys' fees, expenses, costs, etc., amounting to \$1,725.92, and thereupon brought this action to recover from defendant the amount so paid. The defenses to the action have already been sufficiently noticed.

In the Chapman petition it was, among other things, alleged that "the oil was sold and delivered to plaintiff's wife as coal oil; it was 21 per cent gasoline, and at the time, and about one week before said sale to plaintiff's wife by defendants' agent, A. C. Strong, he was notified that the oil contained gasoline and was not right, and, notwithstanding said notice and knowledge on the part of A. C. Strong, agent of defendants, he failed and neglected to have the oil inspected or examined by an expert oil inspector, which, if done, would have disclosed the dangerous and explosive character of said oil, and shown that it was 21 per cent gasoline, and, by reason of said negligence of said defendants and their agent, Strong, in selling and delivering a dangerous explosive which plaintiff, his wife and children, had no knowledge of at the time, but, by the use of reasonable care, the defendants would have discovered, plaintiff charges that the injuries inflicted were so caused by defendants' negligence as aforesaid, and plaintiff has sustained damages as follows."

Plaintiffs herein, defendants to that suit, filed a general denial, and the case was tried to a jury upon the issues so made and framed; the theory thereof appearing from the following instruction, given by the trial court: "(6) The specific allegation of negligence made in the petition is that the agent of the defendants, after notice that the oil contained gasoline, and was not right, failed and neglected to have the oil inspected or examined by an expert oil inspector, which, if done, would have disclosed the dangerous explosive character of said oil. On this point, as Strong was the agent of the defendants, carrying on the store in question, his negligence, if he was negligent, would be the negligence of the defendants. It was his duty to use reasonable and ordinary care not to sell oil which did not

conform to the test required by law. In the first instance, and until he had knowledge or notice to the contrary, or such notice as would put a reasonably prudent man upon inquiry which would lead to such knowledge, he had the right to rely upon the inspector's stamp or brand upon the barrel from which the oil sold to plaintiff's wife was taken. If, however, such information came to him prior to the sale of the oil to plaintiff's wife as would put an ordinary prudent person upon inquiry and investigation that would have developed the fact that the oil in question was not up to the required test, then he was negligent in not making such investigation or having it made before making further sales of the oil. There is no requirement that the seller of oil provide himself with apparatus for making the closed test such as the statute requires to be made by the inspector, and there is no specific requirement of law that the seller shall, under any circumstances, call upon a state inspector to determine the character of oil which has been purchased in a barrel properly branded. It was the duty of the said agent, Strong, on receiving information, if he did receive it, such as would lead a reasonably prudent man to think that the oil which he was selling out of said barrel did not correspond to the brand on the barrel, to himself make or cause to be made by some competent person such inspection as would reasonably determine whether the oil which he was selling was, in fact, dangerous; that is, of a lower standard than that required by statute."

In response to interrogatories, the jury in that case also made the following special findings:

"Int. 1: Would the information received by the daughter of Mr. Strong over the telephone from Mr. Booth lead an ordinarily careful and prudent person to believe that the oil in the barrel in question did not correspond to that indicated by the stamp of the state oil inspector? Ans. 1: Yes."

"Int. 5: Did Mr. Strong, at the time of the sale of the oil in question to Mrs. Chapman, have reason to believe, as an ordinarily careful and prudent person, that a careful and proper use of the oil would result in injury or damage to anyone? Ans. 5: Yes."

"Int. 6: Was the test of the oil in question made by Mr. Strong such a test as is usually made by an ordinarily careful and prudent person? Ans. 6: No."

"Int. 7: Was there anything in the test of the oil in question as made by Mr. Strong that would have suggested to an ordinarily careful and prudent person any necessity for a still further or different test of the oil? Ans. 7: Yes."

L.R.A.1915C.

"Int. 8: Was there anything in the test of the oil in question as made by Mr. Strong that disclosed the presence of gasoline in the oil? Ans. 8: No."

A general verdict was also returned for plaintiff, Chapman, in the sum of \$1,084.15.

I. A verdict for plaintiffs was directed at the close of the testimony for the full amount of their claim, less two items of expense in another case; the full amount of the judgment, including interest, being \$3,173.33. This appeal challenges the right of plaintiffs to recover at all; the contention being that, at most, plaintiffs and defendant were joint tortfeasors, and, each being guilty of an actionable wrong, neither may recover from the other any indemnity or enforce contribution. Again, it is said that in no event should a verdict have been directed for plaintiffs, for the reasons: (a) That the testimony shows no negligence on defendant's part, and no violation of any statute of the state; (b) that, although defendant was served with notice to appear and defend against the Chapman suit, no specific charges of negligence were pleaded in the petition which it was necessary or proper for it to defend against, and that the verdict and judgment recovered by Chapman were and are conclusive only as to the fact of rendition, and the amount and the cause of action on which they were rendered, but did not determine the question of defendant's negligence or of its liability over to plaintiffs, nor preclude it from setting up any defense which it could not have interposed to the original Chapman suit. In other words, it is contended that, as no negligence was charged against it in the Chapman Case, the judgment in that case is not conclusive on the question of its negligence; that this was a matter for plaintiffs in the case to prove; that they failed to do so; and that a verdict should have been directed for it on its motion, and, in any event, that the trial court was in error in directing a verdict against it.

There are some inconsistencies in these claims. The first proposition that there can be no contribution between wrongdoers, or that one may not recover indemnity from another, proceeds upon the theory that both were in the wrong, and, in considering this problem, it must be assumed that there is sufficient proof to show that defendant was negligent in selling the oil to the plaintiffs, or that it violated some statute in so doing. Of course, an appellant need not necessarily be consistent in his claims, and in one sense, perhaps, there is no inconsistency.

II. We are brought, at the outset of the case, to this fundamental proposition: May one wrongdoer recover indemnity from another, or may he enforce contributions,

from him? The general rule of course is that he may not. But an examination of the cases discloses the fact that there are many exceptions to this rule. A statute of this state, in force when the sale of the oil was made, provided, in substance, that whoever sold for illuminating purposes any product of petroleum that had not been inspected and branded, and which emitted a combustible vapor at a temperature of less than 105° Fahrenheit, upon a closed test, should be liable for all damages caused thereby. See § 2508 of the Code.

Now, in *Gray v. Boston Gaslight Co.* 114 Mass. 149, 19 Am. Rep. 324, the supreme court of Massachusetts said: "The second objection taken by the defendant is that the injury was caused by the negligence of the plaintiff and defendant; that they were joint tort feors; and that there cannot be indemnity or contribution between them. When two parties, acting together, commit an illegal or wrongful act, the party who is held responsible in damages for the act cannot have indemnity or contribution from the other, because both are equally culpable, or *particeps criminis*, and the damage results from their joint offense. This rule does not apply when one does the act or creates the nuisance, and the other does not join therein, but is thereby exposed to liability and suffers damage. He may recover from the party whose wrongful act has thus exposed him. In such case the parties are not *in pari delicto* as to each other, though as to third persons either may be held liable."

Again, in *Lowell v. Boston & L. R. Corp.* 23 Pick. 32, 34 Am. Dec. 37, the same court said: "Our law, however, does not in every case disallow an action by one wrongdoer against another, to recover damages incurred in consequence of their joint offense. The rule is, *in pari delicto potior est conditio defendentis*. If the parties are not equally criminal, the principal delinquent may be held responsible to his co-delinquent for damages incurred by their joint offense. In respect to offenses in which is involved any moral delinquency or turpitude, all parties are deemed equally guilty, and courts will not inquire into their relative guilt. But, where the offense is merely *malum prohibitum*, and is in no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, although both parties are wrongdoers. This distinction was very fully considered in a case recently decided by this court. *White v. Franklin Bank*, 22 Pick. 181. In that case the plaintiff had deposited in the bank a large sum of money payable at a future day, in violation of a

provision in the Revised Statutes, which prohibits any such deposit or loan. Both parties were culpable, but, as the defendants were deemed the principal offenders, it was held that the plaintiff was entitled to recover back his deposit." See also to the same effect, *Boston Woven Hose & Rubber Co. v. Kendall*, 178 Mass. 232, 51 L.R.A. 781, 86 Am. St. Rep. 478, 59 N. E. 657, 9 Am. Neg. Rep. 496; *Churchill v. Holt*, 131 Mass. 67, 41 Am. Rep. 191.

This matter was thoroughly considered in *Union Stockyards Co. v. Chicago, B. & Q. R. Co.* 196 U. S. 222, 49 L. ed. 455, 25 Sup. Ct. Rep. 227, 2 Ann. Cas. 525, 17 Am. Neg. Rep. 760, and that court, speaking through Justice Day, among other things, said: "Coming to the very question to be determined here, the general principle of law is well settled that one of several wrongdoers cannot recover against another wrongdoer, although he may have been compelled to pay all the damages for the wrong done. In many instances, however, cases have been taken out of this general rule, and it has been held inoperative, in order that the ultimate loss may be visited upon the principal wrongdoer, who is made to respond for all the damages, where one less culpable, although legally liable to third persons, may escape the payment of damages assessed against him by putting the ultimate loss upon the one principally responsible for the injury done. These cases have, perhaps, their principal illustration in that class wherein municipalities have been held responsible for injuries to persons lawfully using the streets in a city, because of defects in the streets or sidewalks caused by the negligence or active fault of a property owner. In such cases, where the municipality has been called upon to respond because of its legal duty to keep public highways open and free from nuisances, a recovery over has been permitted for indemnity against the property owner, the principal wrongdoer, whose negligence was the real cause of the injury. Of this class of cases is *Washington Gaslight Co. v. District of Columbia*, 161 U. S. 316, 40 L. ed. 712, 16 Sup. Ct. Rep.-564, in which a resident of the city of Washington had been injured by an open gas box placed and maintained on the sidewalk by the gas company for its benefit. The district was sued for damages, and, after notice to the gas company to appear and defend, damages were awarded against the district, and it was held that there might be a recovery by the district against the gas company for the amount of damages which the former had been compelled to pay. Many of the cases were reviewed in the opinion of the court, and the general

principle was recognized that, notwithstanding the negligence of one, for which he has been held to respond, he may recover against the principal delinquent, where the offense did not involve moral turpitude, in which case there could be no recovery, but was merely *malum prohibitum*, and the law would inquire into the real delinquency of the parties, and place the ultimate liability upon him whose fault had been the primary cause of the injury. . . . The case then stands in this wise: The railroad company and the terminal company have been guilty of a like neglect of duty in failing to properly inspect the car before putting it in use by those who might be injured thereby. We do not perceive that, because the duty of inspection was first required from the railroad company, the case is thereby brought within the class which holds the one primarily responsible as the real cause of the injury, liable to another less culpable, who may have been held to respond for damages for the injury inflicted. It is not like the case of the one who creates a nuisance in the public streets; or who furnishes a defective dock; or the case of the gas company, where it created the condition of unsafety by its own wrongful act; or the case of the defective boiler, which blew out because it would not stand the pressure warranted by the manufacturer. In all these cases the wrongful act of the one held finally liable created the unsafe or dangerous condition from which the injury resulted. The principal and moving cause, resulting in the injury sustained, was the act of the first wrongdoer, and the other has been held liable to third persons for failing to discover or correct the defect caused by the positive act of the other."

Assuming, then, that defendant might have been made liable, it must be on the theory that it sold plaintiffs the oil which did the injury, and that it was not of the kind and test required by statute. If this were the case, the right of plaintiffs to recover indemnity would, as we think, have been established. Appellant's first proposition is untenable, under all the cases to which our attention has been called. It is not like one where each owed the duty of inspection. That obligation was primarily upon the defendant, and it was not only required to make the necessary tests, but to have the state inspector do so, and to put the necessary brands upon the barrel in which the oil was sold.

III. The other question, to wit, the effect of the judgment in the Chapman Case upon this defendant, in view of the fact that it was given notice of the suit and requested to defend, is much more difficult of decision. The object of the notice was,

no doubt, for the purpose of giving whatever judgment might be obtained conclusive effect, and to relieve the defendants therein, plaintiffs here, from the necessity of making any further proofs in their suit for indemnity. Failure to give the notice in no manner relieved the responsible party from his obligation, if there was any; but, if not given, the party primarily responsible would have the right to contest its liability and to defeat recovery, although the party bringing the suit for indemnity may have been compelled to pay.

The first proposition to be considered here then is: Could the present defendant have appeared in the Chapman suit and succeeded in defeating it by proving that it was in no manner to blame; that the oil which it sold had been tested and stamped, and was of the required grade when it sold the same to the plaintiffs herein? Such a defense might or might not have been available, depending, of course, upon circumstances shown and relied upon by the plaintiff in that case. It is apparent that it might have been wholly blameless and still Chapman would have been entitled to recover because of the negligence of the defendants in that suit, or their agents. Indeed, it appears from the record that recovery was had because of the negligence of defendants' agents in not testing the oil after knowledge that some of it was dangerous, before selling the same to Mrs. Chapman. Whether or not it was dangerous and under test when sold by defendant to plaintiffs was a collateral issue of more or less importance, yet still not controlling.

Again, the only testimony which in any way tended to show that the oil was not of the test required, and that it contained gasoline when sold by defendant to plaintiffs, was that some three weeks after plaintiffs received it, put it in their shed, opened the bung hole and placed a pump therein, it did not answer the required tests, although it was properly inspected and branded by a state official but a few days before it was sold. Against any presumption that the oil was dangerous when sold by defendant, arising from the fact that some two or three weeks after delivery to the plaintiffs some of it was found to be under test, there is also a presumption that the state inspector, who was occupying an official station, did his duty; and that, when tested and branded by him, and sold to the plaintiffs, the oil met the requirements of the law. The rules upon this subject seem to be fairly settled, as will appear from the following cases:

In *Littleton v. Richardson*, 34 N. H. 188, 66 Am. Dec. 760, the supreme court of New Hampshire said: "In actions of this kind several points must be established by the

plaintiff, as: 1. The contract or relation upon which the liability over depends. 2. An action for a cause for which the defendant is so liable under that contract or relation. 3. A notice to the defendant to take upon him the defense of the suit. 4. A recovery of damages, of which the record is conclusive evidence when the other points are established. No presumption is allowed as to either of these points. Each is to be proved. Neither of these points is admitted here. It was admitted that the defendant placed in the highway the stones referred to in Shute's declaration against Littleton, and a notice to Richardson to defend the suit brought by Shute against the town was proved, and a recovery by Shute against the town for the causes set forth in his declaration, among which were the stones placed in the highway by the defendant. The liability over of Richardson depended upon the points that the injury sustained by Shute was occasioned in part or entirely . . . by the stones placed by him in the highway, and that the recovery by him against the town was upon the same account. Of these points, the only evidence offered was the judgment itself. The admission as to placing the stones in the highway did not reach these points. There might be cases where the judgment would be evidence of these points, because it would be apparent upon the face of the record that the recovery was had for the same cause alleged in the action against the party ultimately responsible. But it would rarely happen that some connecting evidence would not be required to show the identity of the cause of action upon which the recovery was had with that in which the recovery over is claimed. If, however, the declaration in that case had so stated the cause of action that the court could clearly see that the cause there stated was identical with the cause stated in the present declaration, and that the recovery could have been for no other cause, the judgment would be competent and conclusive evidence of this point. But if the declarations leave that matter in any doubt, that deficiency must first be supplied by evidence *aliunde* before the judgment can be admitted as evidence of anything beyond its own rendition and tenor. . . . From these views, it follows that, to render the record in Shute's Case evidence generally in this action, it should have been shown that the recovery in that case was upon the same ground which is alleged as the cause of action in this case, and consequently that the ruling of the court below, that the record alone was conclusive evidence of all the facts required to support the action after it had been

L.R.A.1915C.

shown that the defendant placed the stones in the highway, cannot be sustained."

In *Scott v. Curtis*, 195 N. Y. 424, 40 L.R.A.(N.S.) 1147, 133 Am. St. Rep. 811, 88 N. E. 794, the supreme court of New York, in speaking of this question, said: "The plaintiff in this action cannot recover, unless he shows that the active negligence and wrong which caused the injury to the person falling into the hole was the negligence and wrong of the defendants. As we have stated, it does not appear from the record how the accident occurred. If it occurred by the negligent and careless manner in which the defendants temporarily covered or guarded the coalhole, it may be assumed that this action will lie. If, however, the injuries occurred by reason of the cover of the hole breaking, without any negligence or carelessness on the part of the defendants, or by reason of some carelessness of the plaintiff in this action, or by reason of some defect in the construction of the cover to such coalhole wholly independent of the temporary use thereof, the defendants are not liable. It may be assumed, for the purpose of this opinion, that, notwithstanding the plaintiff's admission that he was liable in the action brought by the person who fell into the coalhole, nevertheless the judgment roll establishes, as against the defendants herein, that the plaintiff therein was injured by reason of negligence in connection with the covering of said hole, and that no negligence of hers contributed to such injury, and that it also establishes the amount of her damages; but it was also incumbent upon the plaintiff to give evidence in addition to the judgment roll in that action to show that the accident occurred by negligence for which the defendants were primarily liable. This he wholly failed to do, and the judgment must therefore be reversed."

In *Central of Georgia R. Co. v. Macon R. & Light Co.* 9 Ga. App. 628, 71 S. E. 1076, the court of appeals of Georgia said: "Where one of the parties to a pending action claims that a third person is liable over to him in the event he loses in the suit, and vouches that person by notifying him of the pendency of the suit and giving him opportunity to appear therein, the judgment in that suit is conclusive on the person vouched as to the correctness of the judgment, but is not conclusive of the fact that there is such a relationship between the person vouched and the person vouching as that a right of action over exists."

See also to the same effect, *Consolidated Hand-Method Lasting Mach. Co. v. Bradley*, 171 Mass. 127, 68 Am. St. Rep. 409, 50 N. E. 464; *Missouri P. R. Co. v. Twiss*, 35

Neb. 267, 37 Am. St. Rep. 437, 53 N. W. 76.

These cases, and others which might be cited, seem to hold to the rule that one not a party to a suit, but notified to appear and defend, must do so, if the negligence charged is such that, if proved, would make it liable for the wrong done; but that it need not do so if the defendant in the suit would be liable for his own negligence, independent of any wrong on the part of the person so notified. The party injured may select his own ground for recovery, and sue one alone for his independent negligence, and if he does so, and the defendant seeks to hold a stranger by giving notice of the suit, and offering him an opportunity to defend, the case must be such that his defense, if established, would be an end to the suit. Save as he might be permitted to defeat the action by proof of his freedom from negligence, he would be held liable to another without an opportunity to defend himself. If, in response to the notice, the defendant had appeared and offered to defend, it could not interpose any defense not personal to itself, and, by putting in such a defense, it might have tendered a false issue, in so far as the original case was concerned, thus complicating the issues and delaying the trial.

The record made in the Chapman Case and the special findings of the jury conclusively show the grounds of recovery in so far as plaintiffs herein are concerned. *Central of Georgia R. Co. v. Macon R. & Light Co. supra*; *Chicago & N. W. R. Co. v. Northern Line Packet Co.* 70 Ill. 217.

We do not mean by this pronouncement to hold that the defendant's motion for a directed verdict should have been sustained. On the theory on which the case was tried, the matter should have gone to the jury on the testimony adduced. It may be that, instead of introducing the record upon the former trial, plaintiffs should have produced affirmative testimony, either in the form of depositions or their equivalent, or oral testimony showing or tending to show that the oil, when delivered to them by the defendant, was not of the kind required by statute, and had the jury pass upon that question as one of fact. No proper objection was made to the testimony as offered on the present trial, because the witnesses were not present; and, accepting this as true, we think there was enough to take the case to the jury. This may be supplemented by testimony on another trial, showing, circumstantially or otherwise, that the oil when delivered to the plaintiffs was not of the kind required by statute.

No other points are made for appellant which require consideration at this time.
L.R.A.1916C.

It follows, however, that the judgment must be, and it is, reversed.

Ladd, Ch. J., and Gaynor and Withrow, JJ., concur.

Petition for rehearing denied.

MARYLAND COURT OF APPEALS.

ZACHARIAH R. DUVALL, Appt.,

v.

CHARLES D. RIDOUT.

(124 Md. 193, 92 Atl. 209.)

Easement — convenient way over land of grantor.

1. One purchasing the portion of a farm containing the buildings has no right to the continued use of a plainly visible way from the buildings to the highway over land retained by the grantor, where it is not necessary, although it is more convenient than another route would be, and the deed included all and every the rights, ways, privileges, appurtenances, and advantages to the same belonging or in anywise appertaining.

Same — extent of relief.

2. A grantee claiming an absolute right to a way across remaining property of the grantor cannot be given the benefit of a right which is admitted by the grantor, to the use of the way so long as the grantee retains possession of the granted property, but which is disclaimed and disavowed by the grantee.

Injunction — against use of way — remedy at law.

3. The remedy at law is not so adequate as to prevent the issuance of an injunction to prevent the attempted use of a way across farm property, which is not needed by the owner of the property, but divides the tract, and may interfere with the owner's plans for its use and development.

(November 28, 1914.)

Note. — Easements created by severance of tract of land with apparent benefit existing.

Scope.

This note is supplemental to the note to *Rollo v. Nelson*, 26 L.R.A.(N.S.) 315, where the earlier cases are collected.

For devise as carrying visible easement, see the note to *Gorton-Pew Fisheries Co. v. Tolman*, 38 L.R.A.(N.S.) 882.

For implication from necessity of easement other than right of way, see the note to *Miller v. Hoeschler*, 8 L.R.A.(N.S.) 327.

For way of necessity where other possible modes of access exist, see the notes to *Corea v. Higuera*, 17 L.R.A.(N.S.) 1018, and to *Doten v. Bartlett*, 32 L.R.A.(N.S.) 1075.

APPEAL by defendant from a decree of the Circuit Court for Anne Arundel County enjoining him from using a certain roadway extending from his farm through plaintiff's adjoining property to a public highway. Affirmed.

The facts are stated in the opinion.

Mr. Robert Moss, for appellant:

The injury complained of by the plaintiff is not irreparable, so as to demand the intervention of a court of equity by way of injunction.

Bartlett v. Moyers, 88 Md. 720, 42 Atl. 204; Amelung v. Seekamp, 9 Gill & J. 468; Whalen v. Dalashmutt, 59 Md. 253; Hamil-

ton v. Ely, 4 Gill, 38; Green v. Keen, 4 Md. 106; Shipley v. Caples, 17 Md. 182; Fort v. Groves, 29 Md. 193; Lanahan v. Gahan, 37 Md. 107; Chesapeake & O. Canal Co. v. Young, 3 Md. 490; Roman v. Strauss, 10 Md. 97; Baugher v. Crane, 27 Md. 39; Bernei v. Sappington, 102 Md. 185, 62 Atl. 365.

Ways may be so improved and well defined as to bring them within the class of easements or quasi easements known as continuous and apparent, and hence pass by implied grants.

Eliason v. Grove, 85 Md. 227, 36 Atl. 844; Burns v. Gallagher, 62 Md. 462; Mitchell v. Seipel, 53 Md. 257, 36 Am. Rep. 404; Baker

For right of purchaser of property according to plat, to easements in streets or ways indicated thereon other than those on which his property abuts, see the note to Danielson v. Sykes, 28 L.R.A.(N.S.) 1024.

For implied easement by exhibiting unfiled plat to intending purchaser, see the note to Pyper v. Whitman, 35 L.R.A.(N.S.) 938.

The reader will find in the notes in 8 L.R.A.(N.S.) 327, and 26 L.R.A.(N.S.) 315, elaborate discussions of the rules and principles of the vexed subject of easements by implication, and will see, from those discussions and the cases referred to, the inherent difficulty of the subject, and the confused, shifting, and unsettled state of the law in regard to it. It may be that an improvement might result from some direct statutory regulation. The reader will notice, *infra*, English and Canadian cases resting to some extent on statutes of an indirect or general character.

As the element of necessity sometimes enters into the question as to the existence of a visible easement, it is not always easy to distinguish the cases that involve that question from those which merely involve the question as to easements of necessity. However, it is the intention to include all cases in which the claim of easement was planted upon the ground of the existence at the time of the severance of an apparent benefit, even though in passing upon that claim the court may have considered the question of necessity. But where the claim of an easement is planted solely upon the ground of necessity, without any claim upon the ground of existing apparent benefit, the case is excluded.

The general rule.

Supplementing note in 26 L.R.A.(N.S.) 316.

In *Feitler v. Dobbins*, 263 Ill. 78, 104 N. E. 1088, the court laid down the principle that "the law applicable to the situation here is that, where the owner of entire premises arranges for ways, light, etc., for the benefit of the different parts or portions of the premises, and afterwards the premises are severed and the title vested in separate owners, each grant will carry with it, with-

out being specifically mentioned, the rights and burdens and advantages imposed by the owner prior to such severance. The doctrine is founded upon the principle that the conveyance of a thing imports a grant of it as it actually exists at the time the conveyance is made, unless a contrary intention is manifested in the grant."

In *Kane v. Templin*, 158 Iowa, 24, 138 N. W. 901, the court said: "It must be conceded that easements by implication are to be strictly limited to rights which in the very nature of the case must be presumed to have been in the minds of the parties concerned, appurtenant on the one hand and servient on the other; and the necessity of the use for the convenient enjoyment of the premises to which the easement is claimed as appurtenant is a material consideration in determining whether such easement is to be implied. Nevertheless, an easement by implication is a different thing from an easement by necessity, as the latter term is properly used. . . . It must be conceded, also, that in some courts easements by implication have been limited to those existing strictly by necessity. . . . Much may be said in behalf of this rule; but we think the other rule, which recognizes an implied easement as arising out of the method of construction and use of the building, portions of which subsequently pass to different purchasers, has been adopted by this court in the cases already cited."

—application—to implied grants.

As will be seen, most of the cases in this note are cases of implied grant as distinguished from implied reservations.

—to implied reservations.

For the question of easements by implied reservations, see the following cases: *Brown v. Fuller and National Trust Co. v. Western Trust Co.* *infra*, "Apparent and obvious;" *Hoffman v. Shoemaker*; *Hill v. Bernheimer*; *Lathrop v. Lytle*; and *Howley v. Chaffe*, — *infra*, "Necessary;" *Taylor v. Wright and Runge v. Koch*, *infra*, "Buildings—encroachments;" *Casey v. Canning*, *infra*, "Use of building."

v. Rice, 56 Ohio St. 463, 47 N. E. 653; Phillips v. Phillips, 48 Pa. 178, 86 Am. Dec. 577; Walker v. Clifford, 128 Ala. 67, 86 Am. St. Rep. 74, 29 So. 588; O'Daniel v. Baxter, 112 Ky. 334, 65 S. W. 805.

Mr. James W. Owens, for appellee:

No court shall refuse to issue a mandamus or injunction on the mere ground that the party asking for the same has an adequate remedy in damages, unless the party against whom the same is asked shall show to the court's satisfaction that he has property from which the damages can be made, or shall give a bond.

Frederick County Nat. Bank v. Shafer, 87

Md. 58, 39 Atl. 320; Conner v. Groh, 90 Md. 684, 45 Atl. 1024; Oberheim v. Reeside, 116 Md. 265, 81 Atl. 590; Bartlett v. Moyers, 88 Md. 720, 42 Atl. 204; Oliver v. Hook, 47 Md. 307.

Urner, J., delivered the opinion of the court:

By the decree from which this appeal is taken the appellant was perpetually enjoined from using a certain roadway extending from his farm through the adjoining property of the appellee to the public highway. It is alleged in the bill of complaint and shown by the proof that the contiguous

Requisites—in general.

For a discussion of this subject, see the earlier note in 26 L.R.A. (N.S.) 324, 325.

—use at time of grant.

In *Re New York*, 135 App. Div. 520, 120 N. Y. Supp. 354, it was held that it was not essential that the incidental use of the property retained, for the benefit of the property conveyed, should be actually exercised by the grantor at the time of the grant. It is sufficient that it is open and visible and reasonably necessary to the full enjoyment of the demised premises; so where the grantor sold a plot of land on both sides of a street which had been laid out on the city map, but never actually opened, although there were sewer pipes in it, and the conveyance retained the right of the grantor in the street, it was held that the conveyance carried an easement to use the street for street purposes. See also in this connection *Stone v. Burkhead*, infra, "acquisition by use and severance."

—apparent and obvious.

Supplementing note in 26 L.R.A. (N.S.) 326.

As the theory of these easements rests upon intention, where the sale is made without notice or knowledge of an easement, there is no easement by intention; and if any easement is upheld in such a case it must rest upon necessity.

Thus, where at the time of the partition between heirs there was a sewer running from a house on one parcel on one street, under a house on another parcel on another street, to the sewer on such other street, and there was no evidence that the heirs knew anything about this sewer, it was held that a buried and concealed easement such as this could pass only by express grant. *Robinson v. Hillman*, 36 App. D. C. 241.

An easement by reservation was denied in the absence of necessity in a case where the grantee had no actual knowledge of it. *Brown v. Fuller*, 165 Mich. 162, 33 L.R.A. (N.S.) 459, 130 N. W. 621, Ann. Cas. 1912C, 853. The court, however, stated that knowledge by the grantee would not have altered the case, as the grantor knew L.R.A.1915C.

that the property was purchased for a use which would destroy the desired easement, being also of the opinion that in any case necessity was a requisite to an easement by reservation. In that case it was held that a grant with full covenant of warranty of the rear of a lot, for the construction of a building, terminated the right of the grantor to drain a building standing on the front of the lot to the sewer in the alley at the rear, where the sewer connection had been underground, and the grantee had no actual knowledge thereof, and the roof drainage had been across a low building on the lot, which the grantor knew was to be torn down, and it was not impossible to secure drainage in other directions, although it would be expensive to do so.

In this connection may be cited the case of the sale of a lot within the limits of which were underground foundations of a building on adjoining property of the grantor. In *National Trust Co. v. Western Trust Co. (Sask.)* 4 D. L. R. 455, it was held where the owner of property consisting of several numbered lots built a building on one of the lots, the foundations of which extended underground within the limit of another of the lots, and sold such other lot to a purchaser without reference to these foundations, such purchaser knowing nothing about them, that these foundations belonged to the purchaser, and that he could remove them, he having taken a certificate of title under the land titles act without any reservation, and therefore (according to § 65 of said act) he held the same absolutely free from "all encumbrances, liens, estates, or interests whatsoever," the act further providing (§ 71) that when any right of way or other easement is intended to be created or transferred, the owner shall execute a transfer describing the land and containing an accurate description of the estate, interest, or easement intended to be transferred or created, and that (§ 73) whenever any easement is created for the purpose of being annexed to, or used and enjoyed together with, other land, the registrar shall make a memorandum of the instrument creating such easement upon the certificate of title of such other land. The court stated that it was not necessary to decide whether an easement of necessity

lands of the parties to the suit formerly composed a single farm of about 127 acres, under the ownership of the appellee and his brother as tenants in common. On December 28, 1909, they conveyed to the appellant 81 acres of the land, including the portion on which the farm buildings are located. The appellee has since become the owner of the entire title to the remaining 46 acres by grant from his cotenant. At the time of the appellant's purchase there was a well-defined, but unimproved, driveway leading to the public road, from the dwelling and barn on the premises conveyed, over the land reserved by the grantors. This had been used as the customary way of travel to and from the farm buildings for many years. It was not, however, the only

available outlet, as the land sold to the appellant bordered on a public thoroughfare, and contained within its own area a road leading from the buildings to the highway. The last-mentioned private way, by reason of its grade and location, was much less serviceable and convenient than the one extending through the property retained by the appellee and his co-owner.

The deed to the appellant conveyed to him the 81 acres mentioned, together with "all and every the rights, alleys, ways, waters, privileges, appurtenances, and advantages to the same belonging or in anywise appertaining." It is the appellant's theory that under this clause of the grant he acquired an easement in the roadway over the land reserved. For several years after his pur-

could be created except in the manner specified by § 71, because it was shown at the trial that the building could be supported by foundations entirely in its own lot, and it was simply a question of expense. (This question curiously enough arose on an action by the grantee to compel the grantor and his successor to remove the footings, and the judgment was for the defendant on the ground that the footings belonged to the plaintiff and that he could remove them if he chose.)

—continuous.

Supplementing note in 26 L.R.A.(N.S.) 331.

There is a distinct tendency in the recent cases to class ways, at least improved ways, as "continuous" easements within the rule that easements arising by implication must be continuous; the reader will notice a reference to this matter in *DUVALL v. RIDOUT*.

—necessary.

See note in 26 L.R.A.(N.S.) 333.

As heretofore pointed out, easements of necessity, not dependent upon an apparent existing benefit at the time of the severance, are not within the scope of this note. This excludes cases like the following:

Bean v. Bean, 163 Mich. 379, 128 N. W. 413 (sustaining way of necessity); *Muse v. Gish*, 114 Va. 90, 75 S. E. 764 (sustaining way of necessity or of reasonable necessity on purchase from a devisee); *Malsch v. Waggoner*, 62 Wash. 470, 114 Pac. 446 (right of way denied where there was another practicable way); *Jemo v. Tourist Hotel Co.* 55 Wash. 595, 30 L.R.A.(N.S.) 926, 104 Pac. 820, 19 Ann. Cas. 1199 (passage through a doorway into another part of lessor's building, denied to lessee as not a necessity); *Roe v. Walsh*, 76 Wash. 148, 135 Pac. 1031, 136 Pac. 1146 (easement of way denied as not an absolute necessity); *Hoffman v. Shoemaker*, 69 W. Va. 233, 34 L.R.A.(N.S.) 632, 71 S. E. 198 (reservation of way upheld as necessary); *Bussmeyer v. Jablonsky*, 241 Mo. 681, 39 L.R.A.(N.S.) 549, 145 S. W. 772, Ann. Cas. 1913C, 1104 L.R.A.1915C.

(use of hall way in reserved building to reach upper stories of building sold, denied as not necessary or reasonably necessary); *Jablonsky v. Wussler*, — Mo. —, 171 S. W. 641 (the same); *Sandford v. Boss*, 76 N. H. 476, 42 L.R.A.(N.S.) 629, 84 Atl. 936 (denying right to maintain a ladder rack on an adjoining passageway, as not a necessity); *Hill v. Bernheimer*, 78 Misc. 472, 140 N. Y. Supp. 35 (denying a reservation of right to use an alley and space for water, gas, and sewer connections, as not necessary); *Lathrop v. Lytle*, 84 Misc. 161, 145 N. Y. Supp. 906 (denying an easement by reservation to use of well on the conveyed property, as not one of necessity, the easement being sustained, however, on the ground of prescription); *Howley v. Chaffee*, — Vt. —, 93 Atl. 120 (denying an easement of way by reservation as not one of strict necessity, holding that the doctrine of visible easements does not apply in such a case, and that reasonable necessity is not sufficient).

Incidents—order of transfer.

Supplementing note in 26 L.R.A.(N.S.) 337.

See supra, "Application to implied grants," and "To implied reservations."

For a case of practically simultaneous conveyances of the dominant and servient tenements, see *Lewis v. Meredith*, infra, "Race way."

—method of transfer as affecting—alienation by devolution and division in case of death.

For devise as carrying visible easement, see the note to *Gorton-Pew Fisheries Co. v. Tolman*, 38 L.R.A.(N.S.) 882; and see also *Kane v. Templin* and *Stephens v. Boyd*, infra, "Stairways, etc."

—severance by partition.

See note in 26 L.R.A.(N.S.) 342.

See also *Robinson v. Hillman*, supra, "Apparent and obvious," and the same case infra, "Acquisition by use and severance."

chase of the part of the farm described in his deed, he used the way through the remaining portion without objection. But it appears from the evidence that in October, 1913, the appellee erected wire fencing across the roadway, and, the appellant having removed it under a claim of right to the continued and permanent use of the way as appurtenant to his property, the present litigation has resulted.

In the case of *Oliver v. Hook*, 47 Md. 307, where the question we have now to decide was considered upon facts analogous to those shown by the record before us, it was contended that, inasmuch as the way in controversy was existing and apparent at the time of the execution of the deed under which the right to its use was claimed, it

passed under the grant as incident and appurtenant to the land conveyed. In discussing this theory the court, in the opinion delivered by Judge Alvey, said: "The deed is for a specific piece of land, being parcel of a larger piece held and owned by the grantor, and described by metes and bounds. In such case, in the absence of apt and express terms, no specific way outside the limits of the land granted, if not properly an existing easement, will pass as appurtenant. The only words in the deed . . . that could possibly be relied on to convey the right of way in question are 'all and every the rights, privileges, appurtenances, and advantages to the same belonging, or in any wise appertaining.' If there was a way belonging to the estate as a pre-existing ease-

See also *Stone v. Burkhead*, *infra*, "Acquisition by use and severance," where, however, the report is somewhat indefinite on the subject.

Application of rules to easements of way or passage—in general.

For a discussion of the question whether an easement of way can arise by implication as an appurtenance, see the earlier note in 26 L.R.A.(N.S.) 344.

The question of necessity is excluded. For cases on ways, excluded as decided on the question of necessity, see *supra*, "Necessary."

—acquisition by use and severance.

Supplementing note in 26 L.R.A.(N.S.) 346.

It will be observed that in *DUVALL v. RIDOUT*, the court points out that the opinion has been entertained that ways may be of such an improved character as to be considered "continuous." So, it is stated in *Jones on Easements* (§ 265) that "an exception has been ingrafted on the general rule in the case of a formed or inclosed road." It is also stated by the last-mentioned authority (§ 264) that "there is a tendency in recent cases to regard a way as a continuous and apparent easement, which will pass upon the severance of a tenement in the same manner as any other easement." These views have recent support.

In *Robinson v. Hillman*, 36 App. D. C. 241, where an alley ran along the back of certain lots, and gave access to a neighboring street from the rear of the lots, and on partition between heirs this alley or right of way was apparent and well defined, and had been used for many years by the occupants of the premises claimed to be dominant, such use being reasonably necessary to the enjoyment of those premises, a lot owner was held entitled to a verdict for damages for the obstruction of his use of the alley by the owner of the fee of such alley.

An easement of way by implication was also sustained in *Feitler v. Dobbins*, 263 Ill. L.R.A.1915C.

78, 104 N. E. 1088, where the owner of two adjoining city lots, one built across its entire width so as to afford no access to the rear from the street except through the building, the other having a 3-foot space along the boundary line between the two lots, made a cement walk along this space and opened a gate in the boundary fence, on the rear part of the lot, so as to afford access to the rear of the first lot along this passageway, and also opened a gate at the end of such passageway into an alley that ran along the rear of both of the lots. With the premises in this situation, she conveyed the fully built lot, and the passageway continued to be used as before for the benefit of such lot, and some three years later she conveyed the other lot to a third person. The court held that the benefit was of a permanent, open, and feasible character, and that therefore the lot second sold was subject to the easement, and that, it seems, both the gate in the boundary fence and the gate on the end of the passageway into the alley must be left open for the benefit of the lot first sold. It was one of the elements, however, in the case, that at the time of the sale of the first lot, such lot was subject to a deed of trust which the purchaser assumed, which described the easement, and at the time of the purchase of the second lot the purchaser of that lot had actual notice of the trust deed. The grantor testified that she supposed that the effect of the trust deed would be null and void when it was paid off, but the court held that this would not interfere with the express recognition of the easement in the trust deed by the then owner of the premises, so far as any subsequent purchasers were concerned.

Where a person was at the same time the owner of a residence and of an adjoining electric light and power plant, and there was at the time a cement and stone walk from the electric light and power plant across the residence grounds of the owner, and also wires from the plant on poles stretched across said residential grounds, a conveyance by the owner of the electric light plant and power property, containing

ment, such way would pass by force of these terms, or even without the use of them; but such terms used in a conveyance of part of a tract of land, as in this case, will not create a new easement, nor give a right to use a way which had been used with one part of the land over another part, while both parts belonged to the same owner, and constituted an entire estate. A party cannot have an easement in his own land, as all the uses of an easement are fully comprehended and embraced in his general right of ownership. . . . The general principle is that no right in a way which has been used during the unity of ownership will pass upon the severance of the tenements, unless proper terms are employed in

the conveyance to show an intention to create the right *de novo*."

After stating the doctrine, as quoted from Gale on Easements, 81, that "upon the severance of an heritage a grant will be implied . . . of all those continuous and apparent easements which have in fact been used by the owner during the unity, and which are necessary for the use of the tenement conveyed, though they have no legal existence as easements," the opinion proceeds: "This is a very just and beneficial principle in those cases to which it is properly applicable, and it has been fully sanctioned in this state; but it would seem to be well settled that it does not apply to the case of an ordinary way, like the one in controversy here, not being at the time an exist-

the expression "everything provided for use for or in connection with said electric light plant," and "all rights, privileges, and appurtenances thereto belonging," will carry with it as a matter of law the right of way for foot travel and for conduct of wires, such easements or servitudes being apparent and visible as an incident and appurtenance of the property conveyed. *Keokuk Electric R. & P. Co. v. Weisman*, 146 Iowa, 679, 126 N. W. 60.

While there was necessity in the case, reference may be here made to *Hankins v. Hendricks*, 247 Ill. 517, 93 N. E. 428, where it was held that the grantee of premises had the right to the use of a court and alley retained by the grantor and later sold to a third party, such court and alley at the time of such first sale being used not only for access to the granted premises, but to other adjacent premises, this fact being apparent, and no other means of access existing to such granted premises from the public street. The court lays stress on the fact that the purchase was made with reference to the continued existence of such access, and that the conveyance of the premises carried with it the visible advantage of the easement of access, stating also that the existence and use of the alley and court were plainly apparent to the purchaser of such alley and court when he obtained his deed, and that it is not essential that the easement be absolutely necessary for the enjoyment of the estate granted, "but it is sufficient that it is highly convenient and beneficial thereto."

In *Dinneen v. Corporation for Relief of Widows & Children*, 114 Md. 589, 79 Atl. 1021, where the owner of land through which there ran a private road sold a portion of the land, the road not affording the only means of access to such portion, but being reasonably necessary for a means of access, and thereafter he sold another portion of the land to a third person, including one half of the road, which was then open and visible, it was held that the land secondly sold was burdened with the easement of a road in favor of the land sold first. (The report seems to make it at L.R.A.1915C.

least doubtful whether there was any other way of access that was fit for travel, but the headnote states that the road in question was not the only means of access.)

Reference may also be made here to another case where a right of way was sustained as one of necessity. In *Stone v. Burkhead*, 160 Ky. 47, 169 S. W. 489 (rehearing denied in 171 S. W. 417), where the owner of two lots had placed on one of them a store and postoffice, and upon the other lot a pass way from the public road to such store and postoffice, it was held where, after the death of such owner, the property was divided, that, as it was apparent from the lay of the ground as a physical fact that it would be impracticable to get to the store with wagons or vehicles in any other way than by such pass way, the purchaser of the storehouse lot took an easement in the pass way. It was contended in this case that the ordinary rule did not apply for the reason that at the time of the severance of title the storehouse had been burned for four years, but the court stated that the foundation of the cellars still existed and was used in building a new storehouse; that this had been the location of a general store for a great number of years and also of the postoffice of the village, and that it was not unreasonable to assume at the time of the severance, considering the importance of the location to the industries near it, that the storehouse would be reconstructed.

See also in this connection *Re New York*, supra, "Use at time of grant."

In *Peters v. Sinclair*, 48 Can. S. C. 57, it was held that a grantee of a corner lot in a city would not take an easement in the grantor's cul-de-sac street in the rear, which had been opened for the benefit of lots on the other side of it and for the benefit of the lot at the end of the cul-de-sac, although such grantor had, in selling the lot at the end of the cul-de-sac, covenanted with the grantee of such lot that he should have a right of way over and upon the said street in common with the grantor, her heirs and assigns, and the persons to whom she or her predecessor had already granted

ing easement. *Grant v. Chase*, 17 Mass. 447, 448, 9 Am. Dec. 161; *Worthington v. Gimson*, 2 El. & El. 626, 29 L. J. Q. B. N. S. 116, 6 Jur. N. S. 1053; *Pearson v. Spencer*, 1 Beat & S. 583, 584, Jur. N. S. 1195, 4 L. T. N. S. 769; *Dodd v. Burchall*, 1 Hurlst. & C. 113, 120, 31 L. J. Exch. N. S. 364, 8 Jur. N. S. 1180."

In *Mitchell v. Seipel*, 53 Md. 273, 36 Am. Rep. 404, where the distinction between grants and reservations of easements by implication was considered and stated, the case of *Oliver v. Hook*, supra, was cited as holding "upon abundant authority" that "the doctrine of implied grants had no application to the case of an ordinary, open, and uninclosed way, not being at the time of the grant an existing easement."

or might hereafter grant any part of their original holding abutting on such street. It was held that there had been no dedication of the street, and that an easement was not effected by the statute which provided that "every conveyance of land, unless an exception is specially made therein, shall be held and construed to include all . . . ways . . . easements . . . and appurtenances whatsoever, to the lands therein comprised, belonging or in anywise appertaining, or with the same demised, held, used, occupied and enjoyed, or taken or known as part or parcel thereof."

—stairways, etc.

In this connection reference may be made to two Iowa cases sustaining easements of stairways, etc., by implication, although the claims arose out of devises.

In *Kane v. Templin*, 158 Iowa, 24, 138 N. W. 901, where the owner of a building divided by a wall gave the two halves to different devisees, the court considered that the question was the same as if the devisees had taken by deed, and it was there held that, as there existed at the time the devise took effect, in the east half of the building adjoining the dividing walls, stairways and a hall way originally designed and still used, as was obvious to all the devisees, for the mutual convenience of the occupants of the entire building, the devisees of the west half took by implication an easement in the use of such stairways and hall, and the devisees of the east half took subject to such easement. The court distinctly pointed out and recognized the rule which distinguishes between easements of necessity and easements by implication.

In *Stephens v. Boyd*, 157 Iowa, 570, 138 N. W. 389, the owner of a house fronting upon a street, in building a house also fronting on the street alongside of the first house, built no stairway by which the second floor could be reached in the second house, but opened the wall between the two houses in order that access to the second story of the second house could be made through the stairway from the street in the first house. L.R.A.1915C.

It was observed by Judge Boyd in the case of *Eliason v. Grove*, 85 Md. 227, 36 Atl. 845, that "there are a number of cases which hold that ways may be so improved and well defined as to bring them within the class of easements, or quasi easements, known as continuous and apparent, and hence pass by implied grants."

The court in that case was dealing with a claim to the benefit of the principle stated with respect to the use of a well located immediately adjacent to the dividing line between the premises of the plaintiff and defendant, and which, during the unity of a preceding ownership, had been used in common by the occupants of both properties; access to the well from the lot subsequently conveyed to the plaintiff, being afforded

He made a deed of the quasi dominant house to his daughter, which was not delivered until after his death, but the will devised the property to such daughter and directed that such deed be delivered to her. It was held in an action by one claiming under the daughter against one who had bought the apparent servient tenement at a sale by the testator's executors for the payment of his debts, that the plaintiff was entitled to enjoin the tearing down of the stairway. It was claimed by the defendant that the plaintiff's predecessor had acquired no easement because the stairway was not necessary, but the court stated that it was not essential that this should be held, as the original owner had so constructed and used the two buildings as to create an easement in favor of one as soon as he destroyed the unity of title by the conveyance to his daughter; the court, however, stated further that while, if there had been another available entrance, that would be taken into consideration, there was here no other available entrance.

—right to cross land with poles and wires.

See *Keokuk Electric R. & P. Co. v. Weisman*, supra, "Acquisition by use and severance."

Application of rules to easements in waters and water courses—artificial water courses and conduits.

Supplementing note in 26 L.R.A.(N.S.) 356.

In *Adams v. Gordon*, 265 Ill. 87, 106 N. E. 517, it was held that a bill stated a cause of action for an injunction against interference with the plaintiff's easement, the court considering that the easement was open, visible, continuous, and susceptible of being operated, used, and enjoyed without the interference of man, where the essential allegations were the defendant's former ownership of both properties, his contract to sell the dominant part to the plaintiff's predecessor, describing the easement, his sale to such predecessor of such dominant part and its purchase by the plaintiff, the

through a doorway maintained for that purpose in the division wall, from which the pump was only a few feet distant. There was held to be evidence tending to place the use of the well in the class of continuous and apparent easements, and to show that it was necessary for the reasonable enjoyment of the property for whose benefit it was claimed; and because the issue had been withdrawn from the jury by the lower court, the judgment in favor of the defendant was reversed and a new trial awarded.

Another instance in which the principle just referred to was found to be applicable is the case of *Burns v. Gallagher*, 62 Md. 462, where it was invoked in reference to an alley fenced on both sides, and located in the rear of the plaintiff's lot in Baltimore, and which furnished the only means of ac-

cess to the back yard of the premises, except through the front door of the building by which the lot was improved. In the case of *James v. Jenkins*, 34 Md. 1, 6 Am. Rep. 300, which was concerned with a claim under implied grant, to the maintenance without obstruction of windows overlooking the adjacent ground of the grantor, the right to the easement was sustained; but this decision was declared in *Oliver v. Hook*, supra, not to be authority for the extension of the principle to the case of an ordinary way like the one there in dispute.

In the present case the roadway in question was undoubtedly the most convenient means of ingress and egress to and from the appellant's farm, but it cannot be said to be necessary for the beneficial use of the

occupancy of such dominant part by the plaintiff as tenant of the defendant for a period prior to such first sale, when he used and enjoyed the rights now claimed as an easement, which were the right to the use of a well, a pump, a gasoline engine, and a tank situated on the defendant's premises, with a right to use a path from the plaintiff's property leading in a direct line to the well, these facilities to be maintained at the expense of the owner of the dominant tenement, who should at his own expense furnish water for the use of the defendant, the purpose of the easement being to supply the plaintiff's premises with water for domestic purposes and to supply water for the stables, lawns, and gardens thereon, such water facilities being absolutely necessary and essential to the full enjoyment of her premises. It was also alleged that the water was conveyed by an underground pipe from the tank on the defendant's premises, that the pipe was visible on the defendant's land between the point where it left the tank and entered the ground, and it was also visible on the plaintiff's land where it emerged from the ground and connected with the faucets, plugs, flush boxes, and hydrants on her land, and that a view of the premises at the time of the purchase by the third party, and at the time of the plaintiff's purchase from the third party, would have disclosed that the faucets, etc., on her property were connected with a tank on defendant's land, and that the pump, etc., was used as a means of supplying these premises with water, and that the water facilities thus provided were highly beneficial to her property, and, there being no water mains in the adjoining avenue leading to this property, it was indispensable to its use and enjoyment that the plaintiff have the advantage of water facilities provided for and situated on the defendant's land.

It will be observed that in *WATSON v. FRENCH*, while it was held that the easement was one of necessity, the court stated that a fact to be considered in determining the question of implied grant was that the water pipe was open and visible.

L.R.A.1915C.

For a case denying an easement by reservation to the use of a well on the conveyed property as not a necessity, the easement being sustained, however, on the ground of prescription, see *Lathrop v. Lytle*, 84 Misc. 161, 145 N. Y. Supp. 906.

For a case denying a reservation of right to use an alley and space for water, gas, and sewer connections as not necessary, see *Hill v. Bernheimer*, 78 Misc. 472, 140 N. Y. Supp. 35.

—race way.

Supplementing note in 26 L.R.A.(N.S.) 359.

Where the water for a mill ran from an intake part of the way in an open trough and part of the way underground, and the owner of the mill owned also the property where the open trough was, and some of his tenants, a mason and a fellmonger, used the water from the open trough in their business, such water not being returned to the stream, and such owner, by practically simultaneous conveyances, sold the mill to one party and the land where the trough was to another party, it was held, on proof of the facts of user, that the purchaser of the property where the trough was had a right to use the water from the trough as had been done in the time of his predecessor. The court seemed to consider that while there could have been no easement before the separation of ownership, a use or quasi easement of this character was embraced within the language of the conveying act of 1881, § 6, and stated that the *International Tea Stores Co. v. Hobbs* [1903] 2 Ch. 165, 72 L. J. Ch. N. S. 543, 51 Week. Rep. 615, 88 L. T. N. S. 725, shows that "a right" permissive at the date of the grant may become a legal right upon the grant by force of the general words in such § 6. (But in the *Hobbs* Case the conveyance was to a tenant who was in possession of the premises and enjoyment of the rights claimed.) It would seem to be a matter of serious doubt how far this statute was intended to apply to cases of this character. The court probably referred to subdivisions

property. It was an ordinary, uninclosed, and unimproved way over intervening land to a farm which has another available outlet to the public highway. The conditions here shown are hardly comparable with the exigencies which existed in the cases of *Eliason v. Grove* and *Burns v. Gallagher*, supra, and are certainly not more urgent than those which in *Oliver v. Hook*, supra, were held not to admit of the application of the principle now invoked. If, in a case like the present, it is the purpose and agreement of the parties that such a way as the one in question shall pass as appurtenant to the land conveyed, such an intention may be expressed very readily and simply in the deed, as suggested in the opinion in *Oliver v. Hook*, by the use of such terms as "with

the ways now used," or "with the ways used with the land hereby conveyed," thus creating new easements for the benefit of the estate granted, as contemplated by the rule to which we have referred.

Both the appellant and the appellee have testified to conversations between them prior to the conveyance in regard to their understanding upon the question as to whether the road now in controversy was intended to be included in the purchase. This testimony, having been offered without objection from either side, is entitled to be given the effect of competent proof, and we have no occasion, therefore, to express an opinion as to its admissibility. *Sentman v. Gamble*, 69 Md. 293, 13 Atl. 58, 14 Atl. 673. According to the depositions of the appellee

1 and 4 of § 6, which are as follows: "Sec. 6. (1) A conveyance of land shall be deemed to include and shall by virtue of this act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, water courses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of an appurtenant to the land or any part thereof. (4) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein contained." *Lewis v. Meredith*, 108 L. T. N. S. 549.

Application of rules to easements of drainage.

Supplementing note in 26 L.R.A.(N.S.) 361.

Where the owner of a tract of land has a waste ditch across part of it for draining the other part, and sells such other part, the ditch being plainly marked upon the ground so as to be visible to casual observation, the successors of the grantee will have a right to use the ditch for waste water. *Schumacher v. Brand*, 72 Wash. 543, 130 Pac. 1145, where the court stated that it was not necessary for the purposes of the case to determine whether it was a better rule that the easement must be necessary or merely beneficial, as the record for the case disclosed that the waste ditch was reasonably necessary to the enjoyment of the dominant estate.

A sewer pipe in the cellar is visible. *Dzmura v. Gyurik*, 41 Pa. Super. Ct. 398, which is insufficiently reported as it does not appear whether the separation of the property was by devise, partition among heirs, or otherwise, but the court decided the case as if the original proprietor had made a deed of the dominant tenement. It was there declared that where a man built two houses, one facing the street and the L.R.A.1915C.

other an alley in the rear, each of which was divided by a wall into east and west tenements, and ran a sewer along the west tenements to the public sewer in the alley, connecting the east tenements with it by a visible lateral line extending through the cellars of the west tenements respectively, if he thereafter conveyed to another the east tenement, he could not be heard to complain that his purchaser continued to vent the sewage from that tenement in the way in which the grantor himself had expressly provided for that purpose, and that the case was to be decided as if that was the situation.

For other cases on drains, see *Robinson v. Hillman* and *Brown v. Fuller*, supra, "Apparent and obvious."

Application of rules to easements of support of land and buildings.

Supplementing note in 26 L.R.A.(N.S.) 364.

—buildings—encroachments.

Supplementing note in 26 L.R.A.(N.S.) 367.

In *Taylor v. Wright*, 76 N. J. Eq. 121, 79 Atl. 433, the court seemed to be of the opinion that there was a reservation of an easement where the owner of two houses on a village street conveyed one of the houses, and the boundary line between the premises conveyed and those retained was such as to cut off part of the porch and part of the eaves of the retained house, as the easement was apparent and reasonably necessary and continuous; but the question was not decided.

It is interesting to compare the foregoing case of *Taylor v. Wright*, with *Reiners v. Young*, 109 N. Y. 648, 16 N. E. 368 (reversing 38 Hun, 335), where an owner of two lots erected a building on the easterly lot and conveyed this lot to the defendant's predecessor by metes and bounds, with no mention of buildings or appurtenances, and later conveyed the other lot to the plaintiffs, who discovered through a survey that the westerly wall of the defendant's house

and his cograntor it was distinctly stated and understood in the interviews preceding the execution of the deed that it was not to convey a right to the use of the roadway through the reserved land, but that the grantee would be permitted to use it while the farm was in his personal occupancy. The appellant's testimony is directly to the contrary, and asserts in effect and understanding that he should be entitled without restriction to the use of the road. His deed, however, does not contain the terms necessary to confer such a right, and his statement as to a verbal assurance on the subject could not properly be accepted as conclusive, in view of the explicit denial made by the other two parties to the transaction.

It is to be further remarked that, as the appellant is insisting upon an absolute right to the continued and perpetual use of the roadway as an incident of the grant and as appurtenant to his property, he is, of course, not claiming, and could not be given, the benefit of the alleged agreement, which he disputes and disavows, that he should have a permissive user of the way during his individual possession of the land described in his deed.

In the argument on behalf of the appellant it was contended that the appellee has an adequate remedy at law for any invasion of his property rights occasioned by the appellant's use of the road, and that such use, if wrongful, is a mere trespass, which results in no injury sufficiently serious to justify the granting of relief by injunction. The maintenance of the driveway in question amounts to an appropriation to that extent of the appellee's land for the benefit of the adjacent property of the appellant.

and his west fence in the rear stood upon their lot to the extent of a few inches, and brought ejectment. It was held that the plaintiffs were entitled to recover. The majority of the court concurred in the decision, but not in the opinion, which states that no easement was apparent, that the one claimed was not found in the grant, and that there was no necessity for its existence.

An encroachment, though obvious, was held insufficient to sustain an implied reservation, as it was not necessary, in *Runge v. Koch*, 156 App. Div. 217, 141 N. Y. Supp. 282, where, at the time of the grant there was a party wall between the buildings granted and those retained, and beyond the party wall an oven had been erected on the lot retained, and one of its walls was in the general direction of a continuation of the party wall, and extended some inches over on the plaintiff's lot. It was held that the conveyance to the plaintiff, which stated the boundary to be part of the way through a party wall, did not reserve an L.R.A.1915C.

So long as the way is in existence, the ground it occupies is withdrawn from cultivation and all the other ordinary uses to which it is susceptible. The road creates a division of the tract, which may interfere materially with the owner's plans for its use or development. It does not appear to be needed or desired for the purposes of the property through which it passes. Its use by the appellant, therefore, does not simply impose an additional burden upon a private way which in any event is to be maintained by the appellee for his own convenience, but it appropriates a part of his ground for a road which would not otherwise exist. In our opinion the continuing occupation and use of the appellee's land to the extent and for the purpose thus indicated is such an injury to his property rights as a court of equity may properly restrain and prevent. As stated by Judge Burke in *Chesapeake Brewing Co. v. Mt. Vernon Brewing Co.* 107 Md. 532, 68 Atl. 1048: "The decisions in this state are uniform that, while an injunction will not lie to restrain a mere trespass, it will lie when the injury is destructive of the estate, as it has been held and enjoyed, or where full and adequate relief cannot be granted at law, or where it is necessary to prevent a multiplicity of suits."

Among the other cases in which this principle has been recognized are *Long v. Ragan*, 94 Md. 464, 51 Atl. 181; *Schaidt v. Blaul*, 66 Md. 147, 6 Atl. 669; *Baltimore Belt R. Co. v. Lee*, 75 Md. 600, 23 Atl. 901; *Oberheim v. Reeside*, 116 Md. 275, 81 Atl. 590; *Douglass v. Riffin*, 123 Md. 23, 90 Atl. 1000. The rule thus defined and supported clearly embraces in its scope and purpose the case presented by this record.

Decree affirmed, with costs.

easement in favor of the grantor for the use of so much of the plaintiff's land as supported part of the oven wall. The court said: "Assuming, therefore, that the jury were justified in finding that it was obvious to anyone viewing the premises that the wall encroached upon the plaintiff's premises, still we are of opinion that there was no implied reservation to the grantor and his grantees to retain it in its then position." See also in this connection *National Trust Co. v. Western Trust Co.* supra, "Apparent and obvious."

Applications of rules to easements of light and air.

Supplementing note in 26 L.R.A.(N.S.) 369.

Where the owner of two lots, one of them having a walk from the street along its side, the other having a roadway from the street alongside such walk, sells the lot having the walk, the grantee will not take an easement of light for his windows in such

MAINE SUPREME JUDICIAL COURT.

JOHN WATSON

v.

WALTER T. FRENCH.

(112 Me. 371, 92 Atl. 290.)

Easement — right of way — laying pipes.

1. A right to ingress and egress along a private way does not include a right to lay pipes in the soil to secure a water supply.

Same — conveyance with visible easement attached.

2. A conveyance by a property owner of a parcel for use as a stable, cut off from the street by remaining property belonging to him, with a mere right of passage to and from the street, and with a visible pipe crossing the remaining property to supply water to the stable, includes a right to the continued use of the pipe; at least after the grantor has acquiesced in the continued use for nearly twenty years.

Same — necessity — exercise of power of eminent domain.

3. The possibility of securing a water supply for land in the rear of remaining property of the grantor, by an exercise of the right of eminent domain by the water company whose mains are in the street, is not sufficient to destroy the necessity of the continuance of the right to draw a supply from visible pipes crossing such remaining land of the grantor.

Same — source of supply — effect on rights.

4. That the grantor of land supplied with water from a pipe across his remaining land did not own the source of supply, which was a public service corporation, will not prevent the grantee from acquiring a right by the grant to the continuance of the pipes.

(November 23, 1914.)

roadway, the court stating that an easement for light and air is certainly not manifest, where the house stands back from the line upon the lot sold more than 20 inches, although its eaves project over. *Roe v. Walsh*, 76 Wash. 148, 135 Pac. 1031, 136 Pac. 1146.

Use of building.

Where the owner of two city lots, on one of which there was a privy with two entrances, one from that lot and the other from the other lot, which was in the rear on another street, conveyed the land on which the structure stood, it was held that he had an implied reservation of an easement in the structure, as an easement by implied reservation, while perhaps not resting on the same theory entirely as an easement by implied grant, is none the less secure and substantial in foundation. *Casey v. Canning*, 43 Pa. Super. Ct. 31, where the court does not seem to make the implied reservation dependent upon necessity, and L.R.A.1915C.

REPORT by the Supreme Judicial Court for Aroostook County for the determination by the full court of a bill filed to enjoin defendant from interfering with plaintiff's water connection with certain pipes, or the flow of water from a water main through defendant's premises to plaintiff's stable. Decree for plaintiff.

The facts are stated in the opinion.

Messrs. John B. Madigan and Leonard A. Pierce, for complainant:

An alleged easement is "necessary," and will pass by implied grant, when it is of such a nature, having regard to the circumstances and conditions existing at the time the deed was executed, that without it the beneficial user of the premises granted will be seriously impaired.

Warren v. Blake, 54 Me. 276, 89 Am. Dec. 748; *Kingsley v. Gouldsborough Land Improv. Co.* 86 Me. 279, 25 L.R.A. 502, 29 Atl. 1074; *Lawton v. Rivers*, 2 M'Cord, L. 445, 13 Am. Dec. 741; *Leonard v. Leonard*, 7 Allen, 277; *Pettingill v. Porter*, 8 Allen, 1, 85 Am. Dec. 671; *Grammar School v. Jeffrey's Neck Pasture*, 174 Mass. 572, 55 N. E. 462; *Buss v. Dyer*, 125 Mass. 287; *Gorton-Pew Fisheries Co. v. Tolman*, 210 Mass. 402, 38 L.R.A.(N.S.) 882, 97 N. E. 54; *Brown v. Dickey*, 108 Me. 97, 75 Atl. 382; *O'Rorke v. Smith*, 11 R. I. 259, 23 Am. Rep. 440; *Dolliff v. Boston & M. R. Co.* 68 Me. 176; *Johnson v. Jordan*, 2 Met. 234, 37 Am. Dec. 85; *Carbrey v. Willis*, 7 Allen, 364, 83 Am. Dec. 688; *Thayer v. Payne*, 2 Cush. 327; *Randall v. McLaughlin*, 10 Allen, 366; *Cummings v. Perry*, 169 Mass. 150, 38 L.R.A. 149, 47 N. E. 618; *Brande v. Grace*, 154 Mass. 210, 31 N. E. 633; *Case v. Minot*, 158 Mass. 577, 22 L.R.A. 536, 33

states that the requirement of health and decency demanded that some provision be made for the necessary convenience, and that at the subdivision of the property the use was actual and visible.

For a case denying right to maintain a ladder rack on an adjoining passageway as not a necessity, see *Sandford v. Boss*, 76 N. H. 476, 42 L.R.A.(N.S.) 629, 84 Atl. 936.

Miscellaneous.

The original owner had never conveyed the land traversed by the way in dispute in *Purvis v. Overlander*, 44 Pa. Super. Ct. 22, where he, having laid out a paved and fenced alley along the rear of three lots owned by him, which was also the only practical means of access to the rear of a fourth lot, sold the fourth lot without mention of the alley, and later sold the other lots to various persons describing them as running to the alley, which was an open, visible, and permanent way. It was held that the owner of the lot first sold could not be

N. E. 700; *Johnson v. Knapp*, 146 Mass. 70, 15 N. E. 134, 150 Mass. 267, 23 N. E. 40.

The easement does not arise from any grounds of public policy, but from the implied intention of the parties.

Nichols v. Luce, 24 Pick. 102, 35 Am. Dec. 302; *Cornell-Andrews Smelting Co. v. Boston & P. R. Corp.* 202 Mass. 585, 89 N. E. 118; *Gorton-Pew Fisheries Co. v. Tolman*, 210 Mass. 402, 38 L.R.A.(N.S.) 882, 97 N. E. 54; *Doten v. Bartlett*, 107 Me. 351, 32 L.R.A.(N.S.) 1075, 78 Atl. 456.

Water supply is "necessary" within the meaning of the rule.

Nicholas v. Chamberlain, Cro. Jac. 121; *New-Ipswich W. L. Factory v. Batchelder*, 3 N. H. 193, 14 Am. Dec. 346; *Grant v. Chase*, 17 Mass. 447, 9 Am. Dec. 161; *Johnson v. Knapp*, 146 Mass. 70, 15 N. E. 134, 150 Mass. 267, 23 N. E. 40; *Paine v. Chandler*, 134 N. Y. 385, 19 L.R.A. 99, 32 N. E. 18; *Coolidge v. Hager*, 43 Vt. 9, 5 Am. Rep. 256; *Brakely v. Sharp*, 10 N. J. Eq. 206.

A water company cannot be forced to condemn a way in to the land of plaintiff. Its duty is to serve those along line of its mains, not to extend mains.

Moore v. Harrodsburg, 32 Ky. L. Rep. 384, 105 S. W. 926; *Lawrence v. Richards*, 111 Me. 95, 47 L.R.A.(N.S.) 654, 88 Atl. 92; *Dill. Mun. Corp.* 5th ed. § 317.

Messrs. *Hersey & Barnes*, for respondent:

An easement, to pass under the word "appurtenance," must have ripened into a legal right and become legally attached to the premises conveyed.

Ottumwa Woolen Mill Co. v. Hawley, 44 Iowa, 57, 24 Am. Rep. 719; *Woodhull v. Rosenthal*, 61 N. Y. 390; 40 Cyc. 757; *Dority v. Dunning*, 78 Me. 381, 6 Atl. 6; *Spauld-*

ing v. Abbot, 55 N. H. 423; *Cole v. Bradbury*, 86 Me. 383, 29 Atl. 1097; *Williams v. Wadsworth*, 51 Conn. 277; *Root v. Wadhams*, 107 N. Y. 384, 14 N. E. 281; *Swazey v. Brooks*, 34 Vt. 451.

Water from a source not on grantor's land, and not owned by him, will not pass as an appurtenance to the estate conveyed.

Spaulding v. Abbot, 55 N. H. 423; *Bumstead v. Cook*, 169 Mass. 411, 61 Am. St. Rep. 293, 48 N. E. 767; *Philbrick v. Ewing*, 97 Mass. 133; *Swazey v. Brooks*, 34 Vt. 451; *Wells v. Day*, 124 Mass. 38; *Johnson v. Knapp*, 146 Mass. 70, 15 N. E. 134, 150 Mass. 267, 23 N. E. 40; *Pew v. Johnson*, 35 Mont. 173, 119 Am. St. Rep. 852, 88 Pac. 770.

Grants by implication are limited to cases of strict necessity.

Warren v. Blake, 54 Me. 276, 89 Am. Dec. 748; *Dolliff v. Boston & M. R. Co.* 68 Me. 173; *Johnson v. Jordan*, 2 Met. 234, 37 Am. Dec. 85; *Thayer v. Payne*, 2 Cush. 327; *Manning v. Smith*, 6 Conn. 289; *Spaulding v. Abbot*, 55 N. H. 423; *Buss v. Dyer*, 125 Mass. 287; *Stillwell v. Foster*, 80 Me. 333, 14 Atl. 731.

Cornish, J., delivered the opinion of the court:

The rights of the parties in this case are to be determined by the construction of a certain deed given by Albion P. Heywood to the plaintiff on June 13, 1893. Prior to that time the premises of both the plaintiff and defendant belonged to Heywood, the common grantor, who on that date conveyed the rear portion, with a stable thereon, to the plaintiff, and retained the front portion, with the opera house thereon, adjoining Court street. The plaintiff was also grant-

barred from using the alley by the owners of the other lots.

In *Keokuk Electric R. & P. Co. v. Weisman*, 146 Iowa, 679, 126 N. W. 60, supra, "Acquisition by use and severance," where the owner of a residence adjoining a light and power property was the owner of all the stock of the corporation which owned the light and power property except he had transferred four or five shares to others to enable them to act as directors, it was held, in determining the question whether the corporation which owned the light and power property, in selling the same, had given a valid easement across the residential grounds of the owner, that it was to be considered that the owner of the residence and the owner of the light and power plant were in equity the same.

Where a realty company leased its property to an adjoining proprietor whose buildings were served by a light and power plant in the realty company's building, and the adjoining proprietor, which was the sole stockholder of the realty company, became L.R.A.1915C.

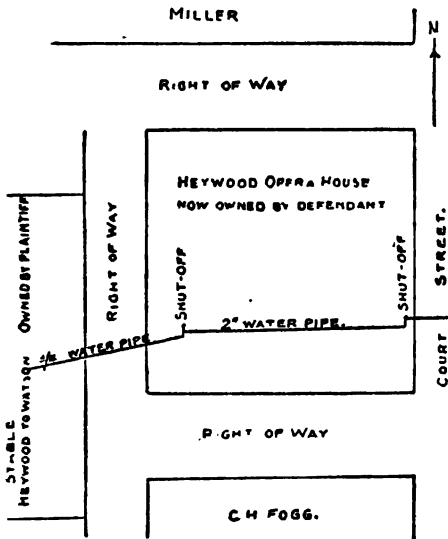
insolvent, the court directed a sale of the realty company's property to someone who would relieve the adjoining proprietor of the lease and the liability under it, which was done, and it was held that the receivers of such adjoining proprietor and their grantees could make no claim to the use of the light and power plant as an easement, as it was clear that the court intended by such directed sale to sever the properties absolutely. *Assets Invest. Co. v. Hollingshead*, 119 C. C. A. 31, 200 Fed. 551.

In *Alexander Smith & Sons Carpet Co. v. Ball*, 143 App. Div. 83, 127 N. Y. Supp. 974, the rule of open and visible easements was applied in a case where the owner of a large tract of property had made conveyances to various grantees, carrying also a certain right of way, the deeds referring to the rights of others in the way.

It may be noted that in *Bauman v. Wagner*, 146 App. Div. 191, 130 N. Y. Supp. 1016, it was held that any easement claimed had been lost by abandonment or by the opening of other ways. B. B. B.

ed the right, in common with Heywood and others, "to use said passageway along the north side of said George Cary's lot, and also the right to use a passage between the premises herein conveyed and the opera house, some 12 or 15 feet wide."

The following diagram will explain the situation:



When the Houlton Water Company installed its system in 1887, Heywood made connection on June 6th of that year with the Court street main, by means of a 2-inch pipe which enters the opera house cellar under the front wall, and rises up and runs across the cellar on top of the concrete floor to a point near the rear wall, and there is connected with a $\frac{3}{4}$ inch pipe that drops down under the cellar, the rear wall, and the passageway, and comes up into the stable. The larger pipe supplied the opera house, and the smaller the stable. This was the situation when the plaintiff occupied the stable as a tenant of Heywood for several years prior to his purchase in 1893. It was the situation when he purchased, and it remained unchanged after his purchase during the lifetime of said Heywood, and after his decease, until July, 1912, when the defendant, as purchaser from the heir at law of Heywood, shut off the supply to the plaintiff's stable.

This bill in equity was brought, asking that the defendant be enjoined "from interfering with or preventing the repairing and restitution by said plaintiff of the said water connection wherever necessary, and from interfering with the entry of the plaintiff on the premises of the defendant for that purpose, and from interfering, injuring, or dam-

aging in any way, either personally or by his agents, servants, or employees, the said connection or the flow of water from the main of the Houlton Water Company through the premises of the defendant to the stable of the plaintiff."

The precise question involved is whether, under the facts of this case and under the circumstances and conditions existing when the deed was executed, the plaintiff had an implied grant of the right to have the water pipes remain as at the time of conveyance, or at least in some other situation equally adapted to conveying water to the plaintiff's premises; in other words, whether the plaintiff has an easement by necessity.

The vital question is: Did the parties intend that the right now claimed by the plaintiff should be granted? In our opinion they did.

The basis of the plaintiff's claim is the presumption of a grant arising from all the circumstances of the case. This is but the application of the general principle that the grant of a thing is presumed to include and carry with it as an incident of the grant whatever right the grantor had in connection with it and could convey by apt words, without which the thing granted would prove practically useless to the grantee. One of these circumstances, and oftentimes the controlling one, is the necessity; and, however lenient other courts may be in defining the degree of necessity which must exist in order to raise the implication that the easement or quasi easement passes, as in *New Jersey (Toothe v. Bryce, 50 N. J. Eq. 589, 25 Atl. 182)* and in *New York (Spencer v. Kilmer, 151 N. Y. 390, 45 N. E. 865)*, the rule has been firmly established in this state, and has been reiterated in many cases, from *Warren v. Blake, 54 Me. 276, 89 Am. Dec. 748*, to *Doten v. Bartlett, 107 Me. 351, 32 L.R.A.(N.S.) 1075, 78 Atl. 456*, that there can be neither implied grant nor implied reservation unless the easement be one of strict necessity. Mere convenience, however great, is not sufficient.

This rule has been applied in cases of right of way of necessity, as in *Whitehouse v. Cummings, 83 Me. 91, 23 Am. St. Rep. 756, 21 Atl. 743*; *Kingsley v. Gouldsborough Land Improv. Co. 86 Me. 279, 25 L.R.A. 502, 29 Atl. 1074*; *Hildreth v. Googins, 91 Me. 227, 39 Atl. 550*; in case of stairway, *Stillwell v. Foster, 80 Me. 333, 14 Atl. 731*; and of drainage, *Dolliff v. Boston & M. R. Co. 68 Me. 173*. And the test of necessity is whether the party claiming the right can, at reasonable cost, on his own estate, and without trespassing on his neighbors, create a substitute. See cases supra; and in case of a chimney, *Buss v. Dyer, 125 Mass. 287*;

a drain, *Randall v. McLaughlin*, 10 Allen, 366, and *Thayer v. Payne*, 2 Cush. 327.

Applying this test in the case at bar, necessity in its strictest sense is seen to exist. It could not be seriously contended that a water supply to a stable from some source is not an absolute necessity, and the evidence here is uncontradicted that the only available source is by means of the pipe passing through the opera house cellar and connecting the pipe extending to the stable with the main. If the plaintiff's land extended to the street, it might with reason be said that he should secure his supply direct from the street main. But his land is situated about 125 feet back from the street, and his only means of ingress and egress is over a private way, in which he has only a right of passage in common with others. Such a right of passage constitutes a limited easement, and gives him no such right in the soil that he could lay pipes in it to connect with the street main. He would be a trespasser, should he attempt it. On all other sides his lot is bounded by land of other parties over which he has no rights.

The defendant suggests that, if the plaintiff should apply to the water company for service, that company would take the necessary intervening land by right of eminent domain, and render the service desired. We do not think this argument removes the necessity, and for several reasons.

In the first place, it is doubtful whether the Houlton Water Company under its charter (*Priv. & Sp. Laws* 1878-80, chap. 227) has the legal right to condemn land of a private individual in order to construct a service pipe to one taker. In the second place, there is no evidence that the company would attempt to do this, even if it has the legal right to do so. The suggestion of defendant is a mere assumption. There is no evidence of the fact. And in the third place, while a water company is obliged to furnish water to each abutting owner along the line of its mains (*Robbins v. Bangor R. & Electric Co.* 100 Me. 496, 1 L.R.A.(N.S.) 963, 62 Atl. 136, it is not compelled to extend its mains at the request of individual takers (*Moore v. Harrodsburg*, 32 Ky. L. Rep. 384, [Ky.] 105 S. W. 926; *Lawrence v. Richards*, 111 Me. 95, 47 L.R.A.(N.S.) 654, 88 Atl. 92). This suggested refuge is therefore too remote, indefinite, and uncertain to be of any practical value in determining the question of necessity. That fact still remains.

A second fact to be considered in determining the question of implied grant is that the water pipe was open and visible. The rule laid down in *Whiting v. Gaylord*, 66 Conn. 337, 50 Am. St. Rep. 87, 34 Atl. 85, L.R.A.1915C.

is as follows: "The American cases have with almost entire unanimity limited easements by implied grant to such as were open, visible, such as would be apparent to an ordinary observer, continuous, and necessary to the enjoyment of the estate granted or retained."

And the same element of visibility is recognized in the recent case of *Brown v. Dickey*, 106 Me. 97, 75 Atl. 382, when this court says: "An implied grant of an easement in favor of a grantee arises from circumstances where at the time of the conveyance the grantor was the owner of land constituting both the dominant and servient estates. Two classes are recognized,—one called quasi easements, which are existing conditions in the land retained, the continuance of which would be so clearly beneficial to the land conveyed that they would be presumed to be intended. These easements must be such as are apparent, in the sense of being indicated by objects which are necessarily seen, or would be ordinarily observable, by persons familiar with the premises."

In the case at bar the water pipe was plainly visible, its purpose was apparent, and when the defendant purchased the servient tenement, he must have been fully apprised of the situation.

The third circumstance of strong corroborating force is to be found in the fact that from the time the water pipes were first installed, in June, 1887, down to July, 1912, the plaintiff and his predecessors have enjoyed the use of the water flowing in identically the same manner. During nineteen years of that period, from 1893 to 1912, the plaintiff has been the owner of the dominant tenement, and during the most of that time Heywood, his grantor, was the owner of the servient tenement, and yet the plaintiff's right to have the water thus flow to him has never been questioned until the defendant shut off the supply in July, 1912, which was the occasion of these proceedings. This fact of continuous and unquestioned user for so long a period of time fortifies the contention of a grant by implication.

The defendant, however, contends that, whatever the rights of the plaintiff might have been if the source of supply was upon the defendant's land, no easement was created here, because the defendant neither owned nor controlled such source. This contention fails to note the distinction between the passing of an easement as an appurtenance and by implication. The reason why a deed is held not to convey as an appurtenance rights in lands other than of the grantor is that the habendum clause cannot enlarge the grant, and if rights in another's land have already accrued and

become a part of the estate granted, before the deed is given, then they pass with it; otherwise not. This is familiar law, as in *Spaulding v. Abbot*, 55 N. H. 423, where the defendant conveyed to the plaintiff a tract of land with buildings thereon, supplied with water from a spring on the land of H. by aqueduct, and it was held in an action for covenant broken that the word "appurtenances" in the habendum could not be construed to convey an easement in the land of H. which, not having ripened into a legal right, had not become legally attached to the premises conveyed. The same rule was followed in *Bumstead v. Cook*, 169 Mass. 410, 61 Am. St. Rep. 293, 48 N. E. 767, also an action for covenant broken, where it was held that where A buys land of B, who has previously connected the land unlawfully with a public sewer, no right to use the sewer passes as an appurtenance, as he had no right in it which he could convey. But this line of cases, the soundness of which is not controverted, has no application to the case at bar. The plaintiff here is not claiming as an appurtenance some right in the land of a third party, but simply as an easement by necessity the right to have the water pipe supplying the granted premises remain in the same condition as when the deed was given. The plaintiff does not claim that any easement in the water itself was granted as an appurtenance under his deed, but does claim an easement in the maintenance of the pipe, whereby the water can continue to flow to his premises in the same manner as when they were bought in 1893. In short, he does not ask an easement in what his grantor did not own and control, but in what he did. The source of supply being a public service corporation, he is thereby assured that his necessities will be met. The plaintiff's rights in the pipe independent of the source of supply are established by authority.

In *Philbrick v. Ewing*, 97 Mass. 133, the court held that pipe, even extending through land of a third party, passed as a fixture annexed to the house, and the fact that the owner of the house had no right to the water except by contract did not affect his right of property in the pipe.

In *Johnson v. Knapp*, 146 Mass. 70, 15 N. E. 134, the distinction is sharply made. In that case, when the deed was given, an aqueduct or pipe led from a well or spring on the lot of one Emory, through the Williams lot, to the land conveyed to the plaintiff, and through and beyond that, and through the Flint lot and the Clark lot, to the dwelling house upon the Pomeroy lot, and supplied water from the Emory spring to the dwelling house upon each of these lots. In discussing the rights of the parties the L.R.A.1915C.

court says: "It is true that the grant by Emory to William Brooks was limited to the right to take water for the use of the plaintiff's land, and that the right to take water for the use of the Pomeroy house was not appurtenant to the plaintiff's land, and Carpenter, as owner of that land, had no right to grant it, and a grant of it cannot be implied, so as to create an easement in the land. But the right to maintain pipes in the land is distinct from the right to take water from the aqueduct on the land, and is a right which Carpenter could have granted without the right to take the water. The right to take the water could be derived only from the owner of the Emory land; the right to maintain the pipes could be derived only from the owner of the plaintiff's land, and a grant of the latter without a grant of the former may be implied. . . . We think that a grant of the right to maintain the pipe in the plaintiff's land was implied in the deed to Pomeroy."

The same case was again before the court in 150 Mass. 267, 23 N. E. 40, where, upon additional facts presented, a different conclusion was reached as to the rights in the spring, and the implication of a grant, but in no way overruling the previous decision, so far as the above quotation is concerned.

Without further discussion, it is sufficient to say that the facts in the case at bar fully conform to the requirements in the decided cases and warrant the conclusion of an implied grant. The entry must therefore be:

Bill sustained, with costs.

Perpetual injunction to issue.

Decree accordingly.

MAINE SUPREME JUDICIAL COURT.

CARL W. THURSTON

v.

ALONZO A. CARTER.

(112 Me. 361, 92 Atl. 295.)

Animals — killing dog for worrying cat.

A cat is within the protection of a statute authorizing the killing of a dog found worrying, wounding, or killing any domestic animal.

(November 23, 1914.)

Note. — Right to kill dogs.

This note is supplementary to the notes to *Graham v. Smith*, 40 L.R.A. 510; *State v. Churchill*, 19 L.R.A. (N.S.) 835, and *State v. Clifton*, 28 L.R.A. (N.S.) 673, where the earlier cases are treated.

As to what animals are within statute in

EXCEPTIONS by plaintiff to rulings of the Supreme Judicial Court for Knox County made during the trial of an action brought to recover damages for the killing of plaintiff's dog which resulted in a verdict for defendant. Overruled.

The facts are stated in the opinion.

Mr. L. M. Staples for plaintiff.

Mr. Frank B. Miller, for defendant:

A cat is a domestic animal, and defendant was justified, under the evidence, in killing the dog.

6 Cyc. 702; *State v. Sumner*, 2 Ind. 377; 2 Bl. Com. 390, et seq.; 4 Bl. Com. 236; *People v. Campbell*, 4 Park. Crim. Rep. 386; *Ford v. Glennon*, 74 Conn. 6, 49 Atl. 189, 338; *Janson v. Brown*, 1 Campb. 41, 10 Revised Rep. 626; *Holcomb v. Van Zylén*, 174 Mich. 274, 44 L.R.A. (N.S.) 607, 140 N. W. 521.

BIRD, J., delivered the opinion of the court:

This action of trespass is brought for the recovery of damages for the killing of the fox hound of plaintiff by defendant. The latter, in justification, under Pub. Laws 1909, chap. 222, § 17, claimed that he shot

relation to killing of animals by dogs, see note to *Holcomb v. Van Zylén*, 44 L.R.A. (N.S.) 607.

Under police power.

A statute providing that dogs not licensed pursuant to the provisions of the act should be seized by a humane society, and if not claimed and redeemed within a specified time be destroyed, is not unconstitutional on the ground that it authorizes a summary destruction of dogs without notice to the owner and amounts to a taking of property without due process of law, or that it assumes to vest in a private corporation the execution of certain police powers of the state. In *People ex rel. Westbay v. Delaney*, 73 Misc. 5, 130 N. Y. Supp. 833, affirmed in 146 App. Div. 957, 131 N. Y. Supp. 1137.

Unlawfully killing dogs.

A dog is property, and the killing of a dog without justification will entitle the owner to nominal damages at least, and therefore to a submission of his case to the jury. *Rowan v. Sussdorff*, 147 App. Div. 673, 132 N. Y. Supp. 550.

In *State v. Tripp*, 84 Conn. 640, 81 Atl. 247, where the defendant was charged with killing dogs, under a statute making it an offense to kill a registered dog, it was held that although the state must prove that the dogs were duly licensed, it was not required to prove that they were duly tagged, and that the fact that they were without their tags would not justify the accused in killing them.

L.R.A.1915C.

and killed the plaintiff's dog while it was chasing and worrying a cat belonging to and upon the land of the defendant. After the introduction of all the evidence, the court ordered a verdict for defendant. To this direction, plaintiff filed his bill of exceptions, in which it is stipulated that if a cat is a domestic animal, the ruling below is to stand, otherwise judgment is to be entered for plaintiff in the sum of \$50.

That portion of § 17, chap. 222, Pub. Laws 1909, which defendant invokes, is as follows:

"Any person may lawfully kill a dog which . . . is found worrying, wounding, or killing any domestic animal, when said dog is outside of the inclosure or immediate care of its owner or keeper."

The enactment is entirely free from technical words or phrases. It is therefore to be construed according to the common meaning of the language. Rev. Stat. chap. 1, § 6, subdiv. 1; *State v. Harriman*, 75 Me. 567, 46 Am. Rep. 423. "Domestic" has been variously defined by lexicographers, but with substantial uniformity of meaning. "Inhabiting the house, not wild." Johnson's Dictionary. "Belonging to the house or

And it was held that a kennel license was not void because the certificate was carelessly and inartificially drawn by the town clerk, where it appeared that the owner had paid the required license fee. *Ibid.*

Nor because it was issued on the 2d day of May, even if it was not applied for until that day, although the owner might be subjected to a penalty for not having applied for a license on or before May 1st. *Ibid.*

And the license was held not vitiated because part of the pack were kept in the house of the owners in the same town. *Ibid.*

In *Johnson v. Downing*, 182 Ill. App. 536, in an action for damages for shooting a dog, it was held that the question whether the defendant was justified in shooting was for the jury. The report in this case, however, is merely an abstract of the decision.

Trespassing dogs.

In *Farney v. Vanarsdall*, 130 Ky. 247, 129 S. W. 589, it was held that § 68 of the Kentucky Statutes enacted in 1865, providing that it should be lawful for any person to kill any dog which he might find roaming at large on his premises without the presence of the owner or keeper, was not repealed by subsec. 6, § 68a, Ky. Stat. act of 1906, providing that any dog returned for taxation, and the tax on which is paid when due, shall be regarded as property, and shall be entitled to the same protection as live stock, and providing for exemplary damages to owners of dogs listed for taxation which might be "injured or killed contrary to law."

And it was accordingly held that an in-

household; domesticated; tame." Standard Dict. "Living in or near the habitations of man; domesticated; tame as distinguished from wild; living by habit or special training in association with man." Webster's New Int. Dict. "Relating to or belonging to the home or household, or to household affairs." Century Dict. "Pertaining, belonging, or relating to a house." Black's Law Dict. See also *Kimball v. North East Harbor Water Co.* 107 Me. 467, 469, 32 L.R.A. (N.S.) 805, 78 Atl. 865. It is a broad term; *Osborn v. Lenox*, 2 Allen, 207, 209.

The cat is defined as "a domesticated animal that catches mice." Johnson's Dict. "A well-known domesticated carnivorous mammal, kept to kill mice and rats and as a house pet." Standard Dict. "A carnivorous quadruped (*felis domestica*) which has long been kept by man in a domestic state, as a pet and for catching rats and mice; . . . [it] is not known in a wild state." Webster's New Int. Dict.

The time of its first domestication is lost in the mists of the dawn of history, but it is apparent that the cat was a domestic animal among the early Egyptians, by whom it came to be regarded as sacred, as evi-

struction, in an action for wrongfully killing dogs, to find for the plaintiff unless the jury believed from the evidence that at the time they were killed they were roaming at large on the defendant's premises unaccompanied by their owner or keeper, was correct. *Ibid.*

Sheep-killing dogs.

In *Ellis v. Oliphant*, 159 Iowa, 514, 141 N. W. 415, citing Code Supp. § 2340, it was held that one could not lawfully kill the dog of another except he was caught in the act of worrying, maiming, or killing sheep, lambs, or domestic animals, or attempting to bite some person, and that the defendant therefore had no right to kill a dog of the plaintiff which was not in the act of worrying or killing sheep, but was caught in a trap set by the defendant to catch dogs which had been killing his sheep.

In this case it was held correct to refuse an instruction that, if the jury found that the plaintiff's dog was one of the dogs that took part in injuring and killing the plaintiff's sheep about two weeks before, they should find for the defendant, since such an instruction would be clearly erroneous. *Ibid.*

In *Turner v. Stephens*, — Tex. Civ. App. —, 155 S. W. 1009, in an action to recover the value of dogs killed by the defendant, it was held that under a plea of general denial evidence by the defendant was admissible that the week before the dogs were killed he found 18 head of his sheep dead in his pasture, which appeared to have been killed by dogs, such evidence being admissible on the issue of exemplary damages. L.R.A.1915C.

denced by the device of Cambyes during his invasion of Egypt B. C. 525 or 527, which could scarcely have been feasible if the animal was then wild. From that day to this it has been a dweller in the homes of men. In no other animal has affection for home been more strongly developed, and in none, when absent from home, can the *animus revertendi* be more surely assumed to exist.

"But the common law has . . . adopted the test laid down by Puffendorf, by referring the question whether the animal be wild or tame to our knowledge of his habits, derived from fact and experience." 2 Kent, Com. § 349.

It is clear, therefore, from the popular meaning of the word "domestic" and from our knowledge of its habits gained from fact and experience that the cat is a domestic animal.

In the Laws of England it is laid down that "the common law follows the civil law in classifying animals in two divisions as follows:

"(1) Domestic or tame (*domita* or *mansuetæ naturæ*). This class includes cattle, horses, sheep, goats, pigs, poultry, cats, dogs, and all other animals which by habit

But it was held that where the defendant relied alone on the general denial, no evidence tending to show excuse or justification was proper. *Ibid.*

In this case an instruction in effect directing the jury to return a verdict for the plaintiff for such damages as the dogs were shown by the evidence to be worth, and an instruction to the effect that a person has the right to protect his property against any unlawful attack made by any person or by any vicious animal, and that if the jury should believe that the defendant killed the dogs, but further believed that they had been destroying his sheep, and that at the time they were killed they were caught in his inclosure, to return a verdict for the defendant, were held inconsistent and erroneous. *Ibid.*

Dogs killing or worrying other domestic animals and fowls.

Evidence in a prosecution for wilfully killing a dog, that it had a habit of killing fowls, and had on former occasions killed some belonging to the defendant, does not, either at common law, or under a statute making it criminal wilfully or carelessly to keep such animal, entitle the defendant to kill it, when it was merely near where his fowls were, if they were protected by a substantial barrier, and the danger of the dogs reaching them was not so imminent or immediately threatening that a prudent and reasonable man would be held to believe that his property was in jeopardy. *State v. Smith*, 156 N. C. 628, 36 L.R.A. (N.S.) 910, 72 S. E. 321. J. T. W.

or training live in association with man. 1 Laws of England (Halsbury) 365."

And following this definition, the same author declares that "domestic animals, like other personal and movable chattels, are the subject of absolute property. The owner can maintain trover for them and retains his property in them if they stray or are lost." *Ibid.*

See also *Yates v. Higgins* [1896] 1 Q. B. 166, 65 L. J. Mag. Cas. N. S. 31, 44 Week. Rep. 335, 60 J. P. 88; *Harper v. Marcks* [1894] 2 Q. B. 319, 322, 323, 63 L. J. Mag. Cas. N. S. 167, 10 Reports, 335, 70 L. T. N. S. 804, 42 Week. Rep. 605, 17 Cox, C. C. 758, 58 J. P. 527.

But it is urged that the cat is not the subject of larceny, and therefore its owner can have but a qualified property therein. Among the ancient Britons it was held to have intrinsic value, and the theft of a cat was punishable by fine. When, however, larceny became punishable capitally, the courts, to mitigate the severity of the law, held that certain animals were not the subject of larceny as not fit for food, or as base, or as kept only for pleasure, curiosity, or whim. They are instanced by Blackstone, as "dogs, bears, cats, apes, parrots, and singing birds, because their value is not intrinsic, but depending only on the caprice of the owner." 2 Bl. Com. § 393. And Hawkins, speaking of the subjects of larceny, says:

"Thirdly, they ought not to be things of a base nature, as dogs, cats, bears, foxes, monkeys, ferrets, and the like, which, howsoever they may be valued by the owner, shall never be so regarded by the law, that for their sakes a man shall die." 1 Hawk. P. C. 214; 1 Gabbett Crim. Law, 579.

And so from the time of Sir Mathew Hale to the case of *Sentell v. New Orleans & G. R. Co.* 166 U. S. 698, 701, 41 L. ed. 1169, 1170, 17 Sup. Ct. Rep. 693, 1 Am. Neg. Rep. 773, the enumeration, with changes to suit the times or individual predilections, has been repeated. 1 Hale, P. C. 512. *Cessante ratione legis, cessat ipsa lex.*

A cat which is kept as a household pet may be properly considered a thing of value. It ministers to the pleasure of its owner, and serves, as was said by Coke of falcons, *ob vitæ solatium*. *Ford v. Glennon*, 74 Conn. 6, 7, 49 Atl. 189, 338. See also *Mulaly v. People*, 86 N. Y. 365, 366. "It follows, then, that the cat must stay at home."

If it be urged that they are not liable to taxation, it is true that they are not enumerated by name as subjects of taxation in the statutes of the state, but the general language of the tax enactments is sufficient to include them, even if the owner had but a qualified property. Poultry is not L.R.A.1915C.

mentioned by name, neither are its various kinds in the statutes respecting taxation. Nor yet the ass, albeit its side issue is. But it will scarcely be contended that hens, geese, ducks, or turkeys, or asses are not liable to be taxed.

The change of sentiment respecting animals and the light in which they are regarded at the present day is admirably shown in the provisions of law punishing cruelties inflicted upon them, and their sweeping character is indicated in the provision that the word "animal" as employed in our statutes upon this subject "includes every living brute creature." On the other hand, while enactments are numerous giving damages for injuries caused by various animals and providing for their license and regulation, our statutes are silent as to the "harmless necessary cat."

It remains to inquire if there be aught in the context of Pub. Laws, chap. 222, which militates against the conclusion reached. As already seen the word "domestic" is a broad term (*Osborn v. Lenox*, 2 Allen, 209), and, while its significance must always be determined with reference to the subject-matter and the relation in which it appears (*Kimball v. North East Harbor Water Co.* 107 Me. 471, 32 L.R.A. (N.S.) 805, 78 Atl. 865), we find nothing in the act in question which indicates that the term "domestic" is used in other than its ordinary and popular meaning as we have found it to be defined. See *Osborn v. Lenox*, 2 Allen, 207, 209; *Brown v. Graham*, 80 Neb. 281, 284, 114 N. W. 153.

Exceptions overruled.

MICHIGAN SUPREME COURT.

WALTER REYNOLDS

v.

GARBER-BUICK COMPANY, Appt.

(— Mich. —, 149 N. W. 985.)

Infant — disaffirmance of purchase — wear on machine.

1. A minor may, upon becoming of age, disaffirm his purchase of an automobile, and upon tendering back the machine re-

Note. — Guardian's consent as affecting infant's contract.

As to the lack of a parent or guardian as enlarging infant's capacity to contract for other than necessities, see note to *Wickham v. Torley*, 36 L.R.A. (N.S.) 57.

It is a general rule that an infant's contracts, except for necessities in certain cases, are voidable at his instance. This rule was admitted in *REYNOLDS v. GARBER-BUICK Co.*, but it was claimed that the con-

cover the money paid for it regardless of the wear which he has given it.

Guardian and ward — effect of consent to ward's purchase.

2. A guardian's knowledge of and consent to the purchase of an automobile by his minor ward, and his furnishing the money to pay for it from the ward's estate, do not make the contract binding on the minor upon his reaching maturity.

(December 18, 1914.)

APPEAL by defendant from a judgment of the Circuit Court for Saginaw County in plaintiff's favor in an action brought to recover money paid for an automobile purchased by plaintiff during infancy. Affirmed.

The facts are stated in the opinion.

Mr. Julius B. Kirby for appellant.

Messrs. E. L. Beach and Alfred F. Myer, for appellee:

More knowledge by the guardian of the purchase by plaintiff does not make the contract binding.

Dunton v. Brown, 31 Mich. 182; 16 Am. & Eng. Enc. Law, 277; Ryan v. Smith, 165 Mass. 303, 43 N. E. 109; Wood v. Losey, 50 Mich. 475, 15 N. W. 557; Porter v. Porter, 50 Mich. 459, 15 N. W. 550; Tyler v. Gallop, 68 Mich. 185, 13 Am. St. Rep. 336, 35 N. W. 902; Lynch v. Johnson, 109 Mich. 640, 67 N. W. 908; Corey v. Burton, 32 Mich. 30.

Steere, J., delivered the opinion of the court:

Plaintiff, a young man residing in a rural neighborhood in the township of Dover, in Clare county, brought this action in Saginaw

county, against defendant, a corporation located and dealing in automobiles in the city of Saginaw, for the purpose of recovering from the latter \$300 paid it for a Ford automobile and \$75 later paid as the difference in exchanging said Ford for a Buick runabout. The contracts of purchase and exchange for these cars were made and money paid during plaintiff's minority. On coming of age he disaffirmed the contracts, returned the Buick car, and demanded refund of the \$375. His demand being refused, this action was instituted. On the trial of the case before a jury in the circuit court a verdict and judgment were rendered in his favor for \$375, with interest.

It appears undisputed that defendant had knowledge at the time of these transactions that plaintiff was a minor; that plaintiff personally negotiated for the cars; and that he either personally paid to defendant, or sent it by his brother, the money sought to be recovered. In defense it is urged that the contracts were made with the knowledge and consent of, and, in legal effect, with, Richard Emerson, plaintiff's guardian, who furnished to plaintiff money to pay for the cars.

The court submitted to the jury, under instructions as to the legal relations and status of the parties, the question of whether the contracts were made with plaintiff or his guardian. This is assigned as error, and it is urged that, under the undisputed facts, the court should have held the contract to be that of the guardian, and directed a verdict for defendant.

At the time of these transactions plaintiff was a minor, living in the country 7 miles from Clare, with his brothers and

sent of the guardian validated the contract and prevented the subsequent avoidance of the same. There is very little authority on the question. This lack of authority doubtless arises from the fact that one who deals with an infant who has a guardian, deals with the guardian rather than the infant, so as to make the contract the guardian's contract. This situation gives rise to questions which are different than those which involve the effect of the guardian's consent to the infant's contract.

A statute in Georgia authorizes the holding of an infant upon his contract not for necessities, if he is practising a profession or trade, or is engaged in a business with the permission of his guardian, or of the law, to pursue that occupation, and the contract is connected with that profession, trade, or business. *James v. Sasser*, 3 Ga. App. 568, 60 S. E. 329.

In *Hughes v. Murphy*, 5 Ga. App. 328, 63 S. E. 231, the sale by an infant, who was working for himself, transacting all his business in his own name, and making all his contracts in his own name, and col-
L.R.A.1915C.

lecting and disposing of all money earned by him, without his guardian during this time assuming any control of his person or management of his property, or in any way interfering with his contracts,—of cattle which were not the proceeds of his labor, or connected in any way with his work, or realized from any contract made by him in connection with his work, but derived by a gift from his mother, was held not to be a contract within the provisions of this statute. Nor did the fact that the cattle had been delivered to the ward by direction of the guardian give the ward the right to sell them. It is stated that the ward would have no right to sell the cattle either with or without the consent of his guardian, but it appears that the guardian did not consent to the sale.

The deed of a married woman under the age of eighteen years who under the law has no legal capacity to join with her husband in the conveyance of his lands, and to relinquishment of her dower therein, is invalid even though made with the consent of her guardian. *Law v. Long*, 41 Ind. 586.

sisters, on a farm rented by an elder brother. Emerson, the guardian, was a neighboring farmer who had been appointed guardian some years before, on the death of plaintiff's mother. Plaintiff left school when sixteen years of age, is not shown to have pursued any calling, and apparently was not self-supporting, as he states his guardian furnished him money to keep himself,—“just a little money in order to get along with,”—and the guardian testified that he looked after his wants and supplied him with “necessaries and such things.” The extent of his patrimony is not disclosed, but it was apparently limited; his guardian having enjoined upon him “not to get rid of any money if he could help it, for he didn't have it to spare.”

Though his guardian advised to the contrary, plaintiff conceived and pursued the project of securing for himself an automobile; his reason therefor being: “My brother had a car, and he thought I ought to have a car; that was about the size of it.” In harmony with this thought, on May 24, 1913, he and his brother journeyed to Saginaw for the purpose of investigating the opportunities there for supplying this want. The guardian knew of their mission, and furnished plaintiff \$10 for expenses, but testified that he deprecated the venture, and did not know Saginaw was their objective point. They there visited defendant's garage, where they were offered a second-hand Ford car, which plaintiff finally purchased at an agreed price of \$300. While negotiating he informed the salesman, Mr. Black, who made inquiry as to his ability to pay, that he would pay \$5 down to secure the car; that he was a minor under

guardianship, and on his return home would get the rest of the purchase price and send it to complete the payment. This being agreed to, a regular retail car contract for the purchase running to plaintiff was filled out and signed by him, indorsed:

Accepted. Buick Motor Company,
Black, Manager.

On his return home plaintiff obtained the money to make the deferred payment from his guardian, and sent his brother to Saginaw with it, who paid the balance of \$295 to defendant and drove the car home for plaintiff. After using the Ford for a short time, plaintiff concluded that he preferred a Buick, and wrote defendant, inquiring if he could make an exchange with them. Receiving an encouraging reply, with the suggestion that he visit Saginaw, as they had several secondhand Buicks on hand, he went to Saginaw with his Ford car, taking along an acquaintance who could drive, and on June 22, 1913, exchanged his Ford for a Buick roadster, paying \$75 additional therefor. For this car he was given and signed an accepted retail car contract, as before. These negotiations were had with, and the contract was prepared by, Black, the same salesman or manager with whom he had previously dealt. Plaintiff did not have with him sufficient money to pay the additional \$75 required in making the exchange. At the suggestion of Black, the guardian was reached by long-distance telephone, and consented to send the money, which he did, plaintiff receiving it the following day; the chief difference as to what occurred being whether he told plaintiff or

“The declaration and consent of her guardian,” says the court, “could give no force or validity to the deed;” the deed here is treated as voidable merely, and not void.

In *Hand v. West*, 28 La. Ann. 145, a contract with a minor which was consented to by an uncle of the minor, as guardian, and signed by him at the same time it was executed and signed by the minor, was treated as binding upon the other party, but on the theory that the other party to a contract with a minor cannot avoid it. The uncle was not guardian of the minor, and, on the effect of his signing the contract, it is stated that the fact that he signs as guardian amounts to nothing, where the opposite party to the contract knew that he had no legal authority as guardian, since there was no such office in the state.

In *Smith v. Baker*, 42 Hun, 504, an infant at the request of her guardian indorsed certificates of stock belonging to her, and the guardian afterwards pledged the stock as collateral security to his note. The infant was held entitled to disaffirm this contract, but nothing is said as to the effect of the L.R.A.1915C.

guardian's action. In the case there was, however, the element of fraud, which it would seem would prevent the consent of the guardian from making valid the contract.

A contract entered into by a minor with the consent of his mother, who was present at the time the contract was made, which contract was signed by the minor with the name of the mother, followed by the words, “Guardian of G. S.,” the minor, although the mother had never been appointed guardian of her son, was treated in *Stumpf v. Halstead Land & Development Co.* 59 Misc. 529, 110 N. Y. Supp. 838, as a contract of the mother, and not the contract of the minor; and therefore the minor could not, upon obtaining his majority, rescind the contract and recover back the money paid.

A release executed by an infant to a witness in a suit, for the purpose of rendering him competent, was held not binding although joined in by a guardian *ad litem*, on the theory that the guardian *ad litem* had no power to execute such an instrument. *Walker v. Ferrin*, 4 Vt. 523. W. A. E.

Black that he would send it. Black put in the call for him, and testifies that when he responded:

"I said to Mr. Emerson that 'Walter is down here, and that he has found what he says suits him in the model 14 car, and the price is \$75 difference, and do you want him to have it?' And he said, 'Yes; he may as well have it if it suits and he wants it.' And I said, 'Will you send the \$75?' He said, 'Yes.' Then I said, 'Do you want to talk with Walter?' And he said, 'Yes; I will.'"

Of this and what led up to it Emerson testifies:

Well, he (Walter) showed me a letter he had got from these parties before that time he came down here, and the next I heard from him was the telephone message. Mr. Black was the man that telephoned to me. He said Walter was there and wanted to talk with me.

Q. Did Mr. Black tell you what Walter wanted to talk with you about?

A. He wanted to talk with me about the money.

Q. Did Mr. Black tell you the difference in the price of the cars?

A. He did not. Walter told me over the phone. He told me there was a Buick car down there that he thought was what he wanted, and that he wanted,—it was \$75 difference. That is about all, generally, that he said. He asked me if I could send the money down, and I said I could. He asked me at what time, and I told him. This was on Sunday, and I told him I would send it down on the following day.

Plaintiff testified that Black did the talking over the telephone with Emerson, that he did not remember doing so, and "if I done any I done a very little of it. I am not sure whether I did or not. There was so much dickering I don't know." Ryan, the young man who accompanied plaintiff from Clare and was present when the deal was made, testified that Black put in the call for Emerson, "and he got him, and he told him Walter was down here, and Walter saw a car that he wanted, and Mr. Black asked Mr. Emerson if he wanted to talk with Walter, and he said, 'Yes;' at least Walter talked with him and asked him about money." These negotiations were had and an agreement reached on Sunday. Plaintiff then gave Black \$20, and waited at the hotel until the next day, when he received the promised money from his guardian, paid the balance on the Buick, and, with Ryan driving it, returned home.

Plaintiff became twenty-one years of age on July 26, 1913, and on August 4th following asserted his newly acquired manhood by L.R.A.1915C.

disaffirming these contracts, returning the Buick, and demanding that the money he had paid be refunded. He sent the car back by his guardian, accompanied by an attorney, who, on return of the property, made proper tender and demand for plaintiff. His own testimony indicates that this guardian needed a guardian. The automobiles were not necessities, and could scarcely be counted as luxuries to plaintiff, now were they befitting his rank, estate, or station in life. While Black was agreeable to dealing with plaintiff, and had no hesitation in making the sales if the money was forthcoming, the views expressed by him after the Buick was returned and the contract disaffirmed were in some respects appropriate. He testifies:

"I said to Mr. Emerson: 'You ought to be arrested and sent to jail for spending this young man's funds for automobiles in this way, when he isn't fit to operate an automobile new, good, secondhand, or in any condition.'"

We need spend little time upon the question of plaintiff's right to recover, if the contracts were independently made by and with him. After reaching his majority one may disaffirm a contract made by him during infancy, and recover what he paid or parted with pursuant to such contract, if he return what he received. 22 Cyc. 616. And it has been held that depreciation in value of the property returned cannot even be shown to defeat or reduce recovery. On disaffirming the contract and returning the article purchased during infancy, the money paid thereon may be recovered, though the value of its use while the infant had it may exceed the payment made upon it. *Whitcomb v. Joslyn*, 51 Vt. 79, 31 Am. Rep. 678.

It is undisputed that both machines were paid for by plaintiff with his own money, which his guardian furnished him, knowing it would be so used, and that Black knew he was dealing with a minor who was getting his money from his guardian for that purpose. It is idle to say the contract of purchase and sale was with Emerson. The most that can be claimed of the talk over the telephone, as Black himself relates it, is a promise by Emerson, on the Sabbath, to send plaintiff sufficient money to enable him to make the payment of \$75 on the Buick, "if it suits and he wants it," and an acquiescence in, or implied approval, of, the purchase, if plaintiff saw fit to consummate it. He did send the money. Had plaintiff concluded that the car did not suit him, and he did not want it, and used the money so sent him for something else, it would scarcely be contended that defendant could recover from Emerson the balance due on the purchase price of the car by reason of his

fulfilled promise to send the money to plaintiff. Emerson took no part in the negotiations or selection of these cars, and never saw them until they were brought to Clare county. He and Black were strangers; they never saw each other, and was never at defendant's place of business until after the second car was sold and delivered to plaintiff. The first communication between them was by telephone, when plaintiff was negotiating a trade for the second car. All the usual transactions of purchase and sale were between plaintiff and defendant. The goods were exhibited and demonstrated to him; he was the "prospect" towards whom the salesman directed his efforts and whom he secured as a customer; plaintiff made the selection, closed the negotiations for the article purchased, paid for it, and received delivery of it. When he wrote defendant in reference to another deal for a Buick, he was answered, in part: "We can show you our new Buick cars. Wish to assure you, however, that any deal we make with you and take in your Ford, we will not take advantage of you; that we will make the price right and deal with you fairly. Come down to Saginaw and see us."

Both the written contracts were with him and signed by him without reference to Emerson, and were prepared by Black, defendant's agent, with full knowledge of existing conditions. The query which directed attention to Emerson was how or where plaintiff could raise the money to pay up and perform on his part the contracts he had made with defendant. Black's evident concern was not over the fact that he was selling to a minor, but how the minor was going to get the money to pay.

Defendant's most appealing contention is that the contracts made by plaintiff while a minor, with his guardian's knowledge and consent, with funds furnished by the guardian from the ward's estate for that purpose, and which would not have been made had not the guardian promised and furnished the money, are binding upon the quondam minor, and cannot be disaffirmed by him on reaching his majority. In support of this proposition *May v. Webb, Kirby, 287*, is cited with the following quotation: "If the ward's contract is made with the guardian's consent and approbation, it is binding on him personally, as if he had made it himself."

Whether that which Emerson consented to, and did and said in connection with this contract, renders him liable and the contract binding on him personally is not the issue here. He is not a party to this action. The case cited did not hold that such conduct on the part of the guardian renders the contract binding on the ward or L.R.A.1915C.

his estate to the exclusion of his right of disaffirmance on reaching majority. That case was decided in 1787, at a time when no provision was made for an official publication of decisions by the superior court of Connecticut; and Kirby, a member of the bar, who states that he "entered upon this business in a partial manner and for private use," compiled and published the volume in which the case is found. What is there said is based upon a quoted special verdict of a jury, from which it appears that one Martha, then wife of May, had, in the years 1773 and 1774, while sole and an infant under eighteen years of age, having a sufficient estate in her own right, with the consent and approbation of Ezekiel Williams, her guardian, purchased of Webb certain goods and articles, which were all necessaries, suitable to her rank and condition, and which were by Webb charged to said guardian, who afterwards refused to pay for them, whereupon, by his order and direction, they were charged to said Martha. The trial court held "that the contract, being for necessities, might well be charged to the minor." With this view the appellate court did not agree, and is reported as saying in part: "A contract made by a minor, under the power of a guardian, and with his consent and approbation, is by law binding upon the guardian, and was so before the revision of the statute laws of this state, in the year 1784. . . . But if such construction may not fairly be given, and the law was otherwise than is here adjudged, still in this case it would be that a minor, without any guardian, by the consent and approbation of said Williams, took the articles charged, and with an understanding on the part of the creditor that they were to be charged to Williams, and, in fact, were so charged. Therefore, on either principle, Williams was the original debtor, and no discharge given to him can operate to fix a legal claim in favor of Webb upon said Martha."

And yet the articles purchased by the infant were for necessities.

A guardian is a trustee of the estate of his ward, bound by law to manage and conserve it in a manner most advantageous to the inheritance, and held, as a rule, to a rigid accountability in the execution of the trust, and liable for loss occasioned by improper or unlawful expenditure of the funds of his ward. He personally has no beneficial title in the ward's estate, and, even for the ward, his expenditures must be limited to those things which are necessary, beneficial, and to the advantage of the child in the line of maintenance and education according to its estate and station in life.

The infant himself, though he request it,

cannot legalize a breach of this trust nor bind himself or his estate during his minority by adopting it. The doctrine of estoppel cannot be applied to his conduct during minority. Of the power of guardians to contract for their wards, it is stated as a general proposition that "Guardians cannot by their contracts bind either the person or estate of their wards. Such contracts bind the guardians personally, and recovery thereon must be had in an action against them, not against the ward." Woerner, Guardianship, p. 185.

The graphic views expressed by Black to Emerson, when the matter of disaffirmance of the contract first arose, touching the latter's disregard of his duties as guardian, indicate a fairly clear comprehension on his part of the limits of such trusteeship. With his knowledge of the disabilities of the parties and understanding of the restricted capacity in which Emerson was acting, defendant was dealing with them, through Black, at its peril. In so far as these transactions relate to depleting plaintiff's estate and his right to rescind, the principle is the same as though his guardian had furnished him funds from his own estate in the first instance with which to purchase an automobile when and where he chose, and he, with, the money to pay, had gone to defendant and made the purchase, truthfully telling whose money it was and how he came by it. Black evidently dealt with and drew up the contract to him under the mistaken theory that an executed contract with a minor was a finality; whereas the only difference between a minor asking relief on an executed contract of purchase and resisting relief asked on an executory contract is that in the former he must make restitution and return, if possible, that which he has purchased.

This is an action at law, and the only questions which can be considered are strict legal rights. Equitable issues are not involved. The recognized policy of courts, when called upon to act in such cases, is the strict and consistent enforcement of the principle involved in the presumption that minors are incapable of obligating themselves by contract, except for necessities, etc., as an essential means of most effectually protecting them against mischievous consequences of their own incapacity and imprudence, and impositions by those older and wiser.

It might well be urged that in submitting the case to the jury the court went further in defendant's favor than the law authorized.

The judgment is affirmed.
L.R.A.1915C.

MISSOURI SUPREME COURT.
(In Banc.)

GEORGE TEBEAU
v.
THOMAS S. RIDGE et al.

(— Mo. —, 170 S. W. 871.)

Appeal — insufficiency of petition — waiver.

1. Failure of a petition for specific performance of an agreement in a lease to convey the leased property, to allege defendant's ownership of the property, does not require a reversal of a decree in plaintiff's favor if the sufficiency of the petition was not challenged until a motion in arrest of judgment, and defendant's ownership of the property was conceded at the trial.

Pleading — specific performance — defendant's ownership.

2. Setting out defendant's contract to convey real estate, in a suit to secure its specific performance, obviates the necessity of alleging that defendant owned the property.

Specific performance — lack of homogeneity of contract — draft by defendant.

3. A landowner who drafts a lease giving an option to purchase cannot defeat specific performance of the option because it does not form an integral part of the lease in the sense that it does not dovetail in logical precision and grammatical construction with what precedes and follows it.

Option — in lease — consideration.

4. An option of purchase inserted by a

Note. — As suggested in the note to Pollock v. Brookover, 6 L.R.A.(N.S.) 403, the lack of consideration for an option to purchase real property is not necessarily a fatal objection to a suit for the specific performance of a contract concluded by the exercise of the option before any attempt to withdraw the same. The question of consideration, however, is important if before the option is exercised the optioner attempts to withdraw the same, but seems clear on principle and from the authorities cited in the note already referred to, and the opinion in TEBEAU v. RIDGE, that even in such a case no independent consideration is necessary if the option is embodied in a lease or other contract resting upon a valid consideration.

The right of the vendee to specific performance with abatement from purchase price, where the vendor is unable to convey a good and unencumbered title, is treated in the notes to Eppstein v. Kuhn, 10 L.R.A.(N.S.) 117, and Kuratli v. Jackson, 38 L.R.A.(N.S.) 1195.

The converse question as to the right of the vendor whose title is defective to specific performance upon condition of compensation or indemnity is discussed in the note to Charles B. James Land & Invest. Co. v. Vernon, 52 L.R.A.(N.S.) 959.

lessor in a lease is supported so far as consideration is concerned by the payment of the stipulated rent reserved so that it may be specifically enforced, and cannot be withdrawn during the period covered by the instrument.

Appeal — findings outside issues — effect.

5. Findings of the court in an equity cause, outside the pleadings and proof, do not require a reversal if there is enough in the pleadings and proof to justify the decree.

Specific performance — diminution of price for dower.

6. In enforcing specific performance of a contract to convey real estate in favor of one who did not know that the grantor was married, diminution of the purchase price by the present value of the wife's inchoate right of dower may be allowed where the vendor has not attempted to secure her signature to the conveyance and the contract does not call for a warranty deed.

(Bond and Woodson, JJ., dissent.)

(November 17, 1914.)

CROSS APPEALS from a decree of the Circuit Court for Jackson County in plaintiff's favor in an action brought to enforce specific performance of a contract to convey land; defendant Thomas S. Ridge appealing from the decree in plaintiff's favor, and plaintiff appealing from the refusal of the court to modify the decree to the extent of allowing him a diminution and reduction of the purchase price of the land equal to the value of the inchoate dower right of defendant's wife. Affirmed on defendant's appeal. Reversed on plaintiff's appeal.

Statement by Faris, J.:

Suit from Jackson county in equity for specific performance of a contract to convey land. Tebeau (hereafter called plaintiff to distinguish him, since the case is here on cross appeals) had a decree against Thomas S. Ridge, hereafter called defendant, but upon the refusal of the court nisi to diminish the purchase price by the value of the inchoate dower of Effie S. Ridge, wife of defendant Thomas S. Ridge, hereafter called Mrs. Ridge, said Tebeau appealed.

The status of these appeals, which have been consolidated by stipulation, is, then, that defendant is appealing as against plaintiff, for that the latter obtained any decree whatever, while plaintiff is appealing as against Mrs. Ridge, for whom the court found, for that no diminution was decreed to him for the inchoate dower of Mrs. Ridge. The latter does not appeal.

The learned trial court made and filed his L.R.A.1915C.

findings of fact, which throw much light upon the case made and are besides the subject of criticism leveled at them by defendant. For the latter reason, and since they succinctly set out the facts and greatly shorten our statement, we set them out, as follows:

"The court, being fully advised in the premises, doth find the issues in favor of the plaintiff and against the defendant Thomas S. Ridge, and doth further find from the proofs and evidence: That the allegations of fact in plaintiff's petition are true. That the defendants, Thomas S. Ridge and Effie S. Ridge, are and were at all the times herein referred to husband and wife. That on or about December 31, 1901, the plaintiff and defendant Thomas S. Ridge, for value received, and in consideration of the mutual agreements and covenants therein contained and the rents therein reserved, entered into, executed, and delivered each to the other a written agreement in words and figures following, to wit: 'This article of agreement witnesseth: That Thomas S. Ridge has this day rented to George Tebeau, in the present condition thereof, the tract of ground bounded by Olive street on the west, Twentieth street on the south, Prospect avenue on the east, and the line of the Kansas City Belt Line Railway on the north, in Kansas City, Missouri. It is understood by the clause which follows relative to subleasing that said Tebeau shall have the right to rent the above-described premises to others for occasional unobjectionable entertainments. Said Ridge to have free access to said premises on all occasions. Said Tebeau shall have the option of purchasing said property during the first year of this lease at and for the price of \$30 per front foot on Olive, Wabash, and Prospect streets, during the second year at \$35, after the second year and until the fifth year at \$40 per foot, and between the fifth and tenth year at and for the price of \$50 per front foot as above measured on the three streets frontage, for the period of ten years from the 1st day of January, 1902, on the following terms and conditions, to wit: For the use and rent thereof the said Tebeau hereby promises to pay Thomas S. Ridge or to his order \$700 per year for the first five years and \$900 per year for the next five years' time above stated, and to pay the same quarterly at the first of each quarter; that he will not sublet or allow any other tenant to come in with or under him without the written consent of said Thomas S. Ridge; that all of the property of said Tebeau on said premises, whether subject to legal exemption or not, shall be bound and subject to the payment of said rents; that in default of the pay-

ment of any quarterly instalment of rent for ten days after the same is due, he will, at the request of said Ridge, quit and render to him the peaceable possession thereof, but for this cause the obligation to pay shall not cease; and finally at the end of the term he will surrender to said Ridge, his heirs, or assigns, the peaceable possession of said premises, and at the expiration of said lease the said Tebeau shall have the right to remove from said grounds all buildings erected by him thereon, upon the express condition of his having paid all rents due under this lease, and not otherwise. In witness whereof, the parties have subscribed to duplicate copies hereof, to be retained by each party hereto.'

"That said agreement was duly acknowledged by the plaintiff on the 23d day of January, 1905, and thereafter duly recorded upon the records of the recorder's office of Jackson county, Missouri, at Kansas City, on the 26th day of January, 1905, in Book B. No. 959, at page 14 of said records. That defendant Ridge had knowledge that said land was being obtained by plaintiff for a baseball park. That plaintiff has faithfully complied with and performed all the terms, covenants, and agreements contained in said agreement and binding or obligatory upon him. That he entered upon the said land under said agreement, and made valuable and permanent improvements thereon. That the defendant Thomas S. Ridge insisted upon free access to the grounds and games as one of the conditions for dealing. That on or about July 31, 1909, plaintiff exercised the option of purchasing the property described in the said agreement, and elected to purchase the same according to the terms of said agreement, at and for the price and sum of \$50 per front foot, as measured on said Olive, Prospect, and Wabash streets, it being the extension of said Wabash street across said tract of real estate between said Olive and Prospect streets, in Kansas City, Missouri, which said date, namely, July 31, 1909, being the time of the exercise of the said option and the election by the plaintiff to purchase said property, occurred between the fifth and tenth year of the period of the said agreement and lease. That the amount of frontage of the above-described real estate on the streets named in the said agreement, to wit, Olive, Wabash, and Prospect streets, is 1,364 feet, and the price thereof fixed by the said agreement at the date aforesaid at \$50 per front foot, as measured on the said streets, is \$68,200. That the plaintiff did on July 31, 1909, concurrently with and as part of the transaction of exercising his said option and electing to purchase said real estate under L.R.A.1915C.

and according to the terms of the said contract, tender and offer to pay to the defendant Thomas S. Ridge the full price of the said real estate, to wit, the sum of \$68,200, in lawful money and legal tender of the United States, and did thereupon, and as part of the same transaction, notify said Ridge of his exercise of the said option and his election to purchase said land and of his tender and offer to pay said purchase price thereof, and thereupon the defendant Thomas S. Ridge rejected and refused to accept the said tender, and failed and refused to carry out the terms of the said contract, and denies any and all liability and obligation to sell or convey the said real property under the terms of the said agreement. That the plaintiff at all times from and after the said date, to wit, July 31, 1909, has been ready, willing, and able to purchase and pay for the real estate according to the terms of said contract, and is now willing and desirous of so doing, and now offers to pay the defendant Thomas S. Ridge the price of said land according to the terms of said agreement, and does now request the conveyance of the said real estate to him according to the terms of said agreement.

"The court further finds that the defendant Effie S. Ridge declines and refuses to join her husband, the defendant Thomas S. Ridge, in any conveyance of said land to the said plaintiff; that the defendant Thomas S. Ridge has never requested his wife, the defendant Effie S. Ridge, to join him in any such conveyance, and does not intend to make any such request of her; that, at the time of the making of the agreement aforesaid, the plaintiff did not know that the defendant Thomas S. Ridge was a married man.

"The court doth further find and declare that the agreement in the plaintiff's petition mentioned and set out herein ought to be specifically performed and carried into execution, and the title of the defendant Thomas S. Ridge in and to the land therein described, conveyed, or divested out of him and invested in the plaintiff."

To these facts, which, as found by the court, were fair and correct, except as may be discussed later on in the opinion, we may add that in February, 1906, plaintiff wrote defendant and requested a waiver of the provision as to subletting, or rather requested the privilege of assigning the lease to another party, though plaintiff was to retain an interest. Defendant wrote to plaintiff on February 3, 1906, saying:

"As a matter of course, I am willing to do what is right in this matter and will not handicap you in the negotiations contemplated."

To this letter on February 5, 1906, plaintiff wired defendant from Chicago thus:

"Do not understand your letter. Wire my expense if you consent to my subleasing park to purchasers of a controlling interest in the Kansas City Exhibition Company."

Defendant, in reply, on the same day wired plaintiff:

"If you will waive purchase option will consent to sublease."

Plaintiff wired in reply thus:

"Prefer running club myself to waiving purchase option. If I dispose of control and you agree to sublease will increase rent for last five years to \$1,200 per year."

Answering this by wire, defendant said:

"Purchase option provision without consideration, therefore not binding. With this understanding only would I consent to sublease."

In answer to this, plaintiff wired defendant:

"Option is not without consideration. Will not agree to such understanding. Will you consent to sublease as requested? Question can be raised when option is exercised."

This exchange of telegrams ended negotiations till July, 1909, at which time the tender mentioned in the findings of the court was made, and a quitclaim deed of conveyance was prepared and tendered to defendant for his and Mrs. Ridge's execution, which being refused, this action followed.

There are but few disputed questions of fact in the case; the insufficiency of the evidence strenuously urged upon us by defendant arising for the major part from alleged defects in the option clause itself, and not from any very serious contradictions in the facts shown by the respective parties upon the trial. There was a contradiction as to whether plaintiff had knowledge, when the lease was signed, of the fact that defendant had a wife. This is to be resolved by us upon the proof just as the learned court nisi resolved it; since it rests, on the one side, upon the sworn oath of plaintiff that he was ignorant of the defendant's domestic status, and, upon the other side, upon inferences and presumptions that, if he did not know it, he ought to have known it. Since inferences are, in the last analysis, but presumptions of a milder sort, and since, when proof steps in, a presumption must needs fold its tent and steal away, we may well incline in logic as well as in law to the findings on this point of the court below.

The proof showed that at the next nearest birthday anniversary defendant was fifty years of age and Mrs. Ridge was forty-seven; that their anniversaries fell, respectively,

on November 26, 1909, and September 2, 1909. So that the defendant is two years, nine months, and six days older than Mrs. Ridge.

If other facts shall become important during the discussion of the points made, we shall state them in the opinion.

Messrs. Johnson & Lucas, for defendants:

The petition does not state a cause of action, because it does not allege that the appellant was the owner of the land described.

Anderson v. Gaines, 156 Mo. 664, 57 S. W. 726; Gentry v. Rogers, 40 Ala. 442; Mallinckrodt Chemical Works v. Nemnich, 169 Mo. 388, 69 S. W. 355; 20 Enc. Pl. & Pr. 451; Joseph v. Holt, 37 Cal. 250; Williams v. Mansell, 19 Fla. 546; Manton v. Ray, 19 R. I. 423, 36 Atl. 1125; Bliss, Code Pl. 3d ed. § 438; Eberhart v. Reister, 96 Ind. 480; Munchow v. Munchow, 96 Mo. App. 553, 70 S. W. 386; Weil v. Greene County, 69 Mo. 281; Frazer v. Roberts, 32 Mo. 457; Welch v. Bryan, 28 Mo. 30; State ex rel. Reid v. Griffith, 63 Mo. 545; Hart v. Harrison Wire Co. 91 Mo. 414, 4 S. W. 123; Andrews v. Lynch, 27 Mo. 169; Trainor v. Sphalerite Min. Co. 243 Mo. 359, 148 S. W. 70, Ann. Cas. 1913C, 949; Sexton v. Metropolitan Street R. Co. 245 Mo. 254, 149 S. W. 21; Wells v. Covenant Mut. Ben. Asso. 126 Mo. 630, 29 S. W. 807.

The decree is erroneous on the face of the record.

Baldwin v. Whaley, 78 Mo. 186; Needles v. Ford, 167 Mo. 495, 67 S. W. 240; Schneider v. Patton, 175 Mo. 684, 75 S. W. 155; Roden v. Helm, 192 Mo. 71, 90 S. W. 798.

The finding and judgment of the court is contrary to the evidence.

1 Page, Contr. § 41; Turner v. Mellier, 59 Mo. 526; Mers v. Franklin Ins. Co. 68 Mo. 127; Warren v. Castello, 109 Mo. 344, 32 Am. St. Rep. 669, 19 S. W. 29; Hollmann v. Conlon, 143 Mo. 369, 45 S. W. 275; Daly v. Carthage, 143 Mo. App. 564, 128 S. W. 265; Davis v. Petty, 147 Mo. 374, 48 S. W. 944; Elliott v. Delaney, 217 Mo. 14, 116 S. W. 494; Richardson v. Hardwick, 106 U. S. 252, 27 L. ed. 145, 1 Sup. Ct. Rep. 213; Philpot v. Gruninger, 14 Wall. 570, 20 L. ed. 743; Boston & M. R. Co. v. Bartlett, 3 Cush. 224; Chicago & G. E. R. Co. v. Dane, 43 N. Y. 240; Brown v. San Francisco Sav. Union, 134 Cal. 448, 66 Pac. 592; Martin v. Condrey, 13 Cal. App. 618, 110 Pac. 457; Gordon v. Darnell, 5 Colo. 302, 2 Mor. Min. Rep. 220; Ford v. Euker, 86 Va. 75, 9 C. E. 500; Houtz v. Hellman, 228 Mo. 655, 128 S. W. 1001; Gottfried v. Bray, 208 Mo. 652, 106 S. W. 639; Cady v. Straus, 97 Va. 707,

34 S. E. 615; Kirby-Carpenter Co. v. Burnett, 75 C. C. A. 437, 144 Fed. 635.

The attempt to deduct from the purchase price some supposed value of an inchoate right of dower has been condemned by this court in the Aiple-Hemmelmann Real Estate Co. v. Spelbrink, 211 Mo. 671, 111 S. W. 480, 14 Ann. Cas. 652.

Messrs. Hadley, Cooper, Neel, & Wilson, Boyle & Priest, and Scarritt, Scarritt, Jones, & Miller, for plaintiff:

It is not incumbent upon the plaintiff to affirmatively allege or show that defendant is able to perform, nor is it incumbent upon plaintiff to show what title defendant has, or that he has any.

Sayer v. Devore, 99 Mo. 446, 13 S. W. 201; Pomeroy v. Fullerton, 113 Mo. 440, 21 S. W. 19.

Specific performance of an optional agreement to sell real estate will be enforced by a court of equity.

Kirkpatrick v. Pease, 202 Mo. 471, 101 S. W. 651; Aiple-Hemmelmann Real Estate Co. v. Spelbrink, 211 Mo. 671, 111 S. W. 480, 14 Ann. Cas. 652; Woodbury v. Gardner, 77 Me. 68; Couch v. McCoy, 138 Fed. 696; Watts v. Kellar, 5 C. C. A. 394, 12 U. S. App. 274, 56 Fed. 1.

Where an agreement is drawn by one of the parties thereto, it is to be construed most strongly against the one that drew it.

American Surety Co. v. Pauly, 170 U. S. 133, 42 L. ed. 977, 18 Sup. Ct. Rep. 552; Wilson v. Cooper, 95 Fed. 625; Hurley v. Fidelity & D. Co. 95 Mo. App. 88, 68 S. W. 958.

The making of the lease and the things therein required to be performed by the lessee, such as the payment of rent, are a sufficient consideration for an option to purchase expressed in the lease.

Jones, Land. & T. § 387; 18 Am. & Eng. Enc. Law, 2d ed. 631; Souffrain v. McDonald, 27 Ind. 269; Hayes v. O'Brien, 149 Ill. 403, 23 L.R.A. 555, 37 N. E. 73; Re Hunter, 1 Edw. Ch. 1; Stansbury v. Fringer, 11 Gill & J. 149; 24 Cyc. 1021; Monihon v. Wakelin, 6 Ariz. 225, 56 Pac. 735; McCormick v. Stephany, 61 N. J. Eq. 208, 48 Atl. 25; Pearson v. Millard, 150 N. C. 303, 63 S. E. 1053; Tilton v. Sterling Coal & Coke Co. 28 Utah, 173, 107 Am. St. Rep. 689, 77 Pac. 758.

Upon the court ordering specific performance by defendant Thomas Ridge, plaintiff is entitled to a diminution of the purchase price, for Ridge's wife refuses to convey or relinquish her inchoate right of dower.

Aiple-Hemmelmann Real Estate Co. v. Spelbrink, 211 Mo. 671, 111 S. W. 480, 14 Ann. Cas. 652.
L.R.A.1915C.

Faris, J., delivered the opinion of the court:

I. Three contentions are made by defendant and one by plaintiff in the cross appeals before us. Defendant, carrying upon his appeal the weightier burden, strenuously urges: (a) That the plaintiff's petition does not state a cause of action; (b) that there was no consideration for the option to purchase, contained in the lease; and (c) that the evidence adduced does not warrant the decree entered below. Plaintiff, while perforce expressing his contemplated acquiescence, should this court hold against him, yet urges with much earnestness that he is entitled to have the purchase price of the land in dispute diminished by the present value of the outstanding inchoate dower of defendant's wife therein. Three of these contentions go to the question whether there should be a decree at all in favor of plaintiff; the other concerns itself alone with the contents of that decree. We will discuss them in the order stated.

II. The petition on which the case was tried did not aver in apt terms that defendant Thomas S. Ridge was, at the time of the bringing of the suit, the owner of the land, conveyance of which, through a decree for specific performance, is here sought; but there was set out in full in the petition the instrument of lease, which contained the option to purchase. No demurrer was filed by defendant, nor even an objection made to the introduction of any evidence in the beginning of the trial; nor was any attention whatever paid to such alleged defect, till by a motion in arrest there was urged by defendant, as a reason for the arrest of judgment, this, among other things; to wit, "because the position (sic) does not state a cause of action." We know, of course, that the error noted is either stenographical or typographical.

The most casual examination of the record discloses that both parties treated the case upon the trial as if the petition did state that defendant owned the property; such ownership was admitted in the testimony of the defendant himself, and manifestly this fact throughout the trial was regarded by both sides as a thing conceded. Nor is any contention now being urged by defendant that he did not in fact own the land. He and his wife both swear that he owned it; but while the proof, without objection, expressly showed such ownership, the petition did not expressly aver it. If there were aught of substance in the contention of learned counsel for defendant in this behalf, if their position were not bottomed upon sheer, bald technicality, or even if they had in a timely way lodged objections to the petition, we might pause to

examine it more carefully. But their attitude upon the trial regarded, in that they tried this case in every respect as if the averment now contended for had been in the petition, and the fact that they are in no manner hurt, lead us to consider as apposite what was said by Gantt, J., in *Sawyer v. Wabash R. Co.* 156 Mo. loc. cit. 476, 57 S. W. 110: "The parties may try the case as if the omitted averment was in the petition or other pleading, and it is perfectly competent for the court, even after verdict, to amend in accordance with the proofs. In this case it would have been entirely proper for the court, in aid of the verdict, to have permitted the petition to have been amended, if defective, and, as all the facts are before this court, we will, if necessary, treat it as amended. *Darrier v. Darrier*, 58 Mo. 222. Our statute of amendments is very broad, and we are forbidden to reverse any judgment 'for omitting any allegation or averment without proving which the triers of the issue ought not to have given such a verdict.' Rev. Stat. 1889, § 2113; *Seckinger v. Philibert & J. Mfg. Co.* 129 Mo. loc. cit. 598, 31 S. W. 957; *Grove v. Kansas City*, 75 Mo. 672; *Thompson v. Kessel*, 30 N. Y. 383. This doctrine finds abundant support in the decisions of this court construing the statute. We are cited to a case in New York which illustrates the exact point now under discussion. In *Rowland v. Sprouls*, 66 Hun, 635, 50 N. Y. S. R. 921, 21 N. Y. Supp. 895, a material allegation of insolvency had been omitted, and it was urged by appellant that it was indispensable, but the court said that 'the evidence, which was admitted without objection, abundantly established the insolvency of the mortgagor. The complaint could have been amended by the trial court, if an amendment was necessary, for it would not have changed the nature of the action. It is not necessary to send the case back for the purpose of amending the complaint. That may be done by the appellate court. . . . The course of the trial was the same as if the complaint had contained the needed allegation, so that the defendant was neither misled nor prejudiced by the omission.' All of which applies as well to this case. It is perfectly plain that the omission to state defendant had not paid this money to the other subscribers in no manner prejudiced the defendant."

This doctrine is at least salutary, and makes for more expeditious justice, to the great hurt it may be to attenuated technicality, which, however, is not now to be viewed with such a friendly face as in days of yore. Likewise it is in consonance with what we conceive to be both the letter and the spirit of the statute of jeofails (§ 2119, L.R.A.1915C.

Rev. Stat. 1909), which statute, in addition to the apposite provisions in the 8th and 9th subdivisions thereof, furthermore forbids—not so appositely mayhap, but nevertheless forbids—us to reverse a case "for any other default . . . of the parties, or of their attorneys, by which neither party shall have been prejudiced." To the same general import and intent likewise are the provisions of § 2082, Rev. Stat. 1909.

Besides this there are cases from other jurisdictions which seem to hold that the vendee does not need to offer proof of the vendor's title; the fact that the vendor assumed to sell raised the presumption of title, naught else appearing. *Prince v. Bates*, 19 Ala. 105; *Gartrell v. Stafford*, 12 Neb. 545, 41 Am. Rep. 767, 11 N. W. 732. In this view the setting out in the petition in *hæc verba* of the paper containing the option to buy was a sufficient compliance with any requirement to plead ownership in the defendant. We disallow this contention.

III. Was there any consideration to support this option? Upon this phase of the case defendant contends most earnestly that there was not. The point is confessedly troublesome and fairly close. Some one or two facts from the record may help us to determine this vexing point, *viz.*, defendant himself wrote the instrument of ground lease which contained the option about which this action turns, and both plaintiff and defendant agree that the option to buy upon the very terms and within the very time in said instrument set out was to be a part of the lease. So much upon the latter point is said in full knowledge of the rule that, where parties have reduced their contracts to writing, conversations changing their written agreements, in the absence of fraud averred, are no more to be received or heeded in equity than in a suit at law.

But the point is stressed by learned counsel for defendant that, while the option to sell was a part of the ground lease instrument, it was not "an integral part" thereof. If by integral part counsel mean an homogeneous part, dovetailing in logical precision and grammatical and rhetorical construction with what preceded and with what followed it, then the point is well taken. But since the defendant wrote it, and is therefore to have invoked against him for that fact a more strict and harsh construction, and since it is all contained in a single document executed by the same signing and at the same time, we do not think the case should break solely upon the fact that it is lacking in the setting in which we find it,—finished completeness. For "integral," the

books say, means "lacking nothing of completeness." Webster's Dict.

Touching an option to buy made by the vendor to his lessee and contained, as here, in a lease and sought to be exercised only in the last week of a ten-year period, Justice Field of the United States Supreme Court, in the case of *Willard v. Tayloe*, 8 Wall. loc. cit. 564, 19 L. ed. 503, said: "The covenant in the lease giving the right or option to purchase the premises was in the nature of a continuing offer to sell. It was a proposition extending through the period of ten years, and, being under seal, must be regarded as made upon a sufficient consideration, and therefore one from which the defendant was not at liberty to recede. When accepted by the complainant by his notice to the defendant, a contract of sale between the parties was completed. . . . This contract is plain and certain in its terms, and in its nature, and in the circumstances attending its execution, appears to be free from objection. The price stipulated for the property was a fair one. At the time its market value was under \$15,000, and a greater increase than one half in value during the period of ten years could not then have been reasonably anticipated."

In the cases of *Tilton v. Sterling Coal & Coke Co.* 28 Utah, 173, 107 Am. St. Rep. 689, 77 Pac. 758, and *Page v. Martin*, 46 N. J. Eq. 585, 20 Atl. 46, the options to buy were contained in the leases, and except for physical juxtaposition, as here in the instant case also, such options were no more "integral parts" of the leases than is the one here. The consideration mentioned in the above cases did not expressly nor by any implication refer to the option or include it, nor was it syntactically included, though physically it was in the same instrument. In both cases it was an integral part, in that it was a part of the whole or entire instrument of lease, but homogeneity was there, as here, utterly lacking. Yet it was said by Garrison, J., quoting from the earlier case of *Hawralty v. Warren*, 18 N. J. Eq. 124, 90 Am. Dec. 613: "It is now well settled that an optional agreement to convey, without any covenant or obligation to convey and without any mutuality of remedy, will be enforced in equity if it is made upon proper consideration, or forms part of a lease or other contract between the parties that may be a true consideration for it." *Page v. Martin*, 46 N. J. Eq. loc. cit. 593, 20 Atl. 48.

We are fully convinced that, when an option to purchase is contained in a lease, the payment of the stipulated rent reserved is a sufficient consideration for the agreement to convey, and that such option is a continuing offer to sell at the price named up

to the end of the period therein limited, so that the offer may not be withdrawn within such period without the consent of the vendee. This view, in our opinion, is borne out and upheld fully by the above cases as well as by the well-nigh universal holding of the cases and by the language of the textbooks. *McCormick v. Stephany*, 61 N. J. Eq. 208, 48 Atl. 25; *Stansbury v. Fringer*, 11 Gill & J. 149; *Souffrain v. McDonald*, 27 Ind. 269; *Hayes v. O'Brien*, 149 Ill. 403, 23 L.R.A. 555, 37 N. E. 73; 24 Cyc. 1021; *Jones, Land. & T. § 387*; 18 Am. & Eng. Enc. Law, 631; *Willard v. Tayloe*, 8 Wall. 557, 19 L. ed. 501; *De Rutte v. Muldrow*, 16 Cal. 505; *Corson v. Mulvany*, 49 Pa. 88, 88 Am. Dec. 485.

On the other hand, the Missouri cases cited by learned counsel for defendant do not, in our view, bear out their contention upon this point. A fair *résumé* of the cases (largely from plaintiff's brief, but with emendations of our own) follows:

The first case (*Mers v. Franklin Ins. Co.* 68 Mo. 127) was a suit upon an insurance policy, and the question was whether or not plaintiff had title to the property which was burned. In an attempt to show title, plaintiff exhibited a lease and also an option to buy. It was not proved or claimed that the lease and the option were in any way connected, nor had the option to purchase ever been exercised. It was therefore held that plaintiff failed to show sufficient title to maintain the action upon the insurance policy.

The next case (*Davis v. Petty*, 147 Mo. 374, 48 S. W. 944) was one where defendant entered into a contract with plaintiff for the sale of the west half of certain land for \$640, and further agreed that, whenever plaintiff paid him a like sum, he would convey to him the east half of the same land. This contract was made August 4, 1888. There was not, as there is in the instant case, any time fixed within which the option was to be exercised. It was not until December, 1894, more than six years after this contract was made, that plaintiff took any steps toward exercising the option contained in said contract. In the meantime, defendant, the owner, had made valuable improvements on the land, costing more than the sale price mentioned in the option. These improvements by defendant were made with plaintiff's knowledge, but he said nothing, nor gave any indication that he was ever going to exercise his option to buy. The court held that, under all the circumstances of the case, the option contract had been abandoned by the parties, and that plaintiff had been guilty of laches in exercising his option. Specific per-

formance was therefore denied. There was no lease in that case.

In the next case (*Warren v. Castello*, 109 Mo. 343, 32 Am. St. Rep. 669, 19 S. W. 30) one Mreen in 1884 had given Warren, plaintiff, an agreement to sell her certain land for \$2,000 before March 1, 1889. No tender or demand was made during the life of Mreen, but after his death a demand and tender was made to his executrix. It was held that plaintiff, being a married woman, was not capable of making a contract, and that there was no consideration whatever for the option. There was a lease mentioned in this case, but there was not, and could not be, any claim that the lease was a consideration for the option, because the lease was made long prior to the giving of the option, and plaintiff was in possession at that time under the lease. The option agreement stood alone, and no consideration was mentioned in it, and none was proved. Pertinent to our point here in issue, the above case holds: "The principle on which this seeming exception is based is that the bond or conditional covenant to convey upon the option of the lessee or vendee is a continuing offer on the part of the vendor or owner, until accepted within the time and on the terms limited in the option, and when accepted it becomes a valid agreement, supported by mutual promises of competent parties. *Willard v. Tayloe*, 8 Wall. 557, 19 L. ed. 501; *Boston & M. R. Co. v. Bartlett*, 3 Cush. 224; *Welchman v. Spinks*, 5 L. T. N. S. 385; *Old Colony R. Corp. v. Evans*, 6 Gray, 25, 66 Am. Dec. 394; *Waterman*, Spec. Perf. § 200."

The next case (*Elliott v. Delaney*, 217 Mo. 14, 116 S. W. 494) was a suit in ejectment. An option to buy figured in this case, but the question of consideration did not arise. In fact, it was conceded by the court that there was a consideration for the option, and that the same was valid. This case was reversed and remanded on the ground that the decree entered by the court did not conform to the pleadings in an ejectment suit.

The next case cited by counsel for Mr. Ridge is *Hollmann v. Conlon*, 143 Mo. 369, 45 S. W. 275. In that case there was a contract of sale rather than an option, and no lease was involved. Specific performance was denied because plaintiff had not acted within the time specified in the contract of sale, nor had he offered to pay the full purchase price.

It follows, we think, that this contention of the defendant is not well taken.

IV. With the contention that the evidence does not warrant the decree or any decree here for plaintiff, we are likewise unable to agree. Since this case sounds in equity L.R.A.1915C.

the findings of the learned trial judge, sitting below as a chancellor, are not binding upon us, but persuasive merely; we have gone into this point carefully. We set out in the statement the facts as we gather them and find them from the record, and we are convinced that there is enough evidence to fully sustain a decree of specific performance, and that in so holding the trial judge did not err. It would subserve no useful purpose to set out again these facts; it would be but to eat up space. We may give passing notice to the contention of defendant that, in the finding of facts made by the trial judge, more was found than was pleaded. We do not think that the record bears out this contention in the sense that the court below so found any vital facts. Some of the things the learned trial court is charged with having thus found without justification from either the petition or the proof arise as matters of law from the allegations of the petition (e. g., that plaintiff had no adequate remedy at law); others are immaterial, or worse (e. g., that the court, absent an allegation to this effect in the petition, yet found that the land was to be used for a baseball park). But we only mention these things as an evidence that we saw them, since this is an equity case, and therefore to be tried in a broad sense *de novo* here, and since we are not bound to follow the learned chancellor below, unless we find that he was correct. So if he made findings outside both pleadings and proof, and yet there is enough in the case and in the pleadings and proof to justify us in upholding his decree generally, is there any rule of law which forbids us to do so? We think not, and conclude that a decree for specific performance was fully justified by the pleadings and proof. We cannot say, as a matter of law, that an acceptance of a contract to sell in July, 1909, at \$50 a foot, the identical land upon which in 1902 defendant fixed a value of only \$30 a foot, is overreaching or unjust or unconscionable; *a fortiori* where the lowest and the middle and the highest prices were all of the defendant's own fixing; nor do we understand that this is urged by defendant. It follows that a decree for specific performance was proper.

V. Which brings us to a discussion of the plaintiff's cross appeal, and requires us to ascertain, if we can, what sort of decree should be entered. Should we affirm the case without diminution of price for the outstanding inchoate dower of Mrs. Ridge, leaving plaintiff to his action at law for relief, if any he has, or will ever have upon the facts here, or should we decree or order a decree for plaintiff after diminishing the purchase price agreed to be paid by

the value of Mrs. Ridge's inchoate dower, figured upon one third of such actual purchase price?

As to certain facts of debatable value, but held in some of the cases to be of prime importance, we may state as a foreword that the court below found, as the facts fully warranted him in doing, that plaintiff, when he made the lease and got the option in dispute, did not know that defendant was married. It also appears that defendant had not requested, prior to his refusal to convey the land to plaintiff, and did not intend to request, Mrs. Ridge, his wife, to sign any conveyance of this land to plaintiff. Lest undue importance be attached to legal rules growing out of the absence of plaintiff's lack of information as to the defendant's domestic status, we concede, in passing, that such ignorance can in no wise affect the interest of Mrs. Ridge herself, nor can she be required, by any decree we can make or order, to convey her dower. These things can go only to matters of good faith, as such may affect the plaintiff and the defendant.

There is no unanimity of decision on this question of diminution of purchase price. The cases are in much confusion and irreconcilable contrariety. Three views prevail: (1) The purchaser is entitled, as against inchoate dower, to have the purchase price diminished by such sum as represents the present value of the wife's contingent interest, estimated by the tables of mortality and by the statute of present values of estates less than a fee (*Springle v. Shields*, 17 Ala. 295; *Martin v. Merritt*, 57 Ind. 34, 26 Am. Rep. 45; *Noecker v. Wallingford*, 133 Iowa, 605, 111 N. W. 37; *Bostwick v. Beach*, 103 N. Y. 414, 9 N. E. 41; *Davis v. Parker*, 14 Allen, 94; *Walker v. Kelly*, 91 Mich. 212, 51 N. W. 934; *Woodbury v. Luddy*, 96 Mass. 1, 92 Am. Dec. 731; *Samborn v. Nockin*, 20 Minn. 178, Gil. 163; *Wannamaker v. Brown*, 77 S. C. 64, 57 S. E. 665; *Wright v. Young*, 6 Wis. 127, 70 Am. Dec. 453), and in New Jersey, when refusal of the wife to convey is fraudulently brought about (*Young v. Paul*, 10 N. J. Eq. 401, 64 Am. Dec. 456); (2) the view that the decree of the court may permit the vendee to retain one third of the purchase price as an indemnity until the wife die or convey (*Springle v. Shields*, 17 Ala. 295; *Bradford v. Smith*, 123 Iowa, 41, 98 N. W. 377); and (3) the view that the vendee shall have no abatement of the agreed purchase price on account of the wife's refusal to relinquish her inchoate dower, on the ground usually that such abatement would serve to put upon the wife unfair coercion to relinquish a right given to her by law (*Barbour v. Hickey*, 2 App. L.R.A.1915C.

D. C. 207, 24 L.R.A. 763; *Cowan v. Kane*, 211 Ill. 572, 71 N. E. 1097; *McCormick v. Stephany*, 57 N. J. Eq. 257, 41 Atl. 840), unless wife's refusal was fraudulently collusive with husband, in which case rule in New Jersey is *contra* (*Roos v. Lockwood*, 59 Hun, 181, 13 N. Y. Supp. 128; *Riesz's Appeal*, 73 Pa. 485; *Graybill v. Brugh*, 89 Va. 895, 21 L.R.A. 133, 37 Am. St. Rep. 894, 17 S. E. 558; *Aiple-Hemmelmann Real Estate Co. v. Spelbrink*, 211 Mo. 671, 111 S. W. 480, 14 Ann. Cas. 652).

The last holding in this state was in the *Spelbrink Case*, supra, where, by a divided court of three to four, it was held by the majority opinion that the vendee might, if he so wishes, take the title of the husband at the original agreed purchase price, undiminished by the inchoate dower of the wife, but that nothing was to be ruled, so as to forbid the vendee from suing for his damages by reason of the outstanding inchoate dower of the wife. In the *Spelbrink Case* plaintiff knew that the defendant had a wife, and the option provided for a warranty deed. In the instant case plaintiff did not know that defendant had a wife, and the option did not provide for a warranty deed.

In reaching the judgment, supra, it is plain that the order came in a way *ex gratia*; that the majority held to the view that, if plaintiff would not take specific performance on the terms of taking that which the husband alone could convey, then he should not have specific performance at all. But let us quote, so that no error from misunderstanding may befall. On page 706 of 211 Mo., the majority opinion says: "A court of chancery will not specifically enforce a contract for the sale of real estate against a married man, where his wife refuses to join him in the conveyance, without the vendee is willing to pay the full amount of the purchase money and accept a deed from him, alone, and without his wife joining therein, containing the kind and character of covenants and agreements as are called for by the contract. The reason for this principle of equity is that such a court will not lend its aid, even indirectly or remotely, to coerce a wife to relinquish her inchoate right of dower in the face of the statute which expressly provides that the relinquishment of her dower rights shall be done as her own free act and deed. Besides this, dower has always been considered one of the wards of a court of chancery, and it has even extended its protecting hand to the estates of married women and minors. And if, in the face of the statute and the equitable principles mentioned, the court should withhold the payment of a considerable portion of the purchase money during

the life of the wife, because she refused to join her husband in the conveyance, or to subject him to an action for exemplary damages, it would be substituting, in its decree, coercion and oppression in lieu of justice, equity, and good conscience, which have ever characterized its judgments; and it would be no stretch of the imagination to say that the influence and effect thereof would weigh so heavily upon him that the indirect effect upon her would be so great as to amount to a moral coercion, and as a result thereof she would rather relinquish her dower rights than to see him thus punished on account of her said declination, and thereby deprive her of her free disposition of her marital interest in her husband's real estate. There would be no justice or equity in such a decree, but, upon the other hand, it would amount to moral coercion and duress, in so far as she is concerned, and if perpetrated upon her by an individual, that is, if he had secured a deed from her by such means, without the intervention of a court, a court of conscience would not hesitate one moment in releasing her from the fetters which bound her thereto. The law will not permit a person to acquire or retain the fruits of a contract obtained by such extortion. *Wilkerson v. Hood*, 65 Mo. App. 491."

In my humble view the great weight of authority, both of the adjudged cases and the text writers, adhere to the view that in a proper case "a purchaser of real estate under a contract such as here, that is, an honest one, a fair one, free from covin, overreaching, or misuse of trust relation—supported by a valid consideration, definite in term, and not obnoxious to the statute of frauds,—is entitled as of right to performance. The contracting parties write their own law in their contract. Courts sit to enforce the law. Hence they sit to enforce contracts, not abrogate them." Dissenting opinion by Lamm, J., *Aiple-Hemmelmann Real Estate Co. v. Spelbrink*, 211 Mo. 723, 111 S. W. 495, 14 Ann. Cas. 652.

Should any or all of the facts that plaintiff, as here, did or did not know there was a wife in the case, or did not know that such wife would not sign, or that the defendant did not request and would not request his wife to sign, because the agreed sale price was inadequate, or had become so from an undreamed of increase in values, serve to prevent a court of equity, in an otherwise just case, from decreeing specific performance? Nevertheless one or more of these reasons is to be found present and controlling in every case where diminution of the purchase price is refused, and consequently specific performance denied, except upon condition that the plaintiff take

such title only as the sole deed of the husband will convey. I say that the authorities ought not to say so; neither do the great weight of them say so, as I read them. Performance in a proper case will, it seems, almost always be decreed, but upon terms differing and utterly irreconcilable. See cases cited, *supra*, and *Waterman*, Spec. Perf. § 511; 26 Am. & Eng. Enc. Law, 2d ed. 83; 2 Story, Eq. Jur. 13th ed. § 779; Pom. Spec. Perf. of Contracts, 626. If, then, such contracts are to be enforced,—and the rule is that, while the enforcement thereof is in the discretion of the chancellor, the discretion to be used is a sound, judicial, and not a capricious, discretion, and also the rule is that, other things being equal, they are to be enforced,—then, in my opinion, both the weight of authority and the reason of the thing lie with the view that there should be a diminution of the purchase price by the present value of the wife's inchoate dower. The defaulting option giver should not get the whole purchase price, and then, as a reward for his breach of contract, keep one third of the title in a life estate in the family. Therefore I am forced by the authorities and the text writers, as well as by the logic and reason of the case, to follow the dissenting opinion in the *Spelbrink Case*. This is a stronger case than the *Spellbrink Case*; not so much stronger, it may be, as the difference in the rule connotes, but stronger nevertheless in that plaintiff was in ignorance of the marital status of defendant, and also in that defendant defiantly—approaching the twilight zone of fraudulently, in a constructive sense—refused to even request his wife to convey her inchoate dower; moreover, the estate covered by the letter of the option, while impliedly a fee, was not agreed to be warranted.

As forecast above, the cases which refuse to require specific performance, except the plaintiff take that title and estate only which the sole deed of the husband will convey, usually put refusal largely upon the ground that to do so would be to coerce the wife, but we have seen that the rule that specific performance will be decreed upon some terms is almost universal, and that some of these terms are exceedingly harsh; e. g., the retention as indemnity of one third of the purchase price till the wife dies or conveys.

Back of all of the few cases which neither decree diminution of purchase price nor provide for an indemnity to cover inchoate but contingent dower lies the idea that specific performance is a matter resting in the judicial discretion of the chancellor, which discretion will not be exercised, if the exercise thereof shall be beset

with difficulties or shall afford opportunity of injustice such as may happen in dealing with the wholly contingent dower of a wife in the lands of a living husband. When these few cases, which neither indemnify the purchaser nor diminish the purchase price by reason of the inchoate dower of the wife, decree specific performance, it is done in a sense *ex gratia* (that is, the plaintiff is told in effect that he may not have that for which he sues), but, if he be willing to take less than he sued for and less than the option giver contracted to sell, he may have a partial specific performance. If he will not accept this half loaf of justice, he must then take nothing by his solemn contract.

If a decree is to be made and plaintiff is to be relegated to his action for damages to the covenants in his deed or to a breach of a contract to convey a title free and clear of defects, what becomes of a case like this, where no warranty deed is to be made, or has been agreed to be made, but where we are compelled to reach the view that a fee is agreed to be conveyed merely by the implication arising from the agreement to sell? Can plaintiff, after suing in equity for and accepting that title only which defendant's sole deed will convey, absent any covenant of warranty, afterwards sue at law for damages for defendant's failure to convey a title free of Mrs. Ridge's inchoate claim of dower? We are not in this case called on to answer this question, but if the answer happen to be that absent an agreement by defendant to convey by warranty deed, then absent the right to sue at law for damages for breach of the accepted option to buy, it would result in a large loss to plaintiff and a correspondingly large reward to defendant's wife for defendant's breach of faith and contract. It would be bad policy to announce a rule of law which would result in rewarding those who wantonly break their solemn obligations.

By compelling the husband to convey at a price diminished by the present value of the wife's inchoate dower, she personally and presently loses nothing; her husband suffers a loss which, somewhat like bread upon the waters, may come back to the wife. If it be conceded that she is coerced by her husband's present loss to an extent greater than she is buoyed up by the future hope of widowhood and dower in the land, there is no sufficient basis or reason in the view to account logically for the rule. For if she sign rather than refuse to do so, the full purchase price is paid to her spouse; and if—and this contingency must occur to aid her in either case supposed—her husband be gathered to his fathers be-
L.R.A.1915C.

fore her, she takes her statutory interest in the money, to wit, personal property, of her husband, rather than in the land, subject only to her husband's debts. Rev. Stat. 1909, §§ 349 and 351. So that upon such view the case largely falls into the category of those things "which are six of one and half a dozen of the other."

Other reasons might be urged, but the same thing has already been written and the whole matter so ably discussed as that for me to try to add anything of value to the argument and learning would be but to be presumptuous without being illuminating. I am led by the authorities to conclude that the case of *Aiple-Hemmelmann Real Estate Co. v. Spelbrink*, 211 Mo. 671, 111 S. W. 480, 14 Ann. Cas. 652, should no longer be followed, but that the views expressed in the dissenting opinion should be followed as being more in consonance with the reason of things and more in accord with the great weight of authority. To the cases discussed in that dissenting opinion and to the reasoning there, I refer the student who is desirous of pursuing the matter further, without taking the time and space here to reason the matter out again, even if I were able, as I am not, to add one jot or tittle of argument thereto.

It results, therefore, that this case should be reversed and remanded, with directions to the trial court to order specific performance in favor of plaintiff, and that if, within a reasonable time to be fixed by the court, defendant and his wife do not make, execute, acknowledge, and deliver to plaintiff a good and sufficient deed of conveyance covering the premises in controversy to plaintiff, the circuit court shall enter a decree divesting out of defendant Thomas S. Ridge all and singular the right, title, interest, and estate of him (said Ridge) in the land in controversy, and vesting the same in the plaintiff, upon the payment to defendant by plaintiff of the sum of \$68,200, diminished by the value, as of the time of the trial, of the inchoate contingent dower of Mrs. Effie S. Ridge in the one-third part thereof, calculated at 6 per cent upon the basis of a life in the contingent doweress of two years, nine months, and six days more than that of defendant, and being therefore the sum of \$2,863, and leaving to be paid to defendant the sum of \$65,337. *Giaque & McClure's Tables*, pp. 18, 20, and 158. Taxes and special assessments, if any, since suit was begun to be paid by plaintiff; all costs to follow decree.

It is so ordered.

Since, however, some of the views expressed in this opinion by Farris, J., in which Walker, P. J., and Brown, J., concur, are in conflict with the opinion of a

majority of the court in banc in the case of Aiple-Hemmelmann Real Estate Co. v. Spelbrink, 211 Mo. 671, 111 S. W. 480, 14 Ann. Cas. 652, and for the purpose of securing a single, certain, clear, and authoritative utterance of the whole court on the question of whether there should be a diminution of the purchase price in specific performance on account of outstanding inchoate dower, we are of the opinion that this case, pursuant to authority conferred on this division by the Constitution, should be transferred to banc, to be there ruled on by all the brethren, which is accordingly ordered.

All concur.

Per Curiam:

The above cause, coming into banc, is reargued and submitted there with the result that the divisional opinion of Faris, J., is adopted by the court.

Lamm, Ch. J., and Graves, Brown, and Walker, JJ., concur.

Bond, J., dissents.

Woodson, J., dissents for reasons given in the principal opinion in Aiple-Hemmelmann Real Estate Co. v. Spelbrink, 211 Mo. 671, 111 S. W. 480, 14 Ann. Cas. 652.

NEBRASKA SUPREME COURT.

FRANK C. BEST et al., Appts.,

v.

HARLEY G. MOORHEAD, Election Commissioner.

(96 Neb. 602, 148 N. W. 551.)

Office — term — statutory provision.

1. Chapter 46, Laws 1905, fixes the term

Headnotes by SEDGWICK, J.

Note. — Power to extend term of office by postponing time of election.

It is desired to call attention to the fact that the case above reported overrules State ex rel. Hensley v. Plasters, 74 Neb. 652, 3 L.R.A.(N.S.) 887, 105 N. W. 1092, 13 Ann. Cas. 154, only so far as that case declared the Nebraska biennial election law of 1905 wholly unconstitutional, without repudiating in any way the position therein taken that the legislature could not, incidentally to a change in the time for holding elections, extend the term of the then incumbents of public office. This note is a continuation of the note in 3 L.R.A.(N.S.) 887, on that point.

In Spencer v. Knight, 177 Ind. 564, 98 L.R.A.1915C.

of county commissioners of counties having a population of more than 150,000 at four years. Commissioners elected under and pursuant to that act, as amended, hold the office for four years, and until their successors are elected and qualified.

Same — case overruled.

2. State ex rel. Hensley v. Plasters, 74 Neb. 652, and subsequent cases following that decision, are overruled so far as they hold that act invalid to fix the term of county commissioners at four years.

(July 11, 1914.)

APPEAL by plaintiffs from a judgment of the District Court for Douglas County sustaining a demurrer to a petition filed to enjoin defendant from filing nominations for the office of county commissioner before the expiration of plaintiffs' terms. Reversed.

The facts are stated in the opinion.

Messrs. W. T. Thompson, W. W. Slaugh, and H. A. Reese for appellants.

Messrs. George A. Magney and Charles Haffke for appellee.

Sedgwick, J., delivered the opinion of the court:

These plaintiffs, Frank C. Best and August C. Harte, were duly elected to the office of county commissioner of the third and fifth commission districts of Douglas county, at the general election in 1911, and were duly qualified and entered upon the duties of the office in January, 1912. They contend that they were elected for the term of four years and that their respective terms will not expire until January, 1916. The defendant is election commissioner of Douglas county, and plaintiffs allege that the defendant is about to, and unless restrained by decree in this case will, "receive nomination papers and petitions from several parties seeking to become candidates" for said office "now represented by plaintiffs," and will file the same and "will place

N. E. 342, it was held that the act of March 2, 1911, providing that all probate, juvenile, and superior court judges shall be elected at the general election in 1914, and that no election shall be held in 1912 to elect such officers, does not contravene a constitutional provision prohibiting the legislature from creating any office the tenure of which shall be longer than four years, though, as the Constitution provides that incumbents of certain offices elected for a term of years shall hold office until their successors are elected and qualified, its incidental result is to continue the incumbents in office beyond their term, as such extension of their terms of office is by virtue of the Constitution, and not by act of the legislature. E. S. O.

the names of such parties on the official primary ballot to be voted for and nominated to the said offices at the primary election to be held in Douglas county on the 18th day of August, 1914, . . . and will thereby create a useless and unnecessary expense" to the county and taxpayers thereof. They asked that defendant be enjoined from so doing. The defendant filed a general demurrer to the petition, which was sustained and the cause dismissed. The plaintiffs have appealed.

The sole question presented on this appeal is as to the length of the terms to which plaintiffs were elected. The plaintiffs insist that under the statute the term is four years, and the respondent insists that it is three.

The statutes governing this question are conflicting and inconsistent and cannot be literally enforced. Prior to 1905 the statute provided for five commissioners in Douglas county and fixed the term at three years. The act of 1905 (Laws 1905, chap. 46), under which these plaintiffs were elected in 1911, contained the provision for five commissioners, but attempted to fix the term at four years. If this act is constitutional and has not been superseded, and its terms are such as to be capable of being enforced, the plaintiffs are right in their contentions.

The constitutional amendment of 1912 provided: "The general election of this state shall be held on the Tuesday succeeding the first Monday of November in the year 1914 and every two years thereafter. All state, district, county, precinct and township officers, by the Constitution or laws made elective by the people, except school district officers, and municipal officers in cities, villages and towns, shall be elected at a general election to be held as aforesaid. . . . Provided, that no office shall be vacated thereby but the incumbent thereof shall hold over until his successor is duly elected and qualified." Const. art. 16, § 13.

In 1913 the legislature enacted a general statute repealing former acts, and by which it was intended to harmonize the statutes with the constitutional amendment quoted above. Rev. Stat. 1913, chap. 20. Section 17 of the act (Laws 1913, chap. 149, § 1955, Rev. Stat. 1913), provided: "In counties not under township organization having five commissioners, three commissioners shall be elected in the year 1914, and every fourth year thereafter."

Construed literally, this would vacate the office of any commissioner whose term did not otherwise terminate on or before January, 1915. This, of course, the legislature could not do, as the Constitution provided that "no office shall be vacated" on account of the change made by that amendment. L.R.A.1915C.

The legislature will not be presumed to have intended a violation of the Constitution, and this provision of the act of 1913 must be construed as intended to apply only when such offices were or would become vacant before or at the time the terms of those elected in 1914 would begin. It could not therefore apply to these plaintiffs if the term to which they were elected was for four years. The petition alleges that two commissioners were elected in the year 1910. Their successors will therefore be elected in 1914. One was elected in 1912. His term of office will be until January, 1917. The act of 1913 (Rev. Stat. 1913, § 1955), provides that three commissioners shall be elected in 1914 and every four years thereafter. This requires that three commissioners shall be elected at the end of four years from 1914; that is, at the election of 1918. It cannot be effective as to the election of 1914, since the terms of only two commissioners will expire in January, 1915.

Was the act of 1905, under which these plaintiffs were elected, constitutional? Defendant's counsel insists that it is not, and cites *State ex rel. Hensley v. Plasters*, 74 Neb. 652, 3 L.R.A.(N.S.) 887, 105 N. W. 1092, 13 Ann. Cas. 154, *State ex rel. Polk v. Galusha*, 74 Neb. 188, 104 N. W. 197, *State ex rel. Ure v. Drexel*, 76 Neb. 299, 106 N. W. 1135, and *State ex rel. O'Gara v. Furley*, 95 Neb. 161, 145 N. W. 343, as conclusive upon that point.

In *State ex rel. Hensley v. Plasters*, supra, the question was whether the act there considered could have the effect to extend the terms of the incumbents of office of register of deeds in the several counties for another year beyond the term for which they were elected, and it was held that the legislature could not so extend the terms of office of the incumbents. This was the question mainly discussed in the opinion and the only question necessary to determine in that case. In the syllabus it is said that the legislature cannot "by an act wholly for that purpose extend the terms of such officers." Similar language is used in the opinion, which would indicate that the court considered that the sole object of the act therein questioned was to extend the terms of certain registers of deeds. It is manifest that this was not the sole object of the act. The object of the act was to change the time of the election of the registers of deeds in the state from the odd-numbered years to the even-numbered years, and the provision fixing the length generally at four years and extending the terms of the incumbents was incidental to that purpose. There is no doubt that the legislature has the power to change the date of the election and fix the length of the term gener-

ally, and it was not necessary to declare the whole act unconstitutional, as appears to be stated in the second paragraph of the syllabus.

State ex rel. Ure v. Drexel, 76 Neb. 299, 106 N. W. 1135, appears to have involved the same question, the attempt being "to extend for definite periods the terms of office of two of the county commissioners of Douglas county;" and that case was determined upon the authority of State ex rel. Hensley v. Plasters, supra.

In State ex rel. Polk v. Galusha, 74 Neb. 188, 104 N. W. 197, it was held that the general act of the legislature of 1905 (Laws 1905, chap. 65), was unconstitutional because it attempted to change the terms of constitutional officers that were fixed by the Constitution itself. Chapter 46, Laws 1905, was not involved nor considered in that decision. The earlier decisions were predicated entirely, and State ex rel. O'Gara v. Furley, 95 Neb. 161, 145 N. W. 343, partially, upon the statement of the second paragraph of the syllabus of the decision in State ex rel. Hensley v. Plasters, supra. That statement of the law, as we have already said, was not necessary to the decision in the Plasters Case and was therefore not authoritative and ought not to have been followed. Chapter 46 is an act complete in itself and separate from chapter 65. It has several times since its enactment been considered constitutional by the legislature and is in harmony with the amendment to the Constitution of 1912. This amendment was adopted after the legislature had several times re-enacted chapter 46, and is therefore in some sense a recognition of the validity of that act. The only ground upon which chapter 46 could be held unconstitutional is that chapter 65 was an inducement to its passage. That point we expressly refused to decide in State ex rel. Hensley v. Plasters, supra, and no authority has been cited holding that one act of the legislature should be regarded as an inducement to the passage of a separate and distinct act. If we should so hold in this case, it would lead to confusion and render many acts of the legislature incapable of application.

We therefore conclude that chapter 46, Laws 1905, is not wholly invalid. It and subsequent acts of the legislature fix the term of county commissioners of Douglas county at four years, and plaintiffs were elected under and pursuant thereto. It follows that the plaintiffs' terms of office are four years, and will not expire until January, 1916.

The decree of the District Court is therefore reversed, and the cause remanded, with L.R.A.1915C.

instructions to enter a permanent injunction as prayed.

Reese, Ch. J., and Rose, J., not sitting.

NORTH CAROLINA SUPREME COURT.

STATE OF NORTH CAROLINA EX REL. CORPORATION COMMISSION

v.
J. K. MORRISON & SONS COMPANY,
App't.

(155 N. C. 53, 70 S. E. 1079.)

Tax — valuation of corporate property — par value of stock.

1. The valuation for purposes of taxation of the paid up capital of a corporation at par is not excessive where it pays dividends at 24 per cent per annum, and the statute requires it to pay a tax on the actual value of its whole capital stock, with certain deductions to avoid double taxation.

Same — deduction of stock in other corporations.

2. The value of stock in other corporations cannot be deducted in fixing the value of the capital of a corporation for taxation, where the statute provides only for the deduction of the assessed value of real and personal property upon which it pays taxes, although another statute provides that corporations legally holding stock in other corporations upon which a tax has been paid by the corporation issuing it shall not be required to pay any tax on such stock or list the same.

(April 26, 1911.)

Note. — Deductions in taxation of capital stock of corporation.

As to deductions in taxation of shares of corporate stock in hands of stockholders, see note to Re First Nat. Bank, post, 386.

As to constitutionality of statute which allows a deduction of only the assessed value of the real estate in assessing the capital stock of a corporation, see note to Smith v. Stephens, 30 L.R.A. (N.S.) 704.

The early cases passing upon the subject of the present note are presented in the note to State Bd. of Equalization v. People, 58 L.R.A. 513, and the present note is supplementary thereto in so far as it deals with the question of deductions in assessing capital stock for purposes of taxation.

Indebtedness.

Supplementing note in 58 L.R.A. 509.

As shown in the note in 58 L.R.A. 599, a deduction on account of indebtedness of the corporation is quite generally au-

APPEAL by defendant from a judgment of the Superior Court for Iredell County affirming a ruling of the Corporation Commission assessing for taxation defendant's capital stock. Affirmed.

Statement by Brown, J.:

Appeal from the ruling and findings of the Corporation Commission in assessing for taxation under the revenue and machinery acts of 1909 the capital stock of the appellant, a corporation organized under the laws of North Carolina and having its principal office in Statesville, in Iredell county, North Carolina.

The Corporation Commission heard and overruled the exceptions of the respondent, and upon appeal being taken, the cause

was docketed for trial in the superior court of Iredell county, where it was heard upon the findings of fact and record as made up by the Commission. His Honor affirmed the said findings, and the defendant appealed.

Messrs. Dorman Thompson and H. P. Grier for appellant.

Messrs. T. W. Bickett, Attorney General, and G. L. Jones, Assistant Attorney General, for appellee.

Brown, J., delivered the opinion of the court:

It appears from the report of the defendant made to the Corporation Commission in accordance with § 34, machinery act, 1909,

thorized by statute in assessing the capital stock for purposes of taxation.

Unclaimed dividends constitute a liability that should be deducted under a statute authorizing deduction of indebtedness in determining the value of the capital stock of a corporation for the purposes of taxation. *People ex rel. New York & N. J. Teleph. Co. v. Neff*, 15 App. Div. 8, 44 N. Y. Supp. 46, affirmed on opinion below in 156 N. Y. 701, 51 N. E. 1093.

Interest upon outstanding mortgage debts for the year should be deducted although not matured at the time the assessment is made. *Ibid.* The court said: "It appears that monthly the relator charged up to its indebtedness one twelfth of the accruing interest for one year upon its outstanding mortgage debts. This item in the statement represents the interest which had accrued on such debts during the first four months of the year. No reason appears why it may and should not be treated as a debt, although not then matured."

Under a statute taxing foreign corporations doing business in the state upon the amount of capital invested in the state, only such debts as are incurred in relation to such investment or assets may be applied in reduction of the assessment. *People ex rel. Dunlap's Exp. Co. v. Raymond*, 54 Misc. 330, 105 N. Y. Supp. 1007. "The reason for the rule," said the court, "is that the tax imposed is not against the nonresident or foreign corporation, but against specific property, the assessed valuation of which may therefore be reduced only by the amount of debts which bear some relation to it, and cannot be offset by general obligations."

The reinsurance reserve required by law to be maintained by fire insurance companies to meet liabilities on insurance policies issued and outstanding is not a liability to be deducted from the gross assets in ascertaining the capital and accumulated surplus for purposes of taxation. *Trenton v. Standard F. Ins. Co.* 77 N. J. L. 757, 73 Atl. 606.

Under a statute providing that no de-
L.R.A.1915C.

duction should be made by reason of any indebtedness on account of any "indirect liability as surety, guarantor, indorser, or otherwise," a lessee of a railroad is not entitled to a deduction of bonds of the lessor issued in exchange for outstanding bonds which the lessee had purchased, and in payment for sums expended by the lessee in construction work upon the road, and sold by the lessee with a guaranty of payment of the principal and interest thereon, upon the ground that the guaranty did not make the lessee a principal debtor. *People ex rel. Delaware & H. Canal Co. v. Feitner*, 61 App. Div. 129, 70 N. Y. Supp. 500, affirmed in 171 N. Y. 641, 63 N. E. 786.

Under § 18, New Jersey act 1903 (P. L. 1903 p. 405), providing that certain corporations are to be assessed for taxation upon the full amount of capital stock paid in and accumulated surplus less the assessed value of real estate owned by the corporation, which is to be taxed in the taxing district where such real estate is located, the full amount of capital and accumulated surplus must be ascertained by deducting from the gross assets, at their true value, the liabilities and debts of the company; from the full amount of capital and accumulated surplus thus ascertained, the true value of all assets by law exempt from taxation is to be deducted, and the balance thus ascertained is the amount upon which the tax is to be assessed, less the amount of the assessment upon the real estate of the corporation. *Fidelity Trust Co. v. Board of Equalization*, 77 N. J. L. 128, 71 Atl. 61.

Unearned rentals consisting of advance payments for telephone service by a solvent and prosperous corporation prior to the assessment of its capital stock for purposes of taxation, with no obligation to refund any part of such payments except upon default of the corporation to render the service, should not be deducted from the value of its assets as a debt or liability of the corporation, upon the ground that the liability to repay the money so advanced is

that its capital stock fully paid in amounts to \$50,000; that the assessed value of its real and personal property, in which a part of its capital stock is invested, and listed by the defendant with the local assessors in Iredell county for taxation in accordance with law, amounts to \$34,600. It further appears from its said report that the defendant has paid out \$12,000 annually as dividends, and has no surplus or undivided profits.

The Corporation Commission assessed the capital stock at \$50,000, and deducted therefrom \$34,600, the assessed value of real and personal property according to the statute,

too remote and speculative. *People ex rel. New York & N. J. Teleph. Co. v. Neff*, supra.

The liability to repay the amounts received by a corporation from the sale of paper patterns under unexpired contracts with stores, whereby the latter agreed to purchase and keep on hand at all times during the life of the contract a specified number of patterns, and at the termination of the contract the corporation agreed to repurchase the patterns not sold at 75 per cent of the price paid by the store, is too remote to permit of a deduction from the value of its assets in assessing its capital stock for purposes of taxation. *People ex rel. Butterick Pub. Co. v. Purdy*, 153 App. Div. 665, 138 N. Y. Supp. 707, affirmed on this point, and modified on another point on the dissenting opinion of a judge of the court below in 207 N. Y. 771, 101 N. E. 1116. Motion for reargument denied in 208 N. Y. 620, 102 N. E. 1109. It was said in the above case that the liability in the case in hand could not be distinguished from the liability of insurance companies to refund unearned premiums, which is held to be too remote and contingent to constitute a debt owing by the insurance company which should be deducted from the value of its taxable property, the court citing *People ex rel. Westchester F. Ins. Co. v. Davenport*, 91 N. Y. 574; *People ex rel. American F. Ins. Co. v. Feitner*, 168 N. Y. 675, 61 N. E. 1132.

But the cost of furnishing magazines or periodicals to be printed and published in the future, to subscribers who have paid in advance for the unexpired terms of their subscriptions, should be deducted from the value of the assets of a corporation in determining the value of its capital stock for the purposes of taxation, as a debt due subscribers within the contemplation of the statute authorizing a deduction of indebtedness. *People ex rel. Butterick Pub. Co. v. Purdy*, 207 N. Y. 771, 101 N. E. 1116, modifying 153 App. Div. 665, 138 N. Y. Supp. 707, upon dissenting opinion of Scott, J., below. Motion for reargument denied in 208 N. Y. 620, 102 N. E. 1109. In the course of the opinion Judge Scott said: "When relator receives a subscription, say for a year, it at once becomes indebted to its subscriber to deliver him periodicals L.R.A.1915C".

and found a corporate excess of \$15,400, upon which the defendant is required to pay taxes in addition to the property already listed for taxation.

1. The defendant excepts because it contends that such appraisal of the value of its capital stock is excessive.

Upon the findings of the Commission upon which this appeal is heard, as well as upon the defendant's report to the Commission, this contention cannot be sustained. Its capital was paid in to the extent of \$50,000 in cash, and there is no claim made that any part of it has been lost. On the contrary, it appears to be a very prosper-

during the year. As each monthly or weekly periodical is delivered, the debt is *pro tanto* paid and reduced, but some part of the indebtedness remains until the whole debt is extinguished. . . . In the present case the relator sold goods for future delivery, and no contingency is suggested under which it would be absolved from its obligation. A debt is no less a debt because it is payable in goods instead of money. . . . While the time of payment is remote, the obligation to pay is present. In this respect the obligation to deliver the periodicals in the future is not unlike the indebtedness represented by a note not yet due, or a demand note upon which demand has not yet been made."

Deductions on account of property otherwise taxed.

Supplementing note in 58 L.R.A. 600-603.

Under a constitutional provision that "all property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the general assembly shall direct, making the same equal and uniform throughout the state," it was held in *Hempstead County v. Hempstead County Bank*, 73 Ark. 515, 84 S. W. 715, that, in ascertaining the value of the capital stock and undivided profits of a banking corporation for purposes of taxation, the value of the real estate owned by the corporation is to be deducted where by general law real estate is assessed in the political township or ward where situated.

In valuing capital stock of a domestic corporation for purposes of taxation, the value of coal mined by it within the state, but situated in other states, there awaiting sale at the time of the appraisal, should be deducted upon the ground that the property is taxable in the states where it is located. *Delaware, L. & W. R. Co. v. Pennsylvania*, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669, reversing 206 Pa. 645, 56 Atl. 69.

Under a statute taxing domestic corporations upon the value of the capital stock, and authorizing a deduction on account of the "property situated in another state or country and subject to taxation therein,"

ous concern, as it has been able to return to its stockholders dividends at the rate of 24 per cent per annum.

To value such a profitable stock at par surely cannot be considered an excessive valuation. It had no market value reported doubtless because none of it has been for sale. The statute prescribes that corporations of this character shall pay a tax on the actual value of its whole capital stock after deducting therefrom the "assessed value of real and personal property listed with local assessors."

In ascertaining the actual value of its capital stock, the statute authorizes the

Commission to consider, first, the number of shares issued; second, the par value of each share; third, amount actually paid into the treasury on each share; fourth, total amount actually paid in; fifth, the dividend paid or carried into the surplus or undivided profits; sixth, the highest price paid for stock during the year. These are the facts which, in the estimation of the business world, and by the terms of the machinery act, should determine the actual value of the capital stock of a corporation.

We see no reason, even if we had the power, to revise this finding. There is most abundant evidence to support it.

a corporation doing business in other states is entitled to a deduction only of the value of all tangible property located outside the state. *American Glue Co. v. Com.* 195 Mass. 528, 122 Am. St. Rep. 268, 81 N. E. 302. It was contended that a part of the value of the corporate franchise was property situated in another state within the meaning of the statute. But the court said: "The corporate franchise, considered separately, is not property subject to taxation in states other than that which granted it. *Louisville & J. Ferry Co. v. Kentucky*, 188 U. S. 385, 47 L. ed. 513, 23 Sup. Ct. Rep. 463. The value of the property in other states presumably is determined in reference to the use to which it is adapted, and its relations to the business, and it may have a value as a part of a system that it would not have if taken away and disposed of for another purpose. The deduction of this value, under the statute, is very different from a deduction of the value of the franchise to be a corporation and exercise corporate privileges, which is granted by the state where the corporation is established."

A manufacturing corporation liable to tax upon its capital stock not actually invested in its business is liable to pay tax upon the amount of capital invested in bonds of another corporation, although the latter agreed to pay the tax. *Com. v. Jarecki Mfg. Co.* 204 Pa. 36, 53 Atl. 517.

In ascertaining the taxable value of the capital stock, surplus, and undivided profits of a bank which has elected to have the same assessed to it instead of its shareholders, in conformity with the statute, there should be deducted, along with the value of its real estate and property exempt from taxation as provided by the statute, the value of shares of capital stock owned by the bank in a corporation which has caused itself to be assessed in its own name with all its property, as provided by the statute, thereby rendering shares of its stock not liable to taxation in the hands of the owner. *State ex rel. Dillon v. Graybeal*, 60 W. Va. 357, 55 S. E. 398.

A deduction should be made of the amount invested in stock of domestic corporations which pay taxes on their property in the state, in assessing a corporation upon its capital, surplus, and undivided profits L.R.A.1915C.

for purposes of taxation, where the statute provides that personal property shall include all shares in corporations organized under the laws of the state, when the property of such corporation is not exempt, or is not taxable to itself, or when the personal property is not taxed; and also that all corporate property except, where some other provision is made by law, shall be assessed to the corporation in the name of the corporation. *Union Trust Co. v. Detroit*, 170 Mich. 692, 137 N. W. 122.

A corporation owning shares of stock in other corporations is not entitled to have the amount thus invested deducted from the aggregate value of its assets in ascertaining the value of its own capital stock for purposes of taxation, by virtue of a statute providing that corporations legally holding capital stock in other corporations upon which the tax has been paid by the corporation issuing the same shall not be required to pay any tax on such stock. *STATE EX REL. CORPORATION COMMISSION v. J. K. MORRISON & SONS CO.* See to the same effect, *Dallas County v. Home F. Ins. Co.* 97 Ark. 254, 133 S. W. 1113.

It is quite generally provided by statutes taxing the capital stock of corporations, that the real estate owned by the corporation shall be taxed in the taxing district where situated in like manner as other real estate is taxed, and that a deduction of the amount invested in such real estate should be made in assessing the value of the capital stock.

Under such a statute it has been held that the assessed value of real estate, and not the actual value thereof, is to be deducted in ascertaining the value of the capital, surplus and undivided profits of a corporation for purposes of taxation. *State ex rel. Dillon v. Graybeal*, supra; *Smith v. Stephens*, 173 Ind. 564, 30 L.R.A.(N.S.) 704, 91 N. E. 167.

In determining the value of the capital stock of a corporation for purposes of taxation, it is lawful to include the actual value of the real estate, and to deduct merely the assessed value thereof, under § 12, New York Tax Laws (Laws 1896, chap. 908), providing for the assessment of the capital stock at its actual value after deducting the assessed value of the real es-

2. The principal contention of defendant is that the Commission, after valuing its capital stock, refused to deduct therefrom the sum of \$10,350, representing stock in other corporations owned by the defendant.

In overruling this exception the Commission says: In assessing this corporation the Corporation Commission did not understand that they were authorized to deduct anything from the capital stock except "the assessed value of real and personal estate upon which the corporation pays taxes." That is the language of § 34 of the machinery act. But the defendant bases its contention on § 4 of the revenue act, which enacts that "individual stockholders in any corporation . . . paying a tax on its capital stock shall not be required to pay any tax on said stock or list the same, nor shall corporations legally holding capital stock in other corporations upon which the tax has been paid by the corporation issuing the same be required to pay any tax on said stock or list the same." [Laws 1909, chap. 438, p. 656.]

tate. *People ex rel. Bankers' Safe-Deposit Co. v. O'Donnel*, 54 Misc. 5, 105 N. Y. Supp. 457.

Real estate mortgages owned by a corporation should be deducted from the value of its capital stock, notwithstanding the mortgagors covenanted to pay all taxes, under a statute which provided that the assessed value of real estate or other tangible property of a corporation which is assessed separately should be deducted from the valuation of the capital stock for the purpose of assessing such stock for taxation, where it was also provided by statute that mortgages of real estate should be considered as an interest in the land for purposes of taxation, and should be assessed to the mortgagee, unless the mortgagor agreed in the mortgage to pay the taxes thereon, since such mortgages are assessed separately from the capital stock of the corporation, whether the tax is paid by the mortgagor or by the mortgagee. *First Trust Co. v. Lancaster County*, 93 Neb. 792, 141 N. W. 1037, rehearing denied in 93 Neb. 795, 142 N. W. 542; *State Bank v. Seward County*, 95 Neb. 666, 146 N. W. 1046.

A corporation liable to taxation under § 12, New York general tax law (Laws 1896, chap. 908), providing for assessment upon the actual value of the capital stock after deducting the assessed value of its real estate, whose real estate is subject to a mortgage, the payment of which it has not assumed, is not entitled to have deducted from the value of its capital stock the whole assessed valuation of its real estate, when the value of the equity of redemption only has been included in determining the value of its capital stock, but only the L.R.A.1915C.

It appears to be the policy of the general assembly to require that all corporations (with a partial exception as to banks) shall pay all taxes on their capital stock out of the treasury of the corporation, instead of the individual stockholders paying them.

This has been the law for many years, and the same right is extended to a corporation owning stock in another corporation.

As the individual stockholder is not required to list and pay taxes on such stock, neither is the corporate stockholder. But we fail to see in the statutes anything which authorizes the deduction of such investments from the capital stock of the corporation owning them in assessing its value, as is the case with the "assessed value of real and personal estate."

If such had been the intention of the legislature it would doubtless have been more explicit, and would not have left its purpose in doubt and to be arrived at by a process of reasoning.

The learned counsel for the defendant

value of such equity should be deducted. *People ex rel. Weber Piano Co. v. Wells*, 180 N. Y. 62, 72 N. E. 626, reversing 95 App. Div. 574, 88 N. Y. Supp. 1030, three of the judges dissenting.

The amount invested in vaults located in buildings owned by third persons, which from the nature of their construction must be considered real estate, which was included in determining the value of the assets of the corporation, should not be deducted in assessing the capital stock at its actual value after deducting the assessed value of the real estate, as provided by § 12, New York tax law (Laws 1896, chap. 908), where it appeared that the assessors were unaware of the existence of the vaults, and included no sum for their value in the assessment of the buildings. *People ex rel. Knickerbocker Safe Deposit Co. v. Wells*, 181 N. Y. 245, 73 N. E. 961, affirming 99 App. Div. 455, 91 N. Y. Supp. 283.

The amount invested in real estate mortgages and land contracts should be deducted in ascertaining the value of the capital, surplus, and undivided profits of a corporation for purposes of taxation, where a specific tax has been paid on such mortgages and contracts, imposed by a statute declaring such property exempt from further general taxes. *Union Trust Co. v. Detroit*, 170 Mich. 692, 137 N. W. 122; *Detroit Trust Co. v. Detroit*, 170 Mich. 701, 137 N. W. 126.

The amount of capital invested in recorded mortgages cannot be deducted from an assessment of shares of capital stock of a corporation for the purpose of taxation, under a statute authorizing a deduction of the sum at which the real and personal property of a corporation is assessed for

contends that his position is supported by the opinion of this court in *Pullen v. Corporation Commission*, 152 N. C. 548, 63 S. E. 155.

In that case we were not dealing with the original capital stock of a corporation, but with its surplus, something which this defendant seems to regard as undesirable. The decision was based upon the language of the statute under which the bonds of the state were issued, which is as follows: "The said bonds and coupons shall be exempt from all state, county or municipal taxation or assessment, direct or indirect, general or special, whether imposed for purposes of general revenue or otherwise, and the interest paid thereon shall not be subject to taxation as for income, nor shall said bonds and coupons be subject to taxation when constituting a part of the surplus of any bank, trust company or other corporation."

North Carolina bonds have never been the subject of taxation, and no individual

owning them is required to pay taxes on them. Nevertheless, under the terms of that decision, as broad as the language of the statute is, they are not to be deducted from the original capital stock of a corporation in assessing its value, but only from its surplus, and if the corporation has no surplus it cannot claim such deduction.

The opinion of the majority is based upon the words of the statute, which it must be admitted are quite different from those employed in the statute now under consideration, and which the majority held authorized and required the deduction claimed.

We do not think the language of § 4 of the revenue act of 1909 herein quoted authorizes the Commission to deduct from defendant's capital the value of its shares in other corporations, in assessing the value of defendant's capital stock for taxation.

The judgment of the Superior Court is affirmed.

taxation, where the only tax placed on mortgages is a privilege tax for recording the same. *State v. Sellers & O. Co.* 151 Ala. 557, 44 So. 548.

Under Mississippi statute providing for taxing capital stock of corporations at its market value, and authorizing a deduction of the assessed value of real estate owned by the corporation, which was declared subject to separate assessment as other real estate, the corporation could not return that the personal property was not subject to taxation because the assessed value of the real estate exceeded the market value of the stock of the corporation, where the Constitution provided that corporations should be taxed in the same way and to the same extent as individuals, it appearing that individuals were taxed upon the personal property as well as real property, and were not entitled to deduct indebtedness for purposes of taxation. *Panola County v. Carrier & Son*, 89 Miss. 277, 42 So. 347.

It was also held in the above case that the statute was not constitutional as providing a different method of taxation for corporations, but was incomplete, and that the real and the personal property owned by a corporation should be taxed in the same manner as if they belonged to individuals, and only the excess, if any, of the market value of the capital stock after deducting the assessed value of the real and personal property, should be liable to taxation. *Ibid.* To the same effect is *People's Warehouse Co. v. Yazoo City*, 97 Miss. 500, 52 So. 481.

A corporation owning reversionary interests in lands leased for a period of ninety-nine years, renewable for ever, where the lessee covenants to pay all taxes, is not an own-

er of real estate within the meaning of a statute authorizing the tax commissioners, in assessing the shares of capital stock of a corporation, to deduct the assessed value of real estate owned or possessed by the corporation from the aggregate value of all the shares. *Baltimore v. Canton Co.* 63 Md. 218. The court said: "Those corporations only are to be regarded as owners of real estate, the valuation of which is to be deducted from the valuation of their stock, to whom the land is directly assessable, and who are primarily chargeable with the taxes thereon. . . . It is not such taxation as may incidentally burden the resources or reduce the profits of corporations, and incidentally or circuitously affect the market value of their stock, for which it is the design or policy of the law to allow an abatement."

Property exempt from taxation.

Supplementing note in 58 L.R.A. 564, 568.

It is quite generally held that, in assessing the value of capital stock for purposes of taxation, a deduction should be made of the amount invested in national securities and other property owned by the corporation that is exempt from taxation when the tax is treated as a property tax.

In *Home Sav. Bank v. Des Moines*, 205 U. S. 503, 51 L. ed. 901, 27 Sup. Ct. Rep. 571, reversing — *Iowa* —, 101 N. W. 867, in which the court treated the tax involved as a tax upon the capital stock or property of the corporation, it was held that the amount invested in bonds of the United States owned by the corporation should be deducted from the assessed valuation.

A. L. R.

NORTH DAKOTA SUPREME COURT.

RE FIRST NATIONAL BANK OF HILLSBORO, Resp.,

BOARD OF COMMISSIONERS OF TRAILL COUNTY, Appt.

(25 N. D. 635, 146 N. W. 1064.)

Tax — appeal from equalization.

1. Under § 1927, Revised Codes 1895, an appeal will lie from a decision of the board of county commissioners, made while equalizing and correcting assessments in a controversy then pending before them, and judicial in its character.

Headnotes by BARTHOLOMEW, Ch. J.

Note. — Deductions in taxation of shares of corporate stock in hands of shareholders.

As to taxation of shares of stock and corporate assets as double taxation, see notes to State Bd. of Equalization v. People, 58 L.R.A. 589, and East Livermore v. Livermore Falls Trust & Bkg. Co. 15 L.R.A. (N.S.) 952.

As to taxation of property in different states as double taxation, see note to Judy v. Beckwith, 15 L.R.A. (N.S.) 142.

Generally, as to double taxation, see Index to L.R.A. Notes under "Taxes," §§ 9-12.

As to deductions in taxation of capital stock of corporation, see note to State ex rel. Corporation Commission v. J. K. Morrison & Sons Co. ante, 380.

The earlier cases dealing with deductions in taxing the shares of stock in national banks will be found in the note to McHenry v. Downer, 45 L.R.A. 751.

Deduction on account of indebtedness of shareholder.

As to shares of stock in national bank, see also cases cited in note in 45 L.R.A. 751.

The deduction of the individual debts of a shareholder from the value of his shares of stock in a national bank is not required by the provisions of U. S. Rev. Stat. § 5219, Comp. Stat. 1913, § 9784, to the effect that the taxation of such shares shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the state, although by the state law debts are deducted from credits in the taxation of property, where that law does not treat stocks as credits. Commercial Nat. Bank v. Chambers, 21 Utah, 324, 56 L.R.A. 346, 61 Pac. 560, affirmed in 182 U. S. 556, 45 L. ed. 1227, 21 Sup. Ct. Rep. 863.

A statute which does not permit of a deduction of indebtedness of the shareholder from an assessment upon shares of national bank stock, but which does allow such deduction from an assessment upon other credits and investments, is not wholly void, but only so far as the deduction is L.R.A.1915C.

Same — tax on corporate stock and property.

2. Certain real estate belonging to a national bank, and in which a portion of its capital stock was invested, was assessed to the bank as other real estate in the district was assessed. At the same time the shares of stock in said bank were assessed to the individual shareholders, and, in equalizing the assessment of said shares, and in fixing their value, the board of county commissioners refused to deduct from the capital of the bank the amount invested in real estate. Held, that such action constituted neither excessive nor double taxation.

(Wallin, J., dissents.)

(December 5, 1898.)

not permitted. Charleston Nat. Bank v. Melton, 171 Fed. 743.

Payment, or at least a tender, of the amount of the taxes shown from the bill on complainant's own theory justly and equitably to be due on shares of stock in a national bank, must be made before a court of equity will interfere by injunction with their collection, because such assessments, by reason of a failure to make the deduction prescribed by law, was at a greater rate than is assessed upon other moneyed capital. People's Nat. Bank v. Marye, 191 U. S. 272, 48 L. ed. 180, 24 Sup. Ct. Rep. 68. Generally, as to injunction to restrain collection of taxes, see Index to L.R.A. Notes, "Injunction," § 63. Specifically, as to necessity of payment of tax due where injunction is sought against illegal taxation, see note in 22 L.R.A. 703.

Deductions on account of property of corporation otherwise taxed.

The early cases passing upon the right to deduct the amount of capital invested in real estate which is assessed against the corporation, in assessing the shares of stock in national banks in the hands of stockholders for purposes of taxation, are presented in a note in 45 L.R.A. 757. The note shows that the cases are not in harmony on this point.

The refusal to deduct the value of real estate owned in other states by a national bank, from the value of its shares of stock, does not make an unlawful discrimination against such banks, under U. S. Rev. Stat. § 5219, Comp. Stat. 1913, § 9784, forbidding greater taxation of shareholders of national banks than is imposed on other moneyed capital, or deny them the equal protection of the laws, where such deduction is not authorized by the laws of the state in valuing shares of other corporations. Commercial Nat. Bank v. Chambers, 182 U. S. 556, 45 L. ed. 1227, 21 Sup. Ct. Rep. 863.

In taxing the shares of a national bank, the value of real estate situated without the state cannot be deducted, under Utah Constitution, art. 13, § 2, providing that

A PPEAL by the Board of County Commissioners from a judgment of the District Court for Traill County reversing an order in its favor in a proceeding for the equalization of taxes on certain bank stock. Reversed.

The facts are stated in the opinion.

Mr. P. G. Swenson, for appellant:

The fact that the respondent bank as a corporation had \$43,420 of its capital stock invested in real estate, and that no deduction was made for this amount invested in real estate, by the board when it equalized the value of these shares of stock assessed to the different shareholders, does not make in an instance of double taxation.

Second Ward Sav. Bank v. Milwaukee, 94

all property within the state not exempt shall be taxed in proportion to its value, but that the stocks of any corporation shall not be taxed when the property represented by them is taxed, and Utah Rev. Stat. 1898, § 2509, providing for the deduction from the value of the shares in banking institutions, of the value of the real estate represented thereby which has been taxed. Commercial Nat. Bank v. Chambers, 21 Utah, 324, 56 L.R.A. 346, 61 Pac. 560, affirmed in 182 U. S. 556, 45 L. ed. 1227, 21 Sup. Ct. Rep. 863.

In the absence of a statute authorizing a deduction on account of capital invested in real estate, in taxing shares of stock in banks and banking associations it is held in First Nat. Bank v. Board of Assessors, 182 N. Y. 460, 75 N. E. 306, affirming 107 App. Div. 624, 95 N. Y. Supp. 1128, in accord with RE FIRST NAT. BANK, that no deduction should be made on account of real estate owned by the corporation which is assessed against it.

In some states the statutes providing for taxing shares of stock expressly provide for a deduction of the value of the real estate owned by the corporation on which it pays taxes.

The assessed value of real estate, and not the actual value, is to be deducted in ascertaining the value of shares of bank stock, under a statute providing that the value of shares shall be ascertained by adding together the capital, surplus, and undivided profits, and deducting the value of the real estate otherwise taxed in the state. Com. v. Virginia Bank & T. Co. 110 Va. 552, 66 S. E. 853.

To the same effect is Valley Invest. Co. v. Board of Review, 152 Iowa, 84, 131 N. W. 669, which held that, under a statute providing for the taxation of shares of stock of domestic corporations, and authorizing the amount of capital actually invested in real estate to be deducted from the real value of such shares, it is the assessed value of such real estate that is to be deducted.

Under a statute (Conn. Gen. Stat. §§ 3836, 3837, as amended Pub. Acts 1889, chap. 63) providing for the taxation of L.R.A.1915C.

Wis. 587, 69 N. W. 359; Bank of Commerce v. Tennessee, 161 U. S. 134, 40 L. ed. 645, 16 Sup. Ct. Rep. 456; New York v. Tax & A. Comrs. 4 Wall. 244, 18 L. ed. 344; Van Allen v. Assessors (Churchill v. Utica) 3 Wall. 573, 18 L. ed. 229.

Messrs. Carmody & Leslie for respondent.

Bartholomew, Ch. J., delivered the opinion of the court:

In 1896 a controversy arose in Traill county between the board of county commissioners, sitting to equalize and correct assessments, and the banks doing business in the county, relative to the proper equalization of the taxes upon bank stock. As a re-

shares in certain corporations at market values, but for a deduction of so much of the corporate capital as may be invested in real estate upon which the corporation is assessed and taxed it is the assessed, and not the actual or market, value of the real estate, that is to be deducted. Dennis's Appeal, 72 Conn. 369, 44 Atl. 545; Barrett's Appeal, 73 Conn. 288, 47 Atl. 243.

In Batterson's Appeal, 72 Conn. 374, 44 Atl. 546, it is held that the deduction is proportionate to the value of the whole investment of the corporation in real estate, compared with its total net assets.

The assessed value of real estate located without the state upon which the corporation pays taxes in the state where situated, as well as that within the state levying a tax upon the shares of stock, must be deducted from the value of the stock, under a statute authorizing a deduction of that portion of the capital invested in real estate on which the corporation is assessed and pays taxes. Batterson v. Hartford, 50 Conn. 558.

A statute (Wis. Stat. 1911, § 1057), taxing shares of bank stock, which provided that the assessed value of "the building" in which the bank maintains its offices and transacts its business, including the land upon which it is located, when owned by the bank, should be deducted from the total value of the shares, is broad enough to include a branch office and the land owned by the bank on which it stands. State ex rel. Second Ward Sav. Bank v. Leuch, 155 Wis. 493, 144 S. W. 1119; State ex rel. Marshall & I. Bank v. Leuch, 155 Wis. 500, 144 N. W. 1122.

The mere temporary interruption of the active use of the building for banking purposes, caused by the making of repairs or enlargements, during which time the bank occupied rented quarters to transact its business, does not change the legal status of the building so as to bar the right to deduct its value in ascertaining the value of the shares for purposes of taxation. State ex rel. Second Ward Sav. Bank v. Leuch, supra.

But land on which the main banking house stands, which is not owned in fee by

sult of this controversy the said board, on the 11th day of July, 1896, passed a resolution and entered the same upon its records, which reads: "On motion all shares of bank stock was equalized to average sixty (60) per cent on capital stock." From the decision so entered the First National Bank of Hillsboro, plaintiff herein, appealed to the district court of said county. In the district court the plaintiff was successful, and the defendant brings the case here on appeal.

When the case was reached for trial in the district court the defendant appeared specially, and moved to dismiss on the ground that the court had no jurisdiction, for the reason that it appeared by the notices of appeal that it was an attempt to appeal from the board of equalization, and that the statute allowed no appeal from such board. The denial of this motion is the first point for our consideration. We think the point cannot fairly be considered

open in this jurisdiction since the decision in *Pierre Waterworks Co. v. Hughes County*, 5 Dak. 145, 37 N. W. 733. It was squarely raised in that case, discussed with great ability by Chief Justice Tripp, and the unanimous court held that the appeal would lie. That decision has never been reversed, modified, or questioned. Then, as now, appeals were allowed from all decisions of the board of county commissioners from matters properly before them. Political Code of 1877, § 46, chap. 21; Revised Codes 1895, § 1927. But much learning was expended in the waterworks case in determining that the board of equalization was in fact the board of county commissioners. The statute then in force (§ 28, chap. 28, Political Code of 1877) declared: "The board of county commissioners of each county shall constitute a board of equalization for the county, and said board or a majority of the members thereof shall hold a session of not less than two days," etc.

the bank, but held under a ninety-nine-year lease with the privilege of unlimited renewal, is not within the terms of the statute. *State ex rel. Marshall & I. Bank v. Leuch*, supra. The court pointed out that under the statute the real estate owned by the bank was subject to taxation as other land, and the provision for deduction of the assessed value of the banking building and the land on which it is situated, from the value of the shares, was to avoid double taxation on such property, which represents part of the assets of the bank; but that when the bank has invested no part of its capital or assets in the land, but has only entered into a contract to pay certain sums annually as rental of land for a series of years, it cannot be said that any part of the gross valuation of capital stock represents the land, or that the land is taxed at all when the capital stock is taxed, and said: "Where the bank owns the land its reasonable value goes into the book value of the stock; where it simply leases the land its value nowhere enters into the book value of the stock, but on the contrary the annual rental enters into the expense account, and tends to lower the book value and the market of the stock."

Under a statute providing for the deduction of the value of the real estate owned by the corporation, it is held in *Dexter Horton Nat. Bank v. McKenzie*, 69 Wash. 314, 124 Pac. 915, that bonds issued by a trust company upon land under a trust deed which required the trust company to divide the income among the bondholders, and to ultimately sell the land and to distribute the proceeds among the bondholders to the amount of the face of the bonds, represent real estate within the statute requiring a deduction of the amount invested in real estate.

The accumulations of a life insurance company held as a reserve fund to meet L.R.A.1915C.

future liabilities on life policies, and invested in real estate upon which the corporation pays taxes, are not capital within the meaning of a statute (Conn. Gen. Stat. § 3836, as amended Pub. Acts 1889, chap. 63), providing for the taxation of shares in certain corporations at their market value, and authorizing a deduction from the market value of the stock, of the amount of capital invested in real estate upon which the corporation is taxed. *Bulkeley's Appeal*, 77 Conn. 45, 58 Atl. 8. The court said that the word "capital" as used in the statute "describes the surplus over its liabilities, representing the fund in which the shareholder is equitably interested, and from which he would look for his final dividend, were the company to be wound up;" that the statute "is not intended to authorize an arbitrary deduction from the shareholder's list, but to authorize a reduction of the valuation, treating the shareholder as owning an equitable interest in that part of the corporation's assets representing the amount of the original capital and profits in excess of existing debts, and therefore equitably entitled to be credited in the valuation of his share with the amount of this property which has been taxed."

To the same effect is *Cutler's Appeal*, 74 Conn. 35, 49 Atl. 338, where it was said in reference to the above statute: "The real question is whether such real estate be part of that capital or capital and surplus represented, at the date of the return to the town assessors, the excess in value of the net assets above the amount of corporate debts and liabilities in which the shareholders are directly interested. . . . Land acquired and held for the purpose of responding to particular liabilities, whether through action by the corporation or by force of statutory requirements, would not be a part of such capital or surplus, to any greater extent than that of its value after deducting

It was contended that there were two separate boards composed of the same persons, and that authority to appeal from decisions of the board of county commissioners did not include authority to appeal from decisions of the board of equalization. The opinion fairly met and refuted the contention; but our legislature, as if to remove all doubt upon the subject, has enacted that "it shall be the duty of the board of county commissioners of each county, at its regular meeting in July of each year, to devote the first two days, or more if necessary, of such meeting to the proper equalizing and correcting of the assessment roll in its county." Revised Codes 1895, § 1213. That section was in full force when the tax in question was assessed, and when the decision appealed from was entered. No such thing as a county board of equalization is recognized. The board of county commissioners equalize the taxes, and this they do in the same capacity in which they per-

form any other functions imposed upon them by law. It follows that the only ground upon which the motion to dismiss was based had no foundation in the law as it then stood.

But, notwithstanding the broad language of our statute, which declares that appeals may be taken from "all decisions" of the board upon matters properly before it, we must not be understood to give judicial sanction to the proposition as stated. It must have its limitations. It would not be proper for us to enter into an extended discussion as to what matters may not be appealed. We need only say that the powers of a board of county commissioners are very comprehensive, and extend to all ordinary matters in which the county, as such, is interested. They are in fact executive, administrative, political, and judicial or quasi judicial. Courts have no such extended powers. They are limited to the consideration of matters purely judicial in

the amount of such liabilities." To the same effect is *Barrett's Appeal*, 75 Conn. 280, 53 Atl. 591.

Deductions on account of property exempt from taxation.

It is quite generally held that in assessing the value of corporate stock for purposes of taxation a deduction should be made of the amount invested in national securities and other property owned by the corporation that is exempt from taxation when the tax is upon the corporation, but when the tax is upon the shares in the hands of the stockholders, or is assessed against the corporation as agent of the shareholder, to be deducted from the dividends, no deduction is to be made.

The distinction is based upon the doctrine that capital stock or property and assets of the corporation, and the shares of stock in the hands of individual stockholders, are separate properties for the purpose of taxation.

In fixing the value of shares of stock of a national bank or other corporation for purposes of taxation, no deduction is made on account of the capital of the corporation invested in United States bonds, state bonds, and other securities which are exempt from taxation. This proposition is sustained by cases cited in note in 45 L.R.A. 757, and the following cases: *Home Ins. Co. v. New York*, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; *Palmer v. McMahon*, 133 U. S. 660, 33 L. ed. 772, 10 Sup. Ct. Rep. 324; *Cleveland Trust Co. v. Lander*, 184 U. S. 111, 46 L. ed. 456, 22 Sup. Ct. Rep. 394, affirming 62 Ohio St. 266, 56 N. E. 1036; *Charleston Nat. Bank v. Melton*, 171 Fed. 743; *Ex parte State*, — Ala. —, 66 So. 1; *Batterson v. Hartford*, 50 Conn. 558; *National State Bank v. Burlington*, 119 Iowa, 696, 94 N. W. 234; *First L.R.A.* 1915C.

Nat. Bank v. Independence, 123 Iowa, 482, 99 N. W. 142; *First Nat. Bank v. Board of Reviewers*, 41 La. Ann. 181, 5 So. 408; *Home Ins. Co. v. Board of Assessors*, 42 La. Ann. 1131, 8 So. 481; *Parker v. Sun Ins. Co.* 42 La. Ann. 1172, 8 So. 618; *Board of Liquidation v. Thoman*, 42 La. Ann. 605, 8 So. 482; *Bank of Oxford v. Oxford*, 70 Miss. 504, 12 So. 203; *Mechanics' Nat. Bank v. Baker*, 65 N. J. L. 113, 46 Atl. 586, affirmed on other grounds in 65 N. J. L. 549, 48 Atl. 582; *Pullen v. Corporation Commission*, 152 N. C. 548, 68 S. E. 155.

A state statute imposing a tax upon shares of national bank stock is not invalid because it does not permit a deduction of the value of securities owned by the bank that are by law exempt from taxation, in arriving at the value of the shares for assessment in the hands of the shareholders. *Charleston Nat. Bank v. Melton*, 171 Fed. 743.

Capital of state banks invested in United States securities cannot be subjected to state taxation; but shares of bank stock may be taxed in the hands of their individual owners at their actual, instead of their par, value, without regard to the fact that a part or the whole of the capital of the corporation may be so invested. *Home Ins. Co. v. New York*, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; *Palmer v. McMahon*, 133 U. S. 660, 33 L. ed. 772, 10 Sup. Ct. Rep. 324.

As the Mississippi tax on capital stock in banks is a tax on the shares of stockholders, although collected through the medium of the corporations, no deductions are allowed for investments of capital in nontaxable securities. *Bank of Oxford v. Oxford*, 70 Miss. 504, 12 So. 203.

In *Cleveland Trust Co. v. Lander*, 184 U. S. 111, 46 L. ed. 456, 22 Sup. Ct. Rep. 394, affirming 62 Ohio St. 266, 56 N. E. 1036, it was held that a tax on the shares of stock

character. See §§ 85 and 96, state Constitution. But if a party be wrongfully and unjustly taxed in violation of law (and that is what plaintiff claims in this case), then a wrong exists for which there must be a remedy in law in some form. The courts can take cognizance of it, independent of any action of the county commissioners, because it is inherently judicial in character; and, being a proper subject for judicial determination, the manner in which it may be brought before the court is entirely within legislative control. It is our duty to give force to the statute so far as it comes within the Constitution; and the fact that its enforcement may result in practical inconvenience, or in delay in collecting the revenue, furnishes us no warrant

for declaring the statute void, or limiting its operation. We have no such power. Those matters pertain to the legislature exclusively. One further remark to avoid misapprehension. The word "decision" in the statute is not synonymous with "determination." The board may determine upon certain proceedings in any matter properly before it, and in a general way, and about which there is no special controversy. Such a determination would not, we think, be appealable whatever might be the nature of the matter concerning which the determination was made. A decision presupposes a controversy, and, to be appealable, a decision must be upon a point concerning which some specific claim was made by the party taking the appeal, and which claim was

in a trust company, under the Ohio statutes, is not equivalent to a tax on the property of the corporation, and therefore the shareholders are not entitled under U. S. Rev. Stat. § 3701, Comp. Stat. 1913, § 6816, to have a deduction from the value of the shares of the amount of the capital stock of the company which is invested in United States bonds.

Under a statute (Alabama Code 1907, § 2082, subdiv. 9) taxing shares of stock, which authorized the amount at which the property of the corporation was assessed for taxation to be deducted from the aggregate value of the shares, and provided that the residue should be the assessed value of the shares, the shareholder is not entitled to have deducted the value of such property of the corporation as may have been exempt from taxation in favor of the corporation. *Ex parte State*, — Ala. —, 66 So. 1, overruling *Elmwood Cemetery Co. v. Tarrant*, 170 Ala. 459, 54 So. 186.

No deduction should be made in assessing the value of shares of stock for purposes of taxation, on account of capital invested in patent rights, which by law are exempt from taxation. *Crown Cork & Seal Co. v. State*, 87 Md. 687, 53 L.R.A. 417, 67 Am. St. Rep. 371, 40 Atl. 1074, writ of error dismissed by Supreme Court of United States, Jan. 31, 1900, 44 L. ed. 1221, 20 Sup. Ct. Rep. 1026.

But under a statute exempting state bonds from taxation, which provided that the bonds should not be subject to taxation when constituting a part of the surplus of any bank or other corporation, it was held in *Pullen v. Corporation Commission*, 152 N. C. 548, 68 S. E. 155, that so much of the surplus as is invested in such bonds must be deducted from the aggregate value of the assets in ascertaining the taxable value of the shares of stock. *Clark, Ch. J.*, and *Hoke, J.*, dissenting.

Under a statute taxing shares of bank stock of banks organized under the laws of the state or of the United States, which provided that the assessor in assessing such shares "shall allow all the deductions and exemptions granted by law from the value L.R.A.1915C.

of other taxable property owned by individuals in this state," the value of government securities held by the bank, which are exempt from taxation, should be deducted from the value of the shares in assessing their value for purposes of taxation. *Lippincott v. Lippincott*, 75 N. J. L. 795, 69 Atl. 502, reversing 74 N. J. L. 439, 66 Atl. 113.

Shareholders are not exempt from tax on their shares by virtue of a charter provision exempting the capital of the corporation from taxation. *New Orleans v. Citizens' Bank*, 167 U. S. 371, 42 L. ed. 202, 17 Sup. Ct. Rep. 905, reversing 54 Fed. 73.

In Alabama, under the constitutional rule of uniformity and equality, shareholders in the state banks are entitled to all the deductions allowed to national bank stockholders. *State Bank v. Board of Revenue*, 91 Ala. 217, 8 So. 852.

But the immunity of national securities from state taxation is violated by a tax imposed under the authority of Iowa Code, § 1322, directing that shares of stock of state banks should be assessed to such banks, and not to individual stockholders, the substantial effect of which is to require taxation upon the property, not including the franchises, of such banks, and to adopt the value of the shares as the measure of the taxable valuation of such property, without permitting any deduction from such valuation on account of bonds of the United States owned by the banks. *Home Sav. Bank v. Des Moines*, 205 U. S. 503, 51 L. ed. 901, 27 Sup. Ct. Rep. 571, reversing — Iowa, —, 101 N. W. 867.

The value of real estate owned by a national bank is not to be deducted in estimating the assessable value of the shares of bank stock for purposes of taxation, where the statute exempts from taxation all property of the bank whether real or personal. *Mechanics' Nat. Bank v. Baker*, 65 N. J. L. 113, 46 Atl. 586 (distinguishing *State, Orange Nat. Bank, Prosecutor, v. Williams*, 58 N. J. L. 45, 32 Atl. 745), affirmed on other grounds in 65 N. J. L. 549, 48 Atl. 582.

A. L. R.

denied, in whole or in part, by the decision of the board. In this case it sufficiently appears that there was a controversy between the banks in Traill county and each of them on the one hand, and the county commissioners on the other, concerning the taxation of the bank stock, the banks claiming that they were being unjustly and unlawfully taxed. This claim the board by its decision denied. The question was a judicial question. We hold that an appeal lies in this case, and this brings us to a consideration of the merits.

We are concerned only in ascertaining whether or not the holders of the stock of the plaintiff bank have been unlawfully taxed. Under § 1184, Revised Codes 1895, the bank stock is assessed against the shareholders, but the bank as agent for such shareholders is required to pay the tax. Hence the bank is the proper party plaintiff in this case. It is conceded that the capital stock of the plaintiff bank is \$50,000, divided into shares of \$100 each. Its surplus fund at the date of taxation was \$10,000. The resolution from which the appeal was taken fixed the valuation of shares of bank stock at 60 per cent on capital stock, or for the plaintiff bank at \$60 per share. The book value of the stock, as shown by capital and surplus, was \$120 per share. Its actual market value is not disclosed. What evidence there is on the point tends to show that it was a larger figure. It was not theretofore to the disadvantage of the stockholders to value the entire stock at the amount of the capital stock. The evidence shows without contradiction that other moneyed capital in that taxing district was assessed at 60 per cent of its face value. Thus far plaintiff has no just ground of complaint; nor do we understand that it would complain if that were all. But it is conceded that at that time the bank had invested in real estate over \$43,000, and that this real estate was taxed to the bank as other real estate in the district; i. e., from 25 to 33 per cent of its value. Under these facts plaintiff claims that its stock is being taxed in violation of the constitutional provision requiring uniformity of taxation (see § 176, state Const.), and also of that portion of the national banking act (§ 5219, U. S. Rev. Stat. Comp. Stat. 1913, § 9784), which, while it permits the states to tax the stock of national banks in the hands of the shareholders, yet declares that such shares shall not be taxed higher than other moneyed capital. It is urged that the real estate owned by the bank represents so much of the capital of the bank, and, since it is taxed in its character of real estate, the amount invested therein must be deducted from the total capital of the bank, L.R.A.1915C.

and the remainder only must be used in ascertaining the value of the stock for the purposes of taxation. To hold otherwise, it is claimed, necessarily results in taxing so much of the capital as is so invested twice,—once as real property, and once as bank stock. This argument is specious. It may be true that if the state should elect to exempt the real estate owned by a banking corporation when it required the shares of stock to be assessed at their full value, or if it should elect to deduct from the total capital the amount invested in real estate, and use the remainder as a basis for determining the value of the stock, that other taxpayers would have no legal ground of complaint on the score that either the bank or the shareholders were unduly favored. Our revenue law of 1890 (Laws 1889-90, chap. 132, § 24) expressly provided that, in fixing the value of shares of bank stock, the assessors should deduct from the total capital of the bank the amount legally invested in real property, and the remainder should represent the taxable value of the shares; the real estate being taxed under the general law. There was nothing inequitable in that provision. There is nothing inequitable in a provision that permits any taxpayer to deduct from the total amount of his assets the amount of his indebtedness, and use the remainder as representing the value of his estate; and yet no taxpayer, in the absence of such a provision, has the legal right to demand such a reduction, and it does not aid him any to show that the evidences of his indebtedness are taxed by the same authority that taxes his estate, even when it is certain that the estate must be depleted to pay the debts. Neither the debtor nor the creditor can be heard to say that it is double taxation. Yet it is perfectly apparent that if one taxpayer be indebted in an amount equal to his entire estate, and if the evidences of that indebtedness be held by his neighbor in the same taxing district, and if both the estate and the evidences of indebtedness be taxed at their full value,—and that is the theory of our law,—the aggregate amount on the assessor's books will be double the actual, tangible wealth, and yet there is no double taxation. Why? The answer is ready in the mouth of anyone who has ever studied the rudiments of the law of taxation. Because the estate is property of one kind in the hands of one party; the evidences of indebtedness, while their value depends upon and is measured by the estate, are property of another kind in the hands of another party.

This argument of double taxation has frequently been made under these same circumstances in behalf of banks and the hold-

ers of shares of bank stock. It has not been allowed by the better considered or modern cases. Its basis is untenable. It proceeds upon the theory that the bank and its shareholders are one. Counsel in this case have argued at great length, and presented an array of figures to demonstrate that the bank pays upon its shares upon a valuation largely in excess of their par value. This is all wrong. The bank does not pay a penny of taxes upon the shares except as agent for the stockholders, and for all money so paid it reimburses itself from the dividends or other property belonging to such shareholders. The shareholders pay no tax upon the real estate. That is the property of the bank. The shareholders and the bank are as distinct for purposes of taxation as separate individuals. In law the bank is an entity, a person, with its individual assets and its individual liabilities. Among these individual liabilities is its obligation to pay to its stockholders the face value of the shares of stock held by them. True this obligation may not mature until the bank ceases to do business; but it is no less a sacred obligation. If, then, the property of the bank be sufficient as between the creditors of the bank, the law, for reasons of public policy, makes the shareholder a deferred creditor, but he is none the less a creditor. His certificates of stock constitute the evidences of the bank's indebtedness to him. He cannot object that such evidence of indebtedness is taxed, because the law says it shall be taxed. He cannot object that the real estate of his debtor, the bank, is taxed, because the law says it shall be taxed. Taxation is the rule; exemption from taxation is the exception. He who claims exemption must be able to put his finger upon the law creating the exemption. True it is that the contract of the shareholder with the bank is such that he is entitled to share in the net profits made by the bank. It is this feature that brings his stock above par; and the value of his stock is dependent, in a measure, upon the earning capacity of the bank, or, in other words, upon the amount of net profits to be divided. Of course every item of necessary expenses paid by the bank reduces this amount, but the stockholder has no more legal right to say that the bank shall not pay its indebtedness to the state than it has to say that it shall not pay its hired clerk.

In the case of *Van Allen v. Assessors* (*Churchill v. Utica*) 3 Wall. 573, 18 L. ed. 229, it is said: "The corporation is the legal owner of all the property of the bank, real and personal, and within the powers conferred upon it by the charter, and for the purposes for which it was created, can L.R.A.1915C.

deal with the corporate property as absolutely as a private individual can deal with his own." And again: "The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital, during the existence of its charter, in proportion to the number of his shares; and, upon its dissolution or termination, to his proportion of the property that may remain of the corporation after the payment of its debts. This is a distinct, independent interest or property, held by the shareholder like any other property that may belong to him. Now, it is this interest which the act of Congress has left subject to taxation by the states, under the limitations prescribed." In that case it was held that while the capital stock of the bank was invested in United States bonds that were exempt from taxation, nevertheless the shares of stock in the hands of shareholders were subject to taxation. To same effect is *New York v. Tax & A. Comrs.* 4 Wall. 244, 18 L. ed. 344; *Palmer v. McMahon*, 133 U. S. 660, 33 L. ed. 772, 10 Sup. Ct. Rep. 324.

In *Farrington v. Tennessee*, 95 U. S. 687, 24 L. ed. 560, it is said: "The capital stock and the shares may both be taxed, and it is not double taxation,"—and many authorities are cited to support the proposition. Further, Mr. Justice Swayne enumerates in that case as taxable property in addition to the capital stock: (1) The franchise to be a corporation, etc., citing *Hamilton Mfg. Co. v. Massachusetts*, 6 Wall. 632, 18 L. ed. 904; *Wilmington & W. R. Co. v. Reid*, 13 Wall. 264, 20 L. ed. 568. (2) Accumulated earnings. *State ex rel. Mutual Ben. L. Ins. Co., Prosecutors, v. Utter*, 34 N. J. L. 493; *St. Louis Mut. L. Ins. Co. v. Charles*, 47 Mo. 462. (3) Profits and dividends. *Atty. Gen. v. Bank of Charlotte*, 57 N. C. (4 Jones, Eq.) 287. (4) Real estate belonging to the corporation and necessary for its business. *Wilmington & W. R. Co. v. Reid*, 13 Wall. 264, 20 L. ed. 568; *Bank of Cape Fear v. Edwards*, 27 N. C. (5 Ired.) 516.

In *Tennessee v. Whitworth*, 117 U. S. 129, 29 L. ed. 830, 6 Sup. Ct. Rep. 645, Mr. Chief Justice Waite, after referring to the national bank cases already cited, says: "In corporations four elements of taxable value are sometimes found: (1) Franchise; (2) capital stock in the hands of the corporation; (3) corporate property; and (4) shares of the capital stock in the hands of the individual stockholders." Again, in *Bank of Commerce v. Tennessee*, 161 U. S. 134, 40 L. ed. 645, 16 Sup. Ct. Rep. 456, Mr. Justice Peckham says: "The capital stock of a corporation and the shares into which such stock may be divided and held by individual shareholders are two distinct

pieces of property. The capital stock and the shares of stock in the hands of the shareholders may both be taxed, and it is not double taxation."

The Second Ward Sav. Bank v. Milwaukee, 94 Wis. 587, 69 N. W. 359, is identical in principle with the case at bar. The plaintiff in that case was a state bank, but it does not affect the principle. In that case the court said: "It is contended that to tax the bank upon the value of this real estate is, under the circumstances, double taxation: First, in taxing the shares of its stockholders; and, second, in taxing the real estate of the bank, the legal owner of it. Now, the tax on the shares of stock which are owned by the stockholders is not a tax on the capital or capital stock of the bank, nor is it a tax on the real estate of the bank." And, after fully citing the authorities, the court concludes: "The objection that the taxation complained of is double taxation, and therefore illegal, cannot be sustained. Double taxation is defined as the 'requirement that one person or known subject of taxation shall directly contribute twice to the same burden, while other subjects of taxation, belonging to the same class, are required to contribute but once.' Cooley, Taxn. 2d ed. 225. Here there is diversity of person, as well as of subject of taxation. The shares of stock are the legal property of the stockholders, and, although the value of the stock is founded upon and dependent upon the value of the property of the corporation, they are nevertheless a species of property altogether separate and distinct in character and ownership from the capital or property of the bank. The shareholders, as such, are not the owners of the capital or property of the bank, the title to which is vested in the bank itself. It cannot therefore be said that the case presented is one of double taxation, either as to person or subject."

These authorities we regard as overwhelming, and their reasoning is very satisfactory. It follows that neither the plaintiff bank nor its shareholders were doubly or unjustly taxed.

The District Court is ordered to set aside its judgment and decree herein, and reinstate the resolution appealed from.

Young, J., concurs.

Wallin, J., dissenting:

I am unable to agree with my associates in the disposition made of this case. I differ from them, however, only upon the question of the right to appeal from the action of the county board when sitting as a board of equalization. True, such action may be somewhat in the nature of a "decision,"

and it is further true that the statute defining the powers and duties of the county board declares that, "from all decisions of the board upon matters properly before it an appeal may be taken to the district court by any person aggrieved." Revised Codes 1895, § 1927. But it is conceded by the courts whose decisions are cited and referred to with approval in the majority opinion, that this statutory provision cannot be construed literally without inviting the most serious consequences to public business. In the very cases cited, and those referred to in the cases cited, it is held that many "decisions" of the county board cannot be reviewed by an appeal under this statute, and that among the decisions of the board expressly enumerated as nonappealable are those which are political and those which are administrative in their nature. It will at once be observed that this rule of construction will exclude from the operation of the statute a very large majority of the decisions which a county board in the exercise of its functions is called upon to make. The duties of the board are statutory, and such duties, with a few exceptions, are enumerated in articles 7 and 8 of the Political Code. See Revised Codes 1895, §§ 1892-1951. A glance at these sections discloses the character and kind of "decisions" which the board is called upon to make. Among them are the following, *viz.*: The division of counties into commissioner districts, also changing the boundaries of districts; to punish contempts; to cancel and destroy county warrants; to institute actions; to sell and purchase real estate for county purposes upon a majority vote therefor; to levy taxes; to construct and repair bridges; establish election precincts; equalize assessments; provide a fireproof safe for the use of county officers; to submit to the people the question of an extraordinary expenditure of money; to provide a court room and a jail; to erect county buildings and make building contracts; to settle accounts of county officers; to designate banks as county depositories, etc., etc.; also to approve the official bond of county officers. Id. § 342. Under the rule laid down in the cases cited in the majority opinion, it seems to be clear that any decision which the county board may lawfully make with respect to their duties above enumerated would be nonappealable decisions, such enumerated duties appearing to be neither administrative nor political in their nature, and clearly none of the same are strictly judicial. I am not at loggerheads with this restricted view of the appeal law. On the contrary, it is my opinion that the statute should be, by construction, so narrowed in its scope, in order to prevent partial suspension, if not a to-

tal paralysis, of the duties devolved by law upon boards of county commissioners. If all final decisions necessarily made with respect to the multitude of matters within the jurisdiction of county boards are removable by appeal to the district court by means of a simple notice and an undertaking for costs, and thereafter may in due course be transmitted to this court for final determination, the necessary result would be that duties which are expressly devolved by law upon executive and administrative officers would in appeal cases be cast upon others, *viz.*, judicial officers, whose duties are wholly different in nature, and who are usually far less capable of performing such duties than the officers elected by the people to perform the same. But manifestly the worst effect of such a construction of the appeal law in question would be the delays incident to such appeals if allowed.

Fortunately the courts have, to some extent, foreseen the serious consequences which would inevitably follow from the practice of allowing appeals to be taken from all "decisions" in matters properly before the board of county commissioners. It must be conceded, however, that a literal interpretation of the statute would permit all such decisions to be reviewed in the district court upon the easy terms specified in the statute; but courts under established rules of construction may depart from the literal meaning of terms employed in a statute when this course will give effect to the legislative intent. This rule has been fully recognized in the case cited in the majority opinion, and there referred to.

But I maintain that for obvious reasons the salutary rule of construction should be applied in the case at bar, and insist that the same is broadly ignored by the majority of the court in deciding this case. In my opinion there are peculiar and cogent reasons which are opposed to allowing the assessment and collection of the public revenues to be obstructed by the vexatious delays that would certainly follow if it be once settled by this court that appeals would lie to the courts with respect to decisions in matters of taxation made by the county board. True, such delays have not occurred in the past, but I explain this fact by the prevailing understanding of the profession that no such appeal will lie. Since this court has been organized, not a single tax case has come before us under this statute. It is quite probable, too, that this appeal would not have been attempted had the law not been somewhat changed by the revisioners of the Codes. Under the original statute the board of county commissioners did not, in strictness, act as a board of equalization; but under the Revised Codes

it does so act. See Revised Codes 1895, § 1213.

But I am unable to see how this change, which is nominal rather than real, can at all militate against the strength of the reasons which stand opposed to allowing an appeal from the decisions or conclusions which a board of equalization, however constituted, may make.

There are considerations too numerous to mention which, in my judgment, should constrain the courts of this state to hold that the action of boards of equalization ought to be added to the already long list of "decisions" which under the cases cited are nonappealable under this statute. I maintain that the appeal is not only inadequate as a remedy, but that it is wholly unnecessary to the protection of taxpayers against the consequences of illegal taxation. Other remedies of the taxpayer are ample. If an illegal tax culminates in a lien upon or a sale of real estate, a court of equity will cancel the lien or vacate the sale, and the muniments of title resulting from the sale; and, on the other hand, if a tax upon personal property is unlawful, when the taxpayer is compelled by distraint of his property to pay the same, an action at law can be maintained to recover back such taxes, with costs. This remedy was open to this plaintiff. Besides these familiar remedies, others are added by statute whereby the taxpayer is fully protected by the courts against unlawful taxation, without resort to the dubious right in question.

I claim, further, that such appeals are inadequate as a means of arresting the illegal action of either the board of equalization or the other county officers who have duties to perform in connection with the levying of the taxes, extending the same upon the tax lists or collecting the tax so extended. After property values are equalized by the county and state boards, the next step under the statute is to extend the tax upon the list as against the values so equalized, and this is followed by delivering the list to the county treasurer for collection. Once in the hands of the county treasurer the taxes on the list are required to be collected by that officer, and there is no power short of a decree of a court which will excuse the treasurer for the noncollection of such taxes. The collection of taxes is not among the duties of county boards, nor can such board lawfully prevent such collection by its unaided action. And just here attention is called to the fact that an appeal from the action of the board of equalization is a useless expenditure of energy, and wholly abortive as a means of preventing any step required by law to be taken by the taxing officers, after the board

has completed its work and has equalized the taxes and adjourned *sine die*. If an illegal tax is laid by means of the unauthorized action of the board, such illegal tax must nevertheless, under the statute, so far as the tax is affected by the alleged right of appeal, be extended upon the tax list by the auditor and be thereafter collected by the treasurer. The appeal does not stay the proceedings either of the board or of other officers who have duties to perform in laying the taxes for the public revenues. No provision is made in the statute either for a stay or a stay bond; but, on the contrary, the statute requires only a simple bond for costs in the district court. Revised Codes 1895, § 1927. It is therefore entirely clear that the alleged right of appeal is inadequate as a means of preventing the placing of an illegal tax upon the tax list, or as a means of preventing the treasurer, who is not a party to such appeal, from collecting the illegal tax. The impotency of such appeal as a remedy is made manifest in this case.

The obnoxious resolution of the board of equalization was adopted in the month of July, 1896, and the appeal therefrom was perfected within thirty days thereafter. Since then the appeal has been pending in the district court and in this court until the present time, December, 1898. Meanwhile, what have the taxing officers of Traill county been doing in the way of discharging their imperative duties under the law with respect to collecting the public revenue? This question is readily answered from the record, which shows that the alleged illegal tax has in due course found its way to the tax list, which, at last advices, was in the hands of the county treasurer for collection, where it was placed in due course under the law in the year 1896. If the treasurer has *ex gratia* foreborne to collect this tax, it has been solely an act of forbearance on his part, and cannot be attributed to any restraint placed upon his action by virtue of this appeal. Not only does the appeal not operate as a stay of official action in general, but the treasurer, not being a party to it, cannot be affected by such appeal. Nor did the appeal operate practically or at all to restrain the country auditor from extending the tax against the plaintiff's property in accordance with the value fixed in the obnoxious resolution of the board.

Again, it must not be overlooked in this connection, as further illustrating the abortive character of this alleged remedy by appeal, that the good or bad effect of the resolution of the board remains intact despite the appeal. The trial court, assuming the powers of a court of equity, decreed that the resolution should be "reversed," L.R.A.1915C.

but did not attempt the impossible by further decreeing that the board should, in 1897, reassemble and pass another and different resolution, fixing the value of plaintiff's property as a basis for a tax to be levied for the year 1896. The court below went no further than to "reverse" the resolution appealed from, and thereby declared in effect that all taxes based upon the same were illegal; but this conclusion, as has been seen, produced no effect upon events already concluded. It did not arrest any official action based upon the resolution. True the trial court further decreed that the part of the tax found by that court to be legal should be paid "immediately," and that the county treasurer should be enjoined from collecting the part found to be illegal by the trial court. But this result we have seen could have been reached by other proceedings, in which the action of the board would not be involved. Besides it is apparent that the judgment in the appeal case is not binding upon the treasurer, for the simple reason that he had not been heard in the case, not being a party thereto.

The appeal law, § 1931, provides in terms that "the district court may enter a final judgment," but this cannot be construed as conferring authority to enter a judgment without a hearing and against strangers to the record. But the same section also confers upon the district court authority to send the same back to the board, with an order how to proceed, and "require such board to comply therewith by mandamus or by attachment for contempt." If this section can be applied to the case at bar at all, the only proper course to pursue (after the district court had entered its judgment reversing the obnoxious order) was to send the case back to the board, and direct it to annul or reverse the order appealed from. There would, it is true, be insurmountable obstacles to this course of procedure. Not only had the board of equalization adjourned *sine die* for the year 1896, without power to reassemble as such board, but, as we have seen, other taxing officers not parties to the record had in the interval taken action based upon the resolution in question, and taxes based thereon had been levied, extended, and delivered to the treasurer for collection long before the district court entered its judgment. I allude to these considerations, however, only for the purpose of further illustrating the thought that the legislature could not have contemplated an appeal from the action of a board of equalization when it enacted the statute embraced in § 1941, Revised Codes 1895.

But there is another consideration which is very persuasive to my mind, at least, against this alleged right of appeal. It is

this: Boards of equalization are chosen by the people to correct errors and irregularities which may arise in valuing property for purposes of taxation, and the law expressly devolves these duties upon such board and boards of review. The members of the board are drawn from all parts of the county, and hence are familiar with property values in all parts of the county, and are therefore in a position to discharge their duties intelligently, and with a wise reference to the interests of both the public and the taxpayer. These tribunals are required to assemble annually at a fixed time and place, and there adjust values in accordance with law and the principle of equity and justice. To this tribunal the taxpayer, whether citizen or not, has a legal right to resort, and there he may state his grievances and find his remedy without expense and without let or hindrance from any source, and if he is denied a hearing, that fact alone will invalidate any tax that may be imposed without a hearing. Inasmuch as an *ad valorem* tax can only be laid upon a value ascertained by some board or officer, it follows that such board or officer should have the final right to determine values. But grant a right of appeal, and what follows? Simply this: A court will supersede the duly constituted authority, and substitute his own estimates of values, absolute and relative, for that of the board chosen by the people for that purpose. I do not hesitate to say that in my judgment the courts are far less able and fitted for this work than are the county boards. Courts can only act upon evidence, while boards are not limited to evidence, but can and should act both upon evidence and their own knowledge of facts and values. This court said in *Wells County v. McHenry*, 7 N. D. 246, 74 N. W. 241: "We doubt the expediency of any legislation which should vest all the powers of boards of equalization in the ordinary judicial tribunals. Local boards are better qualified to exercise such functions. And the imposition of such burden upon the courts would seriously impair their efficiency in the discharge of those duties which are germane to the judicial branch of the government." Final authority to fix values for taxation must rest somewhere, and I am confident that it is intended to be left with the assessors and the various boards of review and equalization. Their conclusions are not supposed to be absolutely accurate or absolutely just in all cases. Yet experience has shown that the results reached by these officials are generally sound and just. If these officers do, however, act illegally, corruptly, or without jurisdiction, there is a remedy to be found in the courts L.R.A.1915C.

for such abuse, and this without resorting to the alleged right of appeal.

I will add but a single consideration to these already advanced. If the decisions of the county board, while sitting as a board of equalization, are reviewable under this statute, I can see no escape from the conclusion that a decision of the county board, in levying the annual taxes for all purposes, is likewise appealable under the same statute. But if such an appeal would not arrest the collection of the taxes as levied, and I think it would not have that effect, the same would be an idle and worse than useless proceeding; but if it did stay the collection of the tax, such a result would be nothing less than a public calamity.

These considerations, and many others which could be added, have convinced me that the legislature did not intend to include tax proceedings in providing for appeals from the "decisions" of county boards. Such appeals, if ever allowed, can only be justified under a statute which clearly confers the right, and our statute, in my judgment, does not do so.

NORTH CAROLINA SUPREME COURT.

McKINNON, CURRIE, & COMPANY,
Appt.,
v.
FANNIE CAULK.

(167 N. C. 411, 83 S. E. 559.)

Entireties — effect of divorce.

A divorce destroys an estate held by the parties by entireties, and they thereafter hold the property as tenants in common.

(November 25, 1914.)

Note. — Effect of divorce on tenancy by entireties.

This note is supplementary to subdivision XI. of the note to *Hiles v. Fisher* in 30 L.R.A. at page 333, and the note to *Alles v. Lyon*, 10 L.R.A. (N.S.) 463.

McKINNON, C. & Co. v. CAULK and the other recent cases are opposed to the *Alles* Case, annotated in 10 L.R.A. (N.S.) 463, and are in accord with the weight of authority, as appears from the earlier notes, to the effect that a divorce severs an estate by the entireties, and makes the divorced husband and wife tenants in common. Thus, in Maryland, it has been held that a husband and wife, as the result of a divorce, hold as tenants in common property which during their marriage was conveyed to them "as tenants by entireties." *Reed v. Reed*, 109 Md. 690, 130 Am. St. Rep. 552, 72 Atl. 414.

And this rule has also been recognized,

APPEAL by plaintiff from a judgment of the Superior Court for Robeson County dismissing a petition for partition of an estate by entireties. Reversed.

Statement by Hoke, J..

On the hearing it was properly made to appear that J. W. Caulk and his then wife, Fannie, the present defendant, were seized and possessed of an estate by entireties in the land, and that the husband J. W. Caulk, obtained an absolute divorce by decree of the court, on account of the adultery of the wife. Subsequently to this decree, said J. W. Caulk, by deed duly executed, conveyed all his right, title, and interest in the land to plaintiff, and, holding this deed, plaintiff instituted the present proceedings to obtain partition of the land on the ground that plaintiff and defendant are tenants in common therein. The court, being of opinion that the estate by entireties was not affected by the decree of divorce, dismissed the proceedings, and plaintiff excepted and appealed.

though not directly involved, in other recent cases. Thus, in *Mardt v. Scharmach*, 65 Misc. 124, 119 N. Y. Supp. 449, which was an application for judgment in an action for specific performance of a contract for the purchase and sale of real estate which the plaintiff had originally held as seised of the entirety with her husband, his interest having been sold on execution, and the sheriff's deed thereof having been executed to her after an assignment to her of the sheriff's certificate of sale by the purchaser,—the court, holding the plaintiff's title good, said: "I find a *dictum* in *Alles v. Lyon*, 216 Pa. 606, 10 L.R.A. (N.S.) 463, 116 Am. St. Rep. 791, 66 Atl. 81, 9 Ann. Cas. 137, that the wife cannot oust the husband of his interest in property held by the entirety by buying in the same on execution sale. But the same case holds that absolute divorce has no effect upon tenancy by the entirety, while in New York such a divorce changes it to a tenancy in common."

And in *Holmes v. Kansas City*, 209 Mo. 513, 123 Am. St. Rep. 495, 108 S. W. 9, which was a suit by a wife to enjoin the defendant city and its agents from interfering with or disturbing certain real estate of which she and her husband had been tenants by the entireties, and a part of which the city had attempted to acquire for a public street by condemnation proceedings to which her husband, but not she, had been made a party,—the court, in discussing generally the nature of her interest in the property with reference to the question whether it was such as demanded, at the hands of the city, just compensation before the property or any part thereof could be taken for a public purpose, said: "We have held in this state that the divorce of the wife from the husband gave her absolute title to her moiety, and that an action in partition would lie." L.R.A.1916C.

Messrs. B. F. McLean, S. B. McLean, and H. A. McKinnon, for appellant:

When the marriage is entirely destroyed by a divorce *a vinculo*, the estate held by defendants by entirety would be changed to tenancy in common, as it would have been had they not been married when the land was conveyed to them.

1 *Tiffany*, Real Prop. p. 383, chap. 7, § 165; *Hinson v. Bush*, 84 Ala. 368, 4 So. 410; 21 Cyc. 1201; *Donegan v. Donegan*, 103 Ala. 488, 49 Am. St. Rep. 53, 15 So. 823; *Mardt v. Scharmach*, 65 Misc. 124, 119 N. Y. Supp. 449; *Stelz v. Shreck*, 128 N. Y. 263, 13 L.R.A. 325, 26 Am. St. Rep. 475, 28 N. E. 510; *Lash v. Lash*, 58 Ind. 526; *Enyeart v. Kepler*, 118 Ind. 34, 10 Am. St. Rep. 94, 20 N. E. 539; *Harrer v. Wallner*, 80 Ill. 197; *Elliott v. Nichols*, 4 Bush, 502; *Russell v. Russell*, 122 Mo. 235, 43 Am. St. Rep. 581, 26 S. W. 677; *Joerger v. Joerger*, 193 Mo. 133, 91 S. W. 918, 5 Ann. Cas. 534; *Holmes v. Kansas City*, 209 Mo. 513, 123 Am. St. Rep. 495, 108 S. W.

So, in *Maitlen v. Barley*, 174 Ind. 620, 92 N. E. 738, which was a proceeding for the improvement of a highway, the court, in discussing the question whether a tenant by the entireties was a "freeholder" within the meaning of the statute authorizing the contemplated improvement, said: "A dissolution of the marital relation by divorce is generally held to sever the estate [by entireties], which is thereafter held as joint tenants or tenants in common according to the differing policies and laws of the several states."

And in *Sharpe v. Baker*, 51 Ind. App. 547, 96 N. E. 627, which was an action by a husband and wife to quiet their title as tenants by the entireties to certain real estate which had been sold under an execution issued on a joint judgment against them, the court, in discussing generally the nature of a tenancy by the entireties as bearing upon the question whether the real estate involved had been legally sold, said: "As an estate by entireties can be created only as between husband and wife, and is dependent entirely on the unity of their persons by marriage, anything which has the effect to destroy this unity during their lives destroys the estate. Thus, it is held in this state and in most states that an absolute divorce converts such an estate into an estate in common."

As to the effect of divorce on community property in the absence of an adjudication, see note to *Ambrose v. Moore*, 11 L.R.A. (N.S.) 103.

For other notes as to the effect of divorce on property rights, generally, including homestead and dower rights, see Index to L.R.A. Notes, "Divorce and Separation," §§ 50-54.

For notes as to tenancy by the entireties, generally, see Index to L.R.A. Notes, "Husband and Wife," § 27.

A. C. W.

9, 1134; *Hayes v. Horton*, 46 Or. 597, 81 Pac. 386; *Hopson v. Fowlkes*, 92 Tenn. 697, 23 L.R.A. 805, 36 Am. St. Rep. 120, 23 S. W. 55; *Baker v. Stewart*, 40 Kan. 442, 2 L.R.A. 434, 10 Am. St. Rep. 213, 19 Pac. 904; *Reed v. Reed*, 109 Md. 690, 130 Am. St. Rep. 552, 72 Atl. 414; *Ames v. Norman*, 4 Sneed, 683, 70 Am. Dec. 269; *Godey v. Godey*, 39 Cal. 157; *Biggi v. Biggi*, 98 Cal. 35, 35 Am. St. Rep. 141, 32 Pac. 803; *Kirschner v. Dietrich*, 110 Cal. 502, 42 Pac. 1064; 15 Am. & Eng. Enc. Law 2d ed. 848.

Messrs. McLean, Varser, & McLean and McNeill & McNeill, for appellee:

An absolute divorce has no effect on an estate by entireties.

Alles v. Lyon, 216 Pa. 604, 10 L.R.A. (N.S.) 463, 116 Am. St. Rep. 791, 66 Atl. 81, 9 Ann. Cas. 137; *Gray v. Bailey*, 117 N. C. 439, 23 S. E. 318; *Re Lewis*, 85 Mich. 340, 24 Am. St. Rep. 94, 48 N. W. 580; 2 Bishop, Marr. & Div. § 717; *Babcock v. Smith*, 22 Pick. 61.

The legislature has provided certain changes in the property rights of the parties after an absolute divorce, and has left undisturbed estates by entireties.

Revisal of 1905, §§ 2109, 2110.

Hoke, J., delivered the opinion of the court:

It has been held in several well-considered decisions of this court that our Constitution and the later statutes relative to the property and rights of married women have not thus far destroyed or altered the nature of this estate by entireties a "conveyance to a husband and wife." *Jones v. Smith*, 149 N. C. 318, 19 L.R.A. (N.S.) 1037, 128 Am. St. Rep. 661, 62 S. E. 1092; *West v. Aberdeen & R. F. Co.* 140 N. C. 620, 53 S. E. 477, 6 Ann. Cas. 360; *Bynum v. Wicker*, 141 N. C. 95, 115 Am. St. Rep. 675, 53 S. E. 478; *Bruce v. Nicholson*, 109 N. C. 205, 26 Am. St. Rep. 562, 13 S. E. 790; *Ray v. Long*, 132 N. C. 891, 44 S. E. 652. A perusal of these and other authorities on the subject will disclose that the estate, in its essential features and attributes, is made dependent on the oneness of person of the husband and wife. Thus, in *Ray v. Long*, Associate Justice Douglas, speaking of such an estate, said: "This estate is fully recognized by our law, and has not been impaired by § 6 of article 10 of the Constitution. Whether it arises directly from the marital relation or from a presumption of intention is immaterial, so long as it exists. In *Den ex dem. Motley v. Whitmore*, 19 N. C. (2 Dev. & B. L.) 537, it is said (by Gaston, Judge): 'When lands are conveyed to husband and wife,

they have not a joint estate, but they hold by entireties. Being in law but one person, they have each the whole estate as one person; and, on the death of either of them, the whole estate continues in the survivor. This was settled at least as far back as the reign of Edward III. as appears from the case on the petition of John Hawkins, as the heir of John Ocle, quoted by Lord Coke, 1 Inst. 187a.'"

And Merrimon, Judge, in *Bruce v. Nicholson*, supra, said: "The unity of the husband and wife as one person, and the ownership of the estate of that person, prevent the disposition of it otherwise than jointly. As a consequence, neither the interest of the husband nor that of the wife can be sold under execution, so as to pass away title during their joint lives, or as against the survivor after the death of one of them. . . . Indeed, it seems that the estate is not that of the husband or the wife; it belongs to that third person recognized by the law, the husband and the wife."

And in *West v. Aberdeen & R. F. R. Co.* 140 N. C. 620, 53 S. E. 477, 6 Ann. Cas. 360, the present chief justice refers to certain incidents of the estate as existent "during coverture." And, this being the recognized position, it follows, as the reasonable and necessary deduction, that where this unity of person is entirely severed, whether by death or divorce absolute, the incidents of the estate arising out of such unity and dependent upon it should also disappear; and, our statute having abolished all survivorship in fee simple estates, except this and the estate of trustees without beneficial interests (Revisal, §§ 1579, 1580), the owners should thereafter hold as tenants in common. It is not a satisfactory answer to this position that, the right of survivorship having attached at the creation of the estate, it could not be divested by a decree of divorce subsequently granted. The very question presented is whether this right of survivorship did attach as an inseparable incident of ownership, or was it dependent upon the unity of person between the two; and our conclusion on this question, drawn from the history and nature of the estate, is, we think, in accord with right reason and the great weight of authority. *Stelz v. Shreck*, 128 N. Y. 263, 13 L.R.A. 325, 26 Am. St. Rep. 475, 28 N. E. 510; *Enyeart v. Kepler*, 118 Ind. 34, 10 Am. St. Rep. 94, 20 N. E. 539; *Joerger v. Joerger*, 193 Mo. 133, 91 S. W. 918, 5 Ann. Cas. 534; *Russell v. Russell*, 122 Mo. 235, 43 Am. St. Rep. 581, 26 S. W. 677; *Hopson v. Fowlkes*, 92 Tenn. 697, 23 L.R.A. 805, 36 Am. St. Rep. 120, 23 S. W. 55; *Harrer v. Wallner*, 80 Ill. 197;

Hayes v. Horton, 46 Or. 597, 81 Pac. 386. In Stelz v. Shreck, supra, Peckham, Judge, speaking to the nature of the estate and its incidents, said: "At common law husband and wife were regarded as one person, and a conveyance to them by name was a conveyance in law to but one person. . . . They were thus seised of the whole, because they were legally but one person. . . . Being founded upon the marital relation and upon the legal theory of the absolute oneness of husband and wife, when that unity is broken, not by death, but by a divorce, a *vinculo*, it stands to reason that such termination of the marriage tie must have some effect upon an estate which requires the marriage relation to support its creation. The claim on the part of counsel . . . is that it is only necessary the parties should stand in the relation of husband and wife at the time of the conveyance, and at that time the estate vests, and no subsequent divorce can affect an estate which is already vested. But the very question is: What is the character of the estate which became vested by the conveyance? If it were of such kind that nothing but the termination of the marriage by the death of one of the parties could affect it, then, of course, the claim of the counsel is made out, but it is an assumption of the whole case to say that the estate was of the character he claims. When the idea upon which the creation of an estate by the entirety depends is considered, it seems . . . much . . . more logical as well as plausible view to say that, as the estate is founded upon the unity of husband and wife, . . . anything that terminates the legal fiction of the unity of two separate persons ought to have an effect upon the estate whose creation depended upon such unity. It would seem as if the continued existence of the estate would naturally depend upon the continued legal unity of the two persons to whom the conveyance was . . . made. . . . An absolute divorce terminates the marriage and unity of persons just as completely as does death itself, only instead of one, as in case of death, there are, in case of divorce, two survivors of the marriage, and . . . two living persons in whom the title still remains. It seems to me the logical and natural outcome from such a state of facts is that the tenancy by the entirety is severed, and," this "having taken place, each takes his or her proportionate share . . . as a tenant in common without survivorship."

And again 128 N. Y. 268: "We do not at all question the contention of the defendant's counsel that a decree of divorce in this state only operates for the future, and L.R.A.1915C.

has no retroactive effect, or any other effect than that given by the statute; but we hold that the character of the estate conveyed was such in its creation that it depended for its own continuance upon the continuance of the marital relation, and when that relation is severed, as well by absolute divorce as by death, the condition necessary to support the continuance of the original estate has ceased, and the character of the estate has for that reason changed."

And in Hayes v. Horton, 46 Or. 597, 81 Pac. 386, Bean, Judge, delivering the opinion, said: "There is some conflict in the decisions as to the effect of a divorce upon estates by entirety, but the weight of authority is that it destroys the unity of husband and wife and severs such estate, making them thereafter tenants in common. 2 Bishop, Marr. & Div. 5th ed. § 716; Freeman, Cotenancy, 2d ed. § 76; Stelz v. Shreck, 128 N. Y. 263, 13 L.R.A. 325, 26 Am. St. Rep. 475, 28 N. E. 510; Russell v. Russell, 122 Mo. 235, 43 Am. St. Rep. 581, 26 S. W. 677; Hopson v. Fowlkes, 92 Tenn. 697, 23 L.R.A. 805, 36 Am. St. Rep. 120, 23 S. W. 55. At common law husband and wife were regarded as one person, and a conveyance to them by name was in effect a conveyance to a single person. By such a conveyance two real persons took the whole of the estate between them, and each was seised of the whole, and not of any undivided portion. When the unity was destroyed by death, the survivor took the whole of the estate, because he or she had always been seised of the whole thereof, and the other had no interest which was devisable. But when the unity is destroyed by a decree of divorce, leaving both spouses surviving, the only logical conclusion is that they thereafter become tenants in common of the property, because there are two living persons in whom the title rests."

And the principle is correctly and succinctly stated in a note to Joerger's Case in 5 Ann. Cas. 536, as follows: "Tenancy by entirety originated in the idea of the unity of husband and wife, rendering them but one person in law. The continuance of such tenancy in a given case depends on the continuance of the marital unity. Hence the general rule is, as stated in the reported case, that the dissolution of that unity by divorce, whereby two actual persons are restored to their natural severalty, operates to divide equally between them the title to the estate formerly held by them by entirety, making them tenants in common thereof."

The courts of Michigan and Pennsylvania seem to have made a different decision on this question (Re Lewis, 85 Mich. 340, 24

Am. St. Rep. 94, 48 N. W. 580, and *Alles v. Lyon*, 216 Pa. 604, 10 L.R.A.(N.S.) 463, 116 Am. St. Rep. 791, 66 Atl. 81, 9 Ann. Cas. 137, but the reasoning of these cases is, to our minds, far from satisfactory, and the conclusion is not approved.

We have not been inadvertent to defendant's suggestion that our legislation in reference to the property rights of the parties (Revisal §§ 2109, 2110) in cases of absolute divorce makes no reference to this estate by entirety. But this legislation is intended and purports to deal only with the rights that either may have in the property of the other growing out of the marriage relation, as of dower, curtesy, and the like, and does not therefore refer to this estate, which, on divorce, is property which each holds in his own right and by the nature of the estate as originally created.

There is error in the judgment of the court, and on the facts of record, as they now appear the plaintiff is entitled to partition.

This opinion and decision is to be without prejudice to any other defenses which may not be open to defendant on this record.

TENNESSEE SUPREME COURT.

LOUIS LUSKY and Wife, Appts.,
v.

AMELIA KEISER.

(128 Tenn. 705, 164 S. W. 777.)

Contract — sale of real estate — statute of frauds — acceptance on broker's authorization.

Where the memorandum of sale of real estate must be signed by the grantor to

Note. — Written authorization of broker or agent to buy or sell land as a memorandum of contract of sale sufficient to satisfy the statute of frauds.

This note considers simply the question whether the authorization is a sufficient memorandum so far as concerns the person making it, and does not consider the question as to which party must sign, or whether both parties must sign. For the question as to who must sign a note or memorandum of executory contract for the sale of real property or chattels within the statute of frauds, see notes to *Murray v. Crawford*, 28 L.R.A.(N.S.) 680, and *Houser v. Hobart*, 43 L.R.A.(N.S.) 410.

By the weight of authority an authorization to an agent to sell to a particular buyer, stating fully the property and the terms, is a sufficient memorandum under the statute of frauds.

Thus, in *Smith v. Watson*, *Bunbury*, 55, L.R.A.1915C.

satisfy the statute of frauds, a binding contract is not effected by the purchaser's written acceptance upon a written authorization by the seller to a broker to effect a sale, which contains a full description of the property, price, and terms of sale, but omits the name of the vendee.

(February 28, 1914.)

APPEAL by plaintiffs from a decree of the Chancery Court for Davidson County in defendant's favor in a suit to recover the difference between the price fixed in a contract for the sale of real property, performance of which was refused by defendant, and the market price as determined by the auction sale of the land. Affirmed.

The facts are stated in the opinion.

Mr. Louis Leftwich for appellants.

Messrs. G. B. Kirkpatrick, A. F. Whitman, and John E. Fisher for appellee.

Williams, J., delivered the opinion of the court:

Complainants, husband and wife, executed to one Loventhal, a real estate agent, a contract authorizing the latter to sell a tract of land belonging to the wife. Acting under that contract, Loventhal opened negotiations with defendant, Keiser, who agreed to purchase. The instrument executed to the real estate agents by complainants, so far as pertinent, is quoted, as follows:

We, Louis Lusky and Lettie Lusky, hereby authorize and empower Dorris S. Loventhal, a real estate dealer in Nashville, Tennessee, to sell for us our farm, containing 106 acres, more or less in the 12th civil district of Davidson county, Tennessee (here giving boundaries) at and for the sum of \$11,000, payable \$4,500 in cash, and an as-

where, upon an agreement for an assignment of a lease, the owner sent a letter, specifying the agreement, to a scrivener, with directions to draw an assignment pursuant to the agreement, Bury, Ch. B., Price, B., and Page, B., were of opinion that the letter was a writing within the statute of frauds, but the question was not decided. Cited in *Gibson v. Holland*, L. R. 1 C. P. 1, 1 Harr. & R. 1, 35 L. J. C. P. N. S. 5, 11 Jur. N. S. 1022, 13 L. T. N. S. 293, 14 Week. Rep. 86.

So, it is stated in *Child v. Comber*, 3 Swanst. 423, note, referring to a contemporary case, that Child brought a bill against Godolphin, Dean of St. Paul's, to carry out an agreement for a lease, and that the Dean's plea of the statute of frauds was overruled because he had written his agent, "acquainting him with the agreement he had made with the plaintiff, and forbidding him to treat with any other person."

In *Welford v. Beazely*, 3 Atk. 503, *Hard-*

sumption of a mortgage thereon for \$3-500. . . . And we agree to make a deed to any good purchaser, complying with said terms, procured by said Loventhal, with the usual covenants of warranty and seisin.

This February 16, 1912.

Lettie Lusky.
Louis Lusky.

Defendant's acceptance was appended:

February 17, 1912. I hereby accept the proposition.
Amelia Keiser.

The bill of complaint recites that, in order to carry out the contract in good faith,

the complainants on March 14, 1912, notwithstanding the refusal of defendant to abide by and perform her contract, executed a deed in accordance with the above-quoted instrument, and tendered same, but that its acceptance and contract performance were declined by defendant, who gave no reason or excuse therefor. Suit was brought to recover the difference between the contract price claimed to be thus fixed and the market price as determined by a fully advertised auction sale of the land, made in May, 1912; to wit, \$3,400.

Defendant, Keiser, interposed a demurrer to the bill of complaint on the grounds: (1) That no contract binding on her was entered

wicke, *Ld. Ch.* (in holding that signing as a witness an instrument, the contents of which were known to such witness, was a signing within the statute of frauds), said: "There have been cases where a letter written to a man's own agent, and setting forth the terms of an agreement as concluded by him, has been deemed to be a signing within the statute, and agreeable to the provision of it (see *Clerk v. Wright*, 1 *Atk.* 12.)" (But there is nothing in *Clerk v. Wright* to this effect, it being there held that a letter from one party to the other, not containing the terms, was insufficient; also that giving orders for conveyances was not sufficient as a part performance; but it does not appear whether such orders were verbal or written. Whether the reference to the *Clerk Case* was by the court or the reporter is not clear.)

So it was held in *Carpenter v. Churchill*, 2 *Week. Rep.* 364, that letters by an owner to his solicitor, and by the latter communicated to the solicitor of the buyer, may be looked to as the memorandum or part of it.

In *Morgan v. Holford*, 1 *Smale & G.* 101, 17 *Jur.* 225, 1 *Week. Rep.* 101, the question was whether the buyer had a divisible interest in the property in question at the time of making his will, and it was held that he had such interest, the proof showing (1) a letter by the vendor to his solicitor, stating the agreement, and its terms, and saying, "Will you have the goodness to settle an agreement on the basis of the above for us to sign?" an unsigned copy of which was delivered by the vendor to the purchaser as a memorandum, and this fact is referred to in the letter; (2) a letter from the purchaser to the same solicitor, asking when he would "forward the agreement to be entered into with Mr. Crespigny, relative to the purchase I have concluded with him for his estate in this county."

In *Spangler v. Danforth*, 65 *Ill.* 162, it was held that it is a sufficient writing under the statute where the seller delivers to the buyer a signed letter addressed to the seller's agent, containing the terms and the purchaser's name, and directing him to "make the papers," having at its foot a separately signed receipt, *viz.*, "Rec'd" (stating the sum received) "on the above L.R.A.1916C.

contract." Compare *Illinois cases infra*, "Contrary doctrine."

The owner's signed authorization to brokers to offer to a certain person certain property on certain terms with a signed statement at its foot, signed by such person, *viz.*, "I hereby accept the above offer," is a sufficient memorandum under the statute of frauds. *Alford v. Wilson*, 95 *Ky.* 506, 26 *S. W.* 539, where the court said: "This writing must be regarded as the offer of the Wilsons. Not merely the 'equivalent,' but the very offer to be presented to the vendor; and for what must we say it was so offered? Certainly, for acceptance or rejection; and at the moment of its acceptance the minds of the contracting parties met, and the contract was complete. Is it to be supposed that it was thought necessary for these brokers to go around with this instrument, setting forth the boundary of the property and in detail the terms of the proposed purchase, merely as an evidence of their authority as brokers to treat with Alford on the subject of the purchase of his property? We think not."

A letter from the manager of the owning corporation, to its agent, stating the terms on which he will lease premises to a certain person, "if you can induce" him, etc., together with a lease embracing such terms, signed by such person, makes sufficient evidence of a contract under the statute. *Butterfield v. Commercial Cattle Co.* 72 *Neb.* 605, 101 *N. W.* 250, where the court said that they thought that there could be little doubt that, under the authority of the letter, the agent, "would have been fully authorized to have prepared and signed this lease on behalf of plaintiff, and that, if he had done so, plaintiff would have been bound by the contract."

Letters authorizing an agent to sell land to a certain person are a sufficient memorandum under the statute (although such person is acting for an undisclosed principal). *Nicholson v. Dover*, 145 *N. C.* 18, 13 *L.R.A.* (N.S.) 167, 58 *S. E.* 444.

Letters by the owner to his agent, authorizing the sale of land, and affirming it when made, are a sufficient memorandum. *Lee v. Cherry*, 85 *Tenn.* 707, 4 *Am. St. Rep.*

into; and (2) the instrument relied upon as an agreement falls within, and fails because of, the statute of frauds. The chancellor sustained both of these grounds of demurrer, and from that decree an appeal was prayed to this court.

It is urged in argument in behalf of complainants and appellants that the instrument signed and delivered to the real estate agent by them was a memorandum sufficiently binding them as the "party to be charged" under our statute of frauds, when defendant's acceptance was indorsed.

Our statute, as to this phrase, has been construed by this court to mean the owner of the realty rather than the party attempted to be charged or held liable in an action based on the memorandum. *Frazer v. Ford*, 2 Head, 464; *Lee v. Cherry*, 85 Tenn. 707, 4 Am. St. Rep. 800, 4 S. W. 835.

It is by the defendant insisted that the instrument so signed and delivered was not one with her as a contracting party, and

operated only as between and on the rights and liability of the owners signing and the real estate agent; that it, was, in no proper sense, a memorandum or contract of sale contemplated by the statute.

Thus is raised a sharp issue as to the nature and sufficiency of the instrument thus signed by the owners.

It is not necessary that the contract of sale shall be in writing, provided there outstands a writing which contains evidence of the essential terms of the oral contract, and which is signed by such party to be charged. The memorandum is not the contract, but the written evidence of it required by the statute.

A written offer, when signed and accepted, may constitute a memorandum of the contract, adequate, though it consist of several parts, such as letters relating to the subject, and even though they may be addressed to the owner's agent. *Lee v. Cherry*,

800, 4 S. W. 835. It will be seen that the court in *LUSKY v. KEISER* distinguishes this case, as the name of the purchaser was not omitted.

It may be noted that in *Moore v. Mountcastle*, 61 Mo. 424, an agreement "in relation to the cultivation and improvement by the plaintiff of the defendant's farm" was held sufficiently evidenced by a letter from the defendant to his agent, which stated that the bearer intended to live upon the defendant's land, solicited from the agent certain kind offices for the plaintiff, and proceeded to inform him as to the details of a contract between the plaintiff and the defendant as to the farming operations which were to be conducted by the plaintiff. The case seems decided chiefly upon the *obiter dictum* of Lord Hardwicke in *Welford v. Beazely*, 3 Atk. 503, *supra* (the court stating that the case was cited and followed by Lord Eldon in *Coles v. Trecothick*, 9 Ves. Jr. 235, 1 Smith, 233, 7 Revised Rep. 167, but it was not this *dictum* which was there followed). The Missouri court also, however, cites *Allen v. Bennet*, 3 Taunt, 169, 12 Revised Rep. 633, where a letter by a buyer of personal property to his agent was looked to to help out the contract.

The same rule has been applied (contrary to *LUSKY v. KEISER*) where the name of the purchaser was not in the authorization. *Evans v. Stratton*, 142 Ky. 615, 34 L.R.A. (N.S.) 393, 134 S. W. 1154 (referred to in *LUSKY v. KEISER*), where the facts were similar to those in *Alford v. Wilson*, *supra*, except that there was no mention in the authorization of the purchaser's name.

So, in *Peay v. Seigler*, 48 S. C. 496, 59 Am. St. Rep. 731, 26 S. E. 885, it was held that there was a sufficient memorandum where the vendor requested and authorized his agent by letter to sell the land upon certain terms, and the agent replied in writing that he could not find a purchaser at

the terms, but had a certain offer, specifying it, but not, apparently, the purchaser's name, to which the owner replied, accepting the offer, and the agent gave the buyer a receipt for the cash payment, not fully stating the contract.

It was the theory of the court in *Forbis v. Shattler*, 2 Cin. Sup. Ct. Rep. 95, that the authorization was one to close a contract previously agreed upon, and not a proposition. It was there held that evidence of the contract was sufficient where a letter by the owner to an agent stated, "You are hereby notified to close the sale," specifying the land and terms, but not naming the purchaser, and this was underwritten by an acceptance signed by the purchaser.

In *Everman v. Herndon*, — Miss. —, 11 So. 652, where the court overruled a demurrer to a bill for specific performance against a vendor, it does not appear whether the vendor's defense was that his authorization to his agents was insufficient, or that their contract with the purchaser was insufficient, but the correspondence of the vendor with his agents was held part of the writings, which might be looked to as constituting the memorandum.

Of course, an authorization will not be a sufficient memorandum if it does not contain the terms of the agreement. *Rose v. Cunynghame*, 11 Ves. Jr. 550. See also *Seagood v. Neale*, 1 Strange, 426, where an owner wrote to his agent to deliver the title deeds of property to a certain party, "he having agreed to dispose of it to him," and it was held that such letter did not take the case out of the statute of frauds "because the agreement does not appear in it."

Contrary doctrine.

Some of the cases, however hold that an authorization to an agent is not a sufficient memorandum under the statute of frauds.

supra; *Otis v. Payne*, 86 Tenn. 666, 8 S. W. 848; 20 Cyc. 254, 255.

It is thereupon argued that here there is such an offer shown, addressed to the agent of the owners. But does the instrument tend to evidence, what it must do, a contract of sale between complainants as offerors and defendant as offeree? The defendant was not mentioned in the instrument, when signed, as offeree or buyer, as seems requisite. *Lee v. Cherry*, supra; *Grafton v. Cummings*, 99 U. S. 100, 25 L. ed. 366; *Lewis v. Wood*, 153 Mass. 321, 11 L.R.A. 143, 26 N. E. 862; 20 Cyc. 261.

In the case of *Haydock v. Stow*, 40 N. Y. 363, it appeared that an instrument was executed and delivered to a firm of real estate agents by the owner, as follows:

I hereby authorize and empower Peck, Hillman, & Parks, agents for me, to sell the following property [describing it] to be sold within — days from this date, on the

An owner's authorization to a firm of brokers to sell land, specifying the terms, but not the buyer, across the face of which an intending buyer writes and signs an acceptance, is not a sufficient memorandum under the statute of frauds. *Haydock v. Stow*, 40 N. Y. 363, where the court said: "It is not an agreement to sell, for the reason that there are not two parties to it. An agreement cannot be made by one party alone. There is no pretense that Peck and Hillman [the brokers] agreed to buy, or that the defendant agreed to sell to them, and they are the only parties named in the paper except the defendant himself. Nor do I see any ground upon which it can be called an offer of sale, except so far as the appointment of an attorney to sell may include such offer." Further reference to this case will be found at the closing part of the note.

It is the modern rule in Illinois that where the contract is made by an agent, not only must the authorization to the agent be in writing, but also the contract made by the agent must be in writing. *Lasher v. Gardner*, 124 Ill. 441, 16 N. E. 919; *Fletcher v. Underwood*, 240 Ill. 554, 88 N. E. 1030; *Hartenbower v. Uden*, 242 Ill. 434, 28 L.R.A. (N.S.) 738, 90 N. E. 298. This seems contrary to the decision in *Spangler v. Danforth*, 65 Ill. 152, although in that case the seller's letter to his agent was handed by the seller to the buyer.

In *Jordan v. Mahoney*, 109 Va. 133, 63 S. E. 467, it was held that there was no sufficient memorandum under the statute where the desiring purchaser wrote to (Forest) a real estate agent, authorizing him to purchase certain property at a certain price, and the owner wrote at the foot of the letter, "I accept the above," signing his name. The court said: "The letter authorized R. L. Forest to make a purchase, but to give the letter any effect L.R.A.1915C.

following terms [giving them], with interest semiannually, if desired by the purchaser; reserving the right to withdraw the property at any time before sale, by giving Peck, Hillman, & Parks notice thereof.

Troy, February 18, 1864.

F. A. Stow.

Indorsed thereon was, "I hereby agree to purchase the property herein mentioned upon the terms expressed," signed by plaintiff, who brought suit to enforce the contract, as one properly evidenced by the above as the memorandum, after Stow had served notice declaring null the instrument thus signed by him. The situation of the parties was the reverse of what appears in the pending case, but the question in each was and is as to the sufficiency of the claimed memorandum. The court of appeals, through Hunt, J., said of the instrument: "It is variously styled an agreement to sell, an offer or proposition of sale, and

Forest would have to act on the authority given him in the letter, by making the purchase and executing himself, as agent, a memorandum in writing. Until he did this it is clear that no memorandum in writing of the alleged sale had been made and signed, either by the person to be charged or his agent. The fact that the letter authorizes a purchase in the future shows conclusively that no sale had been made. It cannot be successfully contended that an authority to purchase is in effect a purchase. If, when the letter left the hands of the plaintiffs in error, it was not a promise to purchase, it never became one, and the indorsement, 'I accept the above,' put thereon by the alleged vendor, imparted no new quality to the letter, and gave it no additional force."

In *Donnell v. Currie*, — Tex. Civ. App. —, 131 S. W. 88, it was held that letters by an owner to his agents, stating the terms on which he would sell, should be regarded as mere instructions for their guidance, and not as an offer of sale to a prospective purchaser; but the agent's contract with such purchaser was upheld as sufficient.

It is not easy to say what the present weight and effect are of the above-cited case of *Haydock v. Stow*, supra. While that case seems to have been followed in *Briggs v. Smith*, infra, its effect would seem to be narrowed if the decision in *Barnett v. McCrea*, infra, is correct.

In *Briggs v. Smith*, 4 Daly, 113, in holding that an employee of a firm might not show his contract by a statement of it in the partnership articles, the court said: "The plaintiff was no party to the instrument, and therefore, as the judge then decided, there was a want of mutuality (*Haydock v. Stow*, supra)."

In *Barnett v. McCrea*, 57 N. Y. S. R. 456, 27 N. Y. Supp. 820, the court, in holding that letters to third parties might be looked

a power of attorney. It is not an agreement to sell, for the reason that there are not two parties to it. An agreement cannot be made by one party alone. There is no pretense that Peck and Hillman agreed to buy, or that the defendant agreed to sell to them, and they are the only parties named in the paper, except the defendant himself. Nor do I see any ground upon which it can be called an offer of sale, except so far as the appointment of an attorney to sell may include such offer. I agree that if the defendant had addressed plaintiff a letter offering to sell him these premises upon the terms specified herein, and plaintiff had made a written acceptance of the same, addressed and delivered to the defendant, that a contract of sale would have been thereby created. . . . But that is not the present state of facts. I consider the instrument to be a plain, direct, unqualified power of attorney to sell the land mentioned in it; nothing more, nothing less. I do not discover in it a single expression that embarrasses such a conclusion. . . . In law, this reservation" to withdraw the right to sell "was unnecessary," as "the right belonged to the defendant . . . without the formal reservation. . . . This is neither an agreement for sale nor an offer to sell to any particular person, or to the world at large. It is simply a vesting in Peck & Company of a power before existing in the defendant only. . . . A giving of power and authority in law creates an agency; but the defendant and Peck & Company were not content with the declaration of law to that effect, but take the pains to allege that, in fact, Peck & Company are the agents of the defendant to sell his property. They stand then as agents empowered to sell, . . . and, if they had made such a contract with plaintiff, the defendant would have been bound by it. No such agreement or subscription was made. Plaintiff has, indeed, expressed in writing his readiness to purchase upon the terms that Peck & Company were authorized to accept, but Peck & Company have put nothing in writing. This is not a compliance with the statute, which requires the writing 'to be subscribed by the party by whom the sale was made, or by the agent of such party, lawfully authorized.' The

to in case of an agreement not to be performed within a year, said: "The case of Haydock v. Stow, supra, does not militate against this result. The paper referred to in that case was not designed as a proposal, was not a narration of what had been done, and, therefore, neither as a proposition to be acted upon nor a memorandum of what had been done, did it suffice."

L.R.A.1915C.

defendant or his agent must sign, to make a compliance with the statute, and no aid is derived from the signature of plaintiff."

In *Fletcher v. Underwood*, 240 Ill. 554, 88 N. E. 1030, a similar contract was executed by the owner to a real estate agent, under which the agent had attempted to close orally a trade to Fletcher, who, claiming to be vendee, as appellee on appeal, urged that the instrument referred to was in the nature of an accepted option. The court said: "Appellee contends that 'an inspection of the written option signed by Carney [owner] shows that it was an offer to sell the one-fourth interest for \$2,000, to be accepted by the end of the 27th of January, 1908,' and relies upon *Ullsperger v. Meyer*, 217 Ill. 262, 2 L.R.A.(N.S.) 221, 75 N. E. 482, 3 Ann. Cas. 1032, and other cases of that character, in which specific performance has been decreed in favor of a vendee against a vendor where the latter had signed the contract or memorandum, and the former had not. In each of those cases the identity of both vendor and vendee could be ascertained from the writing. Here no vendee is named or otherwise pointed out by the writing. It is true the instrument states that Carney will, upon demand, within the time limited, make a good and sufficient transfer of the interest to which the contract pertains; but to whom? Manifestly, to the person to whom Parriott [the agent] should make a sale. The fact that Parriott had made a sale, the statute of frauds being interposed could be evidenced, as against Carney, only by a writing signed by Parriott, acting as agent for Carney."

It may be said, by way of parenthesis, that we need not express an opinion in regard to the soundness of those parts of the decisions in the cases of *Haydock v. Stow*, 40 N. Y. 363, and *Fletcher v. Underwood*, supra, in reference to the power of the agents, under such contract executed to them, to conclude or make contracts of sale binding on their principals, the owners. While a ruling on the point is not necessary, it may be noted that the question is comprehensively treated in an annotation of the case of *Weatherhead v. Ettinger*, 78 Ohio St. 104, in 17 L.R.A.(N.S.) 210, 84 N. E. 598, where the rule, by a clear weight of

It may be noted that in *Peabody v. Speyers*, 56 N. Y. 230, the agent's statement to his undisclosed principal, the buyer, on a sale of personal property, was held to be one of the papers which might be looked to as part of the memorandum on a suit by the seller, charging the agent as buyer, the court not referring to *Haydock v. Stow*, supra.

B. B. B.

authority cited, is indicated to be that no wider power is to be deduced from such an authorization to sell than one of finding for the owner a purchaser ready, willing, and able to purchase.

We think it clear that the instrument executed by the owners, Lusky and wife, was one whose function and end was to define in contract form the relationship between them and their agent, Loventhal; and it is difficult to see how, without a further step by or in behalf of the owners towards contractual assent with defendant, Keiser, that instrument, so perfected as a contract proper, may be deemed a memorandum evidencing another and different contract between the owners and defendant, Keiser,—a contract of sale. There was no existent oral contract between the latter parties on February 16, 1912, which could have been evidenced by the contract of agency.

The case of *Lasher v. Gardner*, 124 Ill. 441, 449, 16 N. E. 919, 922, is pertinent on its facts and in this language: "It is not contended that the letter of attorney to Van Zandt was a contract entered into with Lasher [claimant to status of vendee], but it is said that it is a memorandum of the contract signed by the parties to be charged. . . . The writing, on its face, does not purport to relate to a past transaction, and, in fact, as we have seen, there was no contract made, at the time of its execution, of which it could have been a memorandum." In accord is *Jordan v. Mahoney*, 109 Va. 133, 135, 63 S. E. 467.

In *Donnell v. Currie*, — Tex. Civ. App. —, 131 S. W. 88, it was held that letters from the owner of land to his selling agent, referring to the price and terms upon which it might be sold, were mere instructions for the agent's guidance, and not an offer of sale to a prospective purchaser procured by the agent; the letter not having been intended as a contract of sale.

The most specious argument in behalf of appellants' contention is that the agency contract was an offer through the agent to the purchasing public, and binding upon acceptance by anyone able to comply. This is refuted when consideration is given to the nature of the contract, which is not addressed to the world at large, or to any prospective acceptor whomsoever, as is the case in open offers of rewards, of prizes, or of letters of credit addressed generally.

In *Lee v. Cherry*, 85 Tenn. 707, 4 Am. St. Rep. 800, 4 S. W. 835, it may be observed, a correspondence by letters between the owner and his agent was made to serve as an adequate memorandum, but the owner therein authorized the sale of the lot to Lee. In short, the letters "contained all the terms of sale and a sufficient description

of the property," including the name of the prospective vendee, to whom the owner specifically obligated himself.

A contract similar to the one in this case, between owner and agent, appeared in *Evans v. Stratton*, 142 Ky. 615, 34 L.R.A.(N.S.) 393, 134 S. W. 1154, but the question now under consideration seems not to have been there raised. The court, in that attitude of the cause, appears to have assumed that the agency contract as a memorandum was sufficient, or became a contract on acceptance, without deciding the point as we conceive. See, in this connection, *Davis v. Brigham*, 56 Or. 41, 107 Pac. 961, Ann. Cas. 1912B, 1340.

On these authorities, and on principle, we conclude that the contract between the complainants and their real estate agent cannot be made to serve as a memorandum which adequately evidenced the essentials of a contract for the sale of realty between the complainants and the defendant. The complainants, unless and until they came more immediately into contractual relation to defendant, were at liberty to decline to proceed. If this be true, the defendant was not bound to do so. Her signature was not, as we have seen, that of "the party to be charged," and it did not avail to consummate a contract binding on her, where none existed before.

There is no error in the decree of the chancellor. Affirmed.

WASHINGTON SUPREME COURT. (Department No. 1.)

WILLIAM ARNOLD KEMPF, by Guardian
ad Litem, Resp't.

SPOKANE & INLAND EMPIRE RAIL-
ROAD COMPANY, Appt.

(— Wash. —, 144 Pac. 77.)

Electricity — unanticipated injury —
liability.

An electric railway company which maintains an uninsulated wire carrying a heavy current, in a cut under a street below the level of the adjoining property, is not liable for injury to a boy who throws a wire over

Note. — As to duty in stringing electric wires to guard against danger to children, see notes to *Temple v. City Electric Light & P. Co.* 11 L.R.A.(N.S.) 449; *Wetherby v. Twin State Gas Co.* 25 L.R.A.(N.S.) 1220; and *Meyer v. Union Light, Heat & P. Co.* 43 L.R.A.(N.S.) 137; and see later cases, *Harris v. Eastern Wisconsin R. & Light Co.* 45 L.R.A.(N.S.) 1058; *Romana v. Boston Elev. R. Co.* L.R.A.1915A, 510; and *Green v. West Penn R. Co.* ante, 151.

the charged one from the top of the adjoining bank, since it is not bound to anticipate such an occurrence.

(November 16, 1914.)

APPEAL by defendant from a judgment of the Superior Court for Spokane County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Graves, Kizer, & Graves, for appellant:

Defendant was not liable, since it was not incumbent upon it to anticipate the improbable and extraordinary, and resort to unusual means to guard against unusual occurrences.

Graves v. Washington Water Power Co. 44 Wash. 675, 11 L.R.A.(N.S.) 452, 87 Pac. 956; Mayhew v. Yakima Power Co. 72 Wash. 431, 130 Pac. 485; Sheffield Co. v. Morton, 161 Ala. 153, 49 So. 772; Wetherby v. Twin State Gas Co. 83 Vt. 189, 25 L.R.A.(N.S.) 1220, 75 Atl. 8, 21 Ann. Cas. 1092; Mayfield Water & Light Co. v. Webb, 129 Ky. 395, 18 L.R.A.(N.S.) 179, 130 Am. St. Rep. 469, 111 S. W. 712; McAllister v. Jung, 112 Ill. App. 138; Freeman v. Brooklyn Heights R. Co. 54 App. Div. 596, 66 N. Y. Supp. 1052; Johnston v. New Omaha Thomson-Houston Electric Light Co. 78 Neb. 24, 17 L.R.A.(N.S.) 435, 110 N. W. 711, 113 N. W. 526; Brush Electric Light & P. Co. v. Lefevre, 93 Tex. 604, 49 L.R.A. 771, 77 Am. St. Rep. 898, 57 S. W. 640; Sullivan v. Boston & A. R. Co. 156 Mass. 378, 31 N. E. 128; Sutton v. West Jersey & S. R. Co. 78 N. J. L. 17, 73 Atl. 256; Brown v. Pano-la Light & P. Co. 137 Ga. 352, 73 S. E. 580; Riedel v. West Jersey & S. R. Co. 28 L.R.A.(N.S.) 98, 101 C. C. A. 428, 177 Fed. 374, 21 Ann. Cas. 746; Simonton v. Citizens' Electric Light & P. Co. 28 Tex. Civ. App. 374, 67 S. W. 530; Brubaker v. Kansas City Electric Light Co. 130 Mo. App. 439, 110 S. W. 12; Luehrmann v. Laclede Gaslight Co. 127 Mo. App. 213, 104 S. W. 1128; Stark v. Muskegon Traction & Lighting Co. 141 Mich. 575, 1 L.R.A.(N.S.) 822, 104 N. W. 1100; Seymour v. Union Stock Yards & Transit Co. 224 Ill. 579, 79 N. E. 950; O'Connor v. Brucker, 117 Ga. 451, 43 S. E. 731, 13 Am. Neg. Rep. 500.

Messrs. Robertson & Miller and F. W. Girard for respondent.

Main, J., delivered the opinion of the court:

This action was instituted for the purpose of recovering damages for personal injuries sustained through the alleged negligence of L.R.A.1915C.

the defendant. The cause was tried to a jury, and resulted in a verdict and judgment in favor of the plaintiff in the sum of \$2,000. The defendant appeals.

The facts are in substance as follows: On April 12, 1911, and for some years prior thereto, the defendant owned and operated an electric railway. This railway line extends along and across certain streets of the city of Spokane. The location of the accident was at or near the intersection of Fifth avenue and Hogan street. Hogan street extends north and south, and Fifth avenue east and west. The railway line crosses Fifth avenue a little east of the intersection of that street with Hogan street. At the southwest corner of these two streets there is a vacant lot or tract of ground upon which boys, and sometimes men, of the neighborhood, play ball. South of Fifth avenue at this point, and back a little distance from the street, is the railway company's transformer station. The streets at this point are not graded. South of the lot which is used as a ball ground there is a high rocky hill. Upon this hill spectators sit and watch the ball game in progress. The railway line crosses Fifth avenue in a cut approximately 35 feet deep, and 45 feet from one edge of the cut at the top to the other. The cut had been blasted out of basaltic rock, and its sides were almost perpendicular. The trolley wire is 23 feet above the track at the bottom of the cut. Boys of the neighborhood were accustomed to play in this vicinity, and at times sat upon the edge of the cut and watched the cars pass through below. On April 11, 1911, William A. Kempf, then a boy of six or seven years of age, together with other boys of about the same age or a little older, were playing near the intersection of the two streets named. In the vicinity of the transformer station they had picked up a number of short pieces of wire. Apparently not knowing exactly what they expected to do with the wire, they tied the various pieces together. A stone was then tied to one end of the wire. When the boys were near the edge of the cut and in Fifth avenue, one of the boys suggested that they play "telephone." One of the boys, Timothy Golithon by name, attempted to cast the rock with the wire tied thereto across to the opposite bank of the cut. This was then to be used as an imaginary telephone line. The Kempf boy, who was injured, at the time the stone was thrown, had hold of the other end of the wire. The cast of the stone was not sufficiently strong to carry it to the opposite bank. It fell into the cut, bringing the wire to which it was tied across the trolley wire, and the Kempf boy thereby received the electric current and sustained a severe

injury. The trolley wire at this point carried an electric current of 6,600 volts.

The plaintiff claims that the defendant was negligent in failing to have the trolley wire covered or protected at this point in a manner that would have made it impossible for the wire which was thrown by Golithon to have come in contact with the trolley. There was no evidence that prior to this time the boys playing in the vicinity had attempted to enter into any game which would involve the crossing of the cut in any manner. Upon the trial, at the conclusion of the plaintiff's evidence, the defendant challenged the sufficiency thereof and moved for a dismissal of the action. This motion was overruled, and was repeated and likewise overruled at the conclusion of all the evidence.

The question which is decisive of this case is whether the defendant was negligent in failing to guard or cover the trolley wire in some manner. The plaintiff claims that it was negligence on the part of the defendant to maintain a trolley wire carrying 6,600 volts of electricity "within easy reach of the children that play on the bluff above the cut" through which this wire was strung.

The degree of care required of one handling a dangerous agency, such as an electric current, varies in proportion to the attendant dangers. In other words, a person handling an agency which is attended with but slight danger must exercise a moderate degree of care, while, if the agency is attended with great danger, the care must be of the highest degree. *Card v. Wenatchee Valley Gas & Electric Co.* 77 Wash. 564, 137 Pac. 1047.

A trolley wire charged with 6,600 volts of electric current would be an agency which is attended with great danger. In order to charge the defendant with liability, however, it is necessary that the injury which results from such dangerous agency be one which a person of ordinary prudence, in the light of the surrounding circumstances, would reasonably and naturally have anticipated. *Johnston v. New Omaha Thomson-Houston Electric Light Co.* 78 Neb. 24, 17 L.R.A. (N.S.) 435, 110 N. W. 711, 113 N. W. 526; *Brush Electric Light & P. Co. v. Lefevre*, 93 Tex. 604, 49 L.R.A. 771, 77 Am. St. Rep. 898, 57 S. W. 640.

The rules of law just stated seem to be recognized by both parties. The question, then, is reduced to this: Was the injury which the Kempf boy sustained one which the defendant should reasonably and naturally have anticipated as one likely to occur? After stating the facts in this case, it would seem that little need be said. It is very clear that a person of ordinary prudence,

in the light of the surrounding facts and circumstances, would not reasonably and naturally have anticipated that a boy upon the edge of the cut would be injured by the trolley wire, which was approximately 23 feet distant on a horizontal line from the edge of the cut, and 12 feet below.

The plaintiff claims that the case of *Card v. Wenatchee Valley Gas & Electric Co.* supra, sustains his right to have the question submitted to a jury. In that case the defendant maintained along a highway a high-power electric transmission line. This line was supported by poles, and was suspended from the ends of cross-arms which projected over the line of the highway. While one James W. Card was working upon his land, he caused to be elevated to an upright position a wrought iron pipe about 23 feet long and 2½ inches in diameter. This pipe came in contact with the transmission line, and resulted in Card's death. The transmission line at this point was 17 feet from the ground and, as already stated, extended over and beyond the line of the highway. It was held that it was a question for the jury whether the defendant was "negligent in maintaining this high-powered electric transmission line suspended within 17 feet of the ground over the land of the deceased." The deceased came to his death while engaged in the usual and ordinary work upon his farm. He was in no sense a trespasser. The transmission line extended over and was above his land. This defendant had no right to place its wire beyond the line of the highway. In the present case the trolley wire was where the defendant had a right to maintain it. An interference with it was an invasion of the right of the defendant. As already stated, there is no evidence that, prior to the time of the injury for which this suit was brought, the boys, in assembling in the vicinity to play, had in any manner entered upon any games which involved crossing or communicating across the cut. Had it been shown that it was customary for the boys of the neighborhood to indulge in games which involved either real or imaginary communication across the cut, and this fact was actually or constructively known to the defendant, a different question would be presented, upon which no opinion is now expressed. If the defendant were liable under the facts in this case, it would be equally liable if a boy upon the street should tie a stone to a wire and cast it over a trolley wire and be injured by the resulting shock. To hold the defendant liable for the injury which the boy upon the edge of the cut sustained would make the liability of the defendant that of an insurer. This the law does not impose. In order to

sustain the action, negligence must be shown.

The judgment will be reversed, and the cause remanded, with direction to dismiss.

Crow, Ch. J., and Gose, Chadwick, and Ellis, JJ., concur.

UNITED STATES CIRCUIT COURT
OF APPEALS, NINTH CIRCUIT.

CANTON INSURANCE OFFICE, Limited,
et al., Appts.,

v.
INDEPENDENT TRANSPORTATION
COMPANY et al.

(— C. C. A. —, 217 Fed. 213.)

Insurance — laying vessel up for winter.

A policy on a vessel warranted employed

in general passenger and freighting business on a designated sound does not cover it while it is laid up for the winter in a river flowing into the sound.

(October 13, 1914.)

APPEAL by respondents from a decree of the District Court of the United States for the Northern Division of the Western District of Washington in favor of libellant in an action to recover the amount alleged to be due on a marine insurance policy. Reversed.

The facts are stated in the opinion.

Argued before Gilbert and Ross, Circuit Judges, and Wolverton, District Judge.

Mr. William H. Gorham for appellants.

Messrs. Kerr & McCord and Ira A. Campbell, for appellees:

The words, "warranted employed in general freighting and passenger business,"

Note. — Insurance: waters covered by description of waters in policy of marine insurance.

This note is confined to cases involving the question whether the waters in question were within the description of waters in the policy, and is therefore not concerned with cases involving the effect of a temporary departure from, and return to, permitted waters before loss (see as to that point cases cited in note in 10 L.R.A. (N.S.) 736), or cases involving the question whether departure from permitted waters was justified or excused by stress of weather or other reason. Nor does the note purport to cover the effect of deviation from a particular course or voyage, except as that may involve the question stated at the beginning.

In construing descriptions of waters in marine insurance policies, the controlling question, as in all contracts, is the intention of the parties. In considering these provisions the words used will be construed most strongly against the insurer, unless it appears that they were the words of the insured rather than those of the insurer.

Meaning of "inland waters."

It was held in *Cogswell v. Chubb*, 1 App. Div. 93, 36 N. Y. Supp. 1076, affirmed in 157 N. Y. 709, 53 N. E. 1124, that a warranty written in a marine policy on a yacht, "to navigate only the inland waters of the United States and Canada, and not below the Thousand Islands," was broken where the yacht went out upon the high seas beyond Sandy Hook and the Scotland lightship, and into the open waters of the Atlantic ocean. The court said: "The effect of the whole evidence is that the vessel went out of inland waters. Such waters are canals, lakes, streams, rivers, water courses, inlets, bays, etc., and arms of the L.R.A.1915C.

sea between projections of land. That ordinary and accepted signification of the words 'inland waters' must be considered the sense in which the parties used them in their contract of insurance, unless by agreement or understanding some other was assigned to them; and there is nothing in the record to show that a different or wider meaning was intended to be given them. Going to the open ocean and then returning was a plain breach of the warranty, the consequence of which was to avoid the policy, for, hard as the artificial rule may be, it is too firmly settled to be questioned that the breach of an express warranty, whether material to the risk or not, whether a loss happens through the breach or not, absolutely determines the policy, and the assured forfeits his rights under it."

It has been held that a house boat which was lost while inside the line which connects the extremity of Sandy Hook with the nearest point on Rockaway Beach, and forms the "natural" boundary of inland waters, was covered by a policy warranting that the operation of the boat should be confined to the inland waters of New Jersey, New York, and Long Island, and providing that any deviation beyond the limits named should not avoid the policy, but that no liability should exist during such deviation. *Fulton v. Insurance Co. of N. A.* 69 C. C. A. 198, 136 Fed. 182, reversing 127 Fed. 413.

See also *Kirk v. Home Ins. Co.*, which is fully set out by the court in *CANTON INS. OFFICE v. INDEPENDENT TRANSP. CO.*

Provisions as to Atlantic coast or ocean.

In *St. Paul F. & M. Ins. Co. v. Knickerbocker Steam Towage Co.* 38 C. C. A. 19, 93 Fed. 931, the loss was held to be in "the Atlantic coast waters of the United States," within the meaning of a policy on a tug

may be construed to restrict the vessel while being operated to the waters within a radius of 30 miles of Seattle.

Northwestern Mut. L. Ins. Co. v. Neafus, 145 Ky. 563, 36 L.R.A.(N.S.) 1211, 140 S. W. 1026; *Independent Transp. Co. v. Canton Ins. Office*, 173 Fed. 564; *St. Nicholas Ins. Co. v. Merchants' Mut. F. & M. Ins. Co.* 11 Hun, 108; *Grant v. Aetna Ins. Co.* 12 Lower Can. Rep. 386; *St. Louis Ins. Co. v. Glasgow*, 8 Mo. 713, 41 Am. Dec. 661; 26 Cyc. 279.

The warranty accordingly touches the employment of the vessel, and does not contemplate that unless she is constantly in operation she is not protected by the policy. She was laid up at a usual place in the tidal waters of a tributary of Elliott bay. No return premium was demanded, and she was fully covered while so laid up.

Mannheim Ins. Co. v. Clarke, — Tex. Civ. App. —, 157 S. W. 291; *Waring v. Clarke*, 5 How. 441, 12 L. ed. 226.

which gave it the privilege in a written clause to use "all inland and Atlantic coast waters of the United States, and all waters adjacent, connecting, or tributary to any of the above waters, and tow vessels to and from sea, and search for vessels at sea," and which contained a provision that any deviation beyond the limits named should not avoid the policy, but that, upon the return of the vessel within the limits named, the policy should be and remain in force, where it appeared that the tug went to Mexico outside the waters named and started for New York with a tow, and on the voyage stood in for Charleston for a supply of coal, and was wrecked when about 1½ miles from the nearest mainland off that harbor, it being held that she was within the geographical limits mentioned, and that the intention of the parties in issuing the policy on the tug was to cover losses within certain geographical limits, and not to exclude losses occurring within the limits stated although the tug might at the time of loss be upon a voyage to and from ports outside such limits. The court said: "There is no need for reference to any voyage to determine whether a vessel was wrecked in Atlantic coast waters, if she were wrecked on the Atlantic shores of the United States, or upon a shoal situated a mile and a half from the mainland, as was here the case. The popular meaning of the terms, as well as the meaning that has reference to the 3-mile limit, and that which has reference to the usages of the coasting trade, are all properly applicable to the place where this vessel was wrecked."

In *Merchants' Mut. Ins. Co. v. Allen*, 121 U. S. 67, 30 L. ed. 858, 7 Sup. Ct. Rep. 821, a policy issued by a New Orleans insurer, upon a vessel belonging at that place, while she was on a voyage between Liverpool and New Orleans, which provided in writing, "to navigate the Atlantic ocean L.R.A.1915C.

Gilbert, Circuit Judge, delivered the opinion of the court:

On July 3, 1907, the appellants issued to the Independent Transportation Company policies of insurance covering its steamer Vashon, then engaged in the summer trade between the city of Seattle and Alki Point, a summer resort on Puget sound, about 6 miles from Seattle. The policies covered the vessel from July 3, 1907, until July 3, 1908. Each of the policies insured the owner against perils of the sea "and all other losses and misfortunes that shall come to the Vashon, or damage to the said vessel insured or any part thereof, to which insurers are liable by the rules of insurance in San Francisco." In August, 1907, the Vashon discontinued her run to Alki Point, and until December was moored at the King street dock in Seattle. About December 1, 1907, she was removed from that dock and moored in the Duwamish river, a tributary of Elliott bay. On December 15, 1907, the

between Europe and America, and to be covered in port and at sea," and contained a printed clause, warranted not to use ports in Eastern Mexico, Texas, or Yucatan, was held to cover the vessel while she was in the Gulf of Mexico on voyage from New Orleans to Liverpool, it being held that this was clearly the intention of the parties.

In *New Haven Steam Saw-Mill Co. v. Security Ins. Co.* 9 Fed. 779, affirming 7 Fed. 847, where the written memorandum on a policy stated that the vessel was to be employed in the coasting trade on the United States Atlantic Coast, and permitted the use of gulf ports not west of New Orleans, and it was warranted that the vessel would not use ports and places in Texas, except Galveston, nor foreign ports and places in the Gulf of Mexico it was held that the meaning of the written memorandum was that the vessel was to be employed on the United States Atlantic Coast, which was the coast of the Atlantic ocean, and not of the Gulf of Mexico; but that, if necessity required, the vessel was to be permitted to go into the Gulf of Mexico and use the ports not west of New Orleans, but not that her coasting trade was thereby to be extended through the gulf; and it was further held that she was not in the Atlantic coasting trade, but on a voyage outside the terms of the contract, where at the time of loss she was engaged in transporting a cargo from Maine to a gulf port west of New Orleans.

Meaning of river and tributaries.

It has been held that a policy giving "permission to navigate the Mississippi and tributaries" covers a loss which occurred while the vessel was on a bayou which emptied into the Red river, which in turn flowed into the Mississippi, the court holding that the risk was not confined to losses

Vashon sank at her moorings. To the libels brought by the insured against the appellants, to recover on the policies, the appellants answered denying liability thereon, and alleging a violation of the express warranty therein contained that during the term of the policies the vessel would be and remain employed in the general freight and passenger business on Puget sound, within a radius of 30 miles from Seattle. The trial court construed the warranty otherwise, and ruled against the appellants, and entered a decree to enforce their liability upon the policies.

A court should give to a written contract that reasonable construction which it is to be assumed intelligent business men would give it.

occurring on the immediate tributaries of the latter river. *Miller v. Citizens' F. M. & L. Ins. Co.* 12 W. Va. 116, 29 Am. Rep. 452.

See also *Hastorf v. Greenwich Ins. Co.*, set out by the court in *CANTON INS. OFFICE v. INDEPENDENT TRANSP. CO.*

Provisions as to river and gulf waters.

In *Mannheim Ins. Co. v. Clarke*, — Tex. Civ. App. —, 157 S. W. 291, it was held that the question whether the insured vessel was in gulf waters within the meaning of a policy assuming liability only when in gulf waters was a question of law, where the pleadings and evidence showed beyond dispute that the vessel at the time she sank was in a river 18 miles above its mouth, and it was settled by the testimony and jury's verdict that the gulf waters, by the action of the tide, reached the point at which the loss occurred.

In *Cobb v. Lime Rock F. & M. Ins. Co.* 58 Me. 328, it was held that no recovery could be had under a policy containing a warranty, "prohibited from the river and Gulf of the St. Lawrence between September 1st and May 1st," where the insured vessel sailed from St. Johns, Newfoundland, to Pictou, Nova Scotia, in December, and after leaving Pictou was lost between that point and the Gut of Canso, the court, after taking into consideration certain nautical works, holding that the vessel was in the Gulf of St. Lawrence within the prohibited time. It was contended that though Pictou might geographically be deemed within the gulf, yet that, in mercantile acceptance, it was not so regarded, and that evidence to show this was admissible; but it was held that the evidence that there was any such meaning being contradictory, and the defendants having denied any knowledge of such a construction, the contract must be taken in the ordinary acceptance of the language used.

See also *Birrell v. Dryer and Mannheim Ins. Co. v. Clarke*, which are set out by the court in *CANTON INS. OFFICE v. INDEPENDENT TRANSP. CO.* L.R.A.1915C.

"Contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms" which the parties have "used; and, if they are clear and unambiguous, their terms are to be" taken and "understood in their plain, ordinary, and popular sense." *Imperial F. Ins. Co. v. Coos County*, 151 U. S. 452-463, 38 L. ed. 231-236, 14 Sup. Ct. Rep. 379.

"Rules established for the construction of written instruments apply to contracts of insurance equally with other contracts." *Liverpool & L. & G. Ins. Co. v. Kearney*, 180 U. S. 132-135, 45 L. ed. 460-462, 21 Sup. Ct. Rep. 326, 328.

We find written on the margin of the policies involved in this case the following: "Vessel warranted employed in the gen-

Meaning of ports of bay.

In *Campbell v. Canada Ins. Union*, 12 N. S. 21, where the policy contained a condition, "not to use the ports of Big Glace bay, Schooner pond, Block House Mines, or Bridgeport, Cape Breton, except during June, July, and August," it was held that the loss was within the condition, and that no recovery could be had, it appearing that the loss occurred during the month of October at a place known as "the port of Caledonia" in Cape Breton on the same coast with, and about three quarters of a mile from, the workings of Big Glace bay, and that at the time the policy was issued the port of Big Glace bay had ceased to be used as a port, and that Caledonia had been substituted. The court in this case construed the word "of" in the condition as meaning "in," and held that the use of a port in Glace bay, except in the months enumerated, relieved the insurers from liability.

At certain dock.

It has been held that a fire policy insuring a vessel in the Victoria dock, London, and providing that she might go into dry dock and that the insurance should continue while she was in dry dock, did not cover a loss which occurred after she had come out of dry dock and while she was moored in the Thames river, some distance above the dry dock, for the purpose of having her paddle wheels replaced, since the policy was held not to contemplate an insurance on the vessel while she was in the Thames. *Pearson v. Commercial Union Assur. Co. L. R. 1 App. Cas. 498, L. R. 8 C. P. 548, 45 L. J. C. P. N. S. 761, 35 L. T. N. S. 445, 24 Week. Rep. 951, 3 Ass. Mar. L. Cas. 275.*

Port as including adjacent waters.

In *Petrie v. Phenix Ins. Co.* 132 N. Y. 137, 30 N. E. 380, it was held competent to receive evidence as to the meaning in marine insurance business of the term "harbor of New York," and the jury at the trial of this case found that Tarrytown, where the plaintiff's barge was at the time of loss,

eral passenger and freighting business on Puget sound, within a radius of 30 miles from Seattle. Warranted no lime under deck."

These warranties cannot reasonably be construed to be other than what their terms plainly import: First, a warranty that during the term of the policy the vessel is to be navigated in the general passenger and freighting business, and on Puget sound within a radius of 30 miles from Seattle; second, that during that time no lime shall be carried under deck. They are expressed in no unusual form. They are similar in phraseology to other warranties in marine insurance policies, examples of which are found on the margin of policies which were introduced in evidence in this case, such as

was within the harbor of New York, there being testimony that this place and other points within the New York customhouse district were within that harbor.

In *Graham v. Pennsylvania Ins. Co.* 2 Wash. C. C. 113, Fed. Cas. No. 5,674, it was held that a provision in a policy naming Honduras as the place at which a vessel was to take in her load comprehended the whole of the Spanish possessions on the Bay of Honduras, as well as the portion on the bay possessed by the British, there being no provision confining it to the latter part.

In *Vos v. Robinson*, 9 Johns. 192, there was held to be a deviation under a policy insuring a voyage at and from Port Plata, St. Domingo, to New York, where the vessel was lost in going from Port Plata to Susua under a permit from the government at Port Plata to go there for loading, it appearing that she would be obliged to return to Port Plata for her clearance, and that Susua was a bay or open road and dangerous when certain winds blew, although it was included in the district of Port Plata, which stretched for one hundred miles along the coast. The court remarked that the mere statement of the fact was enough to show that sailing from Port Plata to Susua was not a sailing from Port Plata to New York, since Port Plata and the district of Port Plata were distinct objects.

And in *Fernandez v. Great Western Ins. Co.* 48 N. Y. 571, there was held to be a deviation where a vessel insured "at and from New York to Havana" voluntarily went to Elizabethport, New Jersey, 16 or 20 miles from New York, for the purpose of testing her engines, and was subsequently lost while on her voyage to Havana, the court saying that Elizabethport was not a part of or within the port or harbor of New York, or in the ordinary course of a voyage to Havana.

In *Hunter v. Northern Marine Ins. Co.* L. R. 13 App. Cas. 717, a loss was held not to have occurred within the port of Greenock within a policy insuring a vessel "whilst in port," where she left in ballast and had L.R.A.1915C.

"warranted free from capture, seizure, and detention," etc. "Warranted confined to Pacific coast trade not north of Comox nor south of Valparaiso." All such warranties are inserted for the purpose of limiting and defining the risk. Before insuring a vessel, it is important to the insurance company to know in what business the vessel is to be engaged, and upon what water she is to be navigated. Said Lord Watson in *Birrell v. Dryer*, L. R. 9 App. Cas. 345: "To define the limits within which the vessel is to be navigated, for the purposes of a time policy, is in principle precisely the same thing as to describe the voyage for which a vessel is insured under an ordinary policy."

But it is urged that the words of the war-

started in tow for Glasgow to load for a voyage, and was in the fairway of the channel of the Clyde about 500 feet off the harbor works of Greenock when she sustained injury. Lord Herschell said: "Where there is a common understanding among such persons as to the limits of a port, the matter is free from difficulty. Here the appellants attempted to prove such a common understanding. The learned lord ordinary came to the conclusion that they had not succeeded in doing so, and after carefully considering the evidence I see no reason to differ from him. In the absence of any such common understanding, how is the question to be determined? It appears to me that you must then consider what are commonly understood to be the characteristics of a port, and what are in general the tests for determining its limits, and apply the conclusions arrived at to the particular case. A port is a place where a vessel can lie in a position of more or less shelter from the elements, with a view to the loading or discharge of cargo. The natural configuration of the land is therefore often a most important element in determining what are the limits of a port. All the waters within given boundaries which possess the common character of safety and protection would be generally admitted to be within its ambit. Where, however, a port is one of several situate on the same river, it is obvious that the natural configuration of the land is not of the same importance, and does not afford the same guidance. I have carefully examined the plans before your Lordships in the present case, but do not find myself led by them to the conclusion that the disaster to the Afton occurred within the port of Greenock, or assisted in fixing the boundaries of that port."

Miscellaneous.

In *Mark v. Home Ins. Co.* 13 C. C. A. 157, 26 U. S. App. 373, 64 Fed. 804, affirming 52 Fed. 170, where a policy insured a tug in the "bays and harbor of New York . . . and all inland waters as far south as Norfolk, Virginia, and all waters ad-

ranty do not necessarily mean what they purport to say, but that another meaning may be found in them, and the rule is invoked that, where a provision of a policy of insurance is ambiguous, it is to be construed in the sense most favorable to the assured, since the instrument is prepared by the insurer, and it is contended that the warranty first above quoted may be construed to mean that the vessel, at the particular time of taking out the policy, was warranted to be engaged in the passenger and freighting business on the waters of Puget sound within a radius of 30 miles from Seattle, or that she had prior thereto been so engaged. To this it is to be said that such a warranty would be of no value to either party to the insurance contract. It would not in any way affect the risk, and it is not conceivable that such a representation would have been embodied in the form of warranty. If it had been the intention to specify the business in which the steamer was or had been engaged, the warranty would have been that the vessel "is now carrying passengers between Seattle and Alki Point." The construction contended for by the appellee would be strained, unnatural, and unreasonable. By a like process of reasoning, most, if not all, warranties could be explained away. Thus, the warranty "no lime under deck" might be said to mean that there never had been lime below the deck; and the warranty "no St. Lawrence," construed in *Birrell v. Dryer*, above cited, might be construed to mean that the vessel was not then navigating or had not navigated the waters of the St. Lawrence; and the warranty construed in *Kirk v. Home Ins. Co.* 92 App. Div. 26, 86 N. Y. Supp. 980, "warranted confined to the use and navigation of the waters of New Haven harbor and adjacent inland waters," could be explained to mean only that the vessel was warranted to have been theretofore confined to the use of those waters. In

jacent, connecting, or tributary to any of the above waters," and subsequently a rider was attached reading, "Permission is hereby given the tug . . . to use port and harbor of Charleston, and to go as far as the jetties at Charleston, but not to cover on trips either way between Norfolk and Charleston," it was held that the language of the slip could not be construed to cover any part of the trip from Norfolk to Charleston, even while within the inland waters of Chesapeake bay.

In *Providence Washington Ins. Co. v. Brummelkamp*, 58 Fed. 918, a policy on a dredge reading, "Confined to dredging in the Shinnecock canal, Long Island, with liberty to proceed there *via* Long Island sound into Peconic bay," was held not to cover a loss occurring while the dredge was

Birrell v. Dryer, the policy contained the words "warranted no St. Lawrence between the 1st of October and 1st of April." It was held that there was no ambiguity or uncertainty in these words sufficient to prevent the application of the ordinary rules of construction, and that, according to those rules, the whole St. Lawrence navigation, both gulf and river, was within the fair and natural meaning of those negative words. Lord Watson, discussing the contention that the words "no St. Lawrence" were ambiguous and must be applied to the river only, because underwriters are the proferentes with regard to a policy of insurance, said: "That the underwriters may be rightly held to be the proferentes with regard to many conditions in a policy, I do not doubt; whether they ought to be so held depends, in each case, upon the character and substance of the condition. In the present case there are many considerations which lead to the inference that the clause in question is not one constructed and inserted by the appellants alone, and for their own protection merely. It was, in point of fact, inserted in the contract by the agent of the respondents; and it is in form a warranty by them that their vessel will not be navigated in certain waters, a matter which it was entirely within their power to regulate. These considerations point rather to the respondents themselves being the proferentes; but I think the substance of the warranty must be looked to; and that in substance its authorship is attributable to both parties alike. The main object of the clause is to define the limits within which the vessel is to be kept whilst she is navigated under the policy; and that appears to me to be as much the concern of the shipowner as of the underwriters."

In *Kirk v. Home Ins. Co.* *supra*, the policy contained the provision "warranted confined to the use and navigation of the waters of New Haven harbor and adjacent

in Long Island sound bound for the port of New York from the Shinnecock canal, since under such policy the insurer's liability was limited to a loss arising during the employment at Shinnecock canal or while proceeding there.

It has been held that a policy insuring "to a port on the north side of Cuba (with the liberty of a second port thereon) and at and thence to port of discharge in the United States north of Hatteras," and providing for an increased premium "if second port in Cuba is used," allows the vessel, after going to a port on the north side of Cuba, to proceed to another port on the same side of the island only. *Nicholson v. Mercantile Marine Ins. Co.* 108 Mass. 399.

J. T. W.

inland waters." The loss occurred while the dredge so insured was in inland water adjacent to Bridgeport harbor, 17 miles from New Haven harbor. The court held that thereby the policy was avoided. Answering the objection that the language of the policy must be construed strictly against the insurer, the court said: "But we must, in reason, assume that the plaintiffs made the statement as to where the dredge was to be used; and it is as probable that the phrase in question was their language as that it was the defendant's. Under such circumstances, the rule that the policy must be construed most strictly against the insurer does not apply,"—citing *London Assur. Corp. v. Thompson*, 170 N. Y. 94, 62 N. E. 1066.

We are of the opinion that there was breach of the warranty in two particulars: First, in that the insured vessel was taken out of the permitted waters, the waters of Puget sound; second, in that her employment of carrying freight or passengers came to an end when she was anchored for the winter in the Duwamish river. We cannot yield to the appellee's contention that the waters of a river which flow into Puget sound are waters of Puget sound. In *Hasstorf v. Greenwich Ins. Co.* (D. C.) 132 Fed. 122, the policy insuring a scow contained the following provision: "Warranted by the assured to be employed exclusively in the freighting business, and to navigate only the waters of the bay and harbor of New York, the North and East rivers, and inland waters of New Jersey."

It was held that "North river" could not be extended by construction to include tributaries of the Hudson in the state of New York, and that there could be no recovery under the policy for injury to the scow received while she was lying at a dock in Rondout creek, 2½ miles from the Hudson. Said the court: "There can be no doubt that Rondout creek is a different body of water from the North or Hudson river, and that the language used does not in terms cover the locality in which this accident happened."

The appellee cites *Mannheim Ins. Co. v. Clarke*, — Tex. Civ. App. —, 157 S. W. 291. The policy in that case contained this provision: "Limited to the use of the gulf waters of the United States between Key West, Florida, and the mouth of the Rio Grande del Norte, both inclusive."

The boat sank in the Atchafalaya, about 18 miles from its mouth. The question was whether the waters at that place were gulf waters, within the meaning of the policy. The court decided that they were, but in so deciding was influenced by the further provision of the policy which insured "against

the adventures and perils of the harbors, bays, sounds, seas, rivers, and other waters as above named."

The Vashon was left moored in the steam, with no watchman on board, and was placed in the charge of a man who lived in a boathouse some 200 feet away. He, or one of his men, according to his affidavit visited the vessel every day. Without any known cause, the vessel filled with water and sank at her moorings. There was no stress of weather or collision. The testimony of one witness tended to show that the water entered through some small holes on the inside lining of the hull, the plugs in the holes having been in some way removed; but this was contradicted by others. The risk to the vessel thus moored in a stream, with no one on board, was a widely different risk from that which the insurer undertook when it insured the vessel as employed in navigation and with her crew on board. We do not say that a vessel insured as being employed in navigation may not suspend navigation for a time, or lay up at a dock, but that is a different thing from going out of commission for a period of months.

In *St. Nicholas Ins. Co. v. Merchants' Mut. F. & M. Ins. Co.* 11 Hun, 108, the policy insured a barge "while running on the Hudson and East rivers." It was held that these words did not restrict the insurance to the time while the barge was in motion, but that they were intended to describe the business of the barge, and to cover the time required for lading and unlading, as well as when the barge was in actual motion. The court said: "The term 'running,' as it was used by the defendant, must have been designed to include all that ordinarily would be comprehended by the business of a vessel in active employment. It described the condition of a vessel commercially engaged; and it was used by way of contrasting the difference between vessels laid up and out of use and those making trips upon the water."

The vessel in the case at bar was left unguarded and practically abandoned. If she had remained in commission with her crew on board, the mishap which caused her loss could not have occurred. But it is a matter of indifference whether or not the risk was enhanced by the breach of the warranty, for a warranty must be strictly performed. 2 *Arnould, Marine Ins.* 7th ed. § 632.

It is contended that the evidence shows that, by custom and usage, the form of policy issued, referred to as the "San Francisco Hull Time Policy," covers a vessel when laid up. Several insurance brokers and adjusters were called to testify as to

the meaning of the warranty in the policy, and while they all agreed that the words thereof were in common usage and had been employed in "hundreds" of policies, and that their meaning was that the vessel was to be employed in the general passenger and freighting business on Puget sound during the entire period of the policy contract, they differed in their answers to the question whether or not such a policy would remain in force while the vessel was laid up. Five testified that the San Francisco underwriters hold the vessel insured under that form of time policy while the vessel is laid up. Two testified to the contrary. Two others testified that the right to lay up would be recognized only after application had been made to the insurance company and approved by the company, and one testified that in his opinion the insurance would continue after the vessel laid up, provided the hazard was not increased. This testimony, even if admissible, was insufficient to establish a custom.

Where a written contract is on its face susceptible of a construction that is reasonable, resort cannot be had to evidence of custom or usage to explain its language. *Orient Mut. Ins. Co. v. Wright*, 1 Wall. 456, 17 L. ed. 505. While the insurance contract must be construed with reference to the generally established usages and customs of the business, usage cannot be resorted to for the purpose of varying or contradicting the written instrument. *Hearne v. New England Mut. M. Ins. Co.* 20 Wall. 488, 22 L. ed. 395. The insured has the right to rely on the ordinary meaning and scope of the terms used in the policy, unless a more restricted meaning is proved to have been recognized and established by general mercantile usage, or else expressly brought to his notice. *Red Wing Mills v. Mercantile Mut. Ins. Co.* (D. C.) 19 Fed. 115.

In *Odiorne v. New England Mut. M. Ins. Co.* 101 Mass. 551, 3 Am. Rep. 401, the court said: "The usage which was offered to be proved is also inadmissible. *Seccomb v. Provincial Ins. Co.* 10 Allen, 305. It is merely a usage among underwriters in Boston to construe a clause of the policy in a particular way. The clause in question is: 'Prohibited from the river and Gulf of St. Lawrence, Northumberland straits, or Cape Breton, and Black sea, between October 1st and May 1st.' There is nothing in this language so technical or peculiar, or having such application to a particular trade or branch of business, or a particular method of managing business, as to require the evidence of usage to explain it."

In that case the court held that the prohibition in the policy was in effect a war-L.R.A.1915C.

warranty, and that the policy was avoided when the vessel sailed from St. Johns, Newfoundland, for Cape Breton.

In *Cobb v. Lime Rock F. & M. Ins. Co.* 58 Me. 326, it was held that the words, "prohibited from the river and Gulf of St. Lawrence between September 1st and May 1st," constituted a warranty that the vessel should not enter those waters within the time mentioned. The court said: "The words used are to be understood in their ordinary and popular sense, unless, by some known usage of trade, they have a different meaning. . . . The usage must be definite and brought home to the knowledge of the parties to be affected, or so general and well established that there must be ground to presume the parties had knowledge of it, or that they were bound to be informed of it."

The decree is reversed, and the cause remanded, with instructions to dismiss the libel as to the appellants herein.

SOUTH DAKOTA SUPREME COURT.

CLARK IMPLEMENT COMPANY, Appt,
v.

MARY J. WADDEN et al., Resp'ts.

(— S. D. —, 149 N. W. 424.)

Statute — foreclosure sale — notice to redemptioners — retroactive effect.

1. A statute requiring a purchaser at foreclosure sale to notify persons entitled to redeem before taking his deed is not retroactive when applied to existing purchasers, if at the time of its passage ample time for the notice remains before the expiration of the redemption period.

Constitutional law — impairing contract obligation — requiring notice from purchaser at foreclosure sale.

2. No contract obligation by a purchaser at foreclosure sale is impaired by a statute requiring him to notify the person having a right to redeem before taking his deed, if ample time remains to give the notice before the expiration of the redemption period.

Same — statute unconstitutional in part.

3. That a statute requiring a purchaser at foreclosure sale to notify persons entitled

Note. — Applicability to existing purchasers, of changes in law relating to redemption from judicial sales.

In *Thresher v. Atchison*, 117 Cal. 73, 59 Am. St. Rep. 159, 38 Pac. 1020, it is held that a statutory provision that to redeem from an execution sale the purchaser must be paid the amount of the purchase price, with 2 per cent per month until the time

to redeem before taking his deed may be unconstitutional as to sales in which the period for redemption has expired does not affect its validity in respect to sales in which ample time to give the notice remains before expiration of the redemption period.

(November 24, 1914.)

APPEAL by plaintiff from a judgment of the Circuit Court for Buffalo County in defendant's favor, and from an order denying a new trial in an action for leave to redeem from a mortgage foreclosure sale as a subsequent encumbrancer. Reversed.

The facts are stated in the opinion.

Messrs. Woerth & Carlson, for appellant:

The legislature has a right to change, alter, or modify its remedies for the enforcement of any lien which is a creature of the statute, providing such change or modification of the remedy does not substantially impair the obligations of the contract entered into between the state and the purchaser. And this is equally true of tax sales and mortgage-foreclosure sales.

State ex rel. National Bond & Secur. Co. v. Krahmer, 105 Minn. 422, 21 L.R.A. (N.S.) 161, 117 N. W. 780; Curtis v. Whitney, 13 Wall. 68, 20 L. ed. 513; Archambau v.

of redemption, forms a term in the contract under which the purchaser pays his money to the officer, and the legislature cannot impair this contract by diminishing the payment to 1 per cent by an act passed subsequently to the sale.

In Geddis v. Packwood, 30 Wash. 270, 70 Pac. 481, a statute giving judgment debtors a right to redeem from execution and foreclosure, but which provided that the rights of redemption from sales made upon judgments rendered prior thereto should remain unaffected, was held not to apply to one who purchased property at a mortgage foreclosure sale prior to the passage of the act, and he was entitled to enjoin the sheriff from issuing a certificate of redemption under that statute to a judgment creditor who had valid judgment liens upon the premises.

In Seals v. Rogers, 172 Ala. 651, 55 So. 417, the court declared that the requirement of a tender and the payment of money into court as a condition precedent to the statutory right to redeem was not a mere matter of form or pleading, evidence or amendment, but fell within a declaration of the Code of 1907, that the adoption of the same shall not affect any existing "right, remedy, or defense," and accordingly, without passing upon the effect of the failure of a purchaser at a sale subsequent to the Code to file a statement of the amount due within ten days after demand as required by a provision of the Code, upon his right to a tender and payment into

Green, 21 Minn. 520; Oullahan v. Sweeney, 79 Cal. 537, 12 Am. St. Rep. 172, 21 Pac. 960; American Invest. Co. v. Thayer, 7 S. D. 72, 63 N. W. 233.

Messrs. Spangler & Haney and James Brown, for respondents:

The subsequent amended statute requiring notice cannot be held to apply, because to so hold would be to give it retrospective effect, which is never done unless the intention of the legislature to do so clearly appears from the statute itself.

American Invest. Co. v. Thayer, 7 S. D. 72, 63 N. W. 233; Baldwin v. Aberdeen, 23 S. D. 636, 26 L.R.A. (N.S.) 116, 123 N. W. 80; Hulin v. Butte County, 18 S. D. 339, 100 N. W. 739; Briggs v. Gulich, 143 Mich. 457, 107 N. W. 269; Danforth v. McCook County, 11 S. D. 258, 74 Am. St. Rep. 808, 76 N. W. 940; Stewart v. Vandervort, 34 W. Va. 524, 12 L.R.A. 50, 12 S. E. 736.

Section 648 of the statute entered into and became a part of the contract of the purchaser or holder of the certificate, under which the holder of the certificate was absolutely entitled to a deed at the end of the period of redemption without doing anything further; and any subsequent statute which adds to or takes from said contract is invalid so far as this prior contract is concerned.

court as a condition of redemption, held that the provision in question was inapplicable to a purchaser under a sale prior to the Code.

But a mere change in the mode of redeeming, without more, does not affect the substantial rights of the parties, though the sale under foreclosure was held prior to the adoption of the statute making the change. Jack v. Cold, 114 Iowa, 349, 86 N. W. 374.

In Red River Valley Nat. Bank v. Craig, 181 U. S. 548, 45 L. ed. 994, 21 Sup. Ct. Rep. 703, it is held that an alteration of the remedy for enforcing a mechanic's lien, after a sale subject to the lien under a mortgage foreclosure, by providing, in addition to the former right to sell the building under the lien and remove it from the land, that the court, for the best interests of all the parties, might require the land and improvements to be sold together, and the proceeds distributed so as to secure to the prior mortgage or other lien priority upon the land, and to the mechanics' lien priority upon the building, does not impair the obligation of the contract with the purchaser on foreclosure, inasmuch as his property was already subject to the lien, and the building could have been sold and removed from the land under the statute in force when the mortgage was foreclosed, and the value of the purchaser's rights was not lessened by the later statute.

In Huntington v. Forkson, 6 Hill, 149, a purchaser at a sheriff's sale made prior to the Revised Statutes, and when a creditor

Hillebert v. Porter, 28 Minn. 496, 11 N. W. 84; State ex rel. National Bond & Secur. Co. v. Krahmer, 105 Minn. 422, 21 L.R.A.(N.S.) 157, 117 N. W. 780; Blake-more v. Cooper, 15 N. D. 5, 4 L.R.A.(N.S.) 1074, 125 Am. St. Rep. 574, 106 N. W. 566; State ex rel. Waldo v. Fylpaa, 3 S. D. 586, 54 N. W. 599; Hollister v. Donahoe, 11 S. D. 497, 78 N. W. 959; State ex rel. Wheeler v. Foley, 30 Minn. 350, 15 N. W. 375; Merrill v. Dearing, 32 Minn. 479, 21 N. W. 721; Howard v. Bugbee, 24 How. 461, 16 L. ed. 753; Hooker v. Burr, 194 U. S. 415, 48 L. ed. 1046, 24 Sup. Ct. Rep. 706; Phinney v. Phinney, 81 Me. 450, 4 L.R.A. 348, 10 Am. St. Rep. 266, 17 Atl. 405.

If the amendment be considered as a change of remedy only, the subsequent statute must be equally as favorable to the parties to the contract as the statute existing at the time the contract was entered into; it must not add to or take from the contract nor lessen its value, and if it does it is void as to prior contracts.

Louisiana v. New Orleans, 102 U. S. 203, 26 L. ed. 132; Bronson v. Kinzie, 1 How. 311, 11 L. ed. 143; Blakemore v. Cooper, 15 N. D. 5, 4 L.R.A.(N.S.) 1074, 125 Am. St. Rep. 574, 106 N. W. 566; Green v. Biddle, 8 Wheat. 84, 5 L. ed. 568; Seibert v. Lewis (Seibert v. United States) 122 U. S. 284, 30 L. ed. 1161, 7 Sup. Ct. Rep. 1190; Wat-

kins v. Glenn, 55 Kan. 417, 31 L.R.A. 52, 40 Pac. 316; Wilder v. Campbell, 4 Idaho, 695, 43 Pac. 677.

Whitting, J., delivered the opinion of the court:

Under § 648, Code Civ. Proc. as the same read prior to its amendment in the year 1909, after land had been sold upon foreclosure of a real estate mortgage, the holder of the certificate of sale was entitled to a deed, from the sheriff or other officer appointed by the court, at the expiration of one year from the time of sale, in case there had been no redemption; and such purchaser was not required, as a prerequisite to the taking out of such deed, to give any notice of the expiration of the period of redemption or of his intention to take out such deed. By chapter 78, Laws 1909, said § 648 was amended and, as amended, it provides that the purchaser upon foreclosure sale must, before he is entitled to the deed, give notice to certain parties entitled to redeem from said foreclosure sale, advising them that their right of redemption will expire and a deed be taken, unless the said land be redeemed from said foreclosure sale within the time provided by law. One of the respondents held a certificate of sale upon foreclosure at the time this amendment went into effect, but the period for redemp-

whose lien extended to part of the premises only had no right to redeem the whole, was held by the court of errors to be protected from the operation of the Revised Statutes which repealed the prior redemption statute and extended the right to redeem the whole premises to such creditors, by a saving clause to the effect that the repeal of any statutory provision shall not affect "any act done or right accrued" previous to the time when such repeal was to take effect. This apparently overruled the contrary decision of the supreme court in the earlier case of People ex rel. Rosekrans v. Haskins, 7 Wend. 463.

While the validity of statutes changing the law relating to redemption, as applied to the rights of a mortgagee in a mortgage executed before, but not foreclosed until after, the passage of such statutes, is not within the scope of this note, attention is called to the case of Barnitz v. Beverly, 163 U. S. 118, 41 L. ed. 93, 16 Sup. Ct. Rep. 1042, which holds that a statute which authorizes the redemption of property sold upon foreclosure of a mortgage where no such right previously existed, or extends the period of redemption beyond the time formerly allowed, cannot constitutionally apply to a sale under a mortgage executed before its passage.

In the subsequent case of Hooker v. Burr, 194 U. S. 415, 48 L. ed. 1046, 24 Sup. Ct. Rep. 706, in distinguishing the Barnitz case the court points out that in that L.R.A.1915C.

case the sum bid did not pay the amount due on the mortgage, and although the mortgagee became a purchaser at the foreclosure sale, the debt was not thereby paid, and it was the mortgagee's rights under the mortgage contract, not her rights as a purchaser, that were in controversy, and it is held that no contract right of an independent purchaser at a foreclosure sale, who has no other connection with the mortgage contract than that arising from his purchase for a sum sufficient to pay the mortgage debt, is impaired by changes made in the law subsequently to the execution of the mortgage, but prior to the sale, with reference to the time of redemption and the rate of interest payable in order to redeem.

As to the effect of statutes extending a mortgagor's right of possession on foreclosure of a pre-existing mortgage, see State ex rel. Thomas Cruse Sav. Bank v. Gilliam, 31 L.R.A. 721, and note.

As to the reasonableness of the period allowed by statutes of limitation in respect to existing contracts, see the note to State ex rel. National Bond & Secur. Co. v. Krahmer, 21 L.R.A.(N.S.) 157, and the earlier notes referred to therein.

For applicability to past tax sales of statutes eliminating notice of expiration of redemption period required by a previous statute, or requiring such notice when none was before required, see Johnson v. Taylor, 10 L.R.A.(N.S.) 818, and note. R. L. S.

tion from such sale did not expire for several months thereafter, and there remained ample time, before the expiration of such period, within which the notice provided for might have been given. Said respondent neglected to give the notice thus provided for, but nevertheless took out the deed. The sole question before us is the validity of such deed as against the appellant, which, as a subsequent mortgagee, is still entitled to redeem from such foreclosure sale, provided such notice should have been given. It is conceded that this amendment controls as to all foreclosures commenced subsequent to the time when such amendment went into effect. This court has determined that such amendment does not extend the period for redemption—that the notice therein provided can be given prior to the expiration of the statutory period for redemption, so that a purchaser can procure a deed under the amended law as soon as under the original law. *Phelan v. Morris*, 32 S. D. 174, 142 N. W. 470.

Respondents contend that the amendment of 1909 did not affect this foreclosure for two reasons: First, because, in order to affect such foreclosure, such amendment would have to be held retroactive in its effect, and that the amendment is not retroactive in its terms, and therefore should not be construed as retroactive; second, because, to apply the provisions of this amendment to the facts of this case would result in the impairment of vested contractual rights. Appellant seems to have assumed that no question is involved herein except the question of whether or not the application of the provisions of such amendment would impair any contractual rights vested in respondents, and it contends that it would not impair any such rights. We are of the opinion: (1) That to hold this amendment as applying to a sale already held is not to render such statute retroactive in its effect; (2) that applying the provisions of such amendment to the facts of this case does not result in any impairment of the obligations of any contract to which respondents or either of them was a party.

As we look at it, the first question before us is: What are the essential elements of a retrospective law, and are those elements to be found in the statute in question? In other words: What is a proper definition of a retrospective law, and does the statute before us conform to such definition? Among such definitions, which have been approved by courts and law writers, are the following:

"A law is retrospective" in its legal sense "which takes away or impairs vested rights acquired under existing laws, or creates a

new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past." *Sturges v. Carter*, 114 U. S. 511, 29 L. ed. 240, 5 Sup. Ct. Rep. 1014.

A retrospective law "is one which changes, or injuriously affects a present right by going behind it and giving efficacy to anterior circumstances to defeat it, which they had not when the right accrued." *Poole v. Fleeger*, 11 Pet. 185, 9 L. ed. 680.

"A retrospective law is one that relates back to, and gives to a previous transaction some different legal effect from that which it had under the law when it transpired." *State ex rel. American Sav. Union v. Whitteley*, 17 Wash. 447, 50 Pac. 119.

In *Chicago, B. & Q. R. Co. v. State*, 47 Neb. 549, 41 L.R.A. 481, 53 Am. St. Rep. 557, 66 N. W. 624, it is said that "a statute does not operate retroactively from the mere fact that it relates to antecedent events. A retrospective law has been defined as one intended to affect transactions which occurred, or rights which accrued, before it became operative as such, and which ascribes to them effects not inherent in their nature, in view of the law in force at the time of their occurrence." *Bishop, Written Laws*, § 83; *Black, Interpretation of Laws*, 247."

In *Potter's Dwarries on Statutes*, at page 165, the author in speaking of retrospective laws says: "Such laws, when they are only such, look not upon the future, but upon the past; or, in other words, pronounce judgment upon acts done antecedent to their adoption, and in this respect assume a judicial power, as contradistinguished from what is strictly legislative power. They assume to give character to facts which they did not possess at the time they took place, and then to judge of them in the new character thus legislatively created for them; to settle, in some instances, old rights depending on laws as they existed before the act was passed, by new principles created and applied by the retrospective act having no existence antecedent to the time of its passage, which then, and not till then, sprang into being."

Examined in the light of the above, we think it clear that, to apply the provisions of the amendment of 1909 to a sale theretofore held does not render such law retroactive in its effect. The vested right, on the one side, is the right to a deed at the end of a year, provided no redemption is made; the vested right, upon the other side, is the right to redeem from the sale within the period fixed for redemption. The provisions of the amendment do not impair either of these rights; but the amendment provides a means through which one of

these rights is safeguarded. The amendment neither "imposes a new duty," nor "attaches a new disability in respect to transactions or considerations already past," but simply imposes a new duty in respect to a present and future right. In this amendment cannot be found a single one of the elements necessary to make it retrospective in its terms.

The case of *Gage v. Stewart*, 127 Ill. 207, 11 Am. St. Rep. 116, 19 N. E. 702, was "on all fours" with this case both as regards the facts and the statute under consideration. The court in that case said: "The amended act applied to all steps to be taken after it went into effect, and which could be performed according to its requirements. Nor does this construction give the act a retrospective operation, as seems to be supposed. The rule undoubtedly is that a retrospective effect will not be given to the statute unless the legislative intent that it shall so operate is clearly manifested. But no such effect is sought to be given this statute. The legislature, for the better protection of those having the right of redemption, required that notice be served upon the owner, if to be found in the county, at least three months before the expiration of redemption. No other change affecting the right of the purchaser or holder of the certificate of purchase is wrought by this amendment. It in no way affects or applies to the sale, or any of the precedent steps in the proceeding, lawful under the former statute, but relates exclusively to acts to be performed by the purchaser, or his assignee, subsequent to its taking effect, and by the performance of which his inchoate right in the land, under his certificate of purchase, might ripen into a title. These requirements—of giving notice of the sale, when redemption will expire, and making proof thereof to the clerk—are in the nature of remedies to be pursued by the purchaser or holder of the certificate of purchase to mature and perfect his title to the land under the tax sale. As to all these acts, which could be performed by the purchaser, or his assignee, after the statute became in force, it would necessarily operate prospectively. *Bacon, Abr. Statute, 9.*"

The amendment is not retrospective in its terms; neither do we believe that the provisions thereof have the effect of impairing the obligations of any contract—thus rendering it invalid under the Federal Constitution. State courts should concededly follow the Federal courts when considering the Federal Constitution. In the case of *Curtis v. Whitney*, 13 Wall. 68, 20 L. ed. 513—one also "on all fours" with this case, so far as the question of the constitutionality of the law in question was concerned—*L.R.A.1915C.*

cerned—the court said: "Nor does every statute which affects the value of a contract impair its obligation. It is one of the contingencies, to which parties look now in making a large class of contracts, that they may be affected in many ways by state and national legislation. For such legislation, demanded by the public good, however it may retroact on contracts previously made, and enhance the cost and difficulty of performance, or diminish the value of such performance to the other party, there is no restraint in the Federal Constitution, so long as the obligation of performance remains in full force. In the case before us the right of plaintiff to receive her deed is not taken away, nor the time when she would be entitled to it postponed. While she had a right to receive either her money or her deed at the end of three years, the owner of the land had a right to pay the money and thus prevent a conveyance. These were the coincident rights of the parties growing out of the contract by which the land was sold for taxes. The legislature, by way of giving efficacy to the right of redemption, passed a law which was just, easy to be complied with, and necessary to secure in many cases the exercise of this right. Can this be said to impair the obligation of plaintiff's contract, because it required her to give such notice as would enable the other party to exercise his rights under the contract? How does such a requirement lessen the binding efficacy of plaintiff's contract? The right to the money or the land remains, and can be enforced whenever the party gives the requisite legal notice. The authority of the legislature to frame rules by which the right of redemption may be rendered effectual cannot be questioned, and among the most appropriate and least burdensome of these is the notice required by statute."

The Federal court calls attention, in the above case, to the fact that, in case of redemption, the redemptioner must pay the costs of the notice,—a thing which the amendment before us provided for.

We do not want to be understood as holding such amendment controlling in a case where, when it took effect, a purchaser was already entitled to his deed but had not taken it, or where, when such enactment took effect, there remained, before the purchaser was entitled to his deed, less than the time requisite for giving of the notice provided for. In such a case, to enforce the provisions of such statute would clearly impair the obligations of the contract. *State ex rel. Waldo v. Fylpaa*, 3 S. D. 686, 54 N. W. 599. But the mere fact that there might be a case where to apply the provisions of this enactment would result in

the impairment of the obligations of a contract does not render the enactment unconstitutional, but merely prevents its application in such a case. *Gage v. Stewart*, supra. Under the familiar rule that courts should so construe statutes as to render them constitutional, courts would hold that it was not the intention of the lawmakers that, in its workings, this amendment should impair the obligation of contracts, and such courts would therefore hold that the lawmakers did not intend it should apply in a case where, when the amendment went into effect, its provisions could not be applied without extending the time when the purchaser was entitled to his deed.

The trial court held the deed, taken by respondent, valid as against appellant's right of redemption. For the reasons above stated, the court was in error in so holding. The judgment of the trial court is reversed, and such court is ordered to enter judgment in favor of plaintiff in conformity with the views herein expressed.

Petition for rehearing denied.

LOUISIANA SUPREME COURT.

JOHN W. BOFILL

v.

NEW ORLEANS RAILWAY & LIGHT
COMPANY, Appt.

(135 La. 996, 66 So. 339.)

Negligence — imputed — driver of vehicle.

1. Where a person is riding in a vehicle, driven by another, but of which, and of the driver of which, he has entire control, the negligence and inexperience of the driver are imputable to him.

Railroad — crossing — failure to stop — collision — liability.

2. The recognized rule is that, before attempting to cross a railroad track, a person should stop, look, and listen, and where it appears that a police patrol wagon was driven at a brisk speed and without stopping, from one narrow street into another narrow and intersecting street, upon a railroad track, on which the driver might have expected to see, and did see, an electrically

propelled car approaching; and it further appears that, notwithstanding that the motorman in charge of the car did all that could be done to avert it, there was a collision, in which the officer in charge of the wagon was injured, there can be no recovery from the owner of the car on account of such injury.

(October 19, 1914.)

APPEAL by defendant from a judgment of the Civil District Court for the Parish of Orleans, Division B, in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by the negligence of defendant and its employees. Reversed.

Statement by Monroe, Ch. J.:

Defendant appeals from a verdict and judgment awarding plaintiff \$500 as damages for personal injuries sustained by him whilst riding in a patrol wagon, and by reason of a collision between the wagon and a street car. Plaintiff answers the appeal and prays for an increase in the amount of the award. The undisputed facts and the testimony from which the others are to be deduced are as follows:

Plaintiff was a police officer in New Orleans, and was on duty at the Third Precinct station at about 1:15 o'clock on Christmas morning, 1911, when a call for police assistance came from the corner of Burgundy and Bienville streets, and, being ordered to respond thereto, he took the patrol wagon, with George Shorey, as driver, and went to the scene of the trouble. When they reached their destination, other officers turned over to plaintiff a couple of men whom they had arrested for fighting, and, as he carried them, in the wagon, through Bienville street, on the way back to the station, they continued their altercation, in a language with which he was unacquainted, and he kept his eyes on them, in order to be prepared for anything that they might undertake, for which reason, and also because there was a screen, or storm apron, between him and the driver, he did not see ahead of the wagon, and was unaware of the happenings which immediately preceded the accident, and of the accident itself, until he found himself in the midst of it. Shorey, the driver, was

Headnotes by MONROE, Ch. J.

Note. — Generally as to imputing negligence of driver to passenger, see notes to *Schultz v. Old Colony Street R. Co.* 8 L.R.A. (N.S.) 597, and *Christopherson v. Minneapolis, St. P. & S. Ste. M. R. Co.* L.R.A.1915A, 761.

Specifically as to imputed or contributory negligence of passenger riding in automobile driven by another, precluding recovery L.R.A.1915C.

against third person for injury, see note to *Rebillard v. Minneapolis, St. P. & S. Ste. M. R. Co.* L.R.A.1915B, 953.

As to duty to look and listen before crossing tracks of electric road, see notes to *Pilmer v. Boise Traction Co.* 15 L.R.A. (N.S.) 254, and *Cable v. Spokane & I. E. R. Co.* 23 L.R.A. (N.S.) 1224.

rather inexperienced in his particular line of duty, having been engaged in driving a patrol wagon for only about a month, and that in Algiers, though he states that he came over to this side of the river several times during that month. Plaintiff, however, seems to have considered that he needed admonition, and he says in his testimony: "Mind you, I had charge of that wagon, and it was my instruction to the driver, that night, being that he was taken from Algiers over here, to see that he was careful going over the crossings, and to sound his gong."

The driver is shown to have sounded his gong as he left Burgundy street, and also as he crossed Dauphine street, but it is not so certain that he did so as he approached Bourbon street, where the accident occurred. It is quite certain, however, that he drove along Bienville street at a gallop, or a trot, and, though he may possibly have slowed his horses down to a walk when he entered Bourbon street, or when they reached the car track on that street, it is an admitted fact that he never at any time stopped them. Beyond that, it is shown, without contradiction, that the wagon was provided with a cover or hood, which extended over and, to some extent, concealed him, and which must, as we infer, have prevented him from obtaining a very good view of his surroundings, and particularly of objects which approached from the sides. Be that as it may, he drove his horses straight upon and across the car track, and in that situation a street car, moving on the track from the direction of Canal street towards Esplanade avenue, struck the wagon on the right front wheel, with the result that the pole and two front wheels became detached, and were carried off by the horses, and the body of the wagon—the forward end having dropped down—was pushed around to the left, against the curb at the lower, lake-side corner, plaintiff and his prisoners being thrown forward in a heap, and plaintiff receiving the injuries of which he complains.

Lee, a witness called by plaintiff, was on Bienville street, not far from the corner of Bourbon, and as the patrol wagon came along he stepped out into the street to see what passengers it was carrying, and, following it with his eyes, saw it enter Bourbon street and collide with the car. He says that the horses were galloping, and rather leaves the impression that he meant to say that they galloped into Bourbon street. Brown, another witness who appears to be without interest, was called by defendant. He was sitting in the offending car, on the front cross seat on the right side, next to the aisle. His attention was attracted by the action of the motorman in hand-

ling his controller or brake, and by the flash which resulted from the blowing out of the fuse (?) when the power was reversed, and, looking, he saw two horses of the patrol wagon coming from Bienville into Bourbon street. He saw "it [the wagon] was coming pretty fast. The horses had gotten right at the corner, just like a shot, you know." He also testifies that the motorman "turned on his brake 50 feet from Bienville street," and that when the car was stopped the rear end was, perhaps, 3 feet below the lower crossing. Jaunot, the motorman, testifies that he had thrown off the power, in approaching Bienville street, and that he saw the heads of the horses emerging from that street when he was about 40 or 45 feet distant from the corner; that the horses came out in a slow trot, and that he did all he could to stop the car, and so far succeeded that the impact was light, no damage whatever having been sustained by the front of the car, which pushed the body of the wagon to the left, and against the curb, and stopped at about the usual stopping place on the lower (projected) property line of Bienville street. The testimony of Soulabere, the conductor, is corroborative of that given by Brown and Jaunot, as is also that of Neel, with respect to the position of the car when stopped; Neel being a motorman in the defendant's employ, who happened to be walking on Bourbon street, in the direction of Bienville street, and about 100 feet above Bienville. Shorey, the driver of the patrol wagon, testifies that when he first saw the car, it was about halfway between Bienville and Iberville streets; that his horses were about going on the track, and that he went on; that after the car struck the wagon, it went on, crossing Bienville street, and "fully 20 or 30 feet into the next square;" that his horses were going in a slow trot until he reached the corner; that he then allowed them to walk, and that they were walking when they passed the property line into Bourbon street; that he then looked towards Canal street, and saw the car; that he could not tell its speed; that he just looked at it, rang his bell, and tried to go on, and that, "just then" the car struck the wagon; that he made no effort to stop his horses, because he saw that there was plenty of time and space to let them go through.

He testifies further as follows:

Q. You saw the car coming just as soon as you got out from behind the property line?

A. I could see the light; yes, sir.

Q. And, as you saw the light, you had your option to do [either of] three things;

you could have tried to cross, which you did?

A. Yes, sir.

Q. You could have stopped on the lake side, couldn't you?

A. I would have stopped if I had thought the car was too close to me. I would have checked the horses and probably backed up. I thought I could go across.

Q. If you thought you couldn't get across you would have stopped them and backed them?

A. I certainly would.

Q. Then the third thing you could have done, you could have turned down Bourbon street, on the lake-side roadway, and gone down parallel to the car, couldn't you?

A. Well, I couldn't very well do that after the car hit. You see, as soon as I saw the car, I judged my distance, and I knew—I thought—I could cross over.

It is doubtful whether Shorey sounded his gong as he approached Bourbon street, and, if he did, no one heard it, save plaintiff and himself. Even Lee, who was on Bienville street when the wagon passed, was unable to say whether a gong that he heard was that of the wagon or the car. Several officers who came to the scene after the accident testified that the car was stopped farther down the street than as stated by the witnesses to whose testimony we have referred, but we are satisfied that the officers were mistaken. It was shown that upon the upper, lake-side, corner of Bourbon and Bienville streets, there stands, flush with the property lines, a three-story brick house, which intervened, and cut off the view between the patrol wagon and the car, as the two approached each other; and it was also shown that the streets are each but 38 feet 8 inches in width. Plaintiff offered in evidence a rule of defendant company requiring its cars to yield the right of way to the apparatus of the fire department, ambulances, and patrol wagons, and another, requiring motormen to approach street crossings with care, and, whenever practicable, with power off, also to sound gongs before reaching crossings.

Messrs. Hall, Monroe, & Lemann, for appellant:

Plaintiff was chargeable with the negligence of the driver, Shorey.

Holden v. Missouri R. Co. 177 Mo. 456, 76 S. W. 973; Cain v. Traction Co. 1 Street R. Rep. 657, 48 Ohio L. J. Supp. 1; Bresee v. Los Angeles Traction Co. 149 Cal. 131, 5 L.R.A.(N.S.) 1059, 85 Pac. 152; Elliott, Railroads, § 1174; Colorado & S. R. Co. v. Thomas, 33 Colo. 517, 70 L.R.A. 684, 81 Pac. 801, 3 Ann. Cas. 700, 18 Am. Neg. Rep. 316; Louisville v. Bott, 151 Ky. 578, 152 L.R.A.1915C.

S. W. 529; 36 Cyc. 1560; 26 Cyc. 1522; Brommer v. Pennsylvania R. Co. 29 L.R.A.(N.S.) 924, 103 C. C. A. 135, 179 Fed. 577.

Messrs. A. A. Calongne and Woodville & Woodville, for appellee:

The negligence of the driver was not imputable to plaintiff.

McKernan v. Detroit Citizens' Street R. Co. 138 Mich. 519, 68 L.R.A. 347, 101 N. W. 812; Becke v. Missouri P. R. Co. 102 Mo. 544, 9 L.R.A. 157, 13 S. W. 1053; St. Louis & S. F. R. Co. v. McFall, 75 Ark. 30, 69 L.R.A. 217, 86 S. W. 824, 5 Ann. Cas. 161.

Monroe, Ch. J., delivered the opinion of the court:

It is beyond dispute that plaintiff had charge of the patrol wagon and control of the driver at the moment of the accident, and the authorities are agreed that in such case the negligence or incompetence of the driver is imputable to the person so situated; and all the more does the rule apply where, as in this instance, such person has reason to know and does know that the driver is inexperienced in the particular work in which he is engaged. Holden v. Missouri R. Co. 177 Mo. 456, 76 S. W. 973; Cain v. Traction Co. 1 Street R. Rep. 657, 48 Ohio L. J. Supp. 1; Bresee v. Los Angeles Traction Co. 149 Cal. 131, 5 L.R.A.(N.S.) 1059, 85 Pac. 152; Elliott, Railroads, § 1174; Colorado & S. R. Co. v. Thomas, 33 Colo. 517, 70 L.R.A. 684, 81 Pac. 801, 3 Ann. Cas. 700, 18 Am. Neg. Rep. 316; Louisville v. Bott, 151 Ky. 578, 152 S. W. 529; 36 Cyc. 1560; 26 Cyc. 1522. It is equally beyond dispute that the driver who participated in the accident out of which this suit has arisen was inexperienced in the particular work in which he was engaged, and that plaintiff knew it; for he so states in the testimony which we have quoted. It is also beyond dispute that plaintiff permitted the vehicle in which he was riding, and of which and of the driver of which he was in control, to be driven without stopping, and (according to the preponderance of the evidence) with little, if any, slacking of speed from behind an intervening brick building, forming the corner of two narrow streets, upon a railway track, laid in the one upon which they entered, and over which, to the knowledge of the plaintiff, electrically propelled cars are constantly being operated at comparatively high speed. The driver, as we have seen, says that as soon as he passed out beyond the Bourbon street property line, he looked towards Canal street, the direction from which a car was to be expected, and saw the car coming in his direction, and he was asked, "Did you see anything else about it?" to which he replied, "No, I can't

tell the speed; I just looked at the car and rang my bell and tried to continue, but, just then, the car struck me—struck the wagon.” From which it is evident that there was scarcely an appreciable interval of time between the moment when he emerged from behind the corner building, standing upon the property lines of the two streets, and the moment when the car struck the wagon,—a deduction which is also sustained by the testimony of plaintiff’s disinterested witness, Lee, to the effect that the horses were galloping, of defendant’s disinterested witness, Brown, to the effect that they came out of Bienville street “like a shot,” and of the more favorable testimony of the motorman, who says that, when he first saw them, somewhere between the property line and the track (a distance of but 16 feet, 7 inches) they were moving at a slow trot. Beyond that, though defendant is charged with operating its car at an excessive or dangerous speed, the evidence shows that it was not so doing; and it further shows that, from the moment that the motorman saw the wagon, he did all that was in his power to do to avoid the collision. The case, therefore, falls within the rule as enunciated and affirmed by this court in the following, and other, cases, to wit:

“It is a recognized rule that before attempting to cross the track of an electric car a person should look to ascertain whether prudently the crossing should be attempted. The rule contemplates that this should be done at a time and place when the reason upon which it is founded could be made effective. When the law requires steps of diligence and caution it will not be satisfied by the substitution therefor of vain and useless acts.” *Snider v. New Orleans & C. R. Co.* 48 La. Ann. 1, 18 So. 695.

“The motorman upon a moving car may well have doubts as to whether a driver of a wagon might intend to cross his track or not, but the driver of the wagon cannot but know that the purpose of the motorman is to carry his car across the street.” 48 La. Ann. 12.

“The authorities are numerous and uniform to the effect that a person whose business or pleasure occasions him to use the streets of a city which are traversed by electric cars, and particularly at street crossings, is guilty of negligence if he fails to employ proper precautions for his safety. He is bound to look and listen for the approach of cars, and to exercise ordinary care and caution to avoid possible [injury and] danger of a collision. And should he

see an approaching car in close proximity, it would be his plain duty to halt until same could pass by, rather than run the risk of an accident by attempting to cross the track in front of it.” *Dieck v. New Orleans City & Lake R. Co.* 51 La. Ann. 262, 25 So. 71.

“One who reaches a railway crossing on a public highway is under the duty to stop, look, and listen; and if a train be approaching, it is his further duty to so act as to minimize the danger and insure his safety, if possible, under the circumstances and conditions then confronting him.” *Barnhill v. Texas & P. R. Co.* 109 La. 43, 33 So. 63.

“The recognized rule is that before attempting to cross a railway track a person should stop, look, and listen; and it will hardly do to substitute for it a rule to the effect that, being at a distance from a crossing, towards which he and an electric or steam car are traveling, he may then form an opinion as to which of the two will get there first, and, acting upon that opinion, essay the crossing without giving himself further concern upon the subject. The fact that a street railway company has operated a car at too high a rate of speed will not entitle a party who is injured to recover if it appears that the fault of the company would not have caused the injury save for the supervening and greater fault of the party injured.” *Heebe v. New Orleans & C. R. Light & P. Co.* 110 La. 970, 35 So. 251.

We may say, in conclusion: That plaintiff alleges that he sustained a number of quite serious injuries. That the record from the Charity Hospital reads in part: “Patient is brought to the hospital with a severe contusion of chest. The chest was strapped. The patient made an uneventful recovery, and left, cured, January 15/12.” That the only physician who was summoned (from the hospital) to testify as to the nature of the injuries was unable to remember anything whatever about the case, and that it was shown that, while plaintiff was disabled, he received his regular pay, to which were added \$5 per week from the police relief fund. The jury awarded him \$500, but, for the reasons that have been stated, we are unable to concur in the view that he has made out a case which fixes any liability, whatever upon defendant.

It is therefore ordered and decreed that the verdict and judgment appealed from be set aside, that plaintiff’s demand be rejected, and that this suit be dismissed at his cost in both courts.

WASHINGTON SUPREME COURT.
(Department No. 1.)

ALASKA COAST COMPANY, Appt.,
v.
ALASKA BARGE COMPANY, Respt.

(79 Wash. 216, 140 Pac. 334.)

Evidence — burden of proof — injury to vessel — act of God.

1. A charterer who had contracted to return the vessel to the owner in as good condition as it was when he received it, the act of God excepted, has the burden of proving that the injury was caused by the act of God in case he returned it in a damaged condition.

Note. — Vessel striking submerged object as act of God.

On the general subject of what constitutes an act of God see Index to L.R.A. Notes under the title, "Act of God."

Cases relating to the striking by a vessel of a submerged object as a loss by perils of the sea or inevitable accident are not included.

The striking of a submerged object by a vessel may or may not constitute an act of God, according to the peculiar circumstances each case, and no general rule can be laid down.

It has been held that the striking of a vessel upon a submerged object is attributable to an act of God, especially where the existence of such object is unknown to the navigator.

Thus, in *Williams v. Grant*, 1 Conn. 487, 7 Am. Dec. 235, it was held that where the rock on which a vessel struck was generally known but the master did not actually know of it, then, if he conducted himself properly in other respects, and no fault was attributable to him, the striking of the vessel on a rock would be an act of God, an unavoidable accident, and he would not be liable for the loss; but otherwise where the master was ignorant of navigation, had no pilot as was customary, and the vessel went out of the usual course, and the running of the vessel on the rock could be attributed to this negligence. The court said: "Under the term," act of God, are "comprehended all misfortunes and accidents arising from inevitable necessity, which human prudence could not foresee or prevent."

In *Smyrl v. Niolon*, 2 Bail. L. 421, 23 Am. Dec. 146, it was held that a loss arising from a boat running upon an unknown snag in the usual channel of a river is from the act of God.

In *Pennewill v. Cullen*, 5 Harr. (Del.) 238, it was held that where a vessel strikes on a submerged pile not known to the master, the loss or depreciation of the cargo is due to an act of God, excusing the master from liability; but otherwise if its presence was known and laid down on any chart, L.R.A.1915C.

Shipping — act of God — striking submerged obstruction.

2. That a vessel struck its propeller on a submerged obstruction in deep water several miles from land does not show that the injury was caused by an act of God within an exception of liability in a charter party, although it was an inevitable accident.

Same — injury to vessel — necessity of negligence.

3. Negligence is not necessary to render a charterer liable for injury to the vessel under a charter party requiring it to return the vessel in as good condition as it was when he received it, natural wear and tear, the act of God, or the public enemy excepted.

(April 25, 1914.)

as it would then be an accident which could be avoided.

In *Charleston & C. S. B. Co. v. Bason*, Harp. L. 262, the court remarked that in river navigation, owing to the forests upon the banks and frequent inundations, hidden snags frequently occur and constitute a danger peculiar to rivers so situated, and from the frequent shifting of these snags and their recurrence from freshets they constitute an instance of the act of God which skill and experience cannot guard against.

In *Coosa River S. B. Co. v. Barclay*, 30 Ala. 120, which was an action for damages against a steamboat company for injury to goods occasioned by the running of the boat upon an invisible snag in the regular channel of the river, the judgment of the lower court was affirmed because of the fact that the two judges were divided in opinion; but the judge writing the opinion stated that the judgment ought to be reversed, as it was a case of an act of God, but that the other judge disagreed with him, claiming that it was simply a case of danger by the river.

In *Reaves v. Waterman*, 2 Speers, L. 197, 42 Am. Dec. 364, in which it was held that the displacing of a buoy by some supposed natural cause ten or fifteen days before a vessel struck did not constitute an act of God, because it had frequently shifted and had been as frequently replaced, the court remarked that the striking of a vessel upon unknown snags or sawyers in the navigation of a river constituted an act of God.

But, it has been held, however, that the striking of a vessel upon a submerged object is not attributable to an act of God. This is especially true where the navigator has knowledge of its existence.

Thus, where a vessel strikes a submerged rock the location of which is marked by a buoy, loss which is caused by the vessel striking the rock is not an act of God, as the fact that a buoy was used to indicate a dangerous spot was sufficient to establish the existence of the rock as generally known, although its existence was not otherwise known to the master. *Fergusson v. Brent*, 12 Md. 9, 71 Am. Dec. 582.

A PPEAL by plaintiff from a judgment of the Superior Court for King County in defendant's favor in an action brought to recover damages for injuries to a steamboat while in defendant's possession under a charter party. Modified.

The facts are stated in the opinion.

Mr. Richard Saxe Jones, for appellant:

The accident which happened to the ship was not an "act of God" for which the charterer was, under the charter party, not to be responsible.

And proof that a flatboat which struck a partly submerged log in a river was properly constructed and manned by experienced river men, including a skilful pilot, that the place near where the boat was wrecked was one of difficult navigation; that immediately after successfully passing a dangerous place the officer in charge notified the pilot that all was safe, whereupon he gave way on his oar, and, the boat swinging around, struck the log; that no one on the boat had seen the log until after the boat struck, although one of the oarsmen testified that he saw the boiling of the water around the log, but that this was some distance from where the boat struck and did not show how the log lay,—is insufficient to establish a loss by the act of God, but rather a loss due directly to human agency, where there is evidence that there was room enough to pass on either side of the log in safety, and there was further evidence that its presence was well known, and that its position could have easily been determined by the ripple caused by the part submerged. *Steele v. McTyer*, 31 Ala. 667, 70 Am. Dec. 516.

And loss of a vessel and cargo by running upon the mast of a sloop that had been sunk in a river by a squall two days previously, which mast projected 15 or 16 feet out of the water during low tide, and was visible both the day of the accident and the day prior thereto, is not attributable to an act of God. *Merritt v. Earle*, 29 N. Y. 115, 86 Am. Dec. 292. See also *Pennewill v. Cullen*, supra.

In *Friend v. Woods*, 6 Gratt. 189, 52 Am. Dec. 119, it was held that a loss occasioned by a boat running upon a bar of sand and gravel recently formed in the channel along which the boat had to pass, and of which the officers and crew of the vessel were ignorant, is not referable to an act of God.

Where a vessel approaching a harbor upon a stormy night, the practice of mariners being to steer into a channel by bringing a beacon light at the end of a pier and a light in a keeper's house, in the range, and to take them as a guide in entering harbor, mistakes a light on a grounded steamer for the keeper's light and in consequence strikes on a shoal, necessitating the jettison of a part of the cargo, there is no loss by act of God, as the loss was partly due to human agency. *McArthur v. Sears*, 21 Wend. 190.
L.R.A.1915C

Ewart v. Street, 2 Bail. L. 157, 23 Am. Dec. 131; *Tompkins v. Ulster*, Fed. Cas. No. 14,087a; *Merritt v. Earle*, 29 N. Y. 115, 86 Am. Dec. 292; *Polack v. Pioche*, 35 Cal. 416, 95 Am. Dec. 115; *Reaves v. Waterman*, 2 Speers, L. 197, 42 Am. Dec. 364; *Fergusson v. Brent*, 12 Md. 33, 71 Am. Dec. 582; *Gordon v. Little*, 8 Serg. & R. 533, 11 Am. Dec. 632; *Blythe v. Denver & R. G. R.* Co. 15 Colo. 333, 11 L.R.A. 615, 22 Am. St. Rep. 403, 25 Pac. 702; *The Morning Light*, 2 Wall. 560, 17 L. ed. 864; *Chicago, R. I.*

In *Craig v. Childress, Peck* (Tenn.) 270, 14 Am. Dec. 751, it was held that the striking of a vessel, after being carried across a current in a river, upon rocks on the shore, causing loss of cargo, is not due to an act of God, where the carrier is not acquainted with the current and with the manner of navigation there, and does not have a skilful pilot or boatman sufficiently acquainted with the navigation of the river, and does not take precautions to preserve such parts of the cargo as by careful management might have been preserved after the wreck.

Damage by sea water to baggage in a compartment of a steamship is not shown to have been caused by an act of God or inevitable accident, by evidence which merely tends to show that it resulted from the breaking in of the cover of a porthole in the compartment by floating wreckage, where the evidence does not fully establish this fact or the fact that the porthole was properly inspected before the alleged accident, or explain why, if the wreckage was sufficient to do that damage, the vessel did not steer away from it or slacken speed while passing through it. *The Majestic*, 166 U. S. 375, 41 L. ed. 1039, 17 Sup. Ct. Rep. 597, 2 Am. Neg. Rep. 282.

Loss of a vessel and cargo by striking a projecting timber in a pier which it was the duty of the carrier to maintain, although it was driven against the pier by a wind, is not attributable to an act of God. *New Brunswick S. B. & Canal Transp. Co. v. Tiers*, 24 N. J. L. 697, 64 Am. Dec. 394.

In *Trent & M. Nav. Co. v. Wood*, 4 Dougl. K. B. 287, 3 Esp. 127, 1 T. R. 28, it was held that the loss of goods by a vessel running upon the anchor of another vessel while attempting to pass between the vessel and the supposed location of the anchor, the presence of which was not indicated by a buoy, pursuant to custom, is not attributable to an act of God, but rather to the conduct of man. The court said: "The act of God is natural necessity, as wind and storms which arise from natural causes, and is distinct from inevitable accident."

And, it has been held that injury to goods by reason of a flat getting on a shoal in a river in consequence of a fog is not attributable to an act of God. *Liver Alkali Co. v. Johnson*, L. R. 9 Exch. 338, 2 Asp. Mar. L. Cas. 332, 43 L. J. Exch. N. S. 216, 31 L. T. N. S. 95.
A. H. N.

& P. R. Co. v. McKone, 36 Okla. 41, 42 L.R.A.(N.S.) 709, 127 Pac. 488; McKinley v. C. Jutte & Co. 230 Pa. 122, 79 Atl. 244, Ann. Cas. 1912A, 452; Bullock v. White Star S. S. Co. 30 Wash. 448, 70 Pac. 1106.

Mr. William H. Gorham, for respondent:

There can be no recovery from bailee for damages sustained, without proof of negligence on the part of bailee.

Story, Bailm. § 410, 9th ed. note 3; The Barnstable, 181 U. S. 468, 45 L. ed. 954, 21 Sup. Ct. Rep. 684; Sturm v. Boker, 150 U. S. 312, 37 L. ed. 1093, 14 Sup. Ct. Rep. 99; Clark v. United States, 95 U. S. 539, 24 L. ed. 518; W. H. Beard Dredging Co. v. Hughes, 113 Fed. 680; Lake Michigan Car Ferry Transp. Co. v. Crosby, 107 Fed. 723.

The accident causing the damage complained of was an act of God, for which respondent was exempt from liability by the terms of the charter party.

Story, Bailm. 9th ed. §§ 25, 489, 511; The Majestic, 166 U. S. 375, 41 L. ed. 1039, 17 Sup. Ct. Rep. 597, 2 Am. Neg. Rep. 282; New Brunswick S. B. & Canal Transp. Co. v. Tiers, 24 N. J. L. 697, 64 Am. Dec. 394; Klair v. Wilmington S. B. Co. 4 Penn. (Del.) 51, 54 Atl. 694; Fay v. Pacific Improv. Co. 93 Cal. 253, 16 L.R.A. 188, 27 Am. St. Rep. 198, 26 Pac. 1099, 28 Pac. 943; Ryan v. Rogers, 96 Cal. 349, 31 Pac. 244; Smith v. North American Transp. & Trading Co. 20 Wash. 580, 44 L.R.A. 557, 56 Pac. 372, 5 Am. Neg. Rep. 738.

The appellant, under the charter party, was its own insurer against the risk of accident by which the damage to the vessel was sustained.

Cleveland & B. Transit Co. v. Insurance Co. of N. A. 115 Fed. 431; Ames v. Belden, 17 Barb. 513; Clark v. United States, 95 U. S. 539, 24 L. ed. 518; Hastorf v. O'Brien, 97 C. C. A. 606, 173 Fed. 346; Lake Michigan Car Ferry Transp. Co. v. Crosby, 107 Fed. 723.

Gose, J., delivered the opinion of the court:

This is an action upon a charter party for damages to a steamboat, it being alleged that the charterer breached its contract in failing to return the boat in good condition.

The appellant, being the owner of the steamship Jeannie, chartered it to the respondent for voyages from Puget Sound to ports in Southeastern Alaska. The charter party provides that the vessel should be delivered to the respondent "unmanned and without a crew;" that the owner should carry insurance on the steamship "not to exceed \$27,000," in some insurance company satisfactory to it, for which the charterer agreed to pay at the rate of 15 per cent per L.R.A.1915C.

annum, plus additional short-rate charges if the policy should be canceled, for such time as the boat should be engaged in the service of the charterer; that the owner should select a chief engineer for the operation of the steamship during the full term of the charter, but that the master and pilot were to be selected by the charterer, and should be satisfactory to the owner. It was further agreed that the owner should not be liable ". . . for the operation, maintenance, and control of said steamship, but the same is fully assumed by the party of the second part [the respondent], except that, if such steamship is not properly cared for by the party of the second part in accordance with the views and opinions of the chief engineer, acting with either the master or pilot, then party of the first part may immediately cancel this charter and retake possession of said steamship.

. . . It is further agreed that party of the second part will return said steamship Jeannie to party of the first part upon the expiration of this charter, or any extension thereof, in as good condition as she is received, natural wear and tear and the act of God or the enemies of the United States of America excepted; but that, if party of the first part shall receive from insurance placed upon said steamship by party of the first part, any sum or sums arising from any cause covered by such insurance, then the sum so received by party of the first part shall be deducted from any claim of loss, damage, or injury for which party of the second part would be liable under this clause. . . . In the event that said steamship shall meet with any accident for which insurance is thereafter collected, then the amount of insurance so collected by party of the first part and retained by them, shall be the full and true measure of all damage or loss sustained, and no claim shall be made on parties of the second part by party of the first part for loss or damage to said ship by reason of any accident happening thereto which is covered by insurance."

After the Jeannie was turned over to the respondent, it struck some unknown, submerged object in Frederick Sound in Alaskan waters, threw a propeller blade, and was otherwise damaged. The ship was returned to appellant in damaged condition, and this action is brought to recover the amount of such damages. The appellant took out the required amount of insurance, but it is conceded that the damages sustained are not recoverable under the policies. The respondent paid the premium upon the policies in harmony with its agreement.

The first question to be considered is:

Was the accident which caused the damage an "act of God?" The burden of proof was upon the respondent to show that the injury sustained was caused by an "act of God," in order to excuse itself from liability under this clause of the charter. *Merritt v. Earle*, 29 N. Y. 115, 86 Am. Dec. 292; *The Majestic*, 166 U. S. 375, 41 L. ed. 1039, 17 Sup. Ct. Rep. 597, 2 Am. Neg. Rep. 282; *McKinley v. C. Jutte & Co.* 230 Pa. 122, 79 Atl. 244, Ann. Cas. 1912A, 452; *Ewart v. Street*, 2 Bail. L. 157, 23 Am. Dec. 131; *McArthur v. Sears*, 21 Wend. 190; *New Brunswick S. B. & Canal Transp. Co. v. Tiers*, 24 N. J. L. 697, 64 Am. Dec. 394; *Klair v. Wilmington S. B. Co.* 4 Penn. (Del.) 51, 54 Atl. 694.

In *Ewart v. Street*, 2 Bail. L. 157, 23 Am. Dec. 131, it is said: "It was rightly said on the part of the plaintiffs that it is enough to show the damage done, in order to render the defendants liable; and the burden is on them to show that it was occasioned by such a cause as will exempt them from liability."

In *McArthur v. Sears*, 21 Wend. 190, the court said: "The defendant was a common carrier; and it is not denied, as a general rule, that, to protect himself from responsibility for the loss, he was bound to prove that it arose from the act of God or the enemies of the country."

In *Merritt v. Earle*, 29 N. Y. 115, 86 Am. Dec. 292, the term "act of God" is thus defined: "The law adjudges the carrier responsible, irrespective of any question of negligence or fault on his part, if the loss does not occur by the act of God or the public enemies. With these exceptions, the carrier is an insurer against all losses. The expressions, 'act of God' and 'inevitable accident,' have sometimes been used in a similar sense, and as equivalent terms. But there is a distinction. That may be an 'inevitable accident' which no foresight or precaution of the carrier could prevent; but the phrase, 'act of God,' denotes natural accidents that could not happen by the intervention of man, as storms, lightning, and tempest. The expression excludes all human agency. In the case of *Trent & M. Nav. Co. v. Wood*, 4 Dougl. K. B. 287, Lord Mansfield said: 'The general principle is clear. The act of God is natural necessity, as winds and storms, which arise from natural causes, and is distinct from inevitable "accident."' The same judge, in *Forward v. Pittard*, 1 T. R. 27, 1 Eng. Rul. Cas. 216, defined the 'act of God' to be something in opposition to the act of man, adding 'that the law presumes against the carrier, unless he shows it was done by such an act as could not happen by the intervention of man, as storms, lightning, and tempest.'" L.R.A.1915C.

(The italics are ours.) Substantially the same definition is given in *Polack v. Pioche*, 35 Cal. 416, 95 Am. Dec. 115.

In *Reaves v. Waterman*, 2 Speers, L. 177, 42 Am. Dec. 364, it is said: "The act of God is commonly illustrated by such natural convulsions as tempests, lightning, earthquakes, the unknown shifting of shoals, and the like."

In *Fergusson v. Brent*, 12 Md. 9, 71 Am. Dec. 583, it is said: "It is true that every 'act of God' is an inevitable accident, because no human agency can resist it; but, because it is so, it does not therefore follow, in the sense of the books, that every inevitable accident is an act of God. Damage done by lightning is an inevitable accident, and also an act of God; but the collision of two vessels in the dark is an inevitable accident, but not an act of God, such as the stroke of lightning, nor is it so considered by the authorities."

In 1 Cyc. 758, in a footnote, it is said that in numerous cases the courts have expressed the opinion that the words, "inevitable accident" and "unavoidable accident," are exactly equivalent to the expression "act of God." "This is not strictly true, however, for, while every act of God is an inevitable accident, every inevitable accident is not an act of God." In *Blythe v. Denver & R. G. R. Co.* 15 Colo. 333, 11 L.R.A. 615, 22 Am. St. Rep. 403, 25 Pac. 702, it is said: ". . . There is a legal distinction between 'inevitable accident' and the 'act of God.'" In *McKinley v. C. Jutte & Co.* 230 Pa. 122, 79 Atl. 244, Ann. Cas. 1912A, 452, it is remarked that "the terms, 'inevitable casualty or accident' and 'acts of God,' are not synonymous. 'Inevitable casualty' is a broader and more comprehensive term than 'act of God.'"

In *Hale v. New Jersey Steam Nav. Co.* 15 Conn. 539, 39 Am. Dec. 398, it is said: "If the defendants are common carriers, the question must be merely: What are the liabilities of common carriers? The answer is: For all losses, even inevitable accidents, except they arise from the act of God or the public enemy."

These cases are not in conflict with *Smith v. North American Transp. & Trading Co.* 20 Wash. 580, 44 L.R.A. 557, 56 Pac. 372, 5 Am. Neg. Rep. 738, and *Bullock v. White Star S. S. Co.* 30 Wash. 448, 70 Pac. 1106. Nor are they opposed to the rule announced in *The Majestic*, cited by the respondent, where the court said: "The burden in this respect is on the carrier. *Clark v. Barnwell*, 12 How. 272, 13 L. ed. 985; *Western Transp. Co. v. Downer*, 11 Wall. 129, 20 L. ed. 160; *The Edwin I. Morrison*, 153 U. S. 199, 38 L. ed. 688, 14 Sup. Ct. Rep. 823; *The Caledonia*, 157 U. S. 124, 39 L. ed. 644,

15 Sup. Ct. Rep. 537. The act of God, said Chancellor Kent (vol. 2, p. 597), means 'inevitable accident, without the intervention of man and public enemies;' and, again (vol. 3, p. 216), that 'perils of the sea denote natural accidents peculiar to that element, which do not happen by the intervention of man, nor are to be prevented by human prudence. A *casus fortuitus* was defined in the civil law to be, *quod damno fatali contingit, cuius diligentissimo possit contingere*. It is a loss happening in spite of all human effort and sagacity.' The words, 'perils of the sea,' may, indeed, have grown to have a broader signification than 'the act of God,' but that is unimportant here. Judge Shipman in the court of appeals quotes from 1 Parsons on Shipping, 255, the definition there given of the 'act of God,' and the reason for it, as follows: 'The "act of God" is limited, as we conceive, to causes in which no man has any agency whatever; because it was intended never to raise, in the case of the common carrier, the dangerous and difficult question whether he actually had any agency, in causing the loss; for, if this were possible, he should be held.'

Nor are they opposed to the rule announced in New Brunswick S. B. Co. v. Tiers, 24 N. J. L. 697, 64 Am. Dec. 394, cited by the respondent, where the court said: "By the act of God is meant a natural necessity, which could not have been occasioned by the intervention of man, but proceeds from physical causes alone, such as the violence of the winds or seas, lightning, or other natural accident. If the loss happen by the wrongful act or neglect of a third person, the carrier is responsible, and is to seek redress of the wrongdoer. If divers causes concur in the loss, the act of God being one but not the immediate or proximate cause, such act of God does not discharge the carrier. To have this effect, it must be one exclusive of human agency."

The facts touching the cause of the accident are these: The chief engineer testified: "I know she struck something hard, something submerged, and broke one of the blades, and put everything out of line. . . . She gave a sudden stop and then started off. . . . Struck something submerged. I don't know whether it was a log or a chunk of ice, or it might have been a rock." The master of the ship testified that the accident happened in the middle of Frederick Sound, 3 miles from land, in about 125 fathoms of water, in clear weather, with the sea "smooth as glass." He further said: "I felt a jar, but you can feel a jar when a ship loses a blade. It might be a submerged body; it probably was; I don't know. I want to say that I don't

know. I just felt the jar." The accident happened in the month of September, in the daytime. It was stipulated that the chief mate would, if called as a witness, testify that he was watch officer on the bridge at the time of the accident, and that he did not see or hear of any floating objects at or near that time. The testimony does not show whether icebergs were to be anticipated at the time and place of the accident.

This is far from showing that the act could not have happened by the intervention of man. It leaves the cause of the accident to speculation. The most that can be said is that it may have been caused by an "act of God," or it may have been caused by the act of man. We are not required to adopt the strict rule laid down by Judge Shipman and quoted in the excerpt from *The Majestic*, *vis.*, that, if it were possible that the injury was caused by the act of man, the respondent should be held. Under the authorities, it is at least required to show by a preponderance of the evidence that an "act of God" was the cause of the injury. In this it has signally failed. Nor are we willing to adopt the respondent's view that, because it may have been an inevitable accident or casualty, it was an "act of God."

The respondent next contends that, under the charter party, the appellant was its own insurer. The charter party is not susceptible of this construction. When taken as an entirety, the view is compelling that the respondent assumed responsibility for all injuries sustained to the vessel not caused by "the act of God or the enemies of the United States of America," and not "covered by insurance." The testimony is that the appellant procured the highest and best form of insurance obtainable. The charter shows that it was clearly in the minds of the parties that the boat might sustain an injury not covered by the exception clause and not covered by the insurance. The responsibility for such damages was assumed by the respondent. While it is true the appellant furnished the chief engineer, it is also true that the respondent assumed control of the vessel.

It is also argued that there can be no recovery without proof of negligence upon the part of the respondent, because it is said that the respondent was only a bailee. The authorities to which we have referred show that this position is untenable. Moreover, if we assume that the charter party was a bailment, the respective duties are fixed by contract, and the respondent's liability must be measured by that instrument. *Patterson v. Wenatchee Canning Co.* 59 Wash. 556, 110 Pac. 379. In that case we

said: "A special contract of bailment prevails against general principles of law applicable, in the absence of an express agreement."

If respondent breached its contract, it is liable, and it can only excuse itself from liability by showing either that the damages were caused by an act of God or covered by the insurance, or probably—but this is not before us under the evidence—that the appellant, had it exercised reasonable care, could have procured insurance which would have covered the damage. The evidence here, however, is that such insurance could not have been obtained. We think, under the law and the evidence, the appellant is entitled to recover the damages the vessel sustained.

The case will be remanded, with directions to the trial court to ascertain the damage and enter judgment for the amount thereof.

Crow, Ch. J., and Ellis, Main, and Chadwick, JJ., concur.

A petition for rehearing having been granted, the following *Per Curiam* response was handed down on October 9, 1914 (143 Pac. 461):

In the opinion heretofore filed in this case we said: "The case will be remanded, with directions to the trial court to ascertain the damage and enter judgment for the amount thereof."

A petition for a modification of the judgment in this respect, together with an answer, are now on file in this court. Upon a mature consideration we have concluded to modify this statement, so as to read: The case will be remanded, with directions to the trial court, to enter a judgment in favor of the appellant for the sum of \$5,642.89, with interest at the legal rate from October 1, 1911.

WEST VIRGINIA SUPREME COURT OF APPEALS.

P. JONES, Admr., etc., of James W. Jones, Deceased,
v.

VIRGINIAN RAILWAY COMPANY, Plff.
in Err.

(— W. Va. —, 83 S. E. 54.)

Master and servant — employee in railroad yards — care.

1. Knowing the dangers incident to railroad yards in the nighttime, where cars are continuously in motion day and night, an employee who uses the yards in the course

of his employment must constantly exercise sufficient care to insure his own personal safety, and not rely solely on signals by bell, whistle, or light; and if injured while therein by the tender of a reversed engine, the presence of which he was at the time and place of impact anticipating, but who, when hit, was observing the approach of a train on another track, which he knew could not harm him, he cannot, because of his own negligence, recover for the injuries inflicted. Under such circumstances, the only duty the master owes his employee is to exercise reasonable care for his personal safety.

Same — effect of negligence.

2. A railroad yard, where trains, cars, and engines are continuously in motion to and fro, day and night, on the interlacing tracks, is essentially a place of constant danger, of which employees are duly cognizant; and duty to themselves requires their unremittent care and prudence, when using the yard, to observe such movements in order to avoid injury to themselves, and, if negligent, they cannot recover, though no warning by bell or whistle or light be given of such movements.

Same — contributory negligence.

3. If guilty of negligence directly contributing to his injury, a servant cannot recover from the master.

Same — assumption as to exercise of care.

4. Employees engaged in switching cars and engines in railroad yards may reasonably assume that coemployees, familiar with dangers incident thereto, will, when using the yards for their own convenience, exercise necessary and reasonable diligence to protect themselves from such perils as may reasonably be expected therein.

Same — duty of master.

5. The master owes no duty to warn employees, by bell, whistle, or light, of dangers in railroad yards, of the existence of which they are fully cognizant, as they owe themselves the duty of constant vigilance to avoid the perils incident to the use to which such yards are devoted.

Same — assumption of risk.

6. One who engages in the performance of services of the inherently dangerous character of which he is fully aware assumes the risks ordinarily incident thereto, and if

Note. — As to duties of master in respect to rules prescribing means for warning employees of proximity of moving trains or cars, see note to *Nolan v. New York, N. H. & H. R. Co.* 43 L.R.A. 339. As to right of employee to rely on statute requiring signal to be given by train approaching crossing, see note to *Lepard v. Michigan C. R. Co.* 40 L.R.A. (N.S.) 1105. As to duty of railroad company to warn watchman or flagman of danger from passing trains, see note to *Crume v. Louisville & N. R. Co.* 48 L.R.A. (N.S.) 150. As to duty to warn trainman as to location of cars seen ahead on spurs near track, see note to *Stewart v. Nashville, C. St. L. R. Co.* 47 L.R.A. (N.S.) 327.

Headnotes by LYNCH, J.
L.R.A.1915C.

negligent, cannot recover for injuries inflicted while so engaged.

Same — termination of relation.

7. The relation of master and servant is not dissolved by mere cessation of duties assigned, but continues such reasonable time thereafter as will afford the servant opportunity to reach a place of safety from perils of the employment.

(September 15, 1914.)

ERROR to the Circuit Court for Mercer County to review a judgment in plaintiff's favor in an action brought to recover damages for the death of plaintiff's intestate, alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. G. A. Wingfield and Brown, Jackson, & Knight, for plaintiff in error:

The railway company, in shifting engines upon its yards, is under no obligation to notify the employees, familiar with the operation of the yard, of the approach of the engine, but is entitled to act on the belief that the various employees in the yard, familiar with the continuous recurring movement of the cars, will take reasonable precautions against their approach.

Spicer v. Chesapeake & O. R. Co. 34 W. Va. 514, 11 L.R.A. 385, 12 S. E. 553; Christy v. Chesapeake & O. R. Co. 35 W. Va. 117, 12 S. E. 1111; Melton v. Chesapeake & O. R. Co. 64 W. Va. 168, 61 S. E. 39; Huff v. Chesapeake & O. R. Co. 48 W. Va. 45, 35 S. E. 866, 7 Am. Neg. Rep. 675; Aerkfetz v. Humphreys, 145 U. S. 418, 36 L. ed. 758, 12 Sup. Ct. Rep. 835; Elliott, Railroads, § 1258; Baltimore & O. R. Co. v. Lee, 110 Va. 305, 66 S. E. 51; Norfolk & W. R. Co. v. Belcher, 107 Va. 340, 58 S. E. 579; Pittard v. Southern R. Co. 107 Va. 1, 57 S. E. 561; Morris v. Boston & M. R. Co. 184 Mass. 368, 68 N. E. 680, 15 Am. Neg. Rep. 81; Connelley v. Pennsylvania R. Co. 47 L.R.A.(N.S.) 867, 119 C. C. A. 392, 201 Fed. 54; Pennsylvania R. Co. v. Wachter, 60 Md. 395.

The railroad company is not an insurer of the safety of its employees and of the condition of its equipment, but is obliged to use only ordinary care.

Oliver v. Ohio River R. Co. 42 W. Va. 703, 26 S. E. 444.

A proper test of the fellow servant relation is whether the negligence of one is likely to inflict injury on another. This means that if one may chance to be hurt by the negligence of another, he is deemed to have contemplated and risked that chance when he entered the service, and that they are fellow servants.

Jackson v. Norfolk & W. R. Co. 43 W. Va. 393, 46 L.R.A. 337, 27 S. E. 278, 31 S. L.R.A.1915C.

E. 258, 1 Am. Neg. Rep. 722; Christy v. Chesapeake & O. R. Co. 35 W. Va. 117, 12 S. E. 1111; Beuhring v. Chesapeake & O. R. Co. 37 W. Va. 502, 16 S. E. 437; Kniceley v. West Virginia Midland R. Co. 64 W. Va. 278, 17 L.R.A.(N.S.) 370, 61 S. E. 811; Pennsylvania R. Co. v. Wachter, 60 Md. 395.

If there is due care and diligence in choosing and obtaining servants to receive and transmit necessary orders and to use necessary appliances, the negligence of such servants in observing such rules or using such appliances is a risk of employment that the coemployee takes when he enters the service.

Oliver v. Ohio River R. Co. 42 W. Va. 703, 26 S. E. 444; Jackson v. Norfolk & W. R. Co. 43 W. Va. 393, 46 L.R.A. 337, 27 S. E. 278, 31 S. E. 258, 1 Am. Neg. Rep. 722; Pennsylvania R. Co. v. Wachter, 60 Md. 396.

If an employee wilfully encounters dangers which are known to him, or are notorious and apparent, the employer is not responsible for the injury occasioned thereby.

Humphreys v. Newport News & M. Valley Co. 33 W. Va. 135, 10 S. E. 39.

Employees in railroad yards must take reasonable precaution for their own safety.

Aerkfetz v. Humphreys, 145 U. S. 418, 36 L. ed. 758, 12 Sup. Ct. Rep. 835; Jackson v. Wheeling Terminal R. Co. 65 W. Va. 415, 64 S. E. 450; Humphreys v. Newport News & M. Valley Co. supra.

The employee assumes all the risks incident to the business as ordinarily conducted, of which he has knowledge, or of which, by the exercise of ordinary care, he may acquire knowledge; whether those risks are incident to the appliances or to methods of the work.

Skidmore v. West Virginia & P. R. Co. 41 W. Va. 293, 23 S. E. 713; Oliver v. Ohio River R. Co. 42 W. Va. 703, 26 S. E. 444; Reese v. Wheeling & E. G. R. Co. 42 W. Va. 333, 26 S. E. 204; Jackson v. Norfolk & W. R. Co. 43 W. Va. 393, 46 L.R.A. 337, 27 S. E. 278, 31 S. E. 258, 1 Am. Neg. Rep. 722; Seldomridge v. Chesapeake & O. R. Co. 46 W. Va. 569, 33 S. E. 293; Pennsylvania R. Co. v. Wachter, 60 Md. 396; Berns v. Gaston Gas Coal Co. 27 W. Va. 255, 55 Am. Rep. 304; Davis v. Nuttallsburg Coal & Coke Co. 34 W. Va. 500, 12 S. E. 539; Stewart v. Ohio River R. Co. 40 W. Va. 188, 20 S. E. 922; Young v. West Virginia C. & P. R. Co. 42 W. Va. 112, 24 S. E. 615; Smith v. United Lumber Co. 71 W. Va. 749, 77 S. E. 330.

The servant must exercise precautions commensurate with the danger of the situation in which he finds himself.

Cawley v. Winifrede R. Co. 31 W. Va. 116, 5 S. E. 318; Seldomridge v. Chesapeake & O. R. Co. 46 W. Va. 569, 33 S. E. 293; Stewart v. Ohio River R. Co. 40 W. Va. 188, 20 S. E. 922; Knight v. Cooper, 36 W. Va. 232, 14 S. E. 999; Johnson v. Chesapeake & O. R. Co. 38 W. Va. 206, 18 S. E. 573.

The happening of an accident creates no presumption of negligence.

Stewart v. Ohio River R. Co. supra.

Messrs. Sanders & Crockett and John R. Pendleton, for defendant in error:

Where ordinary care is required, the backing of a train in the nighttime without lights or signals or warning of any kind is negligence.

Melton v. Chesapeake & O. R. Co. 71 W. Va. 701, 78 S. E. 369; Southern R. Co. v. Tyree, 114 Va. 318, 76 S. E. 341; Southern R. Co. v. Darnell, 114 Va. 312, 76 S. E. 291; Hammett v. Southern R. Co. 157 N. C. 322, 72 S. E. 1077; Schulz v. Chicago, M. & St. P. R. Co. 57 Minn. 271, 59 N. W. 192; Purnell v. Raleigh & G. R. Co. 122 N. C. 832, 29 S. E. 953; Heavener v. North Carolina R. Co. 141 N. C. 245, 53 S. E. 513; Zachary v. North Carolina R. Co. 156 N. C. 496, 72 S. E. 858; Erickson v. St. Paul & D. R. Co. 41 Minn. 500, 5 L.R.A. 786, 43 N. W. 332; Promer v. Milwaukee, L. S. & W. R. Co. 90 Wis. 215, 48 Am. St. Rep. 905, 63 N. W. 90; 23 Am. & Eng. Enc. Law, 757; Central R. Co. v. Colasurdo, 113 C. C. A. 379, 192 Fed. 901.

The precaution must suit the circumstances and be adequate under the circumstances.

Bowles v. Chesapeake & O. R. Co. 61 W. Va. 272, 57 S. E. 131; Melton v. Chesapeake & O. R. Co. 71 W. Va. 701, 78 S. E. 369.

The duty to furnish reasonably safe machinery and appliances, and keep them so, and a reasonably safe place to work, which includes a reasonably safe way to and from work, are nonassignable duties of the master, and a violation of them by the master, or by its servant to whom the discharge of them is delegated, renders the master liable.

Jackson v. Norfolk & W. R. Co. 43 W. Va. 380, 46 L.R.A. 337, 27 S. E. 278, 31 S. E. 258, 1 Am. Neg. Rep. 722; Madden v. Chesapeake & O. R. Co. 28 W. Va. 610, 57 Am. Rep. 695; Flannegan v. Chesapeake & O. R. Co. 40 W. Va. 436, 52 Am. St. Rep. 896, 21 S. E. 1028; Goshorn v. Wheeling Mold & Foundry Co. 65 W. Va. 250, 64 S. E. 22; Myers v. Concord Lumber Co. 129 N. C. 252, 39 S. E. 960; Kelly v. Yadkin River Power Co. 160 N. C. 283, 76 S. E. 261.

The servant does not assume the risk of L.R.A.1915C.

defective machinery or an unsafe place to work, or way to get to and from work.

Goshorn v. Wheeling Mold & Foundry Co. 65 W. Va. 250, 64 S. E. 22.

Where the servant uses his faculties of seeing and hearing, and they do not disclose the danger, there can be no contributory negligence.

Melton v. Chesapeake & O. R. Co. 71 W. Va. 701, 78 S. E. 369.

Defendant was bound to exercise a higher degree of care for the protection of plaintiff's decedent than for the protection of its "yard employees," in the movement of its trains on the yard.

Southern R. Co. v. Darnell, 114 Va. 312, 76 S. E. 291.

Lynch, J., delivered the opinion of the court:

To a judgment in favor of plaintiff the defendant obtained a writ of error. James W. Jones, the plaintiff's son and intestate, was struck by the tender of a moving engine and killed in the yards of the defendant company. He was a brakeman on a coal train drawn by engine 434 from Page to Princeton, where it arrived between 3 and 4 o'clock A. M. January 23, 1912. At the west end of the yard the train crew, having served sixteen consecutive hours, was necessarily relieved from further duty, and the yard crew took the train in charge, and, after placing the cars composing it upon one or more of the fourteen interlacing tracks and connecting switches, as required by the rules of the company, shifted the engine onto the main line at the opposite end of the yard, in process of delivery to the roundhouse for inspection and repairs. While backing westward on the main line towards the roundhouse, in the usual manner and according to the customary procedure, the tender collided with and killed Jones and seriously injured Easter, also a brakeman, and at the time of the injury Jones's companion. Jones and Easter left the train at the west end of the yard, but, as it passed, caught the caboose and rode on it until it reached its place of lodgment on the inner eighth track from the main line, when, having washed and changed their clothing, as was the custom, according to Easter, they started on foot across intervening tracks towards the main line and in the direction of the passenger depot. For eighteen months both of them had been in defendant's employment, much of the time as brakemen. They knew the yards were necessarily dangerous; that they were in continuous use, day and night; that cars and engines were constantly in motion, shifting and switching incessantly on all parts of the large yard; that cuts of cars

were to be found at different parts thereof, and that the custom was to disconnect the engines from the incoming coal trains in some part of the yard, shift them from track to track until they reached the main line, and thence to run over that line to the roundhouse. Their familiarity with these conditions, customs, and procedure is abundantly established by proof, if proof were necessary for that purpose. In fact, Easter admits he and Jones anticipated the appearance of the engine and tender on the main line at the time he and Jones reached it; for he says immediately before the collision they looked for the engine at that point, but did not see or hear it.

As a basis for recovery, the second count of the declaration, on the averments of which plaintiff seems to rely, avers defendant's duty required it to sound a bell or whistle and keep a light on the forward end of the advancing engine and tender, and that, as a result of its failure to observe these legal requirements, Jones was run over and killed. By defendant's demurrer and plea, we are directly confronted with the inquiry whether, under the circumstances of this case, a breach of the duty averred is, in the absence of statutory requirements, such negligence on the part of the defendant as will sustain the judgment complained of.

Repeatedly have this and other courts held that the duty imposed by statute to sound a bell or whistle when approaching a public crossing does not require a railroad company to give such warning elsewhere than at the places so designated, because they are not intended to afford protection to employees of the operating company, but to persons who of right may use the railroad tracks as parts of the public highway. "The statute (Code chap. 54, § 61 [1913, § 2971]) requiring the bell to be rung or a whistle to be blown at crossings is designed for those passing over the track at such crossings, not for those using the track elsewhere for their convenience as a footpath." *Spicer v. Chesapeake & O. R. Co.* 34 W. Va. 514, 11 L.R.A. 385, 12 S. E. 553. As stated in the opinion, Spicer was an employee, though perhaps not then engaged in the performance of the duties assigned to him. "Yet he was fully aware of the deadly and dangerous character of the yard wherein he was walking when hit and killed." The same holding is found in *Huff v. Chesapeake & O. R. Co.* 48 W. Va. 45, 35 S. E. 866. Though in *Melton v. Chesapeake & O. R. Co.* 64 W. Va. 168, 61 S. E. 39, the person injured was a trespasser, the court said: "Signals or lights or watchmen are not required on a backing train elsewhere than at public crossings, L.R.A.1915C.

to warn trespassers using the track for their own convenience as a footpath."

A railroad yard, with numerous tracks connected by switches, is essentially a place of danger, even in the daytime. Therein trains and engines are in constant motion at all times during the day. Of the dangers incident to the use of the yards for railroad purposes, no one is better advised than the employees whose duty requires them to be in or about the yard, or to pass through or over it. They know the danger, and that their safety therein depends more upon their own watchful care and prudence than upon the blowing of a whistle, the sounding of a bell, or the presence of a light on or about any part of the car. And we find in *Norfolk & W. R. Co. v. Belcher*, 107 Va. 340, 58 S. E. 579: "A railroad company does not owe to its employees engaged on its yards, over which engines are constantly moving, the duty of sounding whistles, ringing bells, or keeping a constant lookout to warn them of dangers of which they already have knowledge. Such employees are exposed to more than ordinary peril, and should be on the alert and vigilant to guard against injuries from the movement of engines and cars always to be expected. Those in charge of switching engines on a yard have the right to assume that employees on the yard, who are familiar with the dangers of the place, will look out for themselves, and will not fail to leave a place of danger in time to avoid injury. There can be no recovery by an employee on a yard who negligently steps onto a track on which a switching engine and cars are moving in his direction, and who is there injured by the cars in consequence of inattention to his surroundings."

So, in *Pittard v. Southern Co.* 107 Va. 1, 57 S. E. 561, it is said: "A railroad yard is a place of ceaseless activity, where cars are being shifted and engines moved, and those engaged therein are exposed to more than ordinary danger, and should be alert to guard against such dangers. The sounding of whistles and the ringing of bells at such places is not essential for the protection of employees, but would tend to increase the confusion. In the case at bar an employee was killed in a railroad yard, but the evidence fails to establish negligence on the part of the company."

Likewise, in *Baltimore & O. R. Co. v. Lee*, 110 Va. 305, 66 S. E. 51, it is said: "It is unnecessary to ring a bell, sound a whistle, or display a light in order to give employees on a railroad yard warning of dangers with which they are already acquainted, and of which they have knowledge."

So, it is held in *Aerkfetz v. Humphreys*,

145 U. S. 418, 36 L. ed. 758, 12 Sup. Ct. Rep. 835, that a track repairer who was injured while in the discharge of his duties in the station yard must take care and exercise diligence to avoid accidents from trains, and the duty of the company to him is not measured by its obligation to a passenger when on or crossing the tracks, except for wanton and wilful negligence. In the opinion it is said: "The ringing of bells and the sounding of whistles on trains going and coming, and switch engines moving forwards and backwards, would have simply tended to confusion. The person in direct charge had a right to act on the belief that the various employees in the yard, familiar with the continuously recurring movements of the cars, would take reasonable precaution against their approach." *Riccio v. New York, N. H. & H. R. Co.* 189 Mass. 358, 75 N. E. 704, 19 Am. Neg. Rep. 277.

In *Crowe v. New York C. & H. R. R. Co.* 70 Hun, 37, 23 N. Y. Supp. 1100, plaintiff was injured while engaged in the yards of the company in the nighttime in repairing one of the forty or more tracks therein. The car which caused the injury had no light on it, and no notice was given of its approach. But plaintiff knew that cars might be expected at any moment, that it was not customary to give any warning of their approach, and that it required constant watchfulness and vigilance to avoid collisions; and it was held that a railroad company is not negligent in not requiring lights to be placed on all cars moving in the yards for the protection of employees, since to do so would require so many men and lanterns and so much time as to be impracticable. In the opinion the court said: "Great care and precaution are required on the part of railroad companies when they are moving cars in places where the general public have a right to pass; . . . but a different rule obtains in the companies' yards, where cars are being distributed and trains made up. The employees about such yards understand the situation. They know . . . that cars frequently pass along without notice of their approach; and they assume the risks incident to the business as thus conducted."

In determining the liability of railroad companies for injuries to their employees while actively engaged in their employment, stress is ordinarily laid on the knowledge of the custom prevailing in the yards in the handling and movement of trains. As held in *Schaible v. Lake Shore & M. S. R. Co.* 97 Mich. 318, 21 L.R.A. 660, 56 N. W. 565, it is the duty of a section hand who is at work at a side track in the yard of a railroad company, who knows it is customary to shunt or kick cars along the track

in the yards unattended for the purpose of making up trains, and that cars have just been run onto the track where he is at work, to keep a lookout for moving cars, and if he fails so to do, and is injured by a car coming down upon him unattended, he is guilty of such contributory negligence as will bar recovery.

A trackman who has had experience and is familiar with the operation of trains, and who knows that both extra and special trains frequently run over the road, must keep a lookout so far as practicable for all trains. *Hoffard v. Illinois C. R. Co.* 138 Iowa, 543, 16 L.R.A.(N.S.) 797, 110 N. W. 446; *Olson v. St. Paul, M. & M. R. Co.* 38 Minn. 117, 35 N. W. 866; *Pennsylvania R. Co. v. Wachter*, 60 Md. 395; *Connelley v. Pennsylvania R. Co.* 47 L.R.A.(N.S.) 867, 119 C. C. A. 392, 201 Fed. 54; *Norfolk & W. R. Co. v. Gesswine*, 75 C. C. A. 214, 144 Fed. 56. One whose duty it is to repair tracks at a crossing and to keep them free from accumulation of dirt, and who knows that engines and cars are almost constantly passing, is negligent if he fails to use his senses, and relies wholly on warnings by bell on approaching engines. *Columbus, H. V. & T. R. Co. v. Burns*, 9 Ohio C. C. 276, 4 Ohio C. D. 21. Where, as in this case, plaintiff is familiar with the usages and dangers of a switch yard, and steps upon a track on which he may and does anticipate the presence of a moving train or engine at any time, and fails to look or listen, he cannot recover for injuries sustained, any more than a traveler upon a highway who fails to look and listen before he attempts to cross the track at a public crossing. *Loring v. Kansas City, Ft. S. & M. R. Co.* 128 Mo. 359, 31 S. W. 6.

In *Connelley v. Pennsylvania R. Co.* 47 L.R.A.(N.S.) 867, 119 C. C. A. 392, 201 Fed. 54, right of recovery for the killing of a trackwalker who, while diligently engaged and about to complete the performance of his usual duties, was so enveloped with steam emitted from an engine on a near-by track that he could not be seen from the engine which caused his death, was denied. While the brakeman on the engine kept a lookout, no bell was rung or whistle sounded, and a light would not have afforded any warning. The court said where the occupation is one of constant peril, "the duty of self-preservation has to rest on them [the employees], for no adequate protection, other than self-protection, can be afforded them."

So, in *Norfolk & W. R. Co. v. Gesswine*, supra, the court, Judge Lurton delivering the opinion, held that, if section men "are hurt while the trains are being managed and operated in the usual and ordinary way,

they can have no just ground of complaint," on the theory of the assumption of the risks incident to all hazardous employments. See also *Bancroft v. Boston & M. R. Co.* 67 N. H. 466, 30 Atl. 409; *Morris v. Boston & M. R. Co.* 184 Mass. 368, 68 N. E. 680, 15 Am. Neg. Rep. 81; *Carlson v. Cincinnati, S. & M. R. Co.* 120 Mich. 481, 79 N. W. 688; *International & G. N. R. Co. v. Hester*, 64 Tex. 401; *Riccio v. New York, N. H. & H. R. Co.* 189 Mass. 358, 75 N. E. 704; *Morehead v. Yazoo & M. Valley R. Co.* 84 Miss. 112, 36 So. 151.

Was decedent guilty of contributory negligence? A moment before the impact of the tender, Easter says, he and Jones were observing the second incoming coal train drawn by engine 503, and which at the time was a short distance from the place of injury, and in front of which they passed onto the main track, when they were hit by the tender of engine 434. They knew train 503 was following them from Page, and that it would reach the yards about the time of its actual approach. They evidently did not stop until 503 passed on track No. 3, for but an instant afterward they were struck by 434, then on the main line. He says they looked and listened for it, but did not see or hear it. But it is proper to infer that they looked and listened casually only; for it is apparent from the testimony of Easter that they simply turned their heads in the direction from which they expected it. But the engine driver on the incoming train saw both Easter and Jones, and the engine which struck them. He saw them and the engine by aid of lights at and near the depot, all of which were then burning as usual, but none of which was observed by Easter, if his statement is to be believed.

Both Jones and Easter carried lanterns furnished by defendant. There was the usual headlight on engine 503. True, they say the night was dark, and that a cut of cars was standing on track No. 2, about 30 feet from them, in the direction from which the engine and tender were approaching. The darkness, however, added additional emphasis to the necessity for the exercise of care on their part. But, as stated, both of them were intently observing the movements of the incoming coal train, on which Easter's brother was employed as a brakeman. Their effort to observe the engine and tender was, judging from the testimony of Easter himself, merely perfunctory.

To use his own language, Easter says, in answer to the question:

You said that when you got approximate-

ly to the main line track you thought you heard a train coming up behind you?

Yes, sir; we heard a train coming up from the west.

You were standing at that time about on the main line track?

No; we were walking along, when we heard this train, crossing the tracks; and we heard the train when we were reaching something near the main line,—we heard the train coming in from the west.

And you were looking down towards the west at that train?

We turned to look at this train coming in from the west. We were walking along. I guess we kinder checked up when we turned to look at this train.

And at the time you were struck you were looking to the west?

Yes, sir.

Weren't you expecting that train in from the west?

Yes; I knew it was following us. Yes, sir.

If, as he says, he and Jones were looking westward at the incoming coal train when struck by the tender coming from the east on the main line, they must then have been either on or in the act of going onto the main line, having passed in front of 503 at the instant of impact with the tender on engine 434. How, then, could it be possible that, with the headlight on 503 and the electric lights near the depot, though the latter may have been, as Easter says they were, 400 feet distant, and with burning lanterns in their hands, Easter and Jones failed to observe the oncoming engine and tender on the main line? It is not readily conceivable, even admitting that the night was densely dark. The fireman on 503 saw them and the engine by means of the depot lights, though much farther from them than were Jones and Easter. But it is argued that a cut of cars standing some 25 or 30 feet distant obstructed the lights. Easter, however, says he saw no lights at the depot or elsewhere. But the fact that he was injured at the same time, to recover for which he has also sued, may have prevented his seeing what others plainly saw. It may be argued, however, to the contrary, that, if by means of these lights opportunity was afforded Easter and Jones to see the engine, the crew in charge of it had the same opportunity of seeing them. But it is clearly shown the engineer and fireman occupied positions on the side opposite that from which Jones and Easter approached the main line, and were not aware of their presence near the track on which the engine was moving towards the roundhouse.

Under these circumstances, is not the inference unavoidable that the accident would not have occurred, had the two men injured been as intent on looking for the engine whose movements they could anticipate, with the custom of yard in mind of which they were fully cognizant, and whose movements they knew would soon bring it on the main line they were about to cross, and which movements did bring it there, as they were observing the movements of train 503? For, as Easter admits, we repeat, at the very instant of the impact they were engaged in looking at the train coming from the west on the third track from the main line, while the engine was on the main line, both of them proceeding in the same direction. Under these circumstances, we think the negligence of Jones obviously precludes recovery, even conceding defendant's duty required the sounding of bell or whistle and the display of a light on the tender, none of which according to the authorities cited, was required.

Conceding the relation between Jones and the railway company at the moment of the injury, to have been that of master and servant, as under the authority of *Kinney v. Baltimore & O. Employees Relief Asso.* 35 W. Va. 385, 15 L.R.A. 142, 14 S. E. 8, it really was, the conclusion necessarily follows, under the repeated decisions of this court, that Jones and those in charge of engine 434 when the collision occurred were fellow servants. If so, then for another reason there was no liability on the company by reason of the absence of the light, if required by the company's rules. For, conceding that the rules prescribed required lights on the tender, and that no light was there, yet if the injury was inflicted by reason of the negligence of a fellow servant, the employee cannot recover therefor, as held in the following cases: *Hoover v. Beach Creek R. Co.* 154 Pa. 362, 26 Atl. 315, where a train crew failed to give proper signals to a train following it, the first train having broken in two, causing a collision; *Jenkins v. Richmond & D. R. Co.* 39 S. C. 507, 39 Am. St. Rep. 750, 18 S. E. 182; *Greenwald v. Marquette, H. & O. R. Co.* 49 Mich. 107, 13 N. W. 517, where fireman omitted to sound the bell or whistle as required; *Jackson v. Norfolk & W. R. Co.* 43 W. Va. 380, 46 L.R.A. 337, 27 S. E. 278, 31 S. E. 258, 1 Am. Neg. Rep. 722, where conductor injured brakeman by his negligence in signaling to back up train; *Niles v. New York C. & H. R. R. Co.* 13 App. Div. 549, 43 N. Y. Supp. 734, where engineer ran his train past a block signal, so that it came into collision with another

standing on the track; *Pittsburgh, C. & St. L. R. Co. v. Henderson*, 37 Ohio St. 549, where trainmen were injured through collision resulting from negligence of employee whose duty required him to flag an approaching train; *Ford v. Lake Shore & M. S. R. Co.* 117 N. Y. 638, 22 N. E. 946, where employees disregarded rules regulating loading of cars; *Byrnes v. New York, L. E. & W. R. Co.* 113 N. Y. 251, 4 L.R.A. 151, 21 N. E. 50, where the injury was caused by the negligence of employees in making inspection of loaded cars as required by the company's rules; *Rutledge v. Missouri P. R. Co.* 123 Mo. 121, 24 S. W. 1053, 27 S. W. 327, where brakeman was injured by a sudden check in movements of the car by a signal given contrary to the custom and use; *Denver & R. G. R. Co. v. Sipes*, 26 Colo. 17, 55 Pac. 1093, 5 Am. Neg. Rep. 305, where the injury was occasioned by the conductor's negligence in failing to observe a rule of the company with respect to closing switches; *Northern P. R. Co. v. Poirier*, 167 U. S. 48, 42 L. ed. 72, 17 Sup. Ct. Rep. 741, 1 Am. Neg. Rep. 751, where collision was caused by the conductor's disregard of rule as to running of train closely behind another; *Davis v. Staten Island Rapid Transit R. Co.* 1 App. Div. 178, 37 N. Y. Supp. 157, where brakeman was injured by a switch left open by the conductor; *Moeller v. Delaware, L. & W. R. Co.* 13 App. Div. 467, 43 N. Y. Supp. 603, 1 Am. Neg. Rep. 503, where car repairer was injured by fellow servant's failure to put out signal flag; *Enright v. Toledo, A. A. & N. M. R. Co.* 93 Mich. 409, 53 N. W. 536, where the engineer disregarded rule requiring freight trains to approach stations under full control; *Peterson v. Chicago & N. W. R. Co.* 67 Mich. 102, 11 Am. St. Rep. 564, 34 N. W. 260, where the signal flag was not placed as required by rules to protect car repairers; *Renfro v. Chicago, R. I. & P. R. Co.* 86 Mo. 302, to same effect; *Whalen v. Michigan C. R. Co.* 114 Mich. 512, 72 N. W. 323, where the injury was caused by the failure to pull automatic cord when brakes were whistled for; *Lundquist v. Duluth Street R. Co.* 65 Minn. 387, 67 N. W. 1006, where warning was not given as prescribed by rules; *Wright v. Southern R. Co.* (C. C.) 80 Fed. 260, where injury was caused by negligence of conductor and engineer in not ringing the bell at crossings and in running at excessive speed; *Healey v. New York, N. H. & H. R. Co.* 20 R. I. 136, 37 Atl. 676, 3 Am. Neg. Rep. 98, where brakeman on one train was injured by a collision resulting from negligence of engineer of another train in running contrary to specific orders; *Moore Lime Co. v. Richardson*, 95

Va. 326, 64 Am. St. Rep. 785, 28 S. E. 334, where member of gang engaged in moving cars on siding was injured by negligent failure of foreman to give warning of approach of car from behind. See also International & G. N. R. Co. v. Hall, 78 Tex. 657, 15 S. W. 108; Rex v. Pullman's Palace Car Co. 2 Marv. (Del.) 337, 43 Atl. 246; Drake v. New York C. & H. R. R. Co. 80 Hun, 490, 30 N. Y. Supp. 671; Tully v. New York & T. S. S. Co. 10 App. Div. 463, 42 N. Y. Supp. 29.

Again, did plaintiff prove any rule prescribing a light as he contends? The only evidence of any such requirement is a diagram of a tender and a light at letter A, with "notes" stating: "The diagrams are intended to illustrate the general location of train signals, not the manner in which they are to be attached. Combination lamps with four illuminated colored faces are represented in diagrams. Engine moving backward by night without cars or at the front of a train pulling cars, white light at A."

Except the testimony of Easter, and of one or two other witnesses examined to the contrary, there is no evidence to show a light was used at the place designated, for yard purposes. Though, as we may assume, Easter was at times engaged as brakeman in the railroad yards, he does not say he placed one there. He contents himself with the statement that he had seen lights on the tender when engaged in shifting and switching cars, while the clear preponderance of evidence shows no such use, and, as stated by the authorities cited, such use is impracticable and the requirement unenforceable under conditions ordinarily obtaining in busy railroad yards. Probably what the witness saw, and all he saw, were lanterns such as he and Jones carried at the time of the accident, in the hands of the brakeman while working in the yards. The conclusion is reasonable that the rule was intended as a protection against injuries to persons using highways, as at public crossings or other places where persons may lawfully and usually be expected to pass or assemble, and not as a matter of protection to employees. But, as we have seen, if the lights were not on the tender, in violation of the rule for which plaintiff contends, the omission was the negligent act of a fellow servant, precluding recovery.

For reasons assigned, we reverse the judgment, sustain the demurrer, and remand for a new trial.

Petition for rehearing denied.
L.R.A.1915C.

WISCONSIN SUPREME COURT.

CLARENCE BERNSTEIN, by Guardian Ad Litem, Appt.,

v.

CITY OF MILWAUKEE, Resp't.

(158 Wis. 576, 149 N. W. 382.)

Municipal corporation — injury on playground — liability.

A municipal corporation is not liable for injury to a child on a playground maintained by it because of the negligence of an attendant in permitting him to use apparatus designed for the use of older children, and which was dangerous for him to use.

(November 17, 1914.)

Note. — Liability of municipal corporations for injuries through unsafe conditions in parks or other public grounds other than streets.

This is a continuation of note to Bisbing v. Asbury Park, 33 L.R.A.(N.S.) 523, which discusses the earlier cases on this question.

In holding the city not liable where a boy, playing on a pond in a public park, broke through the ice and was drowned, the court, in Harper v. Topeka, 92 Kan. 11, 51 L.R.A.(N.S.) 1032, 139 Pac. 1018, states that the maintenance of the park, as described in the petition, is clearly a governmental function. The city as a corporation derives no benefit therefrom; but the park is maintained for the benefit of the public without regard to residence. The park is not a public highway, and unless the pond therein is an attractive nuisance, the city cannot be held liable for the accident upon any principle heretofore recognized by the courts of this state. As described in the petition, and as a matter of common knowledge, the park is not an annoyance to the public, but is a beneficent provision made by the city for open air recreation and diversion. It adds to the happiness and healthfulness of the thousands who avail themselves of its benefit. The pond in the park adds to its beauty, and is accessory to all the beneficent purposes for which the park was established and is maintained. There seems no reason in this case to hold the city liable which would not have been equally cogent had the boy, in going to or from school, gone through a neighbor's pasture with the owner's consent, and met a like fate upon a pond therein. We know of no rule that imposes higher care upon a city than upon an individual. (As to whether a pond is an attractive nuisance, see notes in 19 L.R.A.(N.S.) 1143 and 47 L.R.A.(N.S.) 1101.)

As stated in BERNSTEIN v. MILWAUKEE, negligence in the performance of a governmental function by the officers or agents of a municipality does not give a right of action. The exception to this rule is that a municipality may not maintain a public nuisance, even where it is performing a governmental duty. Neither the BERNSTEIN

A PPEAL by plaintiff from an order of the Circuit Court for Milwaukee County sustaining a demurrer to a complaint filed to recover damages for personal injuries for which defendant was alleged to be responsible. Affirmed.

Statement by Barnes, J.:

The appeal is from an order sustaining a general demurrer to the complaint. The complaint in substance set forth that the city of Milwaukee maintained a playground for children, which was divided into two sections, one being designed for children of the age of twelve years or over, and the other for those under the age of twelve years; that suitable appliances were placed in each of said sections for the use of children of the ages for which they were intended; that a certain appliance placed in the section intended to be used by the older children was a dangerous one when used by children of immature years; that the city placed such playground under the supervision of certain employees, with instruc-

tions that such employees should not permit children of the age of twelve years or under to use the portion of the playground set apart for the older children; that such employees violated their duty in that they permitted and invited the plaintiff, who was only nine years of age, to use the portion of the playground intended for the older children, as well as the appliance alleged to be dangerous when used by children under twelve years of age; that, by reason of the use of such appliance, the plaintiff suffered injury and damage to the extent of \$20,000.

Mr. J. Elmer Lehr, with Messrs. Lehr, Kiefer, & Reitman, for appellant.

Defendant was liable for the injury to the infant plaintiff.

Kuehn v. Wilson, 13 Wis. 105; Dowd v. Chicago, M. & St. P. R. Co. 84 Wis. 105, 20 L.R.A. 527, 36 Am. St. Rep. 917, 54 N. W. 24, 10 Am. Neg. Cas. 485; Warden v. Miller, 112 Wis. 67, 87 N. W. 828; Kelly v. Southern Wisconsin R. Co. 152 Wis. 328, 44 L.R.A. (N.S.) 487, 140 N. W. 60; Web-

nor the Harper Case fell within the exception.

A town, however, which undertakes to let "common land" for the erection of summer cottages thereon, and to construct and maintain the necessary ways to make the property accessible for that purpose, is liable in damages for injuries suffered by one rightfully using the way through its negligence in permitting it to remain in an unsafe condition. Davis v. Rockport, 213 Mass. 279, 43 L.R.A. (N.S.) 1139, 100 N. E. 612. The court in the above case observed that the municipality could either allow the property to remain unused, or it could let the same or any part thereof for profit. If it took the former course, it was answerable only as a municipality in possession of property intended for public use. If it took the latter course, then it became answerable as a private owner.

In Missouri, the same law that requires a municipal corporation to keep its streets free from nuisances, and reasonably safe for those who lawfully use them, also imposes upon it the duty to keep its public parks and other public places in a reasonably safe condition for all who lawfully frequent and use them. Consequently it is held in *Capp v. St. Louis*, 251 Mo. 345, 46 L.R.A. (N.S.) 731, 158 S. W. 616, that a municipal corporation may be found negligent in maintaining in a public park, where many children resort to play, a pond several feet deep, formed in a small stream in which they are in the habit of wading, by water from a storm sewer which the municipality turned into the stream, so as to render it liable for the death of a child drowned while playing there.

The court, in *Capp v. St. Louis*, also states that *Carey v. Kansas City*, 187 Mo. L.R.A. 1915C.

715, 70 L.R.A. 65, 86 S. W. 438, set out in the earlier note, and which holds the city not liable for the drowning of a boy in a reservoir in a public park, clearly holds, and properly so, that the law imposes upon Kansas City the imperative duty of keeping the public parks thereof in a reasonably safe condition for persons using the same for pleasure, amusement, or recreation, and especially for children while engaged in their innocent sports, plays, and recreation.

In *Anadarko v. Swain*, — Okla. —, 142 Pac. 1104, the city maintained a public park in which it had constructed a settling basin or reservoir in connection with its waterworks system, which it maintained for the financial benefit of the city. The city had placed a high wire fence around this basin for the purpose of avoiding injuring the public, but, just prior to the death of the child for which this action was brought, the agents and employees of the city removed a large portion of the fence, and negligently allowed it to remain down for a long period of time, during which time the minor son of the plaintiff went into the park and on the grounds used for waterworks purposes, and was attracted to the reservoir by his curiosity and childish instinct, and was drowned. It was held that the child was upon the premises by express invitation, and the city owed to him the duty of using ordinary care to avoid injuring him while on the premises.

The maintenance of a public park in a populous city, states the court in *Anadarko v. Swain*, supra, is not only an implied but an express invitation to the public to resort to it for amusement and recreation; and where children of tender years and immature minds are invited to play and amuse themselves, the parents have a right to re-

ster v. Corcoran Bros. Co. 156 Wis. 576, 146 N. W. 815; Meinzer v. Racine, 68 Wis. 241, 32 N. W. 139; Durkee v. Kenosha, 59 Wis. 123, 48 Am. Rep. 480, 17 N. W. 677; Bunker v. Hudson, 122 Wis. 43, 99 N. W. 448; Mulcairns v. Janesville, 67 Wis. 24, 29 N. W. 565; Piper v. Madison, 140 Wis. 311, 25 L.R.A.(N.S.) 239, 133 Am. St. Rep. 1078, 122 N. W. 730; Winchell v. Waukesha, 110 Wis. 101, 84 Am. St. Rep. 902, 85 N. W. 668; Weisenberg v. Winneconne, 56 Wis. 667, 14 N. W. 871; Stephani v. Manitowoc, 89 Wis. 467, 62 N. W. 176; Peck v. Baraboo, 141 Wis. 48, 122 N. W. 740; Hill v. Boston, 122 Mass. 344, 23 Am. Rep. 332; Hull v. Roxboro, 142 N. C. 460, 12 L.R.A.(N.S.) 638, 55 S. E. 351; Metz v. Asheville, 150 N. C. 748, 22 L.R.A.(N.S.) 942, 64 S. E. 881; Glase v. Philadelphia, 169 Pa. 488, 32 Atl. 600; Cowley v. Sunderland, 6 Hurlst. & N. 565, 30 L. J. Exch. N. S. 127, 4 L. T. N. S. 720, 9 Week. Rep. 668; Denver v. Spencer, 34 Colo. 270, 2 L.R.A.(N.S.) 147, 114 Am. St. Rep. 158, 82 Pac. 590, 7 Ann. Cas. 1042, 19 Am. Neg. Rep. 94.

ly on the city to exercise reasonable or ordinary care to keep the park and the waterworks system safe for the benefit of those who come there by such express invitation.

The general rule in Pennsylvania is that a municipal corporation having the power, and subject to the duty, to maintain the highways within it, is chargeable with the consequences of the presence of an actual and unlawful obstruction or negligent defect in that portion of a highway within its limits which the general public is invited to travel; at least, as soon as it can be said to have knowledge of the obstruction or defect. The fact that a highway in a municipality is within or passes through an uninclosed public park does not change the rule. Consequently the city was held liable in *Ankenbrand v. Philadelphia*, 52 Pa. Super. Ct. 581, for injury to a pedestrian by falling into a hole in a footway in a public park. The court observed that the park commissioners constitute an agency of the city, through which the city performs a municipal function and discharges a municipal duty, and therefore the city was liable for the neglect to keep the footway in proper repair.

Where a girl about seven years of age was injured while playing on a merry-go-round in a city park, the city was held liable in *Canon City v. Cox*, 55 Colo. 264, 133 Pac. 1040. The court stated that the park was the private and exclusive property of the city. Its exclusive management and control was in the hands of a park commission appointed by its authority. The commissioners were therefore municipal officers, and they were bound to exercise reasonable care to maintain the device in question in a reasonably safe condition. L.R.A.1915C.

Messrs. Daniel W. Hoan and E. L. McIntyre, for respondent:

The function performed by the city in maintaining the playground in question was a governmental function, and it was not liable.

Hayes v. Oshkosh, 33 Wis. 314, 14 Am. Rep. 760; *Manske v. Milwaukee*, 123 Wis. 172, 101 N. W. 377, 17 Am. Neg. Rep. 388; *Higgins v. Superior*, 134 Wis. 264, 13 L.R.A.(N.S.) 994, 114 N. W. 490; *Kelley v. Milwaukee*, 18 Wis. 83; *Schultz v. Milwaukee*, 49 Wis. 254, 35 Am. Rep. 779, 5 N. W. 342; *Liermann v. Milwaukee*, 132 Wis. 628, 13 L.R.A.(N.S.) 253, 113 N. W. 65; *Evans v. Sheboygan*, 153 Wis. 287, 45 L.R.A.(N.S.) 98, 141 N. W. 265; *Bruhne v. La Crosse*, 155 Wis. 485, 50 L.R.A.(N.S.) 1147, 144 N. W. 1100; *Little v. Madison*, 49 Wis. 605, 35 Am. Rep. 793, 6 N. W. 249; *Kempster v. Milwaukee*, 103 Wis. 421, 79 N. W. 411; *Kuehn v. Milwaukee*, 92 Wis. 263, 65 N. W. 1030; *Folk v. Milwaukee*, 108 Wis. 359, 84 N. W. 420, 9 Am. Neg. Rep. 207; *Spellman v. Caledonia*, 117 Wis. 254, 94 N. W. 27; *Dill. Mun. Corp.* § 1660; *Edger-*

Their failure to do so would constitute negligence for which the city is liable if such negligence was the proximate cause of plaintiff's injury. The evidence disclosed that the city knew of the existence of the merry-go-round for about two years previous to plaintiff's injury. The revolving plank by which the child was injured was in a wobbly or shaky condition for a considerable length of time, perhaps a year. The city will be presumed to have what in law is termed constructive notice of a defect for which it may be liable, when it has existed for such a length of time prior to an injury therefrom that its proper officials, by the exercise of ordinary diligence, could have ascertained its existence. It is further stated in this case that the statute requiring notice of the injury to be given to the city within ninety days is complied with by serving a summons and complaint stating the time, place, and cause of the injury, upon the mayor, who delivers them to the clerk within the statutory time.

In *Pennell v. Wilmington*, 7 Penn. (Del.) 229, 78 Atl. 915, the court overruled a demurrer to a declaration in an action against a municipality to recover damages for injuries resulting from defective or dangerous conditions in one of its public parks; the demurrer was based on the ground that the city is not liable in damages for injuries resulting from defective or dangerous conditions in its public parks. The argument of plaintiff, which is set out in the report of the case, contains an elaborate and valuable discussion of the subject.

As to liability of municipality for torts in connection with quarry worked by it, see note to *Radford v. Clark*, 38 L.R.A.(N.S.) 281. Also individual case, *Braunstein v. Louisville*, 42 L.R.A.(N.S.) 538. J. D. C.

ly v. Concord, 59 N. H. 78; Gaetjens v. New York, 132 App. Div. 394, 116 N. Y. Supp. 759; Paterson v. Erie R. Co. 78 N. J. L. 592, 30 L.R.A.(N.S.) 209, 75 Atl. 922; Benton v. City Hospital, 140 Mass. 13, 54 Am. Rep. 436, 1 N. E. 836; Murtaugh v. St. Louis, 44 Mo. 479; Hughes v. Monroe County, 147 N. Y. 49, 39 L.R.A. 33, 41 N. E. 407; Steele v. Boston, 128 Mass. 583; Bisbing v. Asbury Park, 80 N. J. L. 416, 33 L.R.A.(N.S.) 523, 78 Atl. 196; Blair v. Granger, 24 R. I. 17, 51 Atl. 1042; Park Comrs. v. Prinz, 127 Ky. 460, 105 S. W. 948; Clark v. Waltham, 128 Mass. 567; Russell v. Tacoma, 8 Wash. 156, 40 Am. St. Rep. 895, 35 Pac. 605; McGraw v. District of Columbia, 3 App. D. C. 405, 25 L.R.A. 691; Sheehan v. Boston, 171 Mass. 296, 50 N. E. 543, 4 Am. Neg. Rep. 286; Harris v. Salem School Dist. 72 N. H. 424, 57 Atl. 332, 16 Am. Neg. Rep. 119; Ford v. Kendall School Dist. 121 Pa. 543, 1 L.R.A. 607, 15 Atl. 812; Capp v. St. Louis, 251 Mo. 345, 46 L.R.A.(N.S.) 731, 158 S. W. 616; 35 Cyc. 971, 972.

The city cannot be held liable on the ground that it was maintaining a nuisance.

Bruhnke v. LaCrosse, 155 Wis. 485, 50 L.R.A.(N.S.) 1147, 144 N. W. 1100; Folk v. Milwaukee, 108 Wis. 359, 84 N. W. 420, 9 Am. Neg. Rep. 207; Liermann v. Milwaukee, 132 Wis. 628, 13 L.R.A.(N.S.) 253, 113 N. W. 65; Higgins v. Superior, 134 Wis. 264, 13 L.R.A.(N.S.) 994, 114 N. W. 490; Clark v. Waltham, 128 Mass. 567.

The fact that the city is merely authorized, instead of being required, to maintain playgrounds, does not render it liable.

Kuehn v. Milwaukee, 92 Wis. 263, 65 N. W. 1030; Liermann v. Milwaukee, 132 Wis. 628, 13 L.R.A.(N.S.) 253, 113 N. W. 65; Spellman v. Caledonia, 117 Wis. 254, 94 N. W. 27; Clark v. Waltham, 128 Mass. 567.

Barnes, J., delivered the opinion of the court:

It is not alleged in the complaint that the playground was maintained in connection with one of the public schools. Neither is it alleged that the playground was unlawfully maintained. The city of Milwaukee, acting through its school board, might provide for public playgrounds. Section 435el, Stat. 1913. Independent of this statute, the city might, under § 959-17i, maintain public playgrounds. In the absence of any allegation to the contrary, we must assume that the city acted under power conferred on it by law in establishing the playground in question.

Its action in so doing was not one from which, in its corporate capacity, it could derive any special benefit or advantage. On L.R.A.1915C.

the contrary, its action was the result of a duty conferred to conserve and develop the health and strength of future citizens of the state, and thus promote the general welfare of the whole community. Herein lies the distinction between proprietary and governmental functions. Hayes v. Oshkosh, 33 Wis. 314, 318, 14 Am. Rep. 760; Manske v. Milwaukee, 123 Wis. 172, 101 N. W. 377, 17 Am. Neg. Rep. 388; Piper v. Madison, 140 Wis. 311, 314, 25 L.R.A.(N.S.) 239, 133 Am. St. Rep. 1078, 122 N. W. 730.

It has been decided many times in this court that negligence in the performance of a governmental function by the officers or agents of a municipality does not give a right of action. The cases are reviewed in Evans v. Sheboygan, 153 Wis. 287, 45 L.R.A.(N.S.) 98, 141 N. W. 265. See further Bruhnke v. La Crosse, 155 Wis. 485, 50 L.R.A.(N.S.) 1147, 144 N. W. 1100; and Engel v. Milwaukee, 158 Wis. 480, 149 N. W. 141.

The exception to this rule is that a municipality may not maintain a public nuisance, even where it is performing a governmental duty. Hughes v. Fond du Lac, 73 Wis. 380, 41 N. W. 407; Gilluly v. Madison, 63 Wis. 518, 53 Am. Rep. 299, 24 N. W. 137; Schroeder v. Baraboo, 93 Wis. 95, 67 N. W. 27; and Folk v. Milwaukee, 108 Wis. 359, 84 N. W. 420, 9 Am. Neg. Rep. 207. This case does not fall within the exception. The contrivance appears to have been proper enough for children of mature years. The alleged negligence consisted in permitting an immature child to use it. It is not claimed that the city was negligent in installing the appliance or in failing to keep it in a proper state of repair, but in not warning and preventing small children from using it as a plaything.

Order affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

TOWN OF GLENWOOD SPRINGS, Appt.,
v.
GLENWOOD LIGHT & WATER COMPANY.

(121 C. C. A. 88, 202 Fed. 678.)

Water company — franchise — competition by municipality.

1. The exclusion of the grantor in a municipal or quasi municipal grant or contract from the right to compete with the grantee does not inhere in the grant or contract unless such exclusion is clearly stipulated therein, or is necessarily implied therefrom.

Headnotes by SANBORN, Circuit Judge.

A town granted to a water company the right to construct and operate waterworks for a term of years to supply the town and its inhabitants with water for fire, domestic, and other purposes, the right to lay and maintain its pipes in the streets and alleys of the town for this purpose, and the exclusive right to furnish the town with water for public purposes, such as the extinguishment of fires, the flushing of sewers, and the sprinkling of the streets, and the town agreed to pay stipulated prices for the water for public purposes, to protect the company in its use of the streets, in the construction and use of its waterworks, and in the collection of its water rates. The water company accepted this grant, executed the contract, and constructed and operated its waterworks.

Held, the grant and contract did not ex-

clude the town from the right to construct and operate waterworks to supply its inhabitants with water for domestic and other purposes, in competition with the company, and an injunction restraining it from so doing could not be sustained.

Specific performance — breach by complainant — injunction.

2. Courts of equity will not ordinarily compel the specific performance of a contract, either by decree or by an injunction against its violation, at the suit of a party who is guilty of a substantial breach of it.

In a contract for an extension of the foregoing grant and agreement, the town and the company agreed that the town might elect to purchase the waterworks of the company at any time during the extension; that in case of such election each party should appoint two arbitrators, and four

Note. — Right of municipality to establish water plant in competition with company to which it has granted a franchise.

- I. In general, 439.
- II. Question whether municipality exhausts its power by the grant, 439.
- III. Question as to municipality's breach of contract.
 - a. In general, 444.
 - b. Where franchise is not exclusive, 446.
 - c. Where franchise is exclusive, 447.

I. In general.

The question as to the power of a municipality to procure or furnish a water supply, in the absence of express legislative authority, was considered in note in 61 L.R.A. 34.

On power of state to compel municipality to establish water or lighting plant or purchase an existing plant, see note to *Asbury v. Albermarle*, 44 L.R.A. (N.S.) 1189.

The present note is limited strictly to cases regarding waterworks, and does not include cases that involve lighting plants or other public utilities. It does not include the right of a city to grant a franchise or make a contract that will enable the grantee to compete with a former grantee.

II. Question whether municipality exhausts its power by the grant.

If, by granting a franchise or making a contract for a full supply of water for itself and its inhabitants, a municipality exhausts its whole power to furnish or provide a water supply, clearly it cannot thereafter, during the life of the grant or contract, make further provision for supplying itself and its inhabitants with water by constructing waterworks of its own. In such case the decisions do not turn upon the question as to whether or not the grant or contract is exclusive, but rather upon the question, Was the franchise intended to, and does it, bind the grantee to furnish all the water needed by the grantor and its in-

habitants, so that there will be no necessity for the grantor to make any further provision for the supply of water? If so, the municipality has exhausted all its power to furnish or provide water, and, of course, cannot construct waterworks during the life of the franchise, even though the franchise or contract is not an exclusive one. But if the contract falls short of being an exercise of the city's full power to furnish or provide water, of course, the city may exercise its power by constructing works of its own.

The only jurisdiction in which the doctrine that the power is exhausted by the grant has been adopted, so far at least as the reported decisions reveal, is that of Pennsylvania. The court of last resort of that state, after practically overruling two of its earlier decisions, has, through a long line of decisions, at last succeeded in making clear the fact that the doctrine as here outlined is there adopted in every detail. That court believes that the wording of the statutes of 1874 compels the adoption of this doctrine. It would probably experience some difficulty should it ever undertake to point out the exact particulars in which those statutes differ essentially from those which other courts have construed otherwise. But the construction adopted by the Pennsylvania court is such that no Federal question is involved, and if a case should, by reason of diverse citizenship of the parties, find its way into the Federal courts, those courts would probably feel bound to follow the construction of the state courts, so, unless the legislature should sometime interpose, that doctrine will probably continue to prevail within that state.

In *Lehigh Water Co.'s Appeal*, 102 Pa. 515, it appeared that a municipality, under an enabling act passed in 1867, commenced the construction of waterworks to supply it and its inhabitants with water; that a corporation organized for the same purpose, which owned a plant and was supplying the municipality and its inhabitants with water, had at the time accepted the provisions of a statute enacted in 1874, which

should, if they agreed, fix the reasonable value of the waterworks, which should be the price to be paid therefor by the town; and that, if the arbitrators failed to agree, they should appoint an umpire, whose award of the value of the waterworks should be final. The town elected to purchase, appointed two arbitrators, and requested the company to appoint two, and to proceed to fix the valuation. The company failed to appoint arbitrators or to take any action for eleven months. Thereupon the town repealed the resolution signifying its election, and was about to issue bonds to purchase the waterworks at a price it specified, and, if the company failed to accept that price, to construct waterworks of its own, when the company filed its bill and applied for an injunction.

Held, these facts present no equity en-

titling the company to an injunction against the purchase of the waterworks by negotiation, or other lawful means *dehors* the contract, or against the construction or operation of waterworks by the town.

(December 18, 1912.)

A PPEAL by defendant from a decree of the Circuit Court of the United States for the District of Colorado in complainant's favor in a suit to enjoin defendant from incurring indebtedness or issuing bonds to raise money for the construction of waterworks, and from acquiring any part of the complainant's water system except by paying a reasonable value for the same. Reversed.

The facts are stated in the opinion.

provided that "the right to have and enjoy the franchises and privileges of such incorporation within the district or locality covered by its charter shall be an exclusive one; and no other company shall be incorporated for that purpose until the said corporation shall have from its earnings realized and divided among its stockholders, during five years, a dividend equal to 8 per centum per annum upon its capital stock: Provided, That the said corporations shall at all times furnish pure gas and water: and any citizen using the same may make complaint of impurity or deficiency in quantity, or both, to the court of common pleas of the proper county, by bill filed, and, after hearing the parties touching the same, the said court shall have power to make such order in the premises as may seem just and equitable, and may dismiss the complaints or compel the corporation to correct the evil complained of." The water company sought a perpetual injunction restraining the construction of the municipality's plant on the grounds, (1) That, under the act of 1874, the water company's right is exclusive. It was held that its right was exclusive only as against other corporations or individuals, and not as against the municipality, under the enabling act of 1867. (2) That to enforce the act of 1867 would be a violation of clause in the United States Constitution forbidding states to impair the obligation of contracts. The court held that this position was untenable, and the decision was affirmed in 121 U. S. 388, 30 L. ed. 1059, 7 Sup. Ct. Rep. 916, on the ground that the statute of 1874, constituting the contract, was passed after the one by which the contract was supposed to have been impaired. The ground of the decision on this point in the state court, however, was that the granting of a franchise by the state, not expressly made exclusive, does not preclude the municipality from competing with the grantee. The court, per Mr. Justice Paxson, said: "While the language from the act of 1874, above quoted, would seem to favor the exclusive right claimed by the water company, a careful examination of clause 3 of L.R.A.1915C.

§ 34 shows that the legislature intended that the right should be exclusive only as against other water companies, for immediately in this connection occur the words: 'And no other company shall be incorporated for that purpose until the said corporation shall have from its earnings realized and divided among its stockholders, during five years, a dividend equal to 8 per centum per annum upon its capital stock.' The provision that another company shall not be incorporated was not intended to prohibit a city or borough from providing its citizens with pure water by means of works constructed by itself from money in its own treasury. Aside from this, the water company claims this exclusive right by reason of the act of 1874, while the right of the borough to construct the works was conferred by the prior act of 1867, and there is no pretense that the one act repeals the other." Here, it will be seen, there was no grant of a franchise by the city, and no contract made by it, but the franchise had been granted directly by the state, and the question as to the exclusiveness of the franchise was material only for the purpose of determining whether or not the state had made such a contract with the corporation as would preclude it from making a similar contract with the city. For a case where it was held that the state had made such a contract, see *Gas & Water Co. v. Downingtown*, 175 Pa. 341, 34 Atl. 799, *infra*. But the decisions where the franchise was granted or the contract was made by the city, the only ones really within the scope of this note, do not turn upon the exclusive feature of the statute. See *Pennsylvania Water Co. v. Pittsburgh*, 226 Pa. 624, 75 Atl. 945, *infra*.

The words of the court in *Lehigh Water Co.'s Appeal*, quoted *supra*, were quoted with approval in *Freeport Waterworks Co. v. Prager*, 129 Pa. 605, 18 Atl. 560, and here the court added: "A grant of exclusive privileges is not favored by the law, and must be construed strictly. It should not be carried by construction beyond the plain language of the grant. In the act of 1874 the exclusive character of the grant

Argued before Sanborn and Carland, Circuit Judges, and William H. Munger, District Judge.

Mr. John A. Rush for appellant.

Messrs. C. S. Thomas, W. H. Bryant, George L. Nye, and W. P. Malburn, for appellee:

The company has a contract with the town, which precludes the town from constructing a waterworks system to supply itself or its inhabitants with water, and its attempt to compete constitutes an impairment of its obligation in that contract.

Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; *Vicksburg v. Vicksburg Waterworks Co.* 202 U. S. 453, 50 L. ed. 1102, 26 Sup. Ct. Rep. 660, 6 Ann. Cas. 253.

is qualified and limited by the clause above quoted, by which the formation of other water companies is prohibited until the company first in the field shall have realized an 8 per cent dividend for five years; and the prohibition of other water companies negatives the idea that it was intended to apply to other than those companies." This case, however, is not within the scope of the present note, as the right of the city to compete was not the question before the court.

In *Howard's Appeal*, 162 Pa. 374, 29 Atl. 641, which also ruled *Fingal v. Millvale*, 162 Pa. 393, 29 Atl. 644, the court, while admitting that there had been a most shameful misuse of the city's power, held that it could construct its own waterworks and enter into competition with a company to which it had previously granted a franchise to furnish water to it and its inhabitants, even though the effect was to render the company's property worthless. The court said: "In the very important contract which was made between it and the water company, there was no restriction placed upon its right to erect waterworks in the future. That is a right given to all such bodies by law, and they may exercise it no matter at what cost to private companies, whose franchises are held subject to such right. This subject was fully considered by this court in the case of *Lehigh Water Co.'s Appeal*, 102 Pa. 515, where we held that the right of a borough to erect waterworks was entirely independent of the right of private corporations to erect similar works, and that it was a matter of no consequence that such erection injured private franchises of the same character." It should be here noted that the borough of Millvale, the defendant in *Fingal v. Millvale*, was, after the principle upon which this case was decided had been overruled in *White v. Meadville*, *infra*, sued for damages caused by its taking the company's patronage, and the court in *Bennett Water Co. v. Millvale*, 200 Pa. 613, 50 Atl. 155, permitted a recovery. The court said: "The *Bennett Water Company* was not a party to the proceedings in *Fin-* L.R.A.1915C.

The town elected to purchase the property and plant of the company at "reasonable" or "actual cash value," and may not now repudiate its contract.

Denver v. New York Trust Co. 110 C. C. A. 24, 187 Fed. 890; *Castle Creek Water Co. v. Aspen*, 76 C. C. A. 516, 146 Fed. 8, 8 Ann. Cas. 680.

Mr. C. W. Darrow also for appellee.

Sanborn, Circuit Judge, delivered the opinion of the court:

The decree which is challenged by this appeal enjoins the town of Glenwood Springs from incurring indebtedness, or issuing bonds to raise money, to construct waterworks to supply its inhabitants with water, and from seeking to acquire or ac-

gal *v. Millvale*, *supra*, and our decree there was simply one affirming the decree below, refusing a preliminary injunction. With no final decree in that case, which is still pending, and to which the appellee is not even a party, the borough of Millvale cannot turn to it as conclusive of its right to commit the wrongs complained of by the water company, and it can hardly say with candor that it expended any money or did anything in consequence of what may have been said in *Howard's Appeal*, *supra*, argued with the preceding case; for its works were erected in 1893, and these cases were not argued until March 9, 1894, and decided only on July 11 of the same year. There is therefore no reasons why what is now settled in *White v. Meadville*, 177 Pa. 643, 34 L.R.A. 567, 35 Atl. 693, should not apply to the case before us."

But the decisions above cited were, so far as their practical usefulness in Pennsylvania is concerned, overruled in *White v. Meadville*, *supra*. Here the whole act of 1874, part of which is quoted, *supra*, in *Lehigh Water Co.'s Appeal*, was considered in connection with another act passed at the same session of the legislature, and for that reason held to be *in pari materia* therewith. By a construction of the whole body of legislation enacted at that session, it was held that it was the intent of the legislature to grant to the city the right and power to provide for a supply of water for it and its inhabitants either by granting a franchise or by constructing waterworks of its own, but that these powers must be exercised in the alternative, and not concurrently. Hence, when it had granted the franchise, and thereby exhausted its power, and the grantee was fulfilling his part of the agreement, it had no power to choose to exercise the other alternative, except in the manner provided by the statute, which was by legal acquisition of the grantee's property and rights, after twenty years. With regard to its former decisions the court said: "The two cases cited by the referee as sustaining his decision, *Lehigh Water Co.'s Appeal* and *Howard's Appeal*, *supra*, are in apparent con-

quiring any part of the water system of the Glenwood Light & Water Company, except by paying a reasonable value for its waterworks system, fixed by arbitrators in the way prescribed in the contract evidenced by an ordinance of the board of trustees of the town passed on February 14, 1905. The controlling question in the case is: May the town lawfully build and operate a waterworks system in competition with that of the company? The court below answered this question in the negative, and in effect enjoined the town from so doing. Counsel for the company contend that this conclusion was correct, and that this result was just and equitable, because, although the town had not granted to the company

an exclusive franchise to furnish itself and its inhabitants with water, it had, by its contracts with the company, precluded itself from entering into competition with the company in that business, and because it had contracted with the company to purchase its waterworks at a reasonable valuation to be fixed by appraisers.

The company owns and operates a system of waterworks in the town under a contract evidenced by ordinance No. 87 of September 28, 1887, whereby, until September 27, 1907, the right was granted by the town to the predecessors in interest of the company, who accepted the ordinance, to construct, maintain, and operate waterworks and to lay its pipes in the streets and ave-

nue with this judgment; and the language of the court, to some extent, in both cases, would lead to a different conclusion from the one to which we have come. The first case, on its facts, however, is not the same as this. By a supplement to the act incorporating the borough of Easton, March 12, 1867, the town council was authorized to construct and provide waterworks, and elect water commissioners; then, by another supplement, April 15, of the same year, the borough was authorized to construct or purchase waterworks. In this case the municipality had by these special acts, with the consent of the majority of voters, the authority to erect its own waterworks; and this special legislation constituted part of its corporate power, antedating the present Constitution and the acts of 1874; by the schedule to the Constitution it is declared: 'All laws in force in this commonwealth at the time of the adoption of this Constitution, not inconsistent therewith, and all rights, actions, prosecutions, and contracts, shall continue as if this Constitution had not been adopted.' It was held that the authority conferred by the special acts of 1867 was not taken away by the act of 1874, giving the exclusive right to the water company. When it is noticed the controversy turned on the repeal or nonrepeal of the special acts, and whether the borough had, by inaction under the special law, lost its right to construct municipal waterworks, the distinction between that case and the one before us is obvious. Without adverting to what was said by Justice Paxson in delivering the opinion, and considering only what was decided, there is no conflict between that case and this. In Howard's Appeal, supra, it was assumed by all parties in the court below, and by the learned judge of that court, that the authority of the municipality to violate its contract existed. On the appeal the point pressed in this case was scarcely touched upon in the argument. With the greatest reluctance on the part of every member of this court, the decree of the court below was affirmed; that reluctance is expressed in no doubtful language by our Brother Green, who delivered the opinion; in fact, it was assumed L.R.A.1915C.

by all counsel and both courts that Lehigh Water Co.'s Appeal, supra, was decisive of the contention on that point, and the case went against the water company on other grounds. It was a mistake. We now are glad of the opportunity for correction, especially so because the example of Millvale borough seems to have misled other municipal corporations to adopt the same course of action. Luzerne Water Co. v. Toby Creek Water Co. 148 Pa. 568, 24 Atl. 117, also cited by defendants, was a controversy between two rival companies, and the power of the municipality did not come in question."

The rule established by *White v. Meadville*, supra, has been followed in *Metzger v. Beaver Falls*, 178 Pa. 1, 35 Atl. 1134; *Wilson v. Rochester*, 180 Pa. 509, 38 Atl. 136; *Welsh v. Beaver Falls*, 186 Pa. 578, 40 Atl. 784 (in this case an attempt was made by the city to acquire indirectly a system of waterworks by means of a contract, and thus accomplish what the court, in *Metzger v. Beaver Falls*, supra, had enjoined); *Tyrone Gas & Water Co. v. Tyrone*, 195 Pa. 566, 46 Atl. 134; *Troy Water Co. v. Troy*, 200 Pa. 453, 50 Atl. 259; *Nelson v. Warren*, 200 Pa. 504, 50 Atl. 250; *Bennett Water Co. v. Millvale*, 200 Pa. 613, 50 Atl. 155, affirmed on rehearing in 202 Pa. 616, 51 Atl. 1098 (this was an action in trespass for damages caused by the city's constructing waterworks and taking the company's patronage; see same case, in connection with *Fingal v. Millvale*, 162 Pa. 393, 29 Atl. 644); *Pennsylvania Water Co. v. Pittsburg*, 226 Pa. 624, 75 Atl. 945, ruling *Mellon v. Pittsburg*, 227 Pa. 7, 75 Atl. 956.

And this construction of the statute is applicable where the position of the parties is reversed. That is, where the municipality has exhausted its statutory power of providing water, by erecting its own works, either directly or by means of a corporation in which it is a stockholder, it cannot legally grant a franchise to a corporation that will compete with it. *Carlisle Gas & Water Co. v. Carlisle Water Co.* 182 Pa. 17, 37 Atl. 821, approved in a case between the same parties in 188 Pa. 51, 41 Atl. 321.

The fact that the water company has

nues of the town, and under an ordinance adopted February 14, 1905, and accepted by the company, whereby the town extended until September 27, 1927, all the rights and privileges granted by the ordinance of September 28, 1887, and the company gave to the town the right to purchase its waterworks at any time during this extension at a reasonable valuation to be fixed by arbitrators. The facts upon which counsel for the company base their claim that the city is precluded from constructing and operating a system of waterworks to supply its inhabitants with water in competition with the system of the company are these: The contract of 1887 contained a grant by the city of a legal franchise to furnish water

in the town for all purposes, for the purpose of supplying the town of Glenwood Springs and its inhabitants with water for fire, domestic, and other purposes; a grant of the right to lay its mains and pipes in the streets and alleys of the town; a grant of an exclusive right to furnish the town with water from fire hydrants for fire purposes, flushing sewers, and supplying water for sprinkling streets from sprinkling carts; an agreement that the town would not take water from hydrants or water for any public purpose furnished by any person or persons other than the grantees of the franchise; an agreement by the town to pay the grantees specified prices for the use of a certain number of fire

not fulfilled its contractual obligations does not, under the statute, enable the city to proceed to construct waterworks of its own, and ignore the contract, as the statute gives to the city a remedy in such case by providing that the city may petition the court that is given jurisdiction to correct the wrongs. *Troy Water Co. v. Troy*, 200 Pa. 453, 50 Atl. 259. The fact that the supply of water was inadequate was here held to be no defense in this form of action, i. e., a bill in equity to enjoin the city from constructing its own works.

By the act of June 2, 1887, P. L. 310, the clause containing the exclusive feature of the act of 1874 was repealed. (See clause quoted in *Lehigh Water Co.'s Appeal*, 102 Pa. 515.) But in *Pennsylvania Water Co. v. Pittsburg*, 226 Pa. 624, 75 Atl. 945, ruling *Mellon v. Pittsburg*, supra, it was distinctly held that this repeal does not change the rule as established by *White v. Meadville*, 177 Pa. 643, 34 L.R.A. 567, 35 Atl. 693. Even though the company was incorporated after the repeal, the principle of the *Meadville Case* is applicable, for the doctrine does not depend upon the question whether or not the franchise is exclusive, but upon the fact that the city, having made a contract for the full supply of water needed, has exhausted all the power that the legislature has seen fit to confer upon it.

In *Boyertown Water Co. v. Boyertown*, 200 Pa. 394, 50 Atl. 189, the repeal of the clause making a franchise granted under the act of 1874, exclusive, was given by the lower court as one of the reasons why the city was not precluded from entering into competition with the corporation. While the supreme court affirmed the decision on the opinion of the lower court, apparently affirming the opinion in its entirety, it mentioned the fact that there were no contractual relations between the city and the company such as would preclude the city, and said nothing about the repeal of the clause. But see *Pennsylvania Water Co. v. Pittsburg*, supra.

In *Gas & Water Co. v. Downingtown*, 175 Pa. 341, 34 Atl. 799, it was held that the legislature had power to grant an exclusive L.R.A.1915C.

franchise to a corporation to construct waterworks and supply a municipality of the state and its inhabitants with water, and that such franchise, when accepted and acted upon by the grantee, was exclusive as against the municipality itself, so that it could be enjoined from constructing waterworks for itself under a provision in its charter enabling it to do so, since this charter provision, which was prior in date to the grant of the franchise, and had never been used, was by implication repealed by the grant of the franchise. It was further held that the exclusive feature of the franchise was not affected by the grantee's accepting the provisions of the new Constitution under which special grants are forbidden. Here, of course, the municipality had not granted a franchise, but the state had done so for it.

But where there were no contractual relations, express or implied, between a corporation and the municipality, it was held in *Centre Hall Water Co. v. Centre Hall*, 186 Pa. 74, 40 Atl. 153, that the borough was not precluded from erecting its own waterworks and competing with the corporation, by the fact that the latter had constructed waterworks before the incorporation of the borough, had laid its pipes in the streets, and was continuing to supply the inhabitants with water. This case was cited and followed in *Boyertown Water Co. v. Boyertown*, 200 Pa. 394, 50 Atl. 189, where the borough had contracted with the corporation for the supply of some water, but not for a full supply, and the company was not bound to furnish a full supply. It was also followed in *Dorrance v. Bristol*, 224 Pa. 464, 73 Atl. 1015.

And where the corporation completed its plant, placed its pipes in the street, was furnishing water to the inhabitants without any contract with the city, the fact that the city later contracted with it for a supply of water for fire protection for a limited period, and still later extended the agreement to include the right of the company to furnish water to the inhabitants at a limited rate, the company, not having expended any money because of the contracts, will not preclude the city from con-

hydrants, and to protect by proper ordinances the grantees in their use of the streets, alleys, and public places of the town in the construction and use of their buildings, mains, pipes, and waterworks, and in the collection of their water rates.

The argument is that, by virtue of the provisions of the contract of 1887, which have been recited, and which by the extension agreement of 1905 remain in force until 1927, the city cannot, without the impairment of the obligation of its agreement, construct and operate waterworks of its own, and thereby compete with the company; that its competition would be more effective than that of private parties, and might be destructive; and that, as it has the power of taxation, it may compel the

company to contribute toward the expense of the construction and operation of a town plant that might destroy its property. When, however, all is said and considered, the real question is, What is the contract between these parties? If the contract is that during its continuance the town will not construct and operate a system of waterworks in competition with that of the company, then the construction and operation of such a system would work an impairment of the obligation of its agreement. If, on the other hand, the contract is limited to a grant of the franchise to construct and operate a system of waterworks to supply the town and its inhabitants with water, to a grant of the use of the streets and alleys for this purpose, and to an ex-

structing waterworks of its own, and entering into competition with the company. *Tarentum Water Co. v. Tarentum*, 230 Pa. 148, 79 Atl. 402.

In order to preclude the city from constructing its own waterworks, its contract with the corporation must be such as can be reasonably held to have exhausted its power to supply water to its inhabitants; hence, a contract with the company to supply the municipality with water for fire protection does not have that effect, and an implied contract cannot arise out of the fact that the company, at the request of the city, extended its lines so as to supply more inhabitants than it was previously supplying, without any contract with the city that would bind the company to furnish all the water that should be needed. *Bethlehem City Water Co. v. Bethlehem*, 231 Pa. 454, 80 Atl. 984.

But, as observed *supra*, the doctrine that the municipality exhausts its powers to provide or furnish water, by the grant of a franchise for that purpose, is not adopted by any other than Pennsylvania courts. It has been rejected in analogous cases not within the scope of the present note. See note in 61 L.R.A. 38. Since the question as to the exclusiveness of the franchise does not arise if the municipality exhausts its power by the grant, all the cases cited under III. *infra*, are in a negative way opposed to the doctrine, and three of them expressly repudiate it. The doctrine was expressly repudiated in *Thomas v. Grand Junction*, 13 Colo. App. 80, 56 Pac. 665 (the Pennsylvania cases were referred to and distinguished); *North Springs Water Co. v. Tacoma*, 21 Wash. 517, 47 L.R.A. 214, 58 Pac. 773 (in this case the court distinguished the case from those of Pennsylvania, and entered into a lengthy discussion of the question, citing many analogous cases involving franchises for other utilities than waterworks); *Colby University v. Canandaigua*, 98 Fed. 449, where the court said: "The case of *White v. Meadville*, 177 Pa. 643, 34 L.R.A. 567, 35 Atl. 695, arose under the laws of Pennsylvania, which differ in several important particulars from the L.R.A.1915C.

laws of New York here in controversy. The court does not, however, seek to disguise the fact that the reasoning of that decision is in conformity with the complainants' contention. Indeed, it may as well be conceded that, were this controversy before the Pennsylvania court, consistency would require a decree for the relief demanded in the bill. The *Meadville* decision states the argument for the water company as succinctly as possible, and points out the injustice of permitting the sovereign authority, which gives life to the corporation, to destroy its property by indirection. Were the question an open one, this view would have great weight, though modified somewhat by a contemplation of the inequitable results which might ensue were the Pennsylvania doctrine pushed to its logical conclusion. Might it not follow that instances will be more numerous than at present where a community is held in the grasp of a selfish and unyielding monopoly which condescends, for an exorbitant reward, to deal out liquid filth in parsimonious doses to the parched but helpless inhabitants? Admitting that the *Meadville* decision cannot be reconciled with the decisions of the courts of New York, it is clearly the duty of this court to follow the latter."

III. Question as to municipality's breach of contract.

a. In general.

All the decisions except those of the Pennsylvania courts have turned upon the question as to whether or not the franchise granted by the city was an exclusive one. This question, however, cannot arise until the court has decided or assumed that the city did not, by granting a franchise to or making a contract with someone to furnish it and its inhabitants with water, exhaust its power to provide or furnish water. If it did exhaust its power by the grant, clearly it cannot thereafter, during the term of the grant, construct waterworks of its own, or in any other way furnish or provide

clusive right to furnish to the town at fixed rates all the water it shall use during the life of the contract for public purposes, such as the extinguishment of fires, the flushing of sewers, and the sprinkling of the streets, the construction and operation of waterworks by the town to supply its inhabitants with water would be neither a violation of its agreement nor an impairment of the obligation thereof. Counsel for the company concede that the contract is not exclusive; that notwithstanding its provisions the town may lawfully grant to third persons the right to build and operate waterworks to supply the inhabitants with water in competition with the system of the company. In the absence of an express and clear stipulation to that effect, and the con-

tract contains none, it is difficult to conceive that the parties to this agreement intended to exclude the town when they did not exclude others. They inserted in the agreement a plain provision that the town would take and pay for water from the hydrants of the grantees, and that it would not take water for public purposes from any other party. But they inserted no stipulation that the town would not construct and operate a system of waterworks to supply its inhabitants with water in competition with the system of the grantees, and the logical inference is that they intended to make no such agreement.

The exclusion of the grantor from the right to compete with the grantee does not inhere in a quasi municipal grant or con-

water, whether the grant was or was not exclusive. See II. *supra*. But when the court has decided or assumed that the grant did not exhaust the city's power, then the decision must turn upon the question as to whether or not the city's action, in constructing waterworks, is a breach of its contract, and the answer depends upon whether or not the contract or franchise was exclusive. Since the city acts under the power of the state, its alleged breach of contract raises a Federal question under the contract clause of the Federal Constitution. In many of the cases here cited the general question as to the exhaustion of the city's power was not raised, but they are inconsistent with the theory that the city had exhausted its power by the grant.

b. Where franchise is not exclusive.

On the general question as to what constitutes an exclusive franchise to a water company to furnish water to a municipality, see note in 61 L.R.A. 82. In this connection, however, it should be observed that a franchise may be made exclusive by the use of the term "exclusive" (see *Vicksburg v. Vicksburg Water Co.* and other cases as cited under III. c. *infra*), or the same result, so far as the question here considered is concerned, may be effected by expressly providing in the franchise or contract that the municipality will or shall not compete with the grantee of the franchise during the life of the grant (see *Walla Walla v. Walla Walla Water Co.* as cited, under III. c. *infra*). But if the term "exclusive" is not used, nothing short of an express provision such as was involved in the *Walla Walla Case* will have the effect of making it exclusive, even a provision that the city will not grant a franchise to another for the same purpose not being sufficient to have that effect. See *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 50 L. ed. 353, 28 Sup. Ct. Rep. 224, as cited, *infra*.

Unless the water company's franchise is made exclusive by express words in the statute under which it was granted, in the ordi-

nance granting it, or in some supplemental contract, the city is not precluded from subsequently establishing waterworks of its own, and from entering into fair competition with the company, although its action may result in the destruction of the value of the company's franchise. *Bienville Water Supply Co. v. Mobile*, 175 U. S. 109, 44 L. ed. 92, 20 Sup. Ct. Rep. 40; *Bienville Water Supply Co. v. Mobile*, 186 U. S. 212, 46 L. ed. 1132, 22 Sup. Ct. Rep. 820; *Helena Waterworks Co. v. Helena*, 195 U. S. 383, 49 L. ed. 245, 25 Sup. Ct. Rep. 40, affirming 55 C. C. A. 381, 122 Fed. 1; *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 50 L. ed. 353, 28 Sup. Ct. Rep. 224; *Meridian v. Farmers' Loan & T. Co.* 74 C. C. A. 221, 143 Fed. 67, 6 Ann. Cas. 599; *Westerly Waterworks Co. v. Westerly*, 80 Fed. 611; *Colby University v. Canandaigua*, 96 Fed. 449; *Little Falls Electric & Water Co. v. Little Falls*, 102 Fed. 663 (the holding in this case appears to be limited to the right of the city to furnish itself with water in addition to what it had contracted with the company to supply, and the city did not propose to furnish water to its inhabitants); *Tillamook Water Co. v. Tillamook*, 80 C. C. A. 71, 150 Fed. 117, affirming 139 Fed. 405; *Washington-Oregon Corp. v. Chehalis*, 202 Fed. 591; **GLENWOOD SPRINGS v. GLENWOOD LIGHT & WATER CO.**; *Mobile v. Bienville Water Supply Co.* 130 Ala. 379, 30 So. 445 (this holding was merely incidental to the holding that the city could not discriminate in its charges to consumers in such a way as to obtain an unfair advantage in competition with the company); *Phoenix Water Co. v. Phoenix*, 9 Ariz. 430, 84 Pac. 1095, appeal dismissed with costs, per stipulation in 204 U. S. 675, 51 L. ed. 674, 27 Sup. Ct. Rep. 786; *Thomas v. Grand Junction*, 13 Colo. App. 80, 58 Pac. 665; *Syracuse Water Co. v. Syracuse*, 116 N. Y. 167, 5 L.R.A. 546, 22 N. E. 381; *Skaneateles Waterworks Co. v. Skaneateles*, 161 N. Y. 154, 46 L.R.A. 687, 55 N. E. 562, affirmed in 184 U. S. 354, 46 L. ed. 585, 22 Sup. Ct. Rep. 400 (the state court in this case also held that the city would not be permitted to enforce any stat-

tract, unless it is clearly stipulated therein or necessarily implied therefrom, and in this grant it is neither, and the town is not precluded thereby from constructing and operating a system of waterworks in competition with the company for the purpose of supplying its inhabitants with water. *Joplin v. Southwest Missouri Light Co.* 191 U. S. 150, 156, 158, 48 L. ed. 127, 129, 130, 24 Sup. Ct. Rep. 43; *Bienville Water Supply Co. v. Mobile*, 175 U. S. 109, 112, 114, 44 L. ed. 92, 94, 20 Sup. Ct. Rep. 40; *Id.*, 186 U. S. 212, 40 L. ed. 1132, 22 Sup. Ct. Rep. 820; *Skaneateles Waterworks Co. v. Skaneateles*, 184 U. S. 354, 363, 46 L. ed. 585, 590, 22 Sup. Ct. Rep. 400; *Meridian v. Farmers' Loan & T. Co.* 74 C. A. 221, 143 Fed. 67, 69, 71, 6 Ann. Cas.

utes that would give it an unfair advantage over its competitor); *Canandaigua Waterworks Co. v. Canandaigua*, 90 Hun, 605, 35 N. Y. Supp. 1104, affirmed in 149 N. Y. 619, 44 N. E. 1121, on the ground that the order was not reviewable in the court of appeals (by a statement of the court in 96 Fed. 450, it appears that this case involved a complaint for an injunction *pendente lite*, restraining the city from constructing waterworks, and that the original opinion dismissing the complaint was elaborate, but unreported. The decree was affirmed as here indicated, but without opinion by either the appellate division or the court of appeals); *Smith v. Westerly*, 19 R. I. 437, 35 Atl. 526 (the ordinance in this case purported to grant an exclusive franchise, but the enabling statute did not give the city power to grant such franchise); *North Springs Water Co. v. Tacoma*, 21 Wash. 517, 47 L.R.A. 214, 58 Pac. 773.

And where the franchise is not exclusive, the city is not liable in damages to the grantee, where, under legislative authority enacted after grantee's waterworks had been in operation for some time, the city appropriated the waters of the lake from which the grantee had been and was obtaining his supply, thereby rendering it impossible for him to fulfil his contract with the city. *Stolz v. Syracuse*, 59 Misc. 600, 111 N. Y. Supp. 467, affirmed without opinion in 134 App. Div. 993, 119 N. Y. Supp. 1146.

A contract which merely bound the company to maintain a certain number of fire hydrants, for which the city agreed to pay a specified rental for a term of years, and fixed a maximum price beyond which the company agreed it would not charge for water furnished for domestic use during the term, will not preclude the city from erecting waterworks during the term, and competing with the water company. *Bienville Water Supply Co. v. Mobile*, 95 Fed. 539, affirmed in 175 U. S. 109, 44 L. ed. 92, 20 Sup. Ct. Rep. 40.

A contract in which it is expressly stipulated that the city shall not during the term grant a like franchise, or contract with any other person or corporation so as L.R.A.1915C.

599; *Thomas v. Grand Junction*, 13 Colo. App. 80, 56 Pac. 665.

Is the town precluded from constructing and operating waterworks because it has made a contract to purchase the system of waterworks of the company? The extension agreement of February 14, 1905, contained this stipulation: "The town shall have the right to purchase the waterworks of the company at any time during the term of the extension or renewal herein provided for, and at a valuation to be fixed by four arbitrators, two to be selected by the owners of said waterworks and two by the authorities of said town; but, should they fail to agree, such arbitrators to select an umpire whose decision shall be final as to the value of such waterworks, such value to

to bring in competition, is not an exclusion of the city itself, so that it is not precluded from establishing waterworks of its own without first taking over those of the company. *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 50 L. ed. 353, 26 Sup. Ct. Rep. 224.

A franchise wherein the city agreed "that this ordinance, and franchises and rights contained and granted thereby, . . . shall continue in full force for a period of thirty years, . . . during which time the city . . . agrees not to contract with any other person or persons, corporation or corporations, for a supply of water," was held in *Washington-Oregon Corp. v. Chehalis*, 202 Fed. 591, to be not exclusive of the city's right to enter into competition with the grantee in furnishing water to the city and its inhabitants, so that it retained the right to construct its own waterworks during the term for that purpose.

A city ordinance granting a franchise to construct and maintain waterworks therein, expressly stating that when accepted it should constitute a contract, and should be the measure of the rights and liabilities of the parties, obligating the acceptor to construct waterworks according to plans furnished by the city, and to maintain the same for a stated period of time with a capacity sufficient to supply all the needs of the city and its inhabitants, binding the city to take and pay for water during the full period, and giving the city the right at stated periods within the term to purchase the works upon specified terms, is not, when accepted and acted upon for a number of years, a contract that precludes the city from erecting other waterworks of its own during the term, and competing with the grantee under an enabling statute passed by the legislature subsequently to the grant. *Meridian v. Farmers' Loan & T. Co.* 74 C. C. A. 221, 143 Fed. 67, 6 Ann. Cas. 599, reversing 139 Fed. 673.

And where the city has power to grant franchises, but no express legislative authority to grant exclusive franchises, the city is not precluded, by an abortive attempt to grant an exclusive franchise, from

be the reasonable value of said waterworks system at the time of the arbitration."

On August 3, 1908, the town adopted a resolution which recited the ordinances of September 28, 1887, and of February 14, 1905, and resolved, that, "believing it is for the general welfare, as well as the will of the people, that the town should purchase, own, operate, and control the waterworks and water supply of the town, that immediate steps be taken for the fulfillment of such purpose by the appointment of two arbitrators who shall have full power to enter into negotiations with two arbitrators to be selected by the Glenwood Light & Water Company, for the purpose of determining and agreeing upon a value to be placed upon said waterworks; but should they fail to

agree, such arbitrators to select an umpire whose decision shall be final as to the value of said waterworks, subject to the limitations prescribed by statute and the extension ordinance aforesaid;" that a copy of the resolution be delivered to the company and a formal request made of it that the resolution be speedily complied with. On the same day the town appointed two arbitrators. On August 10, 1908, notice of the appointment of these arbitrators and a request that the company appoint its arbitrators was served upon the company, but the company neither protested the appointment of either of the arbitrators named by the town, nor appointed any on its own behalf, nor took any action toward the determination of the value of its

constructing waterworks of its own, and competing with its grantee during the term of the grant. *Smith v. Westerly*, 19 R. I. 437, 35 Atl. 526; *Westerly Waterworks Co. v. Westerly*, 80 Fed. 611.

But in *Columbia Ave. Sav. Fund, S. D. Title & T. Co. v. Dawson*, 130 Fed. 152, the court, by confirming the master's report, held that the city had power, without an express legislative grant, to grant an exclusive franchise for furnishing the city and its inhabitants with water; hence, after it had granted such franchise and the grantee had constructed the works and was complying with its contract, the city was precluded from constructing works of its own and entering into competition with its grantee. However, this decision was reversed and remanded with instruction to dismiss the bill of the water company, in 197 U. S. 178, 49 L. ed. 713, 25 Sup. Ct. Rep. 420, for want of jurisdiction in the Federal courts. The holding in the lower court was approved and followed in *Mercantile Trust & D. Co. v. Columbus Waterworks Co.* 130 Fed. 180, and again, in the same case, in 161 Fed. 135, after the court in 203 U. S. 311, 51 L. ed. 198, 27 Sup. Ct. Rep. 83, had decided the question of jurisdiction; but the order was finally reversed on other grounds in 218 U. S. 645, 54 L. ed. 1193, 31 Sup. Ct. Rep. 105.

As to the power of a city, without express legislative authority, to grant exclusive franchises to water companies, etc., see note in 22 L.R.A.(N.S.) 933 and 938.

c. Where franchise is exclusive.

The general rule is that if the franchise is exclusive and the grantee has gone to expense in complying or preparing to comply with his part of the contract, then it amounts to an impairment of a contract for the city to enter into competition with the grantee, and such action offends the United States Constitution, so that the Federal courts have jurisdiction. The city may be enjoined by an injunction from competing with its grantee. For fuller discussion of the question, see III. b, *supra*. L.R.A.1916C.

Where the city has full power by virtue of state legislation to provide a water supply either by means of its own waterworks or by contracting with others to furnish the same, and under an ordinance its officers make a contract with a water company to furnish water for a period of years giving it power and authority to use the streets, etc., reserving the right to take over its property at a fair valuation at any time, and expressly agreeing that the city will not construct or acquire any other waterworks or enter into competition with the company, the city is precluded from acquiring other waterworks during the term, without first taking and paying for those of the company, and the Federal courts have jurisdiction to enjoin it from so doing, in violation of the contract clause in the Constitution of the United States. *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77, affirming 60 Fed. 957.

And a contract in the form of an accepted ordinance, granting to the corporation, their successors and assigns, the exclusive right to erect, maintain, and operate waterworks for a definite term (thirty years), to supply water for public and private use, is such a contract as expressly precludes the city from entering into competition with the grantee in supplying water to the city or its inhabitants, and the city will be enjoined at the instance of the grantee or its successors from so doing. *Vicksburg v. Vicksburg Waterworks Co.* 202 U. S. 453, 50 L. ed. 1102, 26 Sup. Ct. Rep. 660, 6 Ann. Cas. 253, Harlan, J., dissenting. And the holding is not affected by a provision in the state Constitution enabling the repeal, alteration, or amendment of corporate charters, provided that "no injustice shall be done to the stockholders." In this connection, the court said: "Consistently with this grant, can the city submit the grantee to what may be the ruinous competition of a system of waterworks to be owned and managed by the city, to supply the needs, public and private, covered in the grant of privileges to the grantee? It needs no argument to demonstrate, as was pointed

waterworks or the performance of its part of the contract of sale thereof to the town. The excuses it now offers for its inaction are that one of the arbitrators appointed by the town had litigated with the company its right to the source of its water supply; that the action of the town in making the election should have been by ordinance, and not by resolution, and that the resolution was not passed for the purpose of effecting and did not effect, an election by the town to purchase, but was enacted to ascertain what the town could purchase the waterworks for, and to reserve its right to elect after that determination. On January 4, 1909, the town adopted a resolution which recited that the company had failed to select arbitrators, that immediate action be taken to determine in a legal way the valuation of the waterworks, and that the mayor be directed to employ counsel to commence the necessary legal proceeding and do the necessary acts to protect and enforce the rights of the town to the valuation and title of the waterworks of the company. Nine months more passed. But the com-

pany still failed to appoint arbitrators or to take any other action to perform its part of the contract of sale. Thereupon, on October 6, 1909, and more than eleven months after the town appointed its arbitrators and required the company to perform the contract of sale, the town by resolution in terms repealed and rescinded the resolution notice and election to purchase of August, 1908, and on October 18, 1909, the town adopted an ordinance which in terms repealed the extension ordinance of February 14, 1905. In December, 1909, the town adopted an ordinance to create an indebtedness of the town and to issue its bonds for \$125,000 to raise money to purchase or to construct waterworks, to offer the company \$60,000 in par value of the bonds for its waterworks, and, if it refused to sell for that sum, then to sell the bonds, and to use the money to construct a new system of waterworks of its own. The decree in this case enjoins the town from carrying into effect the provisions of this ordinance, or the provisions of the repealing ordinance of October 18, 1909. But, in view

out in the Walla Walla Case, that the competition of the city may be far more destructive than that of a private company. The city may conduct the business without regard to the profit to be gained, as it may resort to public taxation to make up for losses. A private company would be compelled to meet the grantee upon different terms, and would not likely conduct the business unless it could be made profitable. We cannot conceive how the right can be exclusive, and the city have the right at the same time to erect and maintain a system of waterworks, which may and probably would practically destroy the value of rights and privileges conferred in its grant. If the right is to be exclusive, as the city has contracted that it shall be, it cannot at the same time be shared with another, particularly so when such division of occupation is against the will of the one entitled to exercise the rights alone. It is difficult to conceive of words more apt to express the purpose that the company shall have the undivided occupancy of the field so far as the other contracting party is concerned." This case was before the court on the question of jurisdiction in 185 U. S. 65, 46 L. ed. 808, 22 Sup. Ct. Rep. 585. And it is interesting to note that the same contract was before the court in *Vicksburg v. Vicksburg Waterworks Co.* 206 U. S. 496, 51 L. ed. 1155, 27 Sup. Ct. Rep. 762, on a question as to the city's power under subsequent legislation to establish rates not authorized by the contract, and under the same contract it was held in *Vicksburg v. Henson*, 231 U. S. 259, 58 L. ed. 209, 34 Sup. Ct. Rep. 95, reversing 121 C. C. A. 664, 203 Fed. 1023, that the city, by issuing bonds for, and by the actual construction of, waterworks for supplying the city and its in-

habitants with water only after the expiration of the term of the company's contract, did not violate either the former decree of the court or the spirit of the contract, although the bond issue and construction took place before the expiration of the term, but the operation of the waterworks was postponed until after, the court holding that actual competition by the city during the term of the contract was the substantial matter of which the company could rightfully complain.

In *Farmers' Loan & T. Co. v. Sioux Falls*, 69 C. C. A. 873, 136 Fed. 721, appeal dismissed for want of jurisdiction in 199 U. S. 601, 50 L. ed. 328, 26 Sup. Ct. Rep. 748, the holding is on all fours with that in *Vicksburg v. Henson*, supra.

While the question of jurisdiction was the only one before the court in *Mercantile Trust & D. Co. v. Columbus*, 203 U. S. 311, 51 L. ed. 198, 27 Sup. Ct. Rep. 83, a necessary inference from the decision is that the grant of an exclusive franchise by the city to furnish water to it and its inhabitants precludes the city from erecting waterworks and entering into competition with its grantee.

But notwithstanding the fact that the franchise is an exclusive one, the city may, by a cross bill to the complaint of the grantee seeking an injunction to prohibit the city from constructing works of its own, obtain a rescission of its contract and a dismissal of the grantee's bill, if it can show that there have been substantial breaches of the contract on the part of the grantee in failing to supply a sufficient amount of pure water. *Columbus v. Mercantile Trust & D. Co.* 218 U. S. 645, 54 L. ed. 1193, 31 Sup. Ct. Rep. 105.

J. W. M.

of the conclusion already reached, that the original contract of the town and its extension did not preclude it from constructing and operating a system of waterworks in competition with that of the company, no equity entitling the company to this injunction is perceived in the facts which have been recited, whether or not the town elected and bound itself to purchase the waterworks of the company pursuant to the provisions of the extension ordinance of February, 14, 1905.

Suppose that that ordinance is valid, and that the town legally elected, and thereby irrevocably bound itself, to purchase thereunder, the company has failed ever since August, 1908, when the notice and request were served upon it, to perform its part of this contract. It failed to do so for more than eleven months after the demand was made before the town attempted to withdraw from and to rescind the agreement of purchase. Nor has it yet offered or commenced to perform that contract. Its excuses for its failure are unsatisfactory. That an arbitrator was appointed by the town who had conducted a litigation against it did not relieve it from a performance of the contract on its part. A protest against his appointment or a suit might have removed him, and, if not, it was not he or any of the four arbitrators, but the umpire, who was the final judge of the valuation of its property, and the company could undoubtedly have named two arbitrators who would not have consented to an unjust valuation or to the appointment of an unfair umpire. The other excuses it presents are that the resolution of election was illegal and ineffective, because it was not an ordinance, and because it was not intended to and did not effect an election to purchase, and these excuses are excluded from consideration here by the supposition that there was a valid election. Under this supposition, before the election, the town had the right to elect to purchase the company's waterworks, and the right to elect not to purchase them and to build waterworks of its own. In August, 1908, it elected to purchase the waterworks of the company, and demanded that the company should perform its part of the contract. The mutual agreements of the parties that upon the election each party should appoint two arbitrators who should, either themselves or through an umpire they should select, determine the value of the waterworks, were material covenants of the contract. The town performed its covenant in this regard. It appointed two arbitrators. The company failed to perform its covenant in this re-

spect, though requested. It did not appoint arbitrators, and by this continuing failure it became guilty of the first breach of the contract. And courts of equity will not ordinarily compel the specific performance of a contract, either by decree or by an injunction against its violation, at the suit of a party who is guilty of a substantial breach of it. *Shubert v. Woodward*, 92 C. C. A. 509, 519, 167 Fed. 47, 57; *Rutland Marble Co. v. Ripley*, 10 Wall. 339, 358, 19 L. ed 955, 961; *Taussig v. Corbin*, 73 C. C. A. 656, 663, 142 Fed. 660, 667.

There is no equity here which entitles the complainant to an injunction against the acquisition of its waterworks by the town, by negotiation and purchase *dehors* the contract made by the election, or against its construction and operation of its own waterworks. Suppose, on the other hand, that the resolution of election was void or ineffective, then the town has the right to construct and operate its own waterworks without let or hindrance by the company, and there is no logical escape from the conclusion that there was no equitable ground for the injunction.

If it be said that, in so far as the resolution of October 6, 1909, attempted to repeal the election resolution of August, 1908, and in so far as the ordinance of October 18, 1909, attempted to repeal the extension ordinance of 1909, they are void, and the complainant is entitled to an injunction against their enforcement, the answer is that the evidence does not establish any restriction of or interference with the right of the company to furnish the inhabitants of the town with water, to use the streets, alleys, and public places for that purpose, to supply the town with all the water it may use for public purposes, and to be paid therefor by the town. Nor does it disclose any threat of any such restriction or interference, except that which may arise from the lawful construction and operation of waterworks by the town. If, in the future, any such unlawful restriction or interference, or the threat of it, shall arise, the powers of the courts of equity will be ample to enjoin it and to grant other just relief, and no estoppel of the company by this opinion or decision from securing all the relief to which subsequent events may entitle it can arise. The equity of the complainant, as the case now stands, however, does not support the injunction. The decree below must therefore be reversed, and the case must be remanded to the court below, with directions to dismiss the bill without prejudice to the right of the complainant to enforce, by suits in equity or actions at law, its right to furnish water to the inhabitants of the town, to use the

streets and alleys of the town for that purpose, to supply the town itself with all the water it may use for public purposes, and to collect from it its rates therefor under the contract of 1887, and the extension of February 14, 1905.

It is so ordered.

Appeal dismissed and petition for a writ of certiorari denied by the Supreme Court of the United States, October 27, 1913, 231 U. S. 735, 58 L. ed. 459, 34 Sup. Ct. Rep. 315.

ALABAMA SUPREME COURT.

J. T. VINSON, App't.,
v.

SOUTHERN BELL TELEPHONE &
TELEGRAPH COMPANY.

(— Ala. —, 66 So. 100.)

Evidence — failure of telephone service — overcoming presumption of negligence.

1. A telephone company which fails to furnish service to one entitled to it, who

Note. — Liability of telephone company for failure to make connections for subscriber.

The present note supplements the notes to *Lebanon, L. & L. Teleph. Co. v. Lanham Lumber Co.* 21 L.R.A.(N.S.) 115; *Volquardsen v. Iowa Teleph. Co.* 28 L.R.A.(N.S.) 554; and *Southern Teleph. Co. v. King*, 39 L.R.A.(N.S.) 402, where the earlier cases are presented.

As to the right to withdraw telephone service because of the abuse of privilege by subscribers, see note to *Huffman v. Marcy Mut. Teleph. Co.* 23 L.R.A.(N.S.) 1010.

As to the right to refuse telephone service to coerce payment of bill, see note to *Danher v. Southwestern Tele. & Teleph. Co.* 30 L.R.A.(N.S.) 1027.

As to right of addressee to recover damages for failure to summon him to receive a long-distance telephone message, see note to *McLeod v. Pacific States Teleph. & Teleg. Co.* 15 L.R.A.(N.S.) 810.

As to the measure of damages for removal of telephone, see note to *Carmichael v. Southern Bell Teleph. & Teleg. Co.* 39 L.R.A.(N.S.) 651.

In *Southern Bell Teleph. & Teleg. Co. v. Glawson*, 13 Ga. App. 520, 79 S. E. 488, it is held that telephone companies are required to exercise only ordinary care promptly to furnish a subscriber means of communication over their lines with other subscribers, and that failure to exercise such care authorizes the recovery of whatever damages may proximately result therefrom.

It is also held in the above case that even if proof of a failure to give a subscriber telephonic connection raises an inference of L.R.A.1915C.

pursues the usual method to effect the use of the system, has the burden of showing that the failure was not due to the negligence of itself or its employees, by showing that the cause was of an uncontrollable nature, or was unavoidable by the exercise of due care, skill, and diligence, or was the result of acts for which the company was not responsible either directly or in consequence of its negligent omission to employ due care, skill, and diligence to discover the effect of such acts, and to remove or repair it after becoming aware thereof.

Telephone — liability for breach of service.

2. One having a contract with a telephone company for service, who fails to receive it because of the negligence of it or its employees, may recover nominal damages and such actual damages as he suffered in consequence thereof.

Damages — failure of telephone service — bodily injuries.

3. One who suffered injury to his person through the physical effort necessary to reach a doctor on foot in the night to attend a member of his family dangerously ill, which effort is made necessary by the negligent failure of a telephone company to furnish service for which he has con-

negligence, the inference is removed when it appears that the telephone company has exercised all ordinary care and diligence, and that, notwithstanding the performance of this duty, some portion of the delicate mechanism comprising the telephone system got out of order from some unknown and unforeseen cause against which ordinary care could not guard. The court said: "The evidence discloses (and it is a matter of common knowledge) that frequently a subscriber cannot obtain a connection, and the cause of the trouble is not discovered until after a most minute inspection. . . . The time may come when the instrumentalities may be so perfected that a higher degree of care should be imposed upon those undertaking to furnish telephone service; but that time has not yet arrived."

In *Cumberland Teleph. & Teleg. Co. v. Sutton*, 156 Ky. 191, 160 S. W. 949, it was held that the negligent failure of a telephone company to furnish a subscriber telephonic connections with his family physician after repeated calls by both the subscriber and the physician, when the operator was informed of the serious illness of the subscriber's child, and knew that the physician intended calling the subscriber on the telephone within about thirty minutes, by reason of which the physician did not arrive until the child was beyond recovery, rendered the company liable to the subscriber for compensatory damages, but not for punitive damages.

But in *Southern Bell Teleph. & Teleg. Co. v. Reynolds*, 139 Ga. 385, 77 S. E. 388, it was held that the negligent failure of a telephone company to answer repeated calls of a subscriber who sought to have tele-

tracted, may hold the company liable in damages for such injury and also for the mental distress suffered because of the delay in securing the physician's services, if the company had notice of the likelihood of a necessity for physician's services at the time they were required, so as to be chargeable with notice that such injury would follow its neglect.

Trial — jury — injury to person.

4. The jury must determine whether or not exhaustion suffered by one compelled to go on foot for a doctor to attend a dangerously sick member of his family, because of negligent failure of telephone service for which he had contracted, results in injury to his person.

Evidence — failure of telephone service — recent use of telephone.

5. Upon the question of negligence in failing to furnish telephone service, evidence of use and serviceableness of the telephone mechanism shortly before and after the service failed is admissible as tending to show the condition of the mechanism and the line.

Same — waiver of condition as to prepayment of tolls.

6. Upon the question of waiver of prepayment of tolls for telephone service, ev-

phonic connections with his family physician because of the illness of his wife, after he had explained to the physician over the telephone the physical condition of the wife, who was about to give birth to a child, and was advised by the physician to call him every twenty minutes, stating that he was ready to come to their home as soon as he was advised of symptoms of approaching delivery of the child, does not render the telephone company liable to the wife for physical and mental suffering endured and for impairment of her health on account of being deprived of medical skill and assistance; it appearing that the physician could have reached her home within twenty or thirty minutes after receiving a call. The court followed the case of *Seifert v. Western U. Teleg. Co.* 129 Ga. 181, 11 L.R.A. (N.S.) 1149, 121 Am. St. Rep. 210, 58 S. E. 699, which held that the negligent failure of a telegraph company to transmit and deliver within a reasonable time a telegram summoning a physician, sent on behalf of a sick person, does not render it liable to such person for mental and physical suffering endured between the time when the physician would have come if the telegram had been promptly delivered, and the time when he actually arrived. The *Seifert* Case is accompanied by a note in 11 L.R.A.(N.S.) 1149, on liability of telegraph company for continued physical suffering of sender of message because of negligence in transmission and delivery.

The court in *Southern Bell Teleph. & Teleg. Co. v. Reynolds*, supra, pointed out that the cases of *Western U. Teleg. Co. v. Ford*, 8 Ga. App. 514, 70 S. E. 65 (a telegraph case), and *Glawson v. Southern*

idence is admissible of the patron's view of a conversation with the company's manager when the tolls for the month were paid and accepted, after a failure of service for which the company is sought to be held liable.

Same — statements as to past transaction.

7. Statements of the manager of a telephone company after a failure of service for which the company is sought to be held liable are not admissible in evidence upon the question of the competence of the operator in charge at the time the service failed.

(May 14, 1914.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Cullman County in defendant's favor in an action brought to recover damages for injuries alleged to have been caused by defendant's negligent failure to furnish telephone service. Reversed.

Counts 2, 3, and 4 and Plea 4 mentioned in the opinion are as follows:

Count 2: "Plaintiff claims of defendant \$1,999 as damages for that heretofore, on

Bell Teleph. & Teleg. Co. 9 Ga. App. 450, 71 S. E. 747 (the latter case being set out in the note in 39 L.R.A.(N.S.) 402), cannot to be differentiated from the *Seifert* Case, as was thought by the court of appeals. The court said: "In point of fact, the differentiation was as to the extent of the injury inflicted; and whether the injury resulted in the loss of an eye or other permanent injury or death did not affect the question of the right to recover, but only the extent of the recovery." It would seem, therefore, that the decisions of the court of appeals in these cases were practically overruled, notwithstanding the exceedingly able and convincing opinion of the court of appeals in the *Glawson* Case.

In *Southern Bell Teleph. & Teleg. Co. v. Glawson*, 140 Ga. 507, 79 S. E. 136, the supreme court expressly declined to review and overrule the decisions in *Seifert v. Western U. Teleg. Co.* and *Southern Bell Teleph. & Teleg. Co. v. Reynolds*, supra, upon certificate of the court of appeals that counsel had attacked the soundness of the decisions and asked that court to request the supreme court to review and overrule them. There was evidently a doubt in the minds of some, if not a majority, of the members of the supreme court as to the correctness of the decision; for while it is stated that the court was unanimously of the opinion that two other cases which were also attacked were correctly decided, the refusal to disturb the two cases in question was upon the ground that they were originally concurred in by the entire bench, and the statute required the concurrence of all the justices to reverse them, and, as the court observed, "the entire bench does not

to wit, July 17, 1911, defendant was engaged in the business of operating a public telephone system, serving the public for hire or reward in the transmission of oral messages by means of telephony, and on the day and date aforesaid, and for a long time prior thereto, plaintiff was a patron of said defendant, and plaintiff had installed in his residence near Cullman, Alabama, a telephone for his use, and for which it charged him the sum of \$1.50 per month, and defendant was under a duty to give plaintiff telephone service with the inhabitants of Cullman, Alabama, who had telephones installed in their places of business and places of residence, and to connect plaintiff's telephone with the telephones of other patrons in Cullman county, when plaintiff called therefor by ringing said central office and requesting that he be connected with such telephone, and on the day and date aforesaid plaintiff's minor son suffering from his said injuries, and in a very critical condition, and in danger of dying, the plaintiff, through his wife as his agent, had arranged with his family physician, who was a patron of defendant, and had a telephone installed in his residence, that if his services were needed to attend plaintiff's said minor son, that he would be called over the telephone during the night, and said physician had agreed to answer said call at once, and thereupon plaintiff, through his agent or servant, informed defendant's agents or servants in said central office in Cullman, Alabama, of the condition of his said son, and the arrangements with his said physician; and thereafter, during the evening, the condition of plaintiff's minor son became more critical, and, desiring to call his said physician, he made repeated efforts to secure connection with his said family physician over the telephone by ringing said central office, and the agents or servants of said defendant in said central office so negligently conducted themselves in and about giving plaintiff said connection that he failed to secure the same, and thereby failed to get

in communication with his said family physician, and was forced, in order to procure the services and attendance of said physician, to leave the bedside of his son, and to walk and run all the way from his residence, to wit, about one mile and a half, to the residence of his said family physician, and during plaintiff's absence his son died. Plaintiff was damaged in that he was required to pay for the services of said telephone, that he had to expend great physical energy and exertion in procuring the presence of said physician by running from his home to the residence of said physician, one mile and a half, that he suffered great mental anguish because of not being able to procure said physician to attend to his son, and in being absent from his son at the time of his death, and that he suffered great physical pain and exhaustion because of having to run for said doctor, as aforesaid, all of which said damages he claims in this case. The plaintiff avers that said damages and injury were caused by reason and as a proximate consequence of the negligence of defendant's agents or servants or employees in and about conducting said telephone business, to plaintiff's damage in the sum aforesaid."

Count 3. Same as count 2, down to and including the following words: "All of which damages he claims in this case"—and adds the following: "Plaintiff avers that his said damages and injuries were caused by reason and as a proximate consequence of the negligence of said defendant in failing to have in the conduct of its said business reasonably competent and efficient employees in said central office, to plaintiff's damage as aforesaid."

Count 4: "Plaintiff claims of defendant \$1,999 as damages, for that heretofore, to wit, on July 17, 1911, defendant was engaged in the business of operating a public telephone system, serving the public for hire or reward in the transmission of oral messages by means of telephony, and on the day and date aforesaid, and for a long time

concur in so doing, and they must remain in force."

In *Southwestern Tele. Co. v. Andrews*, — Tex. Civ. App. —, 169 S. W. 218, it was held that the negligent failure of a telephone company to transmit a telephone call to a subscriber after being informed that it was desired to notify him that his sister was expected to die, whereby he was prevented from attending her funeral, rendered the company liable to him for damages for mental suffering caused thereby.

A telephone company is not liable for a penalty imposed by a statute for the denial of telephone service upon the ground of partiality, bad faith, or discrimination, where it declined to furnish service because

of the subscriber's failure to enter into a new contract, after advising the subscriber that it desired to increase the rates and would not furnish service unless he entered into a new contract, which it had a right to do by giving ten days' notice, notwithstanding the fact that by mistake of a clerk a bill was rendered for services in advance at the former rate and was immediately paid by the subscriber, it appearing that when it was ascertained by the company that payment had been made, it continued to render service for the balance of the month. *Kevand v. New York Teleph. Co.* 159 App. Div. 628, 145 N. Y. Supp. 414.

A. L. R.

prior thereto, plaintiff was a patron of said defendant, and plaintiff had installed in his residence near Cullman, Alabama, a telephone for his use, and for which it charged him the sum of \$1.50 per month, and defendant engaged to render plaintiff telephone service by giving connection with all other phones in Cullman, Alabama, and to connect plaintiff's said telephone with the telephones of other patrons in Cullman county, when plaintiff called therefor by ringing said central office and requesting that he be connected with such telephone; and on the day and date aforesaid, plaintiff's minor son, one Irving Vinson, was seriously injured, and was lying at plaintiff's home suffering from his said injuries, and in a very critical condition, and in danger of dying, and plaintiff, through his wife as his agent, had arranged with his family physician, who was a patron of defendant, and had a telephone installed in his residence, that if his services were needed to attend plaintiff's said minor son that he would be called over the telephone during the night, and said physician had agreed to answer said call at once, and thereupon, through his agent or servant, informed defendant's agents or servants in said central office in Cullman, Alabama, of the condition of his said son, and the arrangements with his said physician, and thereafter during the evening the condition of plaintiff's minor son became more critical, and, desiring to call his said physician, he made repeated efforts to secure connection with his said family physician over the telephone by ringing said central office, and the agents or servants of said defendant in said central office so negligently conducted themselves in and about giving plaintiff said connection that he failed to secure the same, and thereby failed to get in communication with his said family physician, and was forced, in order to procure the service and attendance of said physician, to leave the bedside of his son and to walk and run all the way from his residence to wit, about one mile and a half, to the residence of his said family physician, and was greatly delayed in securing the services of his said family physician, and during plaintiff's absence his son died; and plaintiff avers that he was damaged, in this: He paid the regular monthly tolls for the use of said phone, that he had to expend great physical energy in going after said doctor, and was greatly exhausted, and suffered great mental anguish on account of not being able to procure said physician, and on account of having to be away from his said son during his last illness. Plaintiff avers that the cause of action herein stated grew out of the same subject-matter and state of facts as set forth L.R.A.1915C.

in the other counts of the complaint; that plaintiff's injury and damage was caused by reason and as a proximate consequence of the breach of said contract, in that the said servants, agents, or employees of defendant in negligently failing to make proper connection with the phone of said physician."

Plea 4: "There was a regular contract in writing between plaintiff and defendant whereby defendant was requested by plaintiff to establish at his residence a metallic circuit telephone station, to maintain the same and wires connecting it with defendant's exchange, and to furnish service to plaintiff; and plaintiff agreed to pay for such maintenance, etc., the sum of \$1.50 monthly, in advance, from the 1st day of each calendar month; and defendant avers that said contract was breached by plaintiff, in that he did not pay, and had not paid, for such service for the month of July, 1911, on or prior to said July 17, 1911."

Messrs. Brown & Griffith for appellant.

Messrs. George H. Parker and Eyster & Eyster for appellee.

McClellan, J., delivered the opinion of the court:

During the afternoon of July 17, 1911, the plaintiff's (appellant's) seventeen-year-old son was injured about the head by a fall from a bicycle. Dr. Baird, plaintiff's family physician, attended the boy about 4 o'clock in the afternoon, diagnosing his condition to be the result of concussion of the brain. Both Dr. Baird and plaintiff were regular subscribers, whose obligation was to pay monthly, for residence telephones with the defendant company. They had been so for many months, if not longer. The service afforded such subscribers in and about Cullman, Alabama, included the maintenance, day and night, of the usual central office in the town, whereby, in response to the mechanically produced fall of a "drop" on the central office switch board, the attention of the operator would be called and given the calling phone, and connection thereof with the other phone desired would be effected. If the operator left the switch board for sleep or refreshment, the practice was to so order the switch board mechanism as to cause the setting off of a bell or gong when the "drop" fell. This arrangement would ordinarily serve the purpose of a persistent and loud alarm.

The successful operation of these processes depends, of course, upon the working condition of the mechanism and wire connection provided, as well as upon appropriate manipulation or action by the persons desiring

to call another person, by the operative, and by the person intended to be communicated with.

The counts under which the evidence was taken were 2, 3, and 4 as amended. The first two declare as for a breach of duty and one in tort; and the last (4) is for the breach of the contract. The pleas, surviving demurrer, were the general issue numbered 1, and that numbered 4, which, though not addressed to the counts separately, asserted the breach by plaintiff of his contract for the service of a phone in his residence by nonpayment by a stipulated date of the rental sum. Plea 2, setting up a failure to present the claim within a particular period, was stricken on demurrer. In addition to a general traverse of this plea 4, the plaintiff replied that the custom was, and had long been, to allow payment of the rental by a subscriber by a reasonable time after presentation of an account therefor, and that plaintiff paid, and the company accepted without question, the rental sum for the month averred in plea 4 to have been the occasion of the breach alleged. The special rejoinder to special replication 2 was stricken in response to plaintiff's demurrer. The issues made were those raised by averments of the counts mentioned above, of the plea 4, and of special replication 2.

The court gave the general affirmative charge, on the whole case, for the defendant (appellee). The scope of the review here, on the plaintiff's appeal, will appear from the opinion.

The report of the appeal will contain counts 2 and 3 and amended count 4.

After careful review of the entire evidence, the opinion prevails that the court erred in giving the general affirmative charge requested by the defendant. There was evidence, or inferences fairly deducible from evidence, that required the jury's solution of every material issue raised by counts 2, 3, and 4 as amended. Manifestly the affirmative charge was not defendant's due on the theory that the issues made by plea 4, the general replication thereto, and the special replication thereto were incontrovertibly established in the evidence.

It is the duty of telephone companies maintaining lines and exchanges for the purpose of affording patrons the means of telephonic communications, to exercise in that public service a character and degree of care and diligence and skill commensurate with their undertaking. All reasonable and proper means and agencies within their control should be employed to secure effective, prompt, and accurate service. The duty exacted comprehends reasonable and proper care, skill, and effort to afford for L.R.A.1915C.

the service undertaken suitable appliances, instruments, and apparatus, and competent and skilled servants, agents, and operators. And if the appliances, instruments, or apparatus are defective, or if the operatives are incompetent or unskilled, or if there is other negligence in respect of the service undertaken, liability attaches for the loss or damage proximately resulting therefrom to one entitled to proper, prompt, and efficient service. Such companies are not insurers; and where the service undertaken is interfered with, or rendered ineffectual by, uncontrollable causes,—causes not traceable or ascribable to negligence or intentional misconduct in respect of the duty assumed,—such companies are not liable for a tortious breach of duty. 2 Joyce, *Electric Law*, § 733.

Where a telephone company installs an instrument through which it undertakes, for a consideration, to afford continuous telephone service, or service during definite parts of the day or night, or service upon application therefor through public stations, and persons authorized to avail of the service pursue the usual method to effect the use of the telephonic system so tendered by the company, and the telephone service so undertaken to be afforded is not given, or is insufficiently or ineffectually afforded, the presumption *prima facie* is that negligence of the company, or of its servants or employees, is the cause of the failure of the telephone service, or of its inefficiency; and the obligation to rebut the *prima facie* presumption thereupon passes to the telephone company; which presumption may be rebutted by proof that the cause was of an uncontrollable nature, or was unavoidable by the exercise of due care, skill, and diligence, or was the result of acts for which the company was not responsible, either directly or in consequence of its negligent omission to employ due care and skill and diligence to discover the effect of such acts and to remove or repair after becoming aware thereof.

The application of this doctrine to the evidence adduced required the submission of the issues to the jury's determination. The contract between plaintiff and this company for continuous telephone service covering the time in question was shown. There was evidence tending, at least, to show repeated efforts to reach the central office by the usual method for that purpose, through the operation of the instrument in plaintiff's dwelling; that these efforts covered a period from about 10 o'clock to near 11 o'clock, in the evening; that no response was had thereto from the central office; that the mechanism in the central office constructed to direct the operator's attention to the call

did not make the call, or, if it did so, that the operator took no account thereof, paid no heed, as she should have done, thereto; that uncontrollable causes that might have operated to prevent the normal effectiveness of the telephonic mechanism from plaintiff's dwelling to and in the central office did not intervene on this occasion; that a representative of the company in the central office was advised, earlier in the evening of July 17, 1911, of the probable desire or necessity for telephonic communication from plaintiff's dwelling to Dr. Baird, another subscriber and the family physician, in reference to plaintiff's son's condition, which was serious; that the occasion for such communication arose; that the physician would have responded; that, in consequence of the failure of the telephone service engaged to be afforded plaintiff, there was delay in bringing the physician to the bedside of the son; that, in further consequence, the father, being greatly alarmed at the obviously serious symptoms manifested by the stricken son, went afoot to bring the physician; that the distance from his home to the physician's home was approximately a mile and a half; that he traveled rapidly; that when he arrived at the home of the physician, he was "exhausted;" that he and the physician returned afoot to the bedside of the son; and that when they had reached a point near the plaintiff's home they were advised that the son was dead.

If the failure of the service was found by the jury to have resulted from negligence on the part of the company, or of its employees, and if the contract for telephone service was not breached as averred in plea 4, the plaintiff was at least entitled to recover nominal damages for the breach of contract, or for breach of the duty arising out of the contract, for telephonic service, and also such actual damages as he suffered in consequence thereof.

It cannot be affirmed, as a matter of law, that the physical effort expended by plaintiff to secure the physician—an effort that proper telephonic service and communication would have rendered unnecessary—was only a mental disturbance or discomfiture. "Injury to the person" is, we doubt not, synonymous with bodily hurt, bodily harm. Great physical effort may be immediately productive of that character of hurt or harm. If such effort produces physical exhaustion, it is open, at least, to be concluded that bodily harm or hurt has, though not visibly manifested in impaired physique, resulted. Such a draft upon vital organs may produce direct effects hurtful, harmful to the physical man, to the person. It has never been supposed that only permanent injuries were injuries to the person; nor L.R.A.1915C.

that only visible injuries, or injuries susceptible of being discovered or known through any of the five senses of another observing the person alleged to have suffered injury, were injuries to the person. The absence of some sort of physical manifestation of injury to the person is, of course, evidence of the absence of such injury; and in cases where the injury claimed is obvious, one way or the other, such evidence is of course conclusive. It was a jury question on the evidence here whether the physical effort expended by plaintiff resulted in injury to his person; and, if so, mental distress suffered in consequence of the delay in communicating with the physician, and in consequence of the physician's absence after he could, and probably would, have arrived at the bedside, before the death of plaintiff's son, was, if shown, an element for which damages might be awarded, the relationship between plaintiff and person to be attended by the physician being such as to allow the jury to draw the inference of mental distress on that account (*Western U. Teleg. Co. v. Henderson*, 89 Ala. 510, 18 Am. St. Rep. 148, 7 So. 419); provided the testimony tending to show notice to the company's agent or servant of the likelihood that a call for the physician that night would be made over the telephone was credited by the jury.

Any evidence, such as satisfactory use and serviceableness of the mechanism and line with which plaintiff was entitled to be served, during the evening of the son's death and during the next morning, should have been received as tending to show the condition of the mechanism and the line.

If the mechanism and line were in working condition shortly before and after the occasion in question, it was evidence, in connection with the other evidence, to go to the jury upon the issues of neglect by the operative in respect of attention to the service the company had engaged to afford.

Under the issues made by the pleadings, the plaintiff should have been allowed to recite his view of the full conversation with the company's manager (Cassels) when he paid the rental for the month of July; but any statements then made by the manager could not be received for the purpose of showing the qualification of the operative in charge on the night in question.

The judgment is reversed, and the cause is remanded.

Anderson, Ch. J., and Sayre and De Greffenried, JJ., concur.

Petition for rehearing denied, June 24, 1914.

ALABAMA SUPREME COURT.

GEORGIA LIFE INSURANCE COMPANY,
Appt.,
v.

MARTIN L. EASTER, Admr., etc., of Margaret Easter, Deceased.

(— Ala. —, 66 So. 514.)

Insurance — public conveyance — refusal to serve negroes — effect.

1. That a transfer company refuses to let a particular class of picnic wagons to negroes does not affect the question whether or not a person injured while a passenger in such wagon was in or on a public conveyance provided by a common carrier for passenger service, within the meaning of an accident insurance policy.

Same — picnic wagon — common carrier.

2. A rig let by a transfer company by the day to the public generally for picnic parties, to be controlled by its own employees and carry only those invited by the hirer, is not, although the company is as to other parts of its business a common carrier, a public conveyance provided by a common carrier for passenger service, within the meaning of a policy insuring against in-

Note. — Insurance: scope and construction of provision for indemnity in case of injury while riding in or on a public conveyance.

The earlier cases upon this question are treated in the note to *Primrose v. Casualty Co.* 37 L.R.A.(N.S.) 618. The few decisions rendered since the compilation of the earlier note follow.

Seemingly, the only recent decision as to whether a particular transportation facility falls within the meaning of a policy relating to public conveyances is *GEORGIA L. INS. CO. v. EASTER*, wherein it was held that a picnic wagon hired by special contract for a particular occasion, the owner having nothing to do with the persons to be carried in the same, was not a public conveyance provided by a common carrier for passenger service, within the meaning of an accident policy insuring against injuries sustained while "a passenger in or on a public conveyance provided by a common carrier for passenger service."

However, there are several instances of a determination of the interpretation to be accorded the term "in or upon," etc., as used in accident insurance policies.

Thus, the reasoning of the court in *Anable v. Fidelity & C. Co.* 73 N. J. L. 320, 63 Atl. 92, 20 Am. Neg. Rep. 117, affirmed in 74 N. J. L. 686, 65 Atl. 1117, which is set out in the earlier note, was commented upon with approval in *Wallace v. Employers' Liability Assur. Corp.* 26 Ont. L. Rep. 10, 2 D. L. R. 854, Ann. Cas. 1913A, 838, reversing on this point, 25 Ont. L. Rep. 80, 20 Ont. Week. Rep. 385, it being held that a passenger on a street car who, upon reach-

ing his destination, got off upon the highway, but to escape injury from an approaching automobile endeavored to get back upon the street car, in doing which he was thrown and injured, was not injured while "riding as a passenger in or upon a public conveyance," etc., within the meaning of a policy insuring against the injuries sustained while so riding. In reaching this conclusion *MacLaren, J. A.*, said: "The plaintiff was not in fact either in or on the car when he received the injury. If he had been, he would not have been injured. It is common knowledge that the vast majority of street car accidents to passengers occur in connection with entering or leaving the car, injuries to those in or on the cars being limited to the rarer cases of collisions or the car running off the track. I do not think that the language of the policy should be strained so as to cover a risk which does not come within its terms; and a risk for which the proper premium was not paid." And *Meredith, J. A.*, in treating this phase of the question, made the following statement: "The first question is whether the plaintiff, at the time of his injury, was 'riding as a passenger in or upon' the street car; and is not the broader one whether, at that time, he might be considered merely a passenger as against the railway company. He had been a passenger riding in and upon the street car, but had reached his destination; the car had been stopped to let him down, and he had alighted upon the public road, severing entirely all actual connection between himself and it; but, being put in imminent danger by a rapidly approaching motor car,

(November 7, 1914.)

A PPEAL by defendant from a judgment of the City Court of Birmingham in plaintiff's favor in an action brought to recover the amount alleged to be due on an accident insurance policy. Reversed.

The defense was that it was a part of the policy or contract that insured should be riding as a passenger in or on a public conveyance provided by a common carrier for passenger service. Defendant avers that insured was not riding in or on such conveyance at the time she lost her life.

Further facts appeared in the opinion.

Mr. Charles A. Calhoun, for appellant:

The undisputed evidence merely shows a hiring of a private carrier, such as occurs everyday in the ordinary livery stable.

1 *Hutchinson*, Carr. 3d ed. § 35; 2 *Hutchinson*, Carr. § 963, note, 43; *Shoemaker v. Kingsbury*, 12 Wall. 369, 20 L. ed. 432; 6 Cyc. 534; *Wyatt v. Larimer & W. Irrig. Co.* 1 Colo. App. 490, 29 Pac. 906; *Trout v. Watkins Livery & Undertaking Co.* 148 Mo.

ing his destination, got off upon the highway, but to escape injury from an approaching automobile endeavored to get back upon the street car, in doing which he was thrown and injured, was not injured while "riding as a passenger in or upon a public conveyance," etc., within the meaning of a policy insuring against the injuries sustained while so riding. In reaching this conclusion *MacLaren, J. A.*, said: "The plaintiff was not in fact either in or on the car when he received the injury. If he had been, he would not have been injured. It is common knowledge that the vast majority of street car accidents to passengers occur in connection with entering or leaving the car, injuries to those in or on the cars being limited to the rarer cases of collisions or the car running off the track. I do not think that the language of the policy should be strained so as to cover a risk which does not come within its terms; and a risk for which the proper premium was not paid." And *Meredith, J. A.*, in treating this phase of the question, made the following statement: "The first question is whether the plaintiff, at the time of his injury, was 'riding as a passenger in or upon' the street car; and is not the broader one whether, at that time, he might be considered merely a passenger as against the railway company. He had been a passenger riding in and upon the street car, but had reached his destination; the car had been stopped to let him down, and he had alighted upon the public road, severing entirely all actual connection between himself and it; but, being put in imminent danger by a rapidly approaching motor car,

App. 621, 130 S. W. 136; *Stanley v. Steele*, 77 Conn. 688, 69 L.R.A. 561, 60 Atl. 640, 2 Ann. Cas. 342, 18 Am. Neg. Cas. 20; *Copeland v. Draper*, 157 Mass. 558, 19 L.R.A. 283, 34 Am. St. Rep. 314, 32 N. E. 944; *Erickson v. Barber Bros.* 83 Iowa, 367, 49 N. W. 839; *Siegrist v. Arnot*, 86 Mo. 200, 56 Am. Rep. 425; *Meisner v. Detroit, B. I. & W. Ferry Co.* 154 Mich. 545, 19 L.R.A. (N.S.) 872, 129 Am. St. Rep. 493, 118 N. W. 14; *Wood v. General Acci. Ins. Co.* 156 Fed. 982; *Bogart v. Standard Life & Acci. Ins. Co.* 187 Fed. 851.

Messrs. *Haley & Haley*, *Alvin M. Douglas*, and *T. M. Bradley, Jr.*, for appellee:

The court properly left the question as to whether or not the transfer company was a common carrier under the circumstances to the jury.

Pennewill v. Cullen, 5 Harr. 238.

One who makes it a business to carry goods or passengers, and holds himself out to the public as ready and willing to carry indifferently all persons or all persons of a particular class, is a common carrier.

1 *Hutchinson, Carr.* 3d ed. §§ 35, 47, 963, note 43; *Central of Georgia R. Co. v. Lipp-*

man, 110 Ga. 665, 50 L.R.A. 673, 36 S. E. 202, 8 Am. Neg. Rep. 13; *Parmelee v. Lowitz*, 74 Ill. 116, 24 Am. Rep. 276; *Robertson v. Kennedy*, 2 Dana, 431, 26 Am. Dec. 466; *Schouler, Bailm.* p. 591; *Hale, Bailm. & Carr.* § 101, p. 491; 5 *Am. & Eng. Enc. Law*, 2d ed. p. 481; *Nashville & C. R. Co. v. Messino*, 1 Sneed, 225; *Jackson Architectural Iron Works v. Hurlburt*, 15 Misc. 93, 36 N. Y. Supp. 808; *Steinman v. Wilkins*, 7 Watts & S. 466, 42 Am. Dec. 254.

De Graffenried, J., delivered the opinion of the court:

The following excerpts from the testimony of some of the witnesses will place the reader in possession of the facts:

"I am connected with the *Harris Transfer & Warehouse Company*. My position is president and general manager. It is a corporation. We keep the following picnic wagons for hire: I think, let's see, there are two tallyhos, park wagonette; there are about five. You see we use our horses indiscriminately. We use in that kind of business a number of horses; that is, just according to the number of wagons that are out. We could put four horses to each

he caught at the street car again, though it had by that time been started again and was in motion; and, in endeavoring to escape injury from the motor car by getting upon the street car, fell, or was thrown down, coming in contact with the moving cars, and so was severely injured. His purpose in trying to get upon the street car again was not to resume his journey; that was ended; nor was it to begin a new journey; it was solely to escape injury by the negligently driven motor car. It is idle to say that there was negligence on the part of the railway company, if that would make any difference; how could their servants foresee and be blamable for the misconduct of the driver of the motor car? It was at the plaintiff's instance, and upon his signal, that the street car was stopped at this alighting place; an entirely proper place to stop for that purpose; the danger was something not foreseen by the plaintiff or anyone else, because doubtless not apparent until the motor car was almost upon him; avoidable, with any sort of care on the part of its driver, up to almost the last moment. Under these circumstances, it is impossible for me to find that the man was 'riding in or upon' the street car when he was injured; if he had been in or upon the street car, he would not have been injured as he was. The case would have been different if he had, after alighting, boarded the car again with the intention of resuming his journey, or of beginning a new one; but nothing like that was the case. Their plain meaning ought to be given to plain words, even though the result be different from that which one would prefer."

L.R.A.1915C.

So, in *Barber v. Travelers' Ins. Co.* 165 Ill. App. 239, it was held that a passenger who accidentally fell from the platform of a moving railroad car, in consequence of which he met his death, was killed within the meaning of a double indemnity clause of a policy insuring against injuries sustained "while riding as a passenger and being in or upon any railroad passenger car using steam," etc.

And in *Gibson v. Casualty Co.* 156 App. Div. 144, 140 N. Y. Supp. 1045, it was held that a fracture sustained by a passenger while alighting from a public conveyance which had stopped for that purpose, one foot being upon the step and the other upon the pavement at the time of the accident, was within a policy insuring against fractures sustained by the insured "while riding as a passenger in or on a conveyance provided by a common carrier for passenger service, including the platform steps or running board thereof."

And see *Ward v. North American Acci. Ins. Co.* 182 Ill. App. 317, wherein it was held that an accident policy insuring against injuries sustained while the insured was riding as a passenger in a conveyance provided by a common carrier does not cover risk of injuries to a switchman while riding on the platform of a passenger coach in the discharge of his duties. This decision is reported in abstract only, and therefore it is impossible to state whether the decision turned upon the point that the employee was not "in" the conveyance, or upon the point that he was not a "passenger."

G. J. C.

wagon. The company has been in that business since 1880 in the city. I couldn't really say approximately how many trips out we make in a year. We don't rent these picnic wagons to negroes. . . . Our business at that time with reference to passengers . . . was that we sent out picnic parties. . . . We furnished picnic wagons, driver, and horses, and harness for the horses to pull the wagon by, the whole equipment for carrying the crowd, except something to eat and drink, of course, and charged for it. If we knew that the people were going to abuse the horses or the wagon or anything like that, we wouldn't rent them out to white people. I don't know of any case, but if we actually knew it, I don't think that we would actually rent them out. We have stables here in Birmingham. We have wagons, picnic wagons, and other kinds of wagons. From time to time people apply there for a wagon for one purpose or another, and we hire them out to them, and among those wagons we have picnic wagons that we hire to parties from time to time. As a matter of fact, when we hire a picnic wagon, someone of the party comes to me or to some representative of mine and makes a trade with me as to where they are going, how far they are going, and as to what the charge, what the amount of hire, shall be, and that is especially arranged with each party, with reference to the distance they are going or where they are going, and one thing and another."

"I was in the employ of the Harris Transfer & Warehouse Company at the time that this rig was hired. I rented that rig to Mr. Henry. I waited on him. I don't know whether he had anyone with him when he came to me about it or not, but he is the one that transacted the business, he arranged for it, he engaged it for this date, to take a picnic to Mt. Pinson, and ordered it to be at a certain place at a certain hour. We furnished a driver, and turned that rig entirely over to them for their exclusive use for that entire day, to use for the purpose of carrying this picnic party. We did not rent those particular picnic wagons to negroes. We have some other wagons we usually arrange for negroes when they want them; common wagons, you know, straw seats in them, to accommodate them. So far as these wagons were concerned, we only rented those to white people. Usually the terms for renting those wagons are stated, and that would be the only question ordinarily as to whether they accepted the terms or not. The amount would be stated and they would take it if they wanted it. It was optional with us as to who we should rent those wagons to, what persons; I don't know of any occasion there would be to let any-

L.R.A.1915C.

body have it, you know, except negroes. We would not let out a wagon in case we thought there would be any chance for any damages to the outfit. We wouldn't rent it to that kind of a person whether he was white or black. We wouldn't rent these wagons, these particular picnic wagons, to people except white people, anyhow.

"We had some wagons fitted up for negroes and let them have them. As a matter of fact, the Harris Transfer & Warehouse Company didn't turn down people that wanted picnic wagons. They paid me \$15, and I was to furnish a tallyho, that conveyance there, four-wheeled conveyance, and four horses and the harness and the driver, and I was to deliver it at a certain point, and they were to select the crowd, they arranged their own crowd, the picnic. It was for that day, it was understood they were to put—I had nothing to do with the selection of the passengers. The understanding was they were to go to Mt. Pinson; we fed the team, and they paid us \$15 for it. Any other picnic crowd that wanted to go there could have done the same thing. We had the same price for all parties, for the same place and same time and equipment and for the same wagon. We were regularly engaged in that business and been engaged in it for years. We keep wagons for that purpose and let them out on special occasions.

"We wouldn't let those wagons out except to persons we considered would take care of the equipment. We determined who we would rent these wagons to when they came to us and applied to us. We determined whether we would do it or whether we would not, but I don't know of any cases that we turned down, reputable looking people that would come and inquire for it. I don't remember of ever turning down a picnic party unless they wouldn't pay the price we asked for it. We would make the price ourselves. It was determined in every instance what the price would be, and unless they paid that price we wouldn't let them have it at all under any circumstances."

"I have been secretary of the Harris Transfer & Warehouse Company since its organization, since its incorporation. They do a general warehouse, storage, and transfer business of freight principally, and also have a number of wagons which they advertise to hire for picnic purposes and the transfer of passengers. They also have two automobiles which are applicable to either the transfer of freight or the handling of passengers. The original business was established in 1880; the company was incorporated in 1901. I am secretary of the company and have been for twelve years. Prac-

tically all, well 75 per cent, of our business, is the hauling of freight, possibly a larger percentage. In addition to that, we do a storage business. We have a stable, and also have a shop. It is entirely optional with the Harris Transfer Company as to whom we shall rent these wagons to."

1. The plaintiff's intestate while on the picnic party referred to above accidentally fell from the picnic wagon and was killed, and the sole question is: Was the plaintiff's intestate, at the time of her death, "a passenger in or on a public conveyance provided by a common carrier for passenger service?" In this connection we desire to say that we are not inclined to permit the fact that the five picnic wagons referred to in the above testimony were kept exclusively for the use of white picnic parties to in any way influence our decision. The Warehouse & Transfer Company provided other means of transportation for negro picnic parties and the necessity for the segregation of the white and black races in the state is so great that it finds sanction not only in the best thought of all those—both white and black—who have the true interest of the two races in mind, but it has also found expression in many statutes requiring common carriers upon equal and just terms to keep the members of the two races separated while they travel. If a common carrier violates the spirit or the letter of the law, and in the matter of the character of the conveyance discriminates against one of the races in favor of the other, his violation of the law can in no way affect the relations which, as a matter of fact, he bears to the public as a common carrier. *Lloyd v. Haugh & K. Storage & Transfer Co.* 223 Pa. 148, 21 L.R.A.(N.S.) 188, 72 Atl. 516. The members of each race—white and black—have a claim upon a common carrier for equal accommodation while they travel. The members of neither race have, in this state, the right to demand that they be permitted to travel in a conveyance kept exclusively for the other race, but they have a right to demand that the conveyance which is kept for them shall be equal, in point of accommodation, to that kept for the members of the other race. The laws of hygiene, common sense, and necessity dictate this rule of the law. Necessity frequently fixes a rule of law where, in the absence of necessity, no such rule would exist. *Waldrop v. Nashville, C. & St. L. R. Co.* 183 Ala. 226, 62 So. 769.

2. In the case of *Nugent v. Smith*, L. R. 1 C. P. Div. 19 and 423, 1 Eng. Rul. Cas. 216, which case appears in a note, § 49, 1 *Hutchinson on Carriers*, 3d ed. p. 44, we find the following: "The real test whether a man is a common carrier, whether by land

or water, therefore, really is whether he has held out that he will, so long as he has room, carry for hire the goods of every person who will bring goods to him to be carried. The test is not whether he is carrying as a public employment or whether he carries to a fixed place, but whether he holds out, either expressly or by a course of conduct, that he will carry for hire, so long as he has room, the goods of all persons indifferently who send him goods to be carried."

Under this rule a stagecoach, a bus, an automobile, or a hackney coach, a cab, dray, cart, wagon, or sled, which undertakes for a reward to carry, indiscriminately, passengers or baggage for the public "so long as there is room," is a common carrier. 1 *Hutchinson, Carr.* 3d ed. p. 63, § 68.

A few illustrations may drive home the above rule. There is a regular automobile line which runs to and from the city of Montgomery to Eclectic, and in any automobile of this line any person, so long as there is room, may take passage upon the payment of his fare. This automobile line is, of course, a common carrier of passengers. There are in the city of Greensboro, hacks, carriages, and automobiles which carry passengers from the station there to any part of that city, and they take these passengers so long as there is room. These hacks, carriages, and automobiles, when engaged in the above business, are common carriers. During the county fair in Greensboro, there are hacks, automobiles, and carriages which, so long as there is room, carry, for hire, passengers to and from the county fair grounds. When so engaged, these hacks, carriages, and automobiles are common carriers. Any decent member of the public has a right, so long as there is room for him in any hack, automobile, or carriage, to demand that he be permitted to ride in it.

3. Accepting as true all the evidence in this case, and allowing all reasonable inferences favorable to the plaintiff which can be drawn therefrom, the Harris Transfer & Warehouse Company may have been—and probably was—a common carrier of freight and passengers in so far as its transfer business was concerned, but it was not a common carrier in so far as this specific picnic business was concerned. If this testimony is to be believed, then this transfer company occupied the same relation to the public with reference to picnics that an ordinary livery stable keeper occupies to the public. It is evident that, at the period of the year when people are accustomed to avoid the heat of cities and find recreation in the country, private picnics are of frequent occurrence in the neighborhood of the

city of Birmingham, and, to meet this want of the people, the transfer company has provided itself with some extra large wagons for use on such occasions. These picnic wagons are hired out just as the ordinary liveryman hires out his teams. The liveryman keeps his teams for hire to meet a want of the people, just as this transfer company keeps its picnic wagons to meet a want of the people. The picnic wagons have simply been provided to meet the requirements of larger parties than can be accommodated in the hacks and carriages ordinarily in use. The mere fact that a liveryman may be engaged in one line of business as a common carrier does not render him a common carrier as to his livery business. His hack when hauling passengers from a station may be a common carrier, and that same hack when it is carrying a traveling man from one town to another town may not be a common carrier. In the one instance the passenger has the legal right to demand passage. In the other instance the traveler has no legal right to make such demand.

4. That a liveryman is not a common carrier there is, under all the authorities, no doubt. *Stanley v. Steele*, 77 Conn. 688, 69 L.R.A. 561, 60 Atl. 640, 2 Ann. Cas. 342, 18 Am. Neg. Rep. 20; *Payne v. Halstead*, 44 Ill. App. 97; *Siegrist v. Arnot*, 86 Mo. 200, 56 Am. Rep. 425; 25 Cyc. 1513; 1 *Hutchinson*, Carr. 3d ed. p. 92, § 96.

5. It is laid down in the books that, as a general proposition, the question as to whether a particular man is or is not a common carrier is a mixed question of law and fact. It is undoubtedly true, as stated by counsel for appellee in their briefs, that "what constitutes a common carrier is a question of law, but whether a party comes within that meaning is a question of fact."

In this case, under the law, the facts show that, in the particular business in which this transfer company was engaged when the plaintiff's intestate was killed, it was not a common carrier, but only a private carrier for hire.

6. In the above discussion we have not undertaken to give the reasons which have actuated the courts in holding that a liveryman, who keeps vehicles, horses, and drivers for hire, is not a common carrier. The reasons appear in the above authorities, and it is needless to republish them here.

In this case the plaintiff's intestate was killed in falling from a wagon which some of her friends had hired for their own private use on that day. As she was not killed "while a passenger in or on a public conveyance provided by a common carrier for passenger service," the defendant was entitled to affirmative instructions in its behalf. Justice to the defendant, under the law, L.R.A.1915C.

makes this demand, for it contracted under its policy, not against accidents occurring while the plaintiff's intestate was the occupant of a vehicle hired from one who occupied to her the character of a livery stable keeper, and who owed to her only the duties of a livery stable keeper, but only against an accident which she might receive while under the protection of a common carrier who owed to her the high duties which a common carrier owes to a passenger. 1 *Hutchinson*, Carr. 3d ed. p. 92, § 96.

Reversed and remanded.

Anderson, Ch. J., and McClellan and Mayfield, JJ., concur.

ILLINOIS SUPREME COURT.

MARY HARTNETT, Appt.,
v.

BOSTON STORE OF CHICAGO.

(265 Ill. 331, 106 N. E. 837.)

Negligence — sale of gun to boy — liability for resulting injury.

1. The mere sale of a gun to a fifteen-year-old boy in violation of ordinance does not render one liable for an injury done by his loading and firing the gun, if there was no reason to anticipate probable injury because of the carelessness of the boy or his lack of skill in the use of firearms.

Evidence — necessity of offer of proof.

2. Evidence cannot be excluded because of absence of an offer of proof as to what the answer to the question will be, where the question shows the purpose and materiality of the evidence.

Appeal — failure to preserve ruling in motion for new trial.

3. An objection and exception to the exclusion of evidence is abandoned by failure to mention the ruling in the motion for new trial.

(October 16, 1914.)

Note. — Liability of one who sells dangerous instrumentality to child in violation of statute or ordinance for injury inflicted thereby upon child or third person.

The question under annotation presupposes a sale in violation of statute or ordinance, and therefore does not include cases like *Mathews v. Caldwell*, 5 Ga. App. 336, 63 S. E. 250, denying liability upon the ground that the toy pistol sold was not within the purview of a statute in relation to the furnishing of pistols, etc.

The following notes may be consulted with profit in connection with this subject: Violation of police ordinance as ground

APPEAL by plaintiff from a judgment of the Appellate Court, First District, affirming a judgment of the Superior Court for Cook County in defendant's favor, and from an order overruling a motion for new trial, in an action brought to recover damages for injuries alleged to have resulted from defendant's violation of an ordinance forbidding the sale of firearms to minors. Affirmed.

The facts are stated in the opinion.

Messrs. George H. Mason and Fred B. Hovey, with Mr. R. Wilson More, for appellant:

The violation of a valid municipal ordinance enacted for the safety of the public is *prima facie* evidence of negligence.

29 Cyc. 436; Binford v. Johnston, 82 Ind.

for private action, Sluder v. St. Louis Transit Co. 5 L.R.A. (N.S.) 186.

Private action in violation of statute not expressly conferring it, Wolf v. Smith, 9 L.R.A. (N.S.) 338; and especially as to the question of proximate cause in such case, see pp. 345 et seq. of that note.

Violation of statute or ordinance relating to explosives as ground of private action, Molin v. Wisconsin Land & Lumber Co. 48 L.R.A. (N.S.) 876.

Liability for injury to children from explosives left accessible to them, 14 L.R.A. (N.S.) 586; 24 L.R.A. (N.S.) 1257; and 42 L.R.A. (N.S.) 840.

May intervening act of child break causal connection between negligence and injury, 23 L.R.A. (N.S.) 249.

The general rule is that, in order to hold one liable for an injury alleged to have resulted from the violation of a statute, there must be a causal relation between the act of violation and injury, and the violation must be the proximate cause of the injury. See 29 Cyc. 439. As stated in *HARTNETT v. BOSTON STORE*, to constitute proximate cause the injury must be the natural and probable result of the negligent act or omission, and be of such a character as an ordinarily prudent person ought to have foreseen might probably occur as a result of the negligence, although it is not essential that the person charged with negligence should have foreseen the precise injury which might result from the act.

Generally, as to anticipation as an element of proximate cause, see note to *Kreigh v. Westinghouse, C. K. & Co.* 11 L.R.A. (N.S.) 684. See also *Hubbard v. Bartholomew*, 49 L.R.A. (N.S.) 443.

In the *HARTNETT CASE* the plaintiff contended that the violation itself was sufficient in law to connect the sale of the gun with the injury as the proximate cause. The court, however, took the view that, in order to connect the sale with the injury, it was necessary to prove that the seller ought to have foreseen that the probable result would be that the boy would injure someone by his carelessness or inexperience, and that the probabilities of

432, 42 Am. Rep. 508; *United States Brewing Co. v. Stoltenberg*, 211 Ill. 531, 71 N. E. 1081, 17 Am. Neg. Rep. 193; *H. Channon Co. v. Hahn*, 189 Ill. 28, 59 N. E. 522; *True & T. Co. v. Woda*, 201 Ill. 315, 66 N. E. 369; *Commonwealth Electric Co. v. Rose*, 214 Ill. 560, 73 N. E. 780; *Conrad v. Springfield Consol. R. Co.* 145 Ill. App. 564, affirmed in 240 Ill. 12, 130 Am. St. Rep. 251, 88 N. E. 180.

Regardless of the allegations of the declaration as to the ordinance and the violation thereof, the declaration stated a cause of action at common law, and if the statement was defective it was cured by the plea of the general issue.

31 Cyc. 719; *Greathouse v. Robinson*, 4 Ill. 7; *Wills v. Clafin*, 92 U. S. 135, 23 L.

consequent injury did not depend solely upon the question of age. And, in the absence of allegation or proof that the boy was inexperienced in the use of firearms, was unfit to handle or use them, the act of discharging the gun was considered as the act of an intervening independent agency.

A case arising in Canada somewhat similar in its facts to the *HARTNETT CASE*, and ruling contrary, is *Fowell v. Grafton*, 22 Ont. L. Rep. 550, affirming 20 Ont. L. Rep. 639, where a dealer, in violation of a statute, sold an air gun to a boy thirteen years old, who procured ammunition, and while shooting at birds in a public street, hit a woman. The court was of the opinion that, apart from the question of negligence, as the air gun was sold to the boy in contravention of a statute the object of which was to prevent just such accidents, the sellers were liable for the injury, the unlawful sale being the proximate cause thereof. In support of this view the rule is stated that the commission of an act specifically forbidden by law is generally equivalent to an act done with intent to cause injury, where the harm that ensues from the unlawful act is the very kind of harm which it was the aim of the law to prevent. The air gun, observes the court, though in itself harmless when the boy received it, would become a dangerous instrument in his hands when he had obtained the bullets and loaded it with them, and that he would do this was in the contemplation of the seller as well as of the boy. The fact that the danger to the public of an air gun or ammunition being in the hands of a minor under the age of sixteen was deemed by the legislature of so serious a character as to render it proper that it should be made a criminal offense to sell or give either the air gun or ammunition for it to such a minor was a factor the jury might take into account in determining whether the sellers were guilty of the negligence with which they were charged. On the question of proximate cause, Clute, J., said: "The prohibition against selling an air gun to an infant under sixteen years of age was, no doubt, to protect the child and the public

ed. 490; *Illinois Steel Co. v. Hanson*, 195 Ill. 106, 62 N. E. 918; *Nokomis v. Salter*, 61 Ill. App. 150; *Mattoon v. Worland*, 97 Ill. App. 13.

A valid statute or ordinance creating a new duty to the public, or a certain part of the public it is designed to protect, if it is not for the protection of the public generally, creates a legal presumption that a causal relation exists between a violation of the duty to one in the class intended, and a subsequent injury of the kind the statute or ordinance attempted to prevent to one in that class, if the relation of the violation and subsequent injury is the same as that the statute or ordinance foresaw or anticipated.

Osborne v. McMasters, 40 Minn. 103, 12 Am. St. Rep. 698, 41 N. W. 543; *Hayes v. Michigan C. R. Co.* 111 U. S. 228, 28 L. ed. 410, 4 Sup. Ct. Rep. 369; *Weick v. Lander*, 75 Ill. 93; *Ladin & R. Powder Co. v. Tearney*, 131 Ill. 322, 7 L.R.A. 262, 19 Am. St.

Rep. 34, 23 N. E. 389; *Conrad v. Springfield Consol. R. Co.* 145 Ill. App. 564; *Commonwealth Electric Co. v. Rose*, 214 Ill. 545, 73 N. E. 780; *H. Channon Co. v. Hahn*, 189 Ill. 29, 59 N. E. 522; *True & T. Co. v. Woda*, 201 Ill. 315, 66 N. E. 369; *United States Brewing Co. v. Stoltenberg*, 211 Ill. 531, 71 N. E. 1081, 17 Am. Neg. Rep. 193; *O'Donnell v. Riter-Conley Mfg. Co.* 124 Ill. App. 544; *Chicago & J. Electric R. Co. v. Freeman*, 125 Ill. App. 322; *Carlock v. Denver & R. G. R. Co.* 55 Colo. 146, 133 Pac. 1103; *Steel Car Forge Co. v. Chec*, 107 C. C. A. 192, 187 Fed. 868.

The placing of firearms or explosives in the hands of those declared to be incapable of properly handling them is the proximate cause of injuries inflicted by or to such third persons incapable of properly handling them, and the acts of such third persons are not such acts of independent responsible third persons as to interrupt the causal relation between the sale to such

as well, from the danger which would arise from an instrument of that kind being placed in the hands of such a person. The sale of the instrument makes the danger possible, and in that sense the defendants have created a dangerous condition of affairs which in effect resulted in the injury complained of. No doubt, all the circumstances of the particular case would have to be taken into consideration, as the trial judge charged the jury. The prohibition must mean that, if a child of tender age had a gun, he would probably use it, and if he used it, he would probably hurt either himself or somebody else. The defendants sent him out thus armed with a dangerous instrument without instructions and without caution,—if that would make any difference. The effect of the lapse of two days does not, it appears to me, make any difference. During all the time the infant had possession of the gun, that possession was unlawful, and made unlawful by the defendants. He was unlawfully possessed of it by their act; the natural result following—having become possessed of the weapon, he used it, and in using it caused the injury. His final act in the using is so connected with the prohibition that I do not think, in the circumstances of this case, it is so remote as to have entitled the defendants to have the case withdrawn from the jury." The view taken in this case would seem to support plaintiff's contention in the *HARTNETT CASE*, that the violation of the ordinance was in law sufficient to connect the sale of the gun with the injury as the proximate cause.

It will be observed that the complainants in the two cases next cited, which were held not to be demurrable, included allegations of inexperience or known carelessness upon the part of the youthful purchaser, and the cases are therefore distinguishable from the *HARTNETT CASE*.
L.R.A.1915C.

In *Bernard v. Smith*, — R. I. —, 90 Atl. 657, a storekeeper sold to an eleven-year-old boy a 22-caliber rifle and two boxes of cartridges; the boy was entirely unacquainted with and inexperienced in the use of firearms, and, while shooting at a target set up in the traveled way, one of the bullets missed the target and hit a pedestrian about 250 feet away; the negligence charged in the first count of the declaration was the violation of a statute prohibiting the sale of firearms to minors under the age of sixteen years, without the written consent of the parent or guardian; the second count set up the sale and delivery of the rifle to the boy in violation of the common-law duty; he being under the age of twenty-one years, to wit, eleven years of age, and unused to and inexperienced in the use of firearms, all of which the seller knew or should have known. The demurrer did not particularly state in what respect the declarations failed to state a cause of action. It was claimed, however, that the declaration was defective in failing to allege that the child discharged the rifle in ignorance of the danger, and while he was in the exercise of that degree of care of which he was capable. The court, in holding the demurrer properly overruled, came to the same conclusion as that reached by the superior court, that if the injury alleged had been to the child to whom the dangerous article was intrusted, there might have been some force in the argument presented; some allegations might have been necessary to show that he was not guilty of contributory negligence. But here, where the injury was to a third person, it was not necessary to negative lack of due care or even the wilful action of the child. The child's negligence in handling the dangerous weapon or even his wilful use of it was one of the natural consequences of intrusting him with it. In determining

third persons and the injuries inflicted by or to them.

Dixon v. Bell, 1 Starkie, 287, 5 Maule & S. 198, 17 Revised Rep. 308, 19 Eng. Rul. Cas. 26; Carter v. Towne, 98 Mass. 568, 96 Am. Dec. 682; Binford v. Johnston, 82 Ind. 426, 42 Am. Rep. 508; McEldon v. Drew, 138 Iowa, 390, 128 Am. St. Rep. 203, 116 N. W. 147.

Messrs. Hamilton Moses and Walter Bachrach, with Messrs. Moses, Rosenthal, & Kennedy, for appellee:

It was not negligence *per se* at common law to sell or give a gun to a minor.

Palm v. Ivorson, 117 Ill. App. 535; Meyer v. King, 72 Miss. 1, 35 L.R.A. 474, 16 So. 245; Poland v. Earhart, 70 Iowa, 285, 30 N. W. 637; Johnson v. Glidden, 11 S. D. 237, 74 Am. St. Rep. 795, 76 N. W. 933, 5 Am. Neg. Rep. 97; Chaddock v. Plummer, 88 Mich. 225, 14 L.R.A. 675, 26 Am. St. Rep. 283, 50 N. W. 135; Harris v. Cameron, 81 Wis. 239, 29 Am. St. Rep. 891, 51 N. W.

437; Hagerty v. Powers, 66 Cal. 368, 56 Am. Rep. 101, 5 Pac. 622; Malmberg v. Bartos, 83 Ill. App. 483.

The selling of an unloaded gun in violation of the ordinance is not *prima facie* evidence of negligence, unless the sale proximately causes the complained of injury.

Meyer v. King, 72 Miss. 1, 35 L.R.A. 474, 16 So. 245; Illinois C. R. Co. v. Schmitt, 100 Ill. App. 500; Illinois C. R. Co. v. Klein, 95 Ill. App. 226; Toledo, W. & W. R. Co. v. Jones, 76 Ill. 314; Chicago, B. & Q. R. Co. v. Notzki, 66 Ill. 455; Wabash R. Co. v. Coker, 81 Ill. App. 600; Cleveland, C. C. & St. L. R. Co. v. Lindsay, 109 Ill. App. 533; Gibson v. Leonard, 143 Ill. 182, 17 L.R.A. 588, 36 Am. St. Rep. 376, 32 N. E. 182; Boreck v. Michigan Bolt & Nut Works, 111 Mich. 129, 69 N. W. 254; Schmidt v. Mitchell, 84 Ill. 195; Poland v. Earhart, 70 Iowa, 285, 30 N. W. 637; Shugart v. Egan, 83 Ill. 56, 25 Am. Rep. 359; Schulte v. Schleeper, 210 Ill. 357, 71 N. E. 325;

whether the defendant was negligent in selling the rifle to the boy, and whether the injury was the natural and probable consequences of that negligence, it was not important to determine whether the boy, with reasonable care, could have seen the person who was injured approaching; whether he was informed of her approach by his companions; whether he actually observed her coming down the highway when he fired the rifle; or whether he used that degree of care which would be ordinarily exercised by one of that age and experience.

The rule is stated in Anderson v. Settergren, 100 Minn. 294, 111 N. W. 279, that, in order that a complainant may recover for failure to perform a statutory duty, he must show that he is within the class for whose benefit legislation creating not a purely public duty was designed; that there was a violation of statutory requirement by the defendant; and that he suffered damage as the proximate result of such violation. In this case a statute made it unlawful for a minor under the age of fourteen, not accompanied by parent or guardian, to have possession or control of firearms, and made it a misdemeanor to aid or knowingly permit a minor of such age, save in the excepted cases, to violate the same; a complaint alleged that hardware merchants loaned a rifle and sold cartridges to a minor known to be only thirteen years of age, and to be careless and negligent in the use of firearms; that the minor began to shoot with the gun and cartridges in every direction, and damaged plaintiff. It was held that the complaint was not demurrable; that the defendant's wrong was in law the proximate cause of the damage, despite the intervention of the minor.

It was held in Binford v. Johnston, 82 Ind. 426, 42 Am. Rep. 508, that the sale of cartridges, being in violation of a criminal statute, was of itself an act of negligence, L.R.A.1915C.

and that the court could so instruct as a conclusion of law. In this case one knowing their dangerous character sold loaded cartridges to two boys, ten and twelve years old, instructing them how to use them, and the boys left a loaded pistol lying on the floor of their home, where a six-year-old child discharged it inflicting a wound on one of the other boys, from which he died. It was held that the seller could not escape liability upon the ground that the loaded pistol was left lying where the young child could reach it. The decision was based upon the general ground that the resulting injury was one which must have been or ought to have been anticipated.

In Gartin v. Meredith, 153 Ind. 16, 53 N. E. 936, a dealer, in violation of a statute, sold rifle cartridges to a boy fifteen years old, and while the boy was hunting the rifle was discharged injuring his nine-year-old companion. The court held that, negligence having been alleged, the complaint was insufficient as against a demurrer in the absence of an express averment that plaintiff was free from contributory negligence. The court stated that the sale of the cartridges to the minor in violation of the statute was negligence *per se* so far as the plaintiff, a third person, was concerned, and that the dealer's act could in no sense be held to be a wilful wrong, thereby relieving plaintiff of the burden of denying contributory negligence in his complaint. The fact that the defendant's negligence is also violative of a positive statute will not warrant a recovery, when contributory negligence is shown to exist on the part of the one sustaining the injury.

In the following cases, as in HARTNETT v. BOSTON STORE, it was held that the failure to allege that the minor was inexperienced in the use of the instrumentality; that there was anything in the character or disposition of the minor that rendered it danger-

Schroder v. Crawford, 94 Ill. 357, 34 Am. Rep. 236; United States Brewing Co. v. Stoltzenberg, 211 Ill. 537, 71 N. E. 1081, 17 Am. Neg. Rep. 193.

The act of the minor in negligently discharging the gun was the proximate cause of plaintiff's injury.

Loftus v. Dehail, 133 Cal. 214, 65 Pac. 379; Otten v. Cohen, 1 N. Y. Supp. 430; O'Connor v. Brucker, 117 Ga. 451, 43 S. E. 731, 13 Am. Neg. Rep. 500; Tutein v. Hurley, 98 Mass. 211, 93 Am. Dec. 154; Beetz v. Brooklyn, 10 App. Div. 382, 41 N. Y. Supp. 1009; Berman v. Schultz, 40 Misc. 212, 81 N. Y. Supp. 647; Laidlaw v. Sage, 158 N. Y. 98, 44 L.R.A. 216, 52 N. E. 679; Stephenson v. Corder, 71 Kan. 475, 69 L.R.A. 246, 114 Am. St. Rep. 500, 80 Pac. 938, 18 Am. Neg. Rep. 97; Seymour v. Union Stock Yards & Transit Co. 224 Ill. 579, 79 N. E. 950; Stark v. Muskegon Traction & Lighting Co. 141 Mich. 575, 1 L.R.A.(N.S.) 822, 104 N. W. 1100; Malmberg v. Bartos, 83 Ill. App. 483; McKibbin v. Bax, 79 Neb. 577, 13

L.R.A.(N.S.) 646, 126 Am. St. Rep. 677, 113 N. W. 158; Palm v. Iverson, 117 Ill. App. 535; Meyer v. King, 72 Miss. 1, 35 L.R.A. 474, 16 So. 245; Poland v. Earhart, 70 Iowa, 285, 30 N. W. 637; Ship v. Fridenberg, 132 App. Div. 782, 117 N. Y. Supp. 599.

The minor was an independent, responsible agency, and liable for his own acts of negligence.

Chicago & G. T. R. Co. v. Hoffman, 82 Ill. App. 453; Chicago, R. I. & P. R. Co. v. Eininger, 114 Ill. 79, 29 N. E. 196; Heiman v. Kinnare, 190 Ill. 156, 52 L.R.A. 652, 83 Am. St. Rep. 123, 60 N. E. 215.

A declaration which fails to allege a fact without the existence of which the plaintiff is not entitled to recover does not state a cause of action.

Walters v. Ottawa, 240 Ill. 259, 88 N. E. 651; Foster v. St. Luke's Hospital, 191 Ill. 94, 60 N. E. 803.

The rulings of the trial court in sustaining defendant's objections to certain ques-

ous to put the instrumentality in his hands; or that he was ignorant of its use,—was fatal to the attempt to state a cause of action; and the act of the child or purchaser was held an independent intervening cause:

Thus, where one in violation of a statute sold a revolver to a boy fifteen years old, wherewith he accidentally shot himself in the hand, the court in Poland v. Earhart, 70 Iowa, 285, 30 N. W. 637, in denying a recovery, stated that "the immediate cause of these injuries was not the sale of the weapon by defendant, but the accident which subsequently occurred while the boy was handling it whereby he was wounded. If plaintiff has a cause of action then for injuries, it must be founded on the fact that the accident by which her son was wounded might reasonably have been anticipated by the defendant as a consequence of the sale of the weapon to him. But there are no allegations in the petition showing that such injury ought to have been anticipated as a consequence of the act. . . . It is not alleged that he was ignorant of the character of the weapon sold him, or that he was inexperienced in the use of such weapons; neither is it shown that there was anything in his character or disposition that rendered it dangerous to place a weapon of that kind in his hands. It cannot be said that defendant might reasonably have anticipated that an accident would occur from the handling of the weapon from the fact alone that the person to whom he sold it was a minor."

It was held in Meyer v. King, 72 Miss. 1, 35 L.R.A.(N.S.) 474, 16 So. 245, that the proximate cause of the death of a minor from chloroform sold to him was not the act of sale, but his subsequent act of taking it, where there was nothing to show that he was ignorant of its use, or that anything in his character or disposition rendered it

dangerous to put it into his hands; that the sale of chloroform in violation of statute did not render the seller liable for the minor's death from drinking it, where the sale was not the proximate cause of the death.

So, where a druggist, in violation of a statute, sold a bottle of croton oil to an eighteen-year-old minor who, together with a companion, put a few drops of the oil on a pie, some of which they induced the minor son of the plaintiff to eat, causing him great pain, distress, and sickness from which he suffered for some days, the court in McKibbin v. Bax, 79 Neb. 577, 13 L.R.A.(N.S.) 646, 126 Am. St. Rep. 677, 113 N. W. 158, denied the father recovery for loss of son's services and medical expenses on the ground that the illegal sale of the oil was not the immediate and proximate cause of the injury. That injury arose, observed the court, not from the sale of the oil, but from putting it upon the pie which plaintiff's son was induced to eat by another and independent agency,—the act of the purchaser. There was no showing that the purchaser did not know the dangerous character of the article which he bought, or that he labored under any misapprehension of the effect which giving it to plaintiff's son would have. It was not given by mistake, or in the supposition that it was harmless; or at least no attempt has been made to show that such was the case. While the defendant may have been guilty of negligence and the violation of the statute in allowing sales to be made by unregistered pharmacists and by a sale of a poisonous medicine to a minor, it cannot be said that injury to the plaintiff's son was reasonably to be expected from such a sale, or that his injury was the natural and proximate consequences thereof.

J. D. C.

tions propounded by plaintiff's counsel are not open for review.

Janeway v. Burton, 201 Ill. 78, 66 N. E. 337; *West Chicago Street R. Co. v. Krueger*, 168 Ill. 586, 48 N. E. 442; *Matthews v. Granger*, 196 Ill. 164, 63 N. E. 658; *Nonotuck Silk Co. v. Levy*, 75 Ill. App. 55; *Howard v. Tedford*, 70 Ill. App. 660; *Cook v. Haussen*, 51 Ill. App. 269; *Finley v. West Chicago Street R. Co.* 90 Ill. App. 368; *Persels v. McConnell*, 16 Ill. App. 526; *Home Guardian of America v. Holt*, 108 Ill. App. 578; *McLeod v. Andrews & J. Co.* 116 Ill. App. 648.

Cartwright, Ch. J., delivered the opinion of the court:

This is an appeal granted on a certificate of importance by the appellate court for the first district from a judgment of that court affirming a judgment of the superior court of Cook county in an action on the case brought by *Mary Hartnett*, appellant, against the *Boston Store of Chicago*, appellee, to recover damages alleged to have resulted from a violation of an ordinance of the city of Chicago which forbids the sale of firearms to minors. The judgment was in favor of the defendant, and was entered on a verdict of the jury directed by the court.

The declaration consisted of a single count, which set out § 883 of an ordinance of the city of Chicago, as follows:

"Sec. 883. Firearms—Minors.—No person shall sell, loan, or furnish to any minor any gun, pistol, or other firearm, or any toy gun, toy pistol, or other toy firearm in which any explosive substance can be used, within the city, under a penalty of not more than \$100 for each offense: Provided, that minors may be permitted, with consent of their parents or guardians, to use firearms on the premises of a duly licensed shooting gallery, gun club, or rifle club, or to secure a permit to shoot game birds in accordance with the provisions of § 1486 of chapter 39 of this ordinance."

It was then charged that the defendant, by its servants, negligently and carelessly, and in disobedience of the ordinance, sold to *Oscar Soderquist*, a minor of the age of fifteen years, a gun in which explosive substances could be used, together with certain cartridges to be used in said gun; that *Oscar Soderquist* caused the gun to be loaded with cartridges, and by means of the gun discharged a leaden bullet from the gun, by reason of the negligence of the defendant in selling the gun and thereby placing it within the power of *Soderquist* to discharge the bullet from the gun; and that the bullet struck the plaintiff while she was

passing along a public alley, causing injury and damage to her.

The plaintiff offered in evidence the ordinance, together with proof that the defendant sold to *Oscar Soderquist*, a boy fifteen years of age, a 22-caliber rifle and two boxes of cartridges; that *Soderquist* took the gun home and hid it for two days, and then took the gun out and put up a tin target on the fence in the back yard of his home and shot at the target; and that he missed the target and the bullet went through the fence and struck the plaintiff, who was walking in the public alley back of the fence, causing the injuries for which the suit was brought. Thereupon the defendant moved the court to instruct the jury to find it not guilty, and the court gave the instruction. The plaintiff moved the court to set aside the verdict and grant a new trial, and alleged as grounds therefor error in giving the instruction and that the verdict was contrary to the law and the evidence.

There are three essential elements in actionable negligence: First, a duty imposed by law to exercise care in favor of the person for whose benefit the duty is imposed; second, the failure to perform that duty; and, third, a consequent injury so connected with the failure to perform the duty that the failure is the proximate cause of the injury. What constitutes proximate cause has been defined in numerous decisions, and there is practically no difference of opinion as to what the rule is. The injury must be the natural and probable result of the negligent act or omission, and be of such a character as an ordinarily prudent person ought to have foreseen might probably occur as a result of the negligence, although it is not essential that the person charged with negligence should have foreseen the precise injury which might result from his act. If the negligence does nothing more than furnish a condition by which the injury is made possible, and that condition causes an injury by the subsequent independent act of a third person, the creation of the condition is not the proximate cause of the injury. *Cooley, Torts*, 3d ed. 99; *Chicago Hair & Bristle Co. v. Mueller*, 203 Ill. 558, 68 N. E. 51; *Seith v. Commonwealth Electric Co.* 241 Ill. 252, 24 L.R.A. (N.S.) 978, 132 Am. St. Rep. 204, 89 N. E. 425.

The declaration alleged, and the evidence proved, the existence of a duty not to sell to any minor any gun in which an explosive substance could be used, within the city of Chicago, and the breach of that duty by the sale of the gun to the boy fifteen years old. It was also proved that an injury resulted to the plaintiff from the intentional act of the boy in loading the gun and shoot-

ing at a target, and the intermediate question between the injury and the sale was whether the two were so connected that the sale of the unloaded gun was the proximate cause of the injury. The ordinance creates an arbitrary rule based solely on the age of any person to whom a gun, pistol, toy gun, toy pistol, or other toy firearm might be sold, and as age is one of the essential elements to be considered in anticipating probable consequences, it is not questioned but that it was within the power of the city to enact such an ordinance. It would be a violation of the ordinance to sell a gun to a young man within one day of twenty-one years old, although he might be most skilful, careful, and experienced in the use of guns. The ordinance does not prohibit the sale of cartridges or other explosive substances, and the mere sale and delivery to a minor of an unloaded gun could not produce such an effect as resulted in this case. If Soderquist had not had the gun, he could not have loaded or fired it; but the injury did not result from the possession of the gun alone, but it was due to his want of care in the use of it. In considering the question whether the defendant, in selling the gun to Soderquist, might reasonably anticipate that some injury would result to some person by putting him in possession of the gun, there are other things than the mere question of age to be considered. A minor may reasonably be expected to exercise that degree of care which a person of his age, intelligence, capacity, discretion, and experience would naturally and ordinarily use. *Weick v. Lander*, 75 Ill. 93; *Chicago v. Keefe*, 114 Ill. 222, 55 Am. Rep. 860, 2 N. E. 267; *Illinois C. R. Co. v. Slater*, 129 Ill. 91, 6 L.R.A. 418, 16 Am. St. Rep. 242, 21 N. E. 575; *Illinois Iron & Metal Co. v. Weber*, 196 Ill. 526, 63 N. E. 1008; *Star Brewery Co. v. Hauck*, 222 Ill. 348, 113 Am. St. Rep. 420, 78 N. E. 827; *McGuire v. Guthmann Transfer Co.* 234 Ill. 125, 84 N. E. 723. A boy fifteen years of age raised in the country might be perfectly competent to ride and handle horses, although not well broken, or to handle other animals, and to put him in charge of one would not lead a person to anticipate any injury, while to put a city boy in the same situation might be grossly negligent.

Ordinances frequently prohibit the sale of fireworks to minors, but if a purchaser, although a minor, had been in the business of displaying fireworks, the sale to him, although in violation of the ordinance, would not justify a conclusion that the seller anticipated that a boy so skilled would carelessly handle them. If a boy fifteen years of age is wholly unacquainted with firearms, and has had no experience in their

use, it would be quite probable that some harm to another would follow from his use of a gun, but a boy of that age who has been accustomed to the use of firearms may be far more careful and skilful in their use than the ordinary adult, so that the probabilities of consequent injury do not depend solely upon the question of age. During the Civil War there were 105,000 boys not over fifteen years old, more than 1,000,000 not over eighteen years old, and more than 2,000,000 not over twenty-one years old, in the Union army, and it was not considered that they were unfit to be trusted with firearms. Everyone under twenty-one years of age would have come within the terms of this ordinance. It is common knowledge that the average adult unaccustomed to the use of a gun, when hunting, is a source of great danger to others not to be apprehended from a minor acquainted with firearms and their use under the same circumstances. If a boy fifteen years old is experienced in the use of guns, and acquainted with their construction and the proper mode of carrying, handling, and discharging them, and has been careful in their use, danger to others would not be reasonably anticipated by a person selling him a gun.

The declaration merely alleged the existence of the ordinance, the sale of the gun, and the act of Soderquist which resulted in injury to the plaintiff, and the other essential fact from which a jury might infer that the probable result would be that he would injure someone by his carelessness was omitted in allegation and proof. If a mere violation of the ordinance created a cause of action for any injury resulting from the carelessness of the purchaser, the declaration would have been as good if it had averred that Soderquist was twenty years old. The averment that he was fifteen years old added nothing to complete the supposed cause of action. An unloaded gun is not inherently dangerous, and the plaintiff was bound to allege and prove that her injury might reasonably have been anticipated as a consequence of the sale of the gun to Soderquist; but it was not alleged that there was anything in the character or disposition of Soderquist, or such want of skill and experience, as rendered it dangerous for him to have a gun. The evidence, when the court directed the verdict, did no more than to show that the defendant created a condition by which the injury to plaintiff was made possible through the carelessness of Soderquist.

On the trial Soderquist was a witness for plaintiff, and was asked a number of questions evidently designed to show that he had never owned a gun, and was not accustomed to the use of firearms or experi-

enced in that respect, and objections to the questions were sustained. Error is assigned on the ruling, and one reply is that the plaintiff made no offer of proof as to what the witness would answer. That does not justify the ruling, because, where a question shows the purpose and materiality of evidence, it is not necessary to state what the answer would be. If a question is in proper form, and clearly admits of an answer relative to the issue and favorable to the party on whose side the witness is called, the party is not bound to state the facts proposed to be proved by the answer, unless the court requires him to do so. 38 Cyc. 1330; Buckstaff v. Russell, 151 U. S. 626, 38 L. ed. 292, 14 Sup. Ct. Rep. 448.

The plaintiff, however, filed a written motion for a new trial, in which no mention was made of any ruling on the admission of evidence, and the objection and exception were thereby abandoned. Matthews v. Granger, 196 Ill. 164, 63 N. E. 658; Janeway v. Burton, 201 Ill. 78, 66 N. E. 337. The court, in the written instruction directing a verdict, advised the jury that the declaration failed to make any allegation that the minor in question was inexperienced in the use of firearms or unfit in any wise to handle or use them, and therefore omitted an element essential to constitute a legal cause of action. It is quite evident that the ruling on the evidence was based on the want of an allegation of that kind, and when the ruling was made, or at least when the view of the court became manifest in the instruction, a motion to amend the declaration, if made, ought to have been, and undoubtedly would have been, granted; but the plaintiff elected to stand on the claim that an allegation and proof that the ordinance was violated was sufficient, in law, to connect the sale of the gun with the injury as the proximate cause.

The court did not err in directing a verdict, and the judgment of the Appellate Court is affirmed.

Petition for rehearing denied December 4, 1914.

MAINE SUPREME JUDICIAL COURT.

DENNIS A. MEAHER
v.

LEWIS M. MITCHELL.

(112 Me. 416, 92 Atl. 492.)

Husband and wife — liability for services of attorney to wife.

1. A man is not liable for services of an attorney rendered at the request of his L.R.A.1915C.

wife, in consulting merchants as to furnishing credit to the wife pending divorce proceedings, since she might have applied directly for credit on her own behalf.

Same — divorce proceedings — necessities.

2. Where the statute authorizes the court in a divorce proceeding to direct the husband to furnish sufficient money for the prosecution or defense of the suit on her behalf, the attorney cannot hold the husband liable in a direct proceeding for services rendered the wife, as for necessities for which the husband is liable.

(December 9, 1914.)

REPORT by the Supreme Judicial Court for Cumberland County for the opinion of the full bench of an action brought to recover for professional services rendered by plaintiff to defendant's wife during divorce proceedings instituted by him. Judgment for defendant.

The facts are stated in the opinion.

Messrs. W. G. Chapman and D. A. Meaher, *in propria persona*, for plaintiff: Defendant was liable for the services rendered by plaintiff to his wife.

Furlong v. Hysom, 35 Me. 332; Etherington v. Parrot, 1 Salk. 118; M'Cutchen v. M'Gahay, 11 Johns. 281, 6 Am. Dec. 373; Bates v. Enright, 42 Me. 113; Baker v. Carter, 83 Me. 132, 23 Am. St. Rep. 764, 21 Atl. 834; Peaks v. Mayhew, 94 Me. 572, 48 Atl. 172; Ottoway v. Hamilton, L. R. 3 C. P. Div. 393, 47 L. J. C. P. N. S. 725, 38 L. T. N. S. 925, 26 Week. Rep. 783; Wilson v. Ford, L. R. 3 Exch. 63, 37 L. J. Exch. N. S. 60, 17 L. T. N. S. 605, 16 Week. Rep. 482; Conant v. Burnham, 133 Mass. 503, 43 Am. Rep. 532; Fisher v. Shea, 97 Me. 372, 61 L.R.A. 567, 54 Atl. 846; Askey v. Williams, 74 Tex. 294, 5 L.R.A. 176, 11 S. W. 1101; Steinfield v. Girrard, 103 Me. 151, 68 Atl. 630; Raynes v. Bennett, 114 Mass. 424; Stevens v. Stevens, 1 Met. 279; Stocken v. Patrick, 29 L. T. N. S. 507; McCurley v. Stockbridge, 62 Md. 422, 50 Am. Rep. 229; Porter v. Briggs, 38 Iowa, 166, 18 Am. Rep. 27; Manby v. Scott, 1 Lev. 4, 2 Smith, Lead. Cas. (Hare & W.) 445; Morrison v. Holt, 42 N. H. 478, 80

Note. — Liability of husband on wife's contract for attorney's fees in divorce proceedings.

The question here considered is treated in the notes to Wolcott v. Patterson, 24 L.R.A. 629, and Zent v. Sullivan, 13 L.R.A. (N.S.) 244, to which this note is supplementary.

These notes do not include cases that merely involve the right of the wife or her attorney to an allowance for an attorney's fee in the divorce suit itself.

Am. Dec. 120; Langbein v. Schneider, 27 Abb. N. C. 228; Zent v. Sullivan, 47 Wash. 315, 13 L.R.A.(N.S.) 245, 91 Pac. 1088, 15 Ann. Cas. 19; Shepherd v. Mackoul, 3 Camp. 326, 14 Revised Rep. 752; Morris v. Palmer, 39 N. H. 123; Warner v. Heiden, 28 Wis. 517, 9 Am. Rep. 515; Brown v. Ackroyd, 5 El. & Bl. 819, 25 L. J. Q. B. N. S. 193, 2 Jur. N. S. 283, 4 Week. Rep. 229; Turner v. Rooke, 10 Ad. & El. 47, 2 Perry & D. 294, 8 L. J. Q. B. N. S. 211; Preston v. Johnson, 65 Iowa, 285, 21 N. W. 606; Clyde v. Peavy, 74 Iowa, 47, 36 N. W. 883; Ceccato v. Deutschman, — Tex. Civ. App. —, 47 S. W. 739; Bord v. Stubbs, 22 Tex. Civ. App. 242, 54 S. W. 634; McClland v. McClland, — Tex. Civ. App. —, 37 S. W. 350.

It has been held that a husband is liable to attorneys for services rendered at the instance of the wife in preparing a defense to a cross petition for divorce filed against her on the ground of adultery and cruel and inhuman treatment, although the action was dismissed by the parties, since the charges against her had been made public, and she had the right to defend and to employ counsel for that purpose. Read v. Dickinson, 151 Iowa, 369, 130 N. W. 160.

And in Hamilton v. Salisbury, 133 Mo. App. 718, 114 S. W. 563, it was held that a husband was bound to furnish his wife with necessities, and that the protection of her good name was necessary, and that he was liable for services rendered by attorneys in preparing a defense to a divorce action brought against her on grounds derogatory to her character, which the husband subsequently caused to be dismissed; but it was held that the attorneys could not maintain a separate action to recover for such services, but that their fees must be allowed in the divorce action, and that for the purpose of securing an allowance the dismissal of the divorce proceeding might be set aside on motion during the term at which it was entered.

In Varn v. Varn, — Tex. Civ. App. —, 125 S. W. 639, it was held that the husband is liable for attorneys' fees incurred by the wife in prosecuting a suit for divorce, whether they are prayed for by the wife in the suit for divorce, as sued for by the attorney of the wife in a separate action.

And in the following Texas cases it was held that the counsel for the wife in a divorce proceeding instituted by her can recover in an independent action against the husband a reasonable fee for services rendered, where the grounds for the divorce were probably true and there was reasonable cause for bringing the suit, and it was brought in good faith: Dodd v. Hein, 26 Tex. Civ. App. 164, 62 S. W. 811; McLean v. Randell, — Tex. Civ. App. —, 135 S. W. 1116; Ceccato v. Deutschman, — Tex. Civ. App. —, 47 S. W. 739.

And in Hicks v. Stewart, 53 Tex. Civ. App. 401, 118 S. W. 206, it was held that L.R.A.1916C.

Mr. Frank H. Haskell, for defendant:

A husband is not liable to an attorney, in a subsequent and independent action, for professional services rendered his wife in defending against a petition for divorce preferred by him.

Wing v. Hurlburt, 15 Vt. 607, 40 Am. Dec. 695; Coffin v. Dunham, 8 Cush. 404, 54 Am. Dec. 769; Cooke v. Newell, 40 Conn. 597; Ray v. Adden, 50 N. H. 82, 9 Am. Rep. 175; McCullough v. Robinson, 2 Ind. 630; Dow v. Eyster, 79 Ill. 254; Burnham v. Tizard, 31 Neb. 781, 48 N. W. 823; Yeiser v. Lowe, 50 Neb. 310, 69 N. W. 847; Hamilton v. Salisbury, 133 Mo. App. 718, 114 S. W. 563; Westcott v. Hinckley, 56 N. J. L. 343, 29 Atl. 154; Zent v. Sullivan,

if the wife and her counsel acted in good faith in bringing an action for divorce, and for the protection of her property rights, against her husband on the ground of assaults and abuses, and if the grounds set out were probably true and constituted such cruelty as rendered their living together insupportable, both the husband and wife were liable to her attorneys for their services, and an instruction requiring a finding that the divorce suit was necessary for the personal protection of the wife, and for the preservation of her property rights, was held properly refused.

The plaintiffs in this case sought to recover upon a *quantum meruit* for the reasonable value of their services, and it was held that if the grounds for the petition in the divorce proceeding were probably true, and there was reasonable cause for bringing the suit, and it was brought in good faith, recovery for attorneys' fees might be had although the wife was mentally incapable of contracting. Ibid.

In Dodd v. Hein, 26 Tex. Civ. App. 164, 62 S. W. 811, it was held that it is the wife who must in good faith and upon probable cause institute and prosecute the suit, and that the bona fide belief of counsel whom she may have employed to institute the proceedings, that she has upon her representations sufficient ground for divorce, is insufficient.

It has been held in New York, that an attorney may recover in a separate action against the husband the value of legal services rendered to the wife in the institution and prosecution of an action by her for a separation on the ground of cruel and inhuman treatment. Naumer v. Gray, 28 App. Div. 529, 51 N. Y. Supp. 222.

But to succeed in such an action the plaintiff must show affirmatively that the suit was for the protection and support of the wife, and that the conduct of the husband was such as to render its institution and prosecution reasonable and proper. Ibid.; Hendrick v. Silver, 115 N. Y. Supp. 1093.

On a subsequent appeal of Naumer v. Gray, *supra*, it was held that, while there

47 Wash. 315, 13 L.R.A.(N.S.) 244, 91 Pac. 1088, 15 Ann. Cas. 19.

A husband is not liable to an attorney, in a subsequent and independent action, for professional services rendered his wife in a divorce proceeding by the wife against the husband.

Shelton v. Pendleton, 18 Conn. 417; Johnson v. Williams, 3 G. Greene, 97, 54 Am. Dec. 491; Morrison v. Holt, 42 N. H. 478, 80 Am. Dec. 120; Pearson v. Darrington, 32 Ala. 227; Isbell v. Weiss, 60 Mo. App. 54; Williams v. Monroe, 18 B. Mon. 514; Clarke v. Burke, 65 Wis. 359, 56 Am. Rep. 631, 27 N. W. 22; Sherwin v. Maben, 78 Iowa, 467, 43 N. W. 292; Sears v. Swenson, 22 S. D. 74, 115 N. W. 519; Kincheloe v. Merriman, 54 Ark. 557, 26 Am. St. Rep.

60, 16 S. W. 578; Peck v. Marling, 22 W. Va. 708.

Cornish, J., delivered the opinion of the court:

The plaintiff, an attorney at law, seeks to recover in this action against the husband for professional services rendered the defendant's wife during divorce proceedings instituted by the husband. In those proceedings the libellee prevailed, and the divorce was not granted.

No express contract on the part of the defendant to pay for the services is alleged or claimed; but the plaintiff rests his case on the broad ground that the services rendered fall within the class of necessities,

had been no formal discontinuance of the suit for separation, yet the voluntary return of the wife to her husband effectually put an end to the litigation, and that where the wife's attorneys had been allowed no fee, they might maintain a separate action against the husband for compensation. 41 App. Div. 361, 58 N. Y. Supp. 476.

The evidence in Hendrick v. Silver, supra, involving the wife's statements as to allowances, clothing, and food, was held insufficient to show that the services rendered were necessary either for the wife's protection or support, and the situation disclosed was held not such as to afford the attorneys probable cause for believing that the prosecution of the action for separation was reasonable and proper.

In Gordon v. Brackey, 143 Iowa, 102, 135 Am. St. Rep. 751, 120 N. W. 83, it was held that attorneys could not, after a reconciliation of the parties and a dismissal of the divorce action without the attorneys' consent, recover from the husband for services rendered in bringing a suit for divorce for the wife on the ground of cruel and inhuman treatment, although the wife in fact had a good ground for divorce.

And it has been held that no recovery can be had on the ground that the services were necessary to the wife's protection, for work performed by attorneys in an action for divorce brought by the wife on the ground of cruel and inhuman treatment, where the petition was dismissed upon its merits by the trial court, and an appeal from the dismissal was dismissed by the wife without the consent of the attorneys, although it was alleged that if the appeal had been prosecuted a reversal would have been obtained. Stockman v. Whitmore, 140 Iowa, 378, 118 N. W. 403.

And in Dorsey v. Goodenow, Wright (Ohio) 120, it was held that the filing of a petition for divorce by an attorney upon the employment of the wife was not a sufficient ground for an implied undertaking on the part of the husband against whom it was filed to pay the fees.

And it was held in Kincheloe v. Merriman, 54 Ark. 557, 26 Am. St. Rep. 60, 16 L.R.A.1915C.

S. W. 578, that an attorney could not recover against the husband for services rendered his wife in counseling her in reference to a suit which she contemplated bringing for a divorce upon the ground of cruel treatment, for the reason that such services had no relation to her protection as a wife, although the court stated that recovery might be had for services rendered in a proceeding to compel the husband to keep the peace, on the ground that she had a right to pledge the husband's credit to procure services which were necessary to her protection.

And it has been held that counsel fees cannot be recovered on motion, on the ground that they come within the category of necessities where attorneys were employed by the wife to file a bill for separate maintenance, and before hearing a reconciliation between the parties was effected, since it was held that necessities are to be provided by a husband for his wife to sustain her as his wife, and not to provide for her future condition as a single woman or as the wife of another. Kuntz v. Kuntz, 80 N. J. Eq. 429, 83 Atl. 787.

And in Sears v. Swenson, 22 S. D. 74, 115 N. W. 519, it was held that no action could be maintained against a husband to recover for services rendered at the wife's instance in commencing divorce proceedings which were dismissed before an allowance was made, either under a provision of the Code that if a husband fails to make provision for the wife's support, any other person may furnish her with articles for her support and recover therefor from the husband, since such services cannot be regarded as necessities within the meaning of the act; or under another section providing that, while an action for divorce is pending, the court may require the husband to pay money to prosecute or defend the action, since this provision gives a right to recover for counsel fees during the pendency of the proceedings, and this remedy is exclusive and precludes the maintenance of an action against the husband for such services unless they have been allowed by the court in the pending suit.

J. T. W.

for which the husband may be held liable in an independent action.

Two small items in the account annexed cover services for consultations with merchants, at about the time of separation, relating to supplies to be furnished the wife; but the evidence fails to show that these services were in any way necessary. The wife could have applied directly to these parties for credit, and no reason is given for her not doing so. There was no necessity of employing an attorney to make the request in her behalf. The wife's implied agency or authority to pledge her husband's credit, arising from the marital relation alone, might have covered the supplies furnished, but could not be stretched so as to include the apparently unnecessary services of an attorney for consultations with the parties furnishing them. The defendant is not liable for these items.

The balance of the account embraces professional services rendered and disbursements made in the divorce proceeding itself, as counsel for the wife, the libellee. Recovery for these items raises a novel question in this state, although it has been passed upon in many other jurisdictions, and the authorities are not in entire harmony. In Georgia, Iowa, Maryland, West Virginia and Texas, it has been held that an attorney may recover in an action at law for services so rendered the wife in connection with divorce proceedings, and in most of these states it is immaterial whether she be libellant or libellee. *Sprayberry v. Merk*, 30 Ga. 81, 76 Am. Dec. 637; *Porter v. Briggs*, 38 Iowa, 166, 18 Am. Rep. 27; *Preston v. Johnson*, 65 Iowa, 285, 21 N. W. 606; *Clyde v. Peavy*, 74 Iowa, 47, 36 N. W. 883; *McCurley v. Stockbridge*, 62 Md. 422, 50 Am. Rep. 229; *Peck v. Marling*, 22 W. Va. 708; *Dodd v. Hein*, 26 Tex. Civ. App. 164, 62 S. W. 811.

But the overwhelming weight of authority does not sustain this view. In Massachusetts, New Hampshire, Vermont, Connecticut, Illinois, Alabama, Arkansas, Kentucky, Michigan, Missouri, Nebraska, New Jersey, Wisconsin, Washington, the rule of nonliability is asserted and maintained without qualification. *Coffin v. Dunham*, 8 Cush. 404, 54 Am. Dec. 769; *Morrison v. Holt*, 42 N. H. 478, 80 Am. Dec. 120; *Ray v. Adden*, 50 N. H. 82, 9 Am. Rep. 175; *Wing v. Hurlburt*, 15 Vt. 607, 40 Am. Dec. 695; *Shelton v. Pendleton*, 18 Conn. 417; *Cooke v. Newell*, 40 Conn. 596; *Dow v. Eyster*, 79 Ill. 254; *Pearson v. Darrington*, 32 Ala. 227; *Kincheloe v. Merriman*, 54 Ark. 557, 26 Am. St. Rep. 60, 16 S. W. 578; *Williams v. Monroe*, 18 B. Mon. 514; *Wolcott v. Patterson*, 100 Mich. 227, 24 L.R.A. 629, 43 Am. St. Rep. 456, 58 N. W. L.R.A.1915C.

1006; *Hamilton v. Salisbury*, 133 Mo. App. 718, 114 S. W. 563; *Yeiser v. Lowe*, 50 Neb. 310, 69 N. W. 847; *Westcott v. Hinckley*, 56 N. J. 343, 29 Atl. 154; *Clarke v. Burke*, 65 Wis. 359, 56 Am. Rep. 631, 27 N. W. 22; *Zent v. Sullivan*, 47 Wash. 315, 91 Pac. 1088, 13 L.R.A.(N.S.) 244, 15 Ann. Cas. 19, and exhaustive note.

Some courts have based their decisions upon the broad principle that legal services in divorce proceedings cannot be classed as necessities for which the husband can be held liable in an independent action, while others, admitting the necessity of the employment, rely upon the power in the divorce court conferred by statute to compel the husband, pending the libel and as ancillary thereto, to provide an allowance sufficient to enable the wife to prosecute or defend. We adopt, without hesitation, the rule of nonliability in an independent action, not on the ground that such services cannot be classed as necessities, but because of the statutory means provided for their remuneration. Legal services rendered under some circumstances have been held to be necessities. *Peaks v. Mayhew*, 94 Me. 571, 48 Atl. 172. Were there no statute in this state providing for the allowance of the wife's reasonable expenses so incurred, we should hesitate to say that in no case should she be allowed the means with which to protect her property, her good name, and herself. Suppose, for instance, a husband should bring a libel for divorce, charging his wife with adultery. Should she be left powerless to defend herself, and, though innocent, should be deprived of her good reputation, as well as her share of her husband's property, from which by a decree of divorce she would be barred? Certainly not. And it was to obviate such an unfortunate and unjust situation that our statute was passed. It reads: "Pending a libel, the court, or any justice thereof in vacation, may order the husband to pay to the clerk, for the wife, sufficient money for her defense or prosecution thereof, . . . and enforce obedience by appropriate processes." Rev. Stat. chap. 62, § 6 (originally Pub. Laws 1853, chap. 30).

If the husband refuses to comply with such order, he can be adjudged in contempt, and ordered to be committed until he does comply, or execution may issue. *Russell v. Russell*, 69 Me. 336.

This statute guarantees the wife full and complete relief, and provides the avenue through which her prosecution or defense of a libel may be maintained and the services of an attorney may be secured. It follows that, in this state, the wife is under no necessity of pledging her husband's credit for the expenses of prosecuting or defending a

libel for divorce, and therefore she has no implied power to do so, and the husband is not liable in an independent action. This rule, which simply enforces the intention of the legislature as expressed in the statute, best protects the rights of all parties, and is in accord with sound public policy.

"The divorce court has before it the parties, their property, their merits and delinquencies, and can fix the amount of the husband's liability to the wife and her attorney on an equitable basis, without any inquiry into collateral facts; and we are satisfied that the rights of all parties will be best subserved by relegating the question of the husband's liability for the attorney's fees of the wife to that tribunal." *Zent v. Sullivan*, supra.

The plaintiff has misconceived his remedy, which could have been had only in the divorce proceedings in accordance with a long-established practice, the adherence to which is both just and wise.

Judgment for defendant.

NEW YORK COURT OF APPEALS.

LUKE V. LOCKWOOD, Appt.,

v.

UNITED STATES STEEL CORPORATION,
Resp't.

(209 N. Y. 375, 103 N. E. 697.)

Executor and administrator — ancillary — transfer of corporate stock.

1. Where by statute an ancillary administrator has the same power as a domestic

Note. — Situs of corporate stock for purpose of transfer on books of corporation.

The legal obligation of a corporation to keep a record or registry of its stock transfers is statutory, and statutes of the state where it is incorporated imposing such obligation imply, and sometimes provide, that the books shall be kept at the place its charter designates as its principal place of business within the state. See 10 Cyc. 593. It must therefore be assumed that the principal situs of the stock for the purpose of transfer upon the books is the state in which the incorporation was effected. The question then arises: Can it have any other situs for the purpose of transfer?

In general.

The law, at its present stage of development, may be summarized as follows: The state of original incorporation is the only situs for entry of transfers that will be valid under all circumstances and against all claimants; the corporation may establish branch registration offices or agencies in states other than its home state, but a L.R.A.1915C.

administrator, except in disposing of real property for payment of debts and funeral expenses, he may transfer stock of decedent in his possession upon the books of the corporation.

Corporation — transfer of stock — situs — ancillary administrator.

2. A foreign corporation which maintains an office for transfer of stock in a state where an ancillary administrator has possession of shares belonging to a decedent cannot refuse to transfer the stock upon its books in that state, on the theory that the situs of the stock is either at the recent domicile of the decedent or in the state where the corporation is located.

(November 18, 1913.)

APPEAL by plaintiff from an order of the Appellate Division of the Supreme Court, First Department, reversing an interlocutory judgment of a Special Term for New York County, Part III., overruling a demurrer to a complaint filed to recover damages for refusal of the defendant corporation to transfer stock in possession of plaintiff upon its books. Reversed.

Statement by Willard Bartlett, J.:

The allegations of the complaint may be summarized as follows:

The defendant is a foreign corporation organized under the laws of New Jersey, and maintains in the county and state of New York an office for the purpose, among other things, of receiving certificates of its corporate stock for transfer upon its books, and of delivering new certificates when such transfers have been made.

transfer registered only at such branch office is not within the meaning of statutes of the home state requiring registration to be valid against certain claims; a registry at a branch office may be perfected by transferring the same to the principal office in the corporation's home state; the residence of the owner of stock has no bearing upon his right to have a transfer entered at a branch registry office.

At branch registration offices.

An Iowa statute provided that "the transfer of shares is not valid, except as between the parties thereto, until it is regularly entered on the books of the company, so as to show the name of the person by and to whom transferred, the numbers or other designation of the shares, and the date of the transfer," and that "the books of the company must be so kept as to show intelligibly the original stockholders, their respective interests, the amount paid on their shares, and all transfers thereof; and such books, or a correct copy thereof, so far as the items mentioned in this section are concerned, shall be subject to the inspection

One Mary Adelaide Zuill was in her lifetime the owner of forty shares of the capital stock of said corporation standing upon the books thereof in her name. She was formerly a resident of New York, but removed to Bermuda, where she died, being a resident of said island, on March 24, 1910, leaving a last will and testament, of which a copy is annexed to the complaint, by which will she appointed the plaintiff and one Henry J. Cox to be the executors thereof and trustees thereunder. The said will was in every respect duly executed in accordance with a statute of Bermuda then and there in force known as "the wills act of 1840." It was duly admitted to probate by the surrogate's court of the county of New York on or about September 23, 1910, and letters testamentary thereon were thereupon duly issued by said surrogate's court to the plaintiff; the said Henry J. Cox having failed to qualify. The will has not been admitted to probate, nor have letters been granted thereon, in any other jurisdiction.

The decedent left an estate consisting entirely of personal property located in the

state of New York, worth upwards of \$50,000, all of which came into the lawful possession and custody of the plaintiff. At the time of her death there was located in the state of New York, and came lawfully into the plaintiff's possession, a certificate of forty shares of the common capital stock of the defendant corporation duly issued by the defendant in the name of the decedent, dated July 7, 1903, numbered F53,642, duly signed and countersigned, and standing in the stock transfer books of the defendant in the name of the decedent at the time of her death.

On or about July 24, 1911, the plaintiff caused to be presented and tendered to the defendant at its stock transfer office in the city of New York the said certificate of stock, with a duly executed power of attorney in blank to transfer the same indorsed thereon, accompanied by a surrogate's certificate of the issue of letters testamentary to the plaintiff, a waiver by the state comptroller of New York of notice of the transfer of said certificate, and also a certificate of the comptroller of the state of New Jersey that the collateral inheritance tax due

tion of any person desiring the same." It was held in *Perkins v. Lyons*, 111 Iowa, 192, 82 N. W. 486, that a transfer of stock in an Iowa corporation, which would have been sufficient had it been made in the state, was not valid under these provisions as against an attachment, where the entry was made by the secretary of the corporation in the books of the corporation at his home in Massachusetts, where the books remained until after the levy of the attachment.

And where a transfer agent, at his regular place of business in a state other than that of the corporation's home, had, by general authority from the corporation, entered a transfer of stock upon a stock book furnished to him by the corporation for that purpose, issued a new certificate therefor, and forwarded the old certificate, containing the transfer, to the home office, it was held in *Pinkerton v. Manchester & L. R. Co.* 42 N. H. 424, that the transfer was not valid as against an attachment levied upon the stock by a creditor of the transferor in the state of the corporation's domicile after the acts of the transfer agent were performed, but before the old certificate had been received at the home office.

In *Recknagel v. Empire Self-Lighting Oil Lamp Co.* 24 Misc. 193, 52 N. Y. Supp. 635, a penalty was imposed upon a foreign corporation for violation of a statute which provided that "every foreign stock corporation having an office for the transaction of business in this state, except moneyed and railroad corporations, shall keep therein a book to be known as a stock book. . . . Such stock book shall be open daily, during business hours, for the inspection of its stockholders. . . . If any such foreign stock corporation has in this state a trans-

fer agent, whether such agent shall be a corporation or a natural person, such stock book may be deposited in the office of such agent, and shall be open to inspection at all times during the usual hours of transacting business, to any stockholder. . . . For any refusal to allow such a book to be inspected, such corporation and the officer or agent so refusing shall each forfeit the sum of \$250, to be recovered by the person to whom such refusal was made."

It appears to be quite generally held that the fact that a corporation was originally incorporated in a state other than that where the suit is brought does not operate to deprive the court of jurisdiction to compel the corporation to enter a transfer of stock upon its books. The contention that an order or decree compelling a transfer interferes with the internal management of a foreign corporation is held to be untenable. *Westminster Nat. Bank v. New England Electrical Works*, 3 L.R.A.(N.S.) 551, note, and the later decided cases; *Travis v. Knox Terpezone Co.* 165 App. Div. 156, 150 N. Y. Supp. 621; *Lively v. Husebye*, 60 Wash. 47, 110 Pac. 673. But in none of these cases did the court indicate that it expected the decree to be wholly executed within the state where made. On the contrary, some of them distinctly recognize that the court cannot compel a technical performance of its order in this respect; thus, they indirectly furnish support to the theory that a transfer, in order to be valid as against the world, must be made upon books kept within the corporation's original home state. Thus, in *Lively v. Husebye*, supra, the court quoted with approval from *Guilford v. Western U. Teleg. Co.* (one of the cases cited in the L.R.A. note above cited) as

to said state upon said shares had been paid; and thereupon the plaintiff duly tendered and offered to surrender said certificate to the defendant, and duly demanded that a new certificate be issued in the name of Baruch Brothers, of New York, to the end that said certificate and the shares of stock represented thereby might be transferred to them.

The value of said certificate and shares was then \$3,240. The defendant refused and still refuses to issue a new certificate, or to transfer the same or the shares thereby represented, to the damage of the plaintiff in that amount.

The defendant demurred to the complaint on the ground that the facts therein stated were not sufficient to constitute a cause of action. The demurrer was overruled at the special term; but the interlocutory judgment to that effect has been reversed by the appellate division, which, however, has permitted an appeal to this court from the order of reversal, and certified the following question: "Does the complaint herein on its face state facts sufficient to constitute a cause of action?"

follows: "It is also contended that the courts of this state ought not to entertain the action, because they have no means to enforce their decree by compelling the issue of a certificate. It is undoubtedly true that courts will not entertain an action where it is apparent that, if a judgment was rendered, they would be wholly unable to enforce it. But the mere fact that they may be unable to compel specific performance in a particular way is no reason why the suit should not be entertained. If the defendant should refuse to issue certificates in accordance with the judgment, it would be entirely competent for the court, in accordance with the prayer of the complaint, to render judgment for the value of the stock. Our conclusion is that the action can be maintained," and then the court in the Husebye Case, added: "As in that case, the court may be unable to compel specific performance of its judgment in a particular way for want of jurisdiction over the internal affairs of the corporation; but that is no reason why the action should not be maintained. It is apparent that the judgment has been rendered in accordance with the rights of the parties, and in such form that it will not be ineffectual. It is no different in effect from a judgment in replevin or a decree of specific performance where the property involved is beyond the reach of the court at the time of rendering judgment. The court had jurisdiction over the persons of both defendants, and power to render the judgment it did." It may be that no branch registration office was maintained in these states. If so, the only value of these cases in this connection is to show that cases of this class are not in any event opposed to the theory here under discussion. L.R.A.1915C.

Messrs. Frederic R. Coudert, Robert L. Redfield, and Howard Thayer Kingsbury, for appellant:

Plaintiff had legal title to the certificate of stock and full power to transfer the same.

Russell v. Hartt, 87 N. Y. 19; Re Rubens, 128 App. Div. 626, 112 N. Y. Supp. 941, 195 N. Y. 527, 88 N. E. 1130, affirmed in 135 App. Div. 917, 120 N. Y. Supp. 1144; People ex rel. Gould v. Barker, 150 N. Y. 52, 44 N. E. 785; Re Butler, 38 N. Y. 397; Hartnett v. Wandell, 60 N. Y. 346, 19 Am. Rep. 194; Re Bergdorf, 206 N. Y. 309, 99 N. E. 714; Trecothick v. Austin, 4 Mason, 16, Fed. Cas. No. 14,164; Higgins v. Eaton, 178 Fed. 153, 122 C. C. A. 1, 202 Fed. 75; Simpson v. Jersey City Contracting Co. 165 N. Y. 193, 55 L.R.A. 796, 58 N. E. 896.

The stock in question is property within the state.

Jermain v. Lake Shore & M. S. R. Co. 91 N. Y. 483; People ex rel. Hatch v. Reardon, 184 N. Y. 431, 8 L.R.A.(N.S.) 314, 112 Am. St. Rep. 628, 77 N. E. 970, 6 Ann. Cas. 515; Simpson v. Jersey City

As affected by owner's residence.

It has never been held that the residence of the owner of a share of corporate stock has anything to do with his right to use the facilities afforded by a branch registry office outside the corporation's home state, for the purpose of making a transfer. In some cases cited, supra, the suit to compel a transfer by a foreign corporation was brought by a resident of the state where the suit was brought, but in others the plaintiff was a nonresident, and the point was before the court. In Westminster Nat. Bank v. New England Electrical Works, supra, the plaintiff was a foreign corporation, and the court said that the position that the court will not entertain jurisdiction on that account is untenable. In Lively v. Husebye, supra, the plaintiffs were nonresidents, and the court said: "It is true that the record in this case shows that the respondents are not residents of the state of Washington, but we are not able to see why that fact would result in denying them the right to appeal to our courts by resort to an action purely personal, both as to them and the defendants, when the defendant corporation is found with a branch office, the transaction of business, and its principal officers, to wit, its president and secretary, in the state of Washington, such officers being residents and citizens thereof; and the other defendant also a resident of the state. It may be stated in this connection that the respondents have not been residents of North Dakota since prior to the organization of the corporation in that state." This is in harmony with the holding in LOCKWOOD v. UNITED STATES STEEL CORP.

J. W. M.

Contracting Co. 165 N. Y. 193, 55 L.R.A. 796, 58 N. E. 896; *Barry v. Calder*, 48 Hun, 449, 1 N. Y. Supp. 586, affirmed in 111 N. Y. 684, 19 N. E. 285; *Kilmer v. Hutton*, 131 App. Div. 625, 116 N. Y. Supp. 127; *Reichard v. Hutton*, 148 App. Div. 813, 133 N. Y. Supp. 44; *McAllister v. Kuhn*, 96 U. S. 87, 89, 24 L. ed. 615, 616; *London, P. & A. Bank v. Aronstein*, 54 C. C. A. 663, 117 Fed. 601; *Merritt v. American Steel-Barge Co.* 24 C. C. A. 530, 49 U. S. App. 85, 79 Fed. 228.

The refusal to transfer a stock certificate when lawfully demanded is in the nature of a conversion, and an action for damages is the usual and proper remedy.

Commercial Bank v. Kortright, 22 Wend. 348, 34 Am. Dec. 317, affirming 20 Wend. 91; *Case v. Citizens Bank*, 100 U. S. 446, 455, 25 L. ed. 695, 698; *People ex rel. Jenkins v. Parker Vein Coal Co.* 10 How. Pr. 186; *People ex rel. Rottenberg v. Utah Gold & Copper Mines Co.* 135 App. Div. 418, 119 N. Y. Supp. 862.

Messrs. Raynal C. Bolling and William W. Corlett, with Mr. Charles MacVeagh, for respondent:

The probate of decedent's will in the county of New York and the issue of letters testamentary to plaintiff did not confer upon him authority to transfer stock of the decedent in the United States Steel Corporation.

Re Butler, 38 N. Y. 397; *Parsons v. Lyman*, 20 N. Y. 103; *Petersen v. Chemical Bank*, 32 N. Y. 21, 88 Am. Dec. 298; *Re Rubens*, 128 App. Div. 626, 112 N. Y. Supp. 941.

Shares of stock can be said to have their situs only in two possible places,—either at the domicile of the corporation or at the domicile of the stockholder.

Plimpton v. Bigelow, 93 N. Y. 600; *Re James*, 144 N. Y. 6, 38 N. E. 961; *Re Bronson*, 150 N. Y. 1, 34 L.R.A. 238, 55 Am. St. Rep. 632, 44 N. E. 707.

The letters testamentary issued to plaintiff, although original in form, are in fact ancillary, and are not on a parity with principal or domiciliary letters.

Taylor v. Syme, 162 N. Y. 513, 57 N. E. 83; *Re Newell*, 38 Misc. 563, 77 N. Y. Supp. 1116; *Stevens v. Gaylord*, 11 Mass. 256.

Defendant's refusal to transfer its stock upon an original probate, obtained neither at the domicile of the decedent nor at the domicile of the corporation, was proper.

Drexel v. Berney, 122 U. S. 241, 30 L. ed. 1219, 7 Sup. Ct. Rep. 1200; *Wyman v. Halstead (Wyman v. United States)* 109 U. S. 654, 27 L. ed. 1068, 3 Sup. Ct. Rep. L.R.A.1916C.

417; *Parsons v. Lyman*, 20 N. Y. 103; *Re Cape May & D. B. Nav. Co.* 51 N. J. L. 78, 16 Atl. 191.

Willard Bartlett, J., delivered the opinion of the court:

Upon the question raised by this appeal, whether the defendant is under any legal obligation to transfer the stock as requested by the appellant, the appellate division avows its inability to find any direct authority. The learned judge who wrote the opinion below, however, treats the plaintiff as an ancillary executor whose authority is strictly limited to personal property within the jurisdiction of the court, and he argues that the situs of the property represented by the certificate of stock in question cannot be deemed to be in New York, because, under the authorities which he cites, the certificate is to be regarded as having its situs either at the domicile of the deceased testatrix (which was Bermuda) or at the domicile of the defendant corporation (which is New Jersey).

We do not perceive that it makes any essential difference in this case whether the letters of the plaintiff executor are ancillary or domiciliary. Ancillary administration in this state is regulated by statute, and an ancillary executor or administrator has the same general powers as a domestic executor or administrator except in disposing of the decedent's real property for the payment of his debts and funeral expenses. *Smith v. Second Nat. Bank*, 169 N. Y. 467, 62 N. E. 577. Ancillary letters are not less in their effect than other letters. "Apart from the statute, all administrations of estates in different countries are independent, so far as a matter of strict right or jurisdiction; but as a matter of comity all administrations in countries other than that of the domicile are ancillary to the principal administration." *Cullen, J.*, in *Hopper v. Hopper*, 53 Hun, 394, 396, 6 N. Y. Supp. 271, affirmed in 125 N. Y. 400, 12 L.R.A. 237, 26 N. E. 457.

The cases cited in support of the proposition that the situs of the stock in question must be either in Bermuda or New Jersey are *Jermain v. Lake Shore & M. S. R. Co.* 91 N. Y. 483, 492; *Re Enston (People v. Shenwood)* 113 N. Y. 174, 181, 3 L.R.A. 464, 21 N. E. 87; *Re James*, 144 N. Y. 6, 12, 38 N. E. 961; and *Re Bronson*, 150 N. Y. 1, 34 L.R.A. 238, 55 Am. St. Rep. 632, 44 N. E. 707.

In the *Jermain* Case it was merely held that the certificate of the defendant corporation issued to the plaintiff was not itself the stock, but only the evidence thereof.

"A share of stock," said Earl, J., "represents the interest which the shareholder has in the capital and net earnings of the corporation." There is nothing in this which bears directly upon the question here.

Re Enston is more nearly in point. There it was held that the corporate stocks of a decedent were not taxable here under the general laws of the state, although the share certificates were held here by the decedent's agent. "The certificates are in no general sense property," said Judge Andrews. "They simply represent interests in the corporations, and the situs of the property owned by a shareholder in a corporation is either where the corporation exists or at the domicile of the shareholder; it can in no proper sense be said to be where the certificates happen to be in the hands of an agent in a state where the corporation has no existence and the owner no domicile." It is to be observed that this was a tax case in which the court was endeavoring to determine the locality of corporate stock for purposes of taxation, and, as will be shown hereafter, the situs of such property may be in one place so far as the incidence of a tax is concerned, and in another when the certificates are stolen, or they are sought to be reached by a creditor through the process of attachment. Furthermore, in the case at bar it may be said that the defendant has an existence in the state of New York for the purpose of registering transfers of its stock; it lives here for that purpose, having come into the state therefor of its own accord; and therefore one of the conditions is absent here upon which the statement of the rule in the Enston Case was predicated.

In the James Case, which arose under the collateral inheritance tax law, Judge Gray said that the certificates of stock held by the testator represented his interests in the corporations which issued them, "and the legal situs of that species of personal property is where the corporation exists, or where the shareholder has his domicile;" and the Bronson matter was another tax case in which the same learned judge asserted the same doctrine. Neither of these cases could have been deemed by him to be inconsistent with *Simpson v. Jersey City Contracting Co.* 165 N. Y. 193, 55 L.R.A. 796, 58 N. E. 896, in which he also wrote the opinion, and which is the principal New York authority relied upon by the appellant.

In the *Simpson* Case certain certificates of stock of a foreign corporation belonging to a nonresident were in the possession of a

resident of this state as security for a debt, and it was held that the interest therein of the owner and pledgeor was a property right within this state which was subject to levy under a warrant of attachment. Referring to *Re Bronson*, supra, Judge Gray declared that it was difficult to see how that case, in defining the general understanding of the law with respect to the ownership of stock in a corporation, could have any authoritative application to the question whether an attachment would lie against the interest represented by foreign stock certificates actually in New York, and as to that question he said: "The distinctions sought to be drawn are largely artificial. The truth is that it [the foreign corporation] did have property here in the common acceptance of the term as well as in the eye of the law. Certificates of stock are treated by business men as property for all practical purposes. They are sold in the market, and they are transferred as collateral security for loans, and they are used in various ways as property. They pass by delivery from hand to hand, and they are the subject of larceny." p. 197. The question was whether, the foreign certificates being here, there was not present in this state property of the debtor capable of effectual seizure by judicial process, and this court held that there was.

Upon a similar line of reasoning it seems to us that the facts set out in the complaint in the case at bar show that there is property of the plaintiff in New York which he is entitled to have transferred upon the books of the defendant corporation which it has provided and keeps for that purpose in New York.

The maxim, *Mobilia sequuntur personam*, is based upon a legal fiction which has proved most useful in determining the right of succession to personal property; but in modern times, "since the great increase in amount and variety of personal property, not immediately connected with the person of the owner, that rule has yielded more and more to the *lex situs*, the law of the place where the property is kept and used." *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 22, 35 L. ed. 613, 616, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876, 878. The great writers on the conflict of laws concede that it is not of universal application, and Story declares that it does not obtain whenever it becomes necessary for the purpose of justice that the actual situs of the thing should be examined. Story, *Conf. L.* § 550. Justice cer-

tainly requires that the actual situs of the thing should be considered in the present case, where the alternative would be to send the shareholder out of the state to effect a transfer of stock which the corporation has provided convenient ways and means for transferring right here in New York. To impose this burden upon the shareholder, unless it were demanded by some imperative rule of law, would subject the administration of justice to deserved reproach.

The tendency of the courts to prefer actualities to fictions in passing upon the disposition of personal property is well illustrated by a comparatively recent English case which the learned counsel for the respondent concedes is favorable to the appellant's contention in part. *Re Clark* [1904] 1 Ch. 294. There the court was called upon to construe a will by a testator domiciled in England, who bequeathed all his personal estate in the United Kingdom to his home trustee, and all his personal estate in South Africa to his foreign trustee. He was possessed of shares in South Africa mining companies, which had an office in London, where a duplicate register of shares was kept, and shares could be transferred. Mr. Justice Farwell said: "I have got to find out the locality of the personal estate, whether English or South African. The property I have to deal with is a share, and that is represented by a certificate without which no transfer can take place. The actual effective transfer can be done equally effectually in South Africa or in England, and the only conceivable distinction that I can discover in point of locality is the possession of the certificate, which for this purpose is essential to complete the title to the shares. Therefore, I hold that, where the certificates of the shares in these companies were in England, they pass under the gift of property situated in England, and not under the gift of property in South Africa." Hence it will be seen that the place where the shares of stock actually were was the controlling element in the construction of this will, since no reference was made by the learned judge to the doctrine that personal property is deemed to follow the domicile of the owner.

The conclusion that the plaintiff is entitled to prevail upon the allegations of the complaint finds support, not only in the opinion of Judge Gray in the case of *Simpson v. Jersey City Contracting Co.* supra, but also in the salient fact that the defendant corporation by the establishment of

a stock transfer office here has become *pro tanto* domiciled in this state.

The will of the testatrix was lawfully admitted to probate in the state of New York, and letters testamentary were issued to the plaintiff as her executor in this state. The certificate of stock in the defendant corporation which had belonged to the testatrix was also in the state of New York. The defendant, a New Jersey corporation, maintained an office for the transfer of its stock in the state of New York. Nevertheless, the defendant, relying upon the proposition that the situs of personal property owned by a decedent must be deemed to be either at the domicile of the decedent or, in the case of corporate stock, the domicile of the corporation, insists that the plaintiff can only assert his title to the stock which he has derived from the testatrix in the state of New Jersey, under whose laws the defendant was incorporated.

As has already been pointed out, the proposition for which the defendant contends is that shares of stock have their situs only in two possible places,—either at the domicile of the corporation or at the domicile of the stockholder.

In the present case, however, it is alleged in the complaint, and necessarily admitted by the demurrer, that the defendant maintains in the county and city of New York an office for the purpose of receiving certificates of its corporate stock for transfer upon its books, and of delivering new certificates when such transfers have been made. Does not this fact constitute New York the domicile of the corporation, to some extent at least,—so far as the registry and transfer of shares therein are concerned? We think it does. It has been held in reference to life insurance companies, both by the court of appeals of this state and by the Supreme Court of the United States, that such corporations may often be regarded as domiciled for certain purposes in the foreign state where they are permitted to do business. See *Morgan v. Mutual Ben. L. Ins. Co.* 189 N. Y. 447, 82 N. E. 438; *New England Mut. L. Ins. Co. v. Woodworth*, 111 U. S. 138, 28 L. ed. 379, 4 Sup. Ct. Rep. 364.

The order of the Appellate Division should be reversed, and the interlocutory judgment affirmed, with costs in both courts, and the question certified answered in the affirmative.

Cullen, Ch. J., and Hiscock, Chase, Hogan, and Miller, JJ., concur; Gray, J., not sitting.

SOUTH CAROLINA SUPREME COURT.

MRS. LENA WOODWARD, Resp.,
v.

SOUTHERN RAILWAY COMPANY, Appt.

H. J. GLOVER, Resp.,
v.

SAME, Appt.

MRS. R. G. MUNDAY, Resp.,
v.

SAME, Appt.

CHESTER L. LOWE, Resp.,
v.

SAME, Appt.

BERTHA KEEL, Resp.,
v.

SAME, Appt.

('— S. C. —, 83 S. E. 591.)

Carrier — refusal to carry passenger — liability.

1. A carrier cannot avoid liability for refusal to return excursionists to their homes

Note. — Liability of carrier for punitive or exemplary damages for refusal or failure to transport passengers.

Cases where a passenger was ejected or was carried beyond his destination are not within the scope of this note.

On punitive damages for wanton failure to transport baggage, see note to Webb v. Atlantic Coast Line R. Co. 9 L.R.A.(N.S.) 1218.

On refusal of conductor to listen to a passenger's explanation as to his contract, as justification for punitive damages for passenger's expulsion, see note to Illinois C. R. Co. v. Reid, 17 L.R.A.(N.S.) 344.

On exemplary damages for carrying a passenger beyond his destination, see notes to Dalton v. Kansas City, Ft. S. & M. R. Co. 17 L.R.A.(N.S.) 1230, and Ft. Smith & W. R. Co. v. Ford, 41 L.R.A.(N.S.) 746.

On punitive damages for assault by a carrier's servant on a passenger, see note to Houston & T. C. R. Co. v. Bush, 32 L.R.A.(N.S.) 1201.

On the general question of the liability of a master to exemplary damages for acts of its servant, see note to Forrester v. Southern P. Co. 48 L.R.A.(N.S.) 35.

Failure to stop for passenger.

In Thomas v. Southern R. Co. 122 N. C. 1005, 30 S. E. 343, it is held that if an engineer sees the signal of a passenger at a flag station and fails to stop, it is an intentional violation of his rights which will entitle him to recover exemplary or punitive damages; but if there is not sufficient evidence to authorize the jury to find that the engineer saw him, there can be no such recovery.

L.R.A.1915C.

on a particular train, on the ground that they had been detained by act of God until the train upon which they should have gone had departed, if their tickets were good for the train upon which passage was refused.

Damages — punitive — indifference to rights of passengers.

2. Punitive damages may be allowed in favor of excursionists against a carrier the managing officers of which, with knowledge that they had been detained by a storm, and with indifference to their rights, send the train which was to carry them home away with empty cars, leaving insufficient equipment to transport them on later trains.

(Hydrick, J., dissents from proposition two.)

(August 21, 1914.)

APPEAL by defendant from judgments of the Common Pleas Circuit Court for Aiken County in plaintiffs' favor in actions brought to recover damages for failure of defendant to transport plaintiffs to their homes. Affirmed.

The facts are stated in the opinion.

But apparently the fact that an engineer saw the signals of a passenger is not of itself conclusive as to punitive damages, but the jury must find that he wilfully and intentionally disregarded them and passed on. Williams v. Carolina & W. R. Co. 144 N. C. 498, 12 L.R.A.(N.S.) 191, 57 S. E. 216, 12 Ann. Cas. 1000.

So, where an engineer sees the signal of a passenger to stop and understands it and then does not stop, and there is no reasonable explanation as to why he does not stop in obedience to such a signal, it is a question of fact for the jury as to whether his acts were characterized by malice, deliberate design, wilfulness, or wantonness, so as to authorize the assessment of punitive damages. Yazoo & M. Valley R. Co. v. White, 82 Miss. 120, 33 So. 970.

Where either an engineer or fireman saw, or by the exercise of ordinary care could have seen, a signal to stop at a flag station, punitive damages may be awarded if, in the opinion of a jury, the failure to stop was due to malice, deliberate design, wilfulness, or wantonness, capriciousness, or recklessness. Yazoo & M. Valley R. Co. v. Mitchell, 83 Miss. 179, 35 So. 339.

In Wilson v. New Orleans & N. E. R. Co. 63 Miss. 352, although it appeared that plaintiff held a ticket which did not entitle him to passage upon the train which he signaled at a flag station, it was held that he had rights in common with the public in general, and was entitled to travel upon the train by paying the fare the same as any other citizen, and if, under those circumstances, the employees of the company wilfully, recklessly, or capriciously failed to stop the train, the company thereby became subject to exemplary damages. And

Mr. Henderson, for appellant:

No finding of either negligence or wilfulness can be upheld, there being absolutely no testimony upon which to sustain the same.

Where a person buys a cheap excursion ticket, he must take knowledge of its time limit.

Norman v. Southern R. Co. 65 S. C. 518, 95 Am. St. Rep. 809, 44 S. E. 83, 14 Am. Neg. Rep. 468; Black v. Atlantic Coast Line R. Co. 82 S. C. 485, 64 S. E. 418; Daniels v. Florida C. & P. R. Co. 62 S. C. 14, 39 S. E. 762; Pennington v. Philadelphia, W. & B. R. Co. 62 Md. 95; Mulligan v. Southern R. Co. 84 S. C. 175, 65 S. E. 1040; 5 Am. & Eng. Enc. Law, 2d ed. 613; Johnson v. Philadelphia, W. & B. R. Co. 63 Md. 106, 8

where there was a conflict of testimony as to whether the signals for the train to stop were seen, or might by reasonable care have been seen, by the employees of the company, it was error for the court to instruct the jury that there was no proof of wilful wrong. It is evident that the court did not intend in this and the preceding case to imply that failure of defendant's servants to exercise reasonable care to see plaintiff would make defendant liable for exemplary damages, but merely that if they might have seen plaintiff by the exercise of reasonable care, there was some evidence upon which the jury might have found their action in not stopping to have been wilful, reckless, or capricious.

Thus, in *St. Louis & S. F. R. Co. v. Garner*, 96 Miss. 577, 51 So. 273, it was held that the jury should not be allowed to award punitive damages in an action for damages for failure to stop and take up passengers at a flag station, simply because the engineer could, by the exercise of ordinary care and diligence, have seen the signal to stop and have understood it.

And in *Southern R. Co. v. Lanning*, 83 Miss. 161, 35 So. 417, the court held that the true rule as to measure of damages in cases where passenger trains, after being properly signaled by prospective passengers, failed to stop at flag stations, is this: "If the engineer and fireman in charge of the locomotive, through no fault of their own, and while in the exercise of due care on their part, fail to see or obey the signal on account of the manner in which it is given, or by reason of prevailing atmospheric conditions, as fog or darkness, the railroad company is, for failure to stop the train, not liable; but if such employees failed to see the signal through negligence on their part, or when by exercise of ordinary care they could have seen it, the party damaged is entitled to recover compensatory damages; and if the signal is seen and understood by said employees, and their action in not stopping a train is malicious, wanton, or capricious, then the question of the infliction of punitive dam-

L.R.A.1915C.

Am. Neg. Cas. 355; *Howard v. Chicago, St. L. & N. O. R. Co.* 61 Miss. 194; 28 Am. & Eng. Enc. Law, 2d ed. 177.

Mr. B. L. Abney also for appellant.

Mr. John F. Williams for respondents.

Fraser, J., delivered the opinion of the court:

These actions were brought to recover damages for the failure of the appellant to transport the plaintiffs from Charleston to their homes in or near Aiken. The plaintiffs had purchased special excursion tickets from Aiken to Charleston and by other lines from Charleston to the Isle of Palms. The time limit on the tickets expired at 9 o'clock P. M. on the 14th of July, 1912. On account of a sudden storm, many passengers

ages may properly be submitted to the jury."

But the failure of an engineer to see a passenger may not only be the result of negligence, but likewise of wilfulness, and if he should intentionally fail to see a passenger, punitive damages would be recoverable. *Milhou v. Southern R. Co.* 72 S. C. 442, 110 Am. St. Rep. 620, 52 S. E. 41.

And it was held in *Godfrey v. Meridian Light & R. Co.* 101 Miss. 565, 58 So. 534, that a street railway company was liable in punitive damages for failure to stop and take up a passenger on signal, where the motorman and conductor were grossly and recklessly negligent in failing to stop, as well as where the wrong was wilful and intentional.

In *Northern Texas Traction Co. v. Peterman*, — Tex. Civ. App. —, 80 S. W. 535, where the testimony of plaintiffs was to the effect that when defendant's interurban car appeared they signaled it while it was a quarter of a mile away, and continued to signal it until it passed them, and that the motorman waived a derisive signal to them, and the conductor laughed at them as the car went by, and the motorman testified that he watched the plaintiffs as they stood at the crossing, but that they did not signal him until he was passing them, the evidence was held to be sufficient to authorize the court to charge upon exemplary damages.

It is a question for the jury as to whether the failure of employees to stop a train was wilful, reckless, or capricious, so as to authorize punitive damages, where the plaintiff's testimony was to the effect that plaintiff gave the usual signal to flag a train at the regular place as soon as the train came in sight around the curve, while the engineer testified that he was on the lookout for signals, and that it was an unusual thing for the train to pass without stopping, and that, despite the inclement weather, he would have seen the signal had it been given in the manner testified to by plaintiff's witnesses. *Burns v. Alabama & V. R. Co.* 93 Miss. 816, 47 So. 640.

were detained until after the last train before the expiration of the time limit had expired. The defendant had another train that left Charleston for Aiken about 11 o'clock. The plaintiffs presented themselves for passage on this train, but there were insufficient accommodations on the 11 o'clock train, and plaintiffs were refused passage. The time limit was extended on account of the storm, and the tickets were received on the return trip. These tickets were accepted on the return trip, so that no question can arise in this case as to the special provisions of a special excursion ticket, one of the plaintiffs offered to buy a regular ticket, but the sale was refused as unnecessary. When the 8:30 train left Charleston, it carried the

excursion car and left the defendant without sufficient equipment to carry the belated excursionists at 11. Suit was brought before a magistrate for the failure to transport the belated excursionists on the 11 o'clock train. The magistrate found for the plaintiffs \$75 each. There was an appeal to the circuit court. This appeal was heard by Mr. Justice Gage, then circuit judge. Judge Gage reduced the judgment of the magistrate to \$5 actual and \$50 punitive damages. The circuit decree finds that (1) there was no negligence in refusing to allow more passengers on the 11 o'clock train with the equipment it had. (2) That there was no misconduct on the part of the yard management. (3) That the officers of the defendant knew that a

A motorman's failure to respond to an instantaneous signal given with one motion of the hand may be as well attributed to the momentary diversion of his attention, so that he failed to see it, as to any other cause, and where there is no proof that he saw the movement, and plaintiff alleges only that he either saw it or by the use of ordinary care could have seen it, punitive damages should not be allowed. *Ussery v. Augusta-Aiken R. Co.* 79 S. C. 209, 60 S. E. 527.

A finding of wilfulness or intentional wrong so as to authorize the submission of the question of punitive damages to the jury is not sustainable where it appeared that the conductor of a train did not know of the signal by the passenger, but presumed that the train had stopped in pursuance to an order given by him to a brakeman to instruct the engineer to stop to let off a passenger, and that, after letting off the passenger, he signaled the engineer to go ahead, and the engineer, in obedience to the signal, started the train thinking that the passenger who had signaled him to stop had gotten on the train. *Yazoo & M. Valley R. Co. v. Faust*, — Miss. —, 32 So. 9. See a second appeal of this case, reported in 34 So. 356, where the court reduced a second verdict which was larger than the first, though the question of punitive damages was excluded from the jury.

In *Morse v. Duncan*, 14 Fed. 396, which was an action for compensatory and exemplary damages for failure of defendant to stop its train at a flag station upon plaintiff's signal, the court said that, had the engineer or conductor seen the signal and disregarded it, then punitive damages might have been awarded, but as the signal was one of danger, a red light, it was not to be presumed that either of them saw it and disregarded it, so that its nonobservance was more an accident than otherwise, for which none but actual damages could be awarded.

In *Purcell v. Richmond & D. R. Co.* 108 N. C. 414, 12 L.R.A. 113, 12 S. E. 954, 956, it was held that punitive damages are recoverable of a railroad company for a wilful L.R.A.1915C.

ful disregard of its statutory duty to stop at a station for a passenger when it has advertised for passengers for that train and has room for them, or could by reasonable diligence have had cars enough to accommodate them.

In *Heirn v. M'Caughan*, 32 Miss. 17, 66 Am. Dec. 588, which was an action for damages against owners of a steamboat for failure to stop for a passenger at a certain point as they had advertised to do, the excuse for not doing so being that the condition of the weather would have made it dangerous to do so; but, the evidence being conflicting as to whether the failure to stop was not wilful, it was held to be for the jury to determine whether there was such fraud, wilful neglect of duty, or circumstances of aggravation as to warrant exemplary damages.

Where the agent for a railroad company, in violation of a statute, failed to stop the train when it was evident to him that there were passengers to get on, it was held liable for punitive damages. *Bing v. Atlantic Coast Line R. Co.* 86 S. C. 528, 68 S. E. 645.

Refusal to admit passenger to car.

In *McIntosh v. Augusta & A. R. Co.* 87 S. C. 181, 30 L.R.A.(N.S.) 889, 69 S. E. 159, it is held that a passenger cannot be said as matter of law not to be entitled to carry upon a street car as personal baggage a small piece of ice wrapped so as not to drip, and that punitive damages may be awarded against the street car company for its refusal to permit a passenger to board the car with ice so wrapped, which is needed by a sick person, notice of which has been given to the conductor.

In *Story v. Norfolk & S. R. Co.* 133 N. C. 59, 45 S. E. 349, 15 Am. Neg. Rep. 403, which was an action for damages because of the refusal of defendant's conductor to admit plaintiff to his train on the ground that he was drunk, evidence that plaintiff was not drunk, but was quiet and orderly, and that, though he had a ticket in his hand entitling him to passage, the con-

large number of passengers were detained. (4) That the officers of the defendant knew that they had retained an insufficient number of cars to carry them. (5) That the passengers had the right to be carried back on the night of the 14th. (6) That the defendant ought not to have sent out empty cars at 8:30 o'clock, when they knew the remaining cars were insufficient. That the reason assigned for carrying out the empty cars was insufficient.

The defendant appealed to this court from this judgment on several exceptions, but in argument raises five questions:

I. That, by the act of God, plaintiffs were detained until the time limit of their tickets had expired and their legal rights were at an end. The rights under the tickets were not in question; the tickets were

extended, and that plaintiff who offered to pay full fare was denied the right to transportation. It was a question of the right to transportation, and not rates or tickets. This position cannot be sustained.

II. Judge Gage erred in holding that Mr. Wassum, the superintendent, "knew that a large number of passengers had been detained by a storm in the bay, and hence he should have made provision for these passengers in some way." Judge Gage did not say that Mr. Wassum knew it, but that the "managing officers" knew it. There was evidence that they did know it, or were charged with the knowledge, and this position cannot be sustained.

III. The third, fourth, and fifth propositions may be considered together, as they raise the same question.

ductor rudely pushed him back, in the presence of a large crowd, telling him he was drunk and was a nuisance, and refusing him the passage he was entitled to, though he told the conductor he was sick and his family were sick, was held to be sufficient to warrant the jury in awarding punitive damages. And evidence that plaintiff had been intoxicated upon defendant's train at a prior time was held to be inadmissible to show an excuse for his exclusion from the train.

Exemplary damages may be given for the refusal to sell a passenger a ticket or to check his baggage to a regular station or stopping place of a passenger train, in pursuance of an unreasonable regulation of the company, which indicates a wanton disregard of the rights of passengers. *Pittsburgh, C. & St. L. R. Co. v. Lyon*, 123 Pa. 140, 2 L.R.A. 489, 10 Am. St. Rep. 517, 16 Atl. 607.

In *Cagney v. Manhattan R. Co.* 2 N. Y. Supp. 410, it was held that an elevated railway carrier was liable in exemplary damages for the recklessly wilful, wanton, and unjustifiable conduct of a gate man in refusing to admit a passenger after having been properly informed by the head of the station of the full payment of fare, and having been directed to allow the passenger into the car, merely because he did not see the ticket deposited.

But the bare refusal by employees of a carrier, unattended by wanton and malicious acts, to admit a passenger to two through trains upon the ground that the trains did not stop at the passenger's destination, is not ground for the awarding of punitive damages. *Barnett v. Chicago & A. R. Co.* 75 Mo. App. 446.

Causing passenger to alight short of destination.

The act of a conductor in prematurely and negligently calling a station at which the train did not regularly stop, 3 miles distant therefrom, thus causing passengers to alight when the train stopped, is not, in L.R.A.1915C.

absence of evidence of wilfulness, wantonness, or conscious indifference to consequences, ground for the awarding of exemplary damages. *St. Louis Southwestern R. Co. v. Pearson*, 88 Ark. 200, 114 S. W. 211.

And where a passenger gets off at a station short of his destination because of a mistake of the conductor in telling him that he has reached his destination, he can recover only compensatory damages, in the absence of proof of violence in act or speech, or any conduct on the part of the railway employees calculated to humiliate or annoy him. *Cleveland, C. C. & St. L. R. Co. v. Quillen*, 22 Ind. App. 496, 53 N. E. 1024.

And in the absence of oppression, malice, or abuse directed against a passenger by a conductor who by mistake calls the wrong station, resulting in a passenger who is unfamiliar with the locality getting off at a point short of his destination, punitive damages may not be awarded. *Tennessee C. R. Co. v. Brasher*, 29 Ky. L. Rep. 1277, 97 S. W. 349.

When a passenger is negligently put off or allowed to get off at the wrong station, no case for punitive damages is made unless there is some reckless wanton, wilful, capricious, or wrongful act done on the part of the agent or servant of the road. *Gulf, & S. I. R. Co. v. Cole*, 101 Miss. 411, 58 So. 208; *Yazoo & M. Valley R. Co. v. Hughes*, 100 Miss. 95, 50 So. 627. But the circumstances may be such that the jury should be allowed to determine whether there was such gross negligence on the part of the carrier, such conscious indifference to the rights of the plaintiff and the public, as warranted the imposition of punitive damages. *Davis v. Yazoo & M. Valley R. Co.* 95 Miss. 540, 49 So. 179.

Where all the evidence showed that the act of defendant's agent in causing plaintiff to alight at the wrong junction point, thus delaying her in completing her journey, was due to an honest mistake, it was held that there was no evidence upon which to base an instruction for exemplary dam-

The appellants say that there can be no negligence or wilfulness, as Mr. Wassum was acting under instructions from Mr. Whalem, who was in charge of the excursion cars for this division, and those who carried the cars away were acting under orders from their superiors, and were bound to obey them.

It is true that, in well-regulated corporations, the inferior shall obey the orders of the superior, and with the corporation the defense of obedience to orders may be a complete defense to the inferior, and it is on that very theory (in part) that the corporation is held liable for the acts of the employees. It is said that there is no evidence to warrant punitive damages. This cannot be sustained. *Cave v. Seaboard Air*

Line R. Co. 94 S. C. 286, L.R.A. 1915B, 915, 77 S. E. 1019.

"There was no error in submitting to the jury the issue of punitive damages, for the evidence in the case, and the lack of evidence which it was incumbent on the defendant to introduce, offered reasonable ground for an inference of indifference to the rights of the passengers on the part of defendant, in failing to provide adequate accommodations for them."

The judgments are affirmed.

Gary, Ch. J., and Watts, J., concur.

Hydrick, J., dissents from the affirmance of the judgments in so far as they award punitive damages.

ages. *St. Louis, I. M. & S. R. Co. v. Free-land*, 39 Okla. 60, 134 Pac. 47.

In *Kirkland v. Texas & N. O. R. Co.* — Tex. Civ. App. —, 140 S. W. 505, where it appeared that plaintiff, acting upon the advice of a fellow passenger, got off at the wrong station, and that defendant's servant who assisted her knew of her real destination, and that by the time the train started she discovered her mistake and requested the defendant's agents to stop the train and permit her to reboard it, which they failed to do, it was held that sufficient showing was not made to authorize the awarding of exemplary damages.

In *Gulf, C. & S. F. R. Co. v. McFadden*, — Tex. Civ. App. —, 25 S. W. 451, it was held that negligence of defendant's servants in calling the name of the station before it was time for the passengers to leave the car, and in refusing to stop the train after they had discovered that plaintiff had been left, was not sufficient to authorize the awarding of exemplary damages, the ground given for the refusal of such damages being that a master cannot be held in exemplary damages for the negligent act of its servants, unless the acts were authorized or ratified by him, and that the simple retention of the servant in its employ was not sufficient to sustain a verdict based upon such ratification.

And the right of a passenger to punitive damages must be submitted to the jury where, after he had been put off the train by the Pullman porter at the wrong station by mistake, the train went on and left him, notwithstanding his notice to train employees and signals from the station agent to stop. *Campbell v. Seaboard Air Line R. Co.* 83 S. C. 448, 23 L.R.A.(N.S.) 1058, 137 Am. St. Rep. 824, 65 S. E. 628; *Entzminger v. Seaboard Air Line R. Co.* 79 S. C. 151, 60 S. E. 441.

Not giving time to board car.

In *Choctaw, O. & G. R. Co. v. Cantwell*, 78 Ark. 331, 95 S. W. 771, it was held that a railroad company was not liable for ex-

emplary damages for leaving a woman and two of her children on the platform of a station, where it appeared that she was on the platform with her three children ready to take the train when it arrived, that the train remained from five to ten minutes, that she succeeded in getting the oldest child on the train, when it moved out and left her with the other two children at the depot, and the trainman upon discovering the little girl on board, stopped the train about one or two hundred yards from the depot and put her off, but made no effort to run the train back to the depot, it further appearing that in order to run the train back it would have been necessary to send the brakeman back about half a mile with a flag to safeguard against collisions, and to delay the train until it would have missed connections with other trains. The court said that negligence, however gross, will not justify a verdict for exemplary damages unless the negligent party is guilty of wilfulness, wantonness, or conscious indifference to consequences, from which malice may be inferred.

And punitive damages may not be awarded where a train approached a depot platform at which a passenger was waiting, ran about 60 yards beyond the platform, momentarily halted, and then proceeded on its way without affording the passenger an opportunity to get on board, necessitating that the passenger wait three hours and a half and then make his journey on a freight train, in the absence of circumstances of malice, insult, personal injuries, damages to business, mental or physical suffering. *Memphis & C. R. Co. v. Green*, 52 Miss. 779.

In *Alabama & V. R. Co. v. Purnell*, 69 Miss. 652, 13 So. 472, it appeared that it became necessary to transfer the passengers from the train upon which plaintiff was riding around a wreck to another train, and that, while waiting for the other train to arrive, plaintiff chose to remain upon the first train instead of going around the wreck with the other passengers, as she

was requested to do by the conductor, and later the train she was upon was backed a considerable distance from the wreck and when it returned the other train was there and ready to start, and did not wait for plaintiff, although the conductor knew that she was being left, the reason given being that the train was late. The court said that, under the most unfavorable view of the affair which could be taken, it appeared that the defendant simply failed to do all that might have been done to insure plaintiff's continuance of her journey, and that the trial court rightly refused to instruct the jury to find for defendant, but should have restricted it to compensatory damages.

In *Townsend v. Texas & N. O. R. Co.* 40 Tex. Civ. App. 71, 88 S. W. 302, which was an action for damages for failure of defendant's employees to give plaintiff an opportunity to board its train after it had been stopped for repairs it was held that, even if it should be conceded that wilfulness could be implied from the facts alleged, exemplary damages could not be recovered because no act of ratification by defendant of the alleged wrongful act of its agent was shown, and no facts were alleged from which ratification could be implied.

But exemplary damages may be awarded where a street railway company fails to stop a car upon signal at a crossing, but runs 20 to 40 feet beyond the crossing to a point where the mud was very deep, and the conductor refused to back up the car because of the rule of the company forbidding him to do so, and the passenger, because of the depth of the mud, was unable to board the car. *Jackson Electric R. Light & P. Co. v. Lowry*, 79 Miss. 431, 30 So. 634.

So, the act of the conductor of a street car which was scheduled to make a flag stop at a certain place, in immediately giving the signal to go ahead after the car stopped about 200 feet from and beyond the passenger, may be properly found to have been intentional and malicious, so as to form the basis for the assessment of exemplary damages. *Indiana Union Traction Co. v. Heller*, 44 Ind. App. 385, 89 N. E. 419.

And in *Gillman v. Florida C. & P. R. Co.* 53 S. C. 210, 31 S. E. 224, where the plaintiff did not have time to purchase a ticket before the arrival of his train, but was told by the conductor to secure the ticket and he would hold the train for him, it was held that punitive damages could be recovered for failure of the conductor to hold the train.

Failure to run trains.

A railroad company is not liable for punitive damages on account of its failure to run a train on the return trip at the stipulated time, due to the breaking down of an engine, although it has sold a return excursion ticket, where the company has only one other engine, which is in the shop for L.R.A.1915C.

repairs, and its roadbed and equipment have been used for a considerable time in a dilapidated condition, although the earnings on the road were all applied to its improvement, in the absence of personal insult, indignity, or intentional wrong to the passenger. *Hansley v. Jamesville & W. R. Co.* 115 N. C. 602, 32 L.R.A. 543, 44 Am. St. Rep. 474, 20 S. E. 528, on rehearing in 117 N. C. 565, 32 L.R.A. 551, 53 Am. St. Rep. 600, 23 S. E. 443. The court distinguished *Purcell v. Richmond & D. R. Co.* 108 N. C. 414, 12 L.R.A. 113, 12 S. E. 954, 956, saying that the judgment in the *Purcell Case* should be put upon the ground that the defendant treated the plaintiff with indignity and contempt in rushing by the station when there was room for other passengers, or at least when there was evidence tending to show that to be the fact.

But where defendant knew at the time that it sold a return ticket to plaintiff, that it would discontinue a part of the road before the expiration of the time for her to return, the jury might find from that fact that it was guilty of wilful negligence in failing to provide some suitable transportation for her, even if they had been satisfied that the failure to operate that part of the road was not wilful. *Pickens v. South Carolina & G. R. Co.* 54 S. C. 498, 32 S. E. 567.

Delay after commencement of journey.

Where defendant's train upon which plaintiff was a passenger, after proceeding a short distance from the depot, stopped and remained there for over ten hours without any information being given to the passengers as to the cause for the delay or its probable duration, though the conductor possessed information which would have enabled the passengers to avoid much of the inconvenience suffered, punitive damages were allowed. *Miller v. Southern R. Co.* 69 S. C. 116, 48 S. E. 99.

But where, although it appeared that defendant's train was delayed for over twelve hours, it did not appear that the agents of defendant withheld from plaintiffs any information they had which, if communicated, would have avoided the causes of injury alleged, it was held that punitive damages should not be allowed. *Mulligan v. Southern R. Co.* 84 S. C. 171, 65 S. E. 1040.

Where there was nothing to show that when plaintiff was accepted as a passenger on a mixed train, the conductor knew, or had reasonable cause to believe, that he would not be able to run his train to plaintiff's destination that night, or that he would be ordered to lie over at an intermediate point, and there was no evidence of rudeness or disrespect toward plaintiff, but on the contrary there was evidence that the conductor asked by telegraph for permission to carry plaintiff to his destination, but his request was refused because there were some special trains on the road, it was held that it was error to refuse a

charge that plaintiff was not entitled to recover punitive damages. *Black v. Charleston & W. C. R. Co.* 87 S. C. 241, 31 L.R.A. (N.S.) 1184, 69 S. E. 230.

In *Aaron v. Southern R. Co.* 68 S. C. 98, 46 S. E. 556, it was held that a declaration which alleged that the cars upon which plaintiff was riding were delayed for six or seven hours while the engine was used to carry a Pullman car to another destination, because of a wreck on another part of the road, did not state a cause of action for exemplary damages.

In *Fort v. Southern R. Co.* 64 S. C. 423, 42 S. E. 196, it was held that a passenger on a mixed freight and passenger train takes passage subject to the delays incident to that mode of conveyance, and where his train was stopped 2 miles short of his destination, and the engine taken back to another station upon orders received by the conductor, and the station agent made no effort to secure a conveyance for plaintiff so that he was obliged to walk to his destination to avoid delay, it was held that he could not recover exemplary damages, there being no evidence whatever of any rudeness or insult to plaintiff by defendant's agent.

In *Norfolk & W. R. Co. v. Lipscomb*, 90 Va. 137, 20 L.R.A. 817, 17 S. E. 809, it was held that exemplary damages could not be allowed for mere negligence in cutting off a sleeper from the train, whereby a passenger with a sick child was left, while his baggage and medicine went with the train.

But in *Southern R. Co. v. Wooley*, 158 Ala 447, 48 So. 369, it was held that a railroad company was liable for punitive damages where a flagman, although knowing a passenger's destination, wantonly directed her to go into the wrong car, as a consequence of which she was left at a point short of her destination, when the car was switched off to make up a train at an intermediate junction point.

Miscellaneous cases.

In *Holcomb v. Spartanburg R. Gas & Electric Co.* 94 S. C. 435, 78 S. E. 231, where it appeared that one of defendant's conductors told plaintiff that he could make connections with another car so as to reach his destination that night, but that at the time he told him so the car had already left, the court said that while it may be true that it is very improbable that the conductor wantonly misled the plaintiff, still, inasmuch as there was direct evidence that, although he was familiar with the schedule and knew that the last car had gone, yet he assured the plaintiff that he would be taken to his destination that night, there was no error in submitting to the jury the issue of wantonness.

In *Schockley v. Southern R. Co.* 93 S. C. 533, 77 S. E. 221, where it appeared that plaintiff, a woman, was traveling alone, except for her baby, which she was carrying, was sick and nervous, and, while waiting for her train in defendant's station at a L.R.A.1915C.

place with which she was unfamiliar, applied to the agent to inform her when the train arrived, which he promised to do, but later, when she again applied for information as to the train, he informed her that it had gone, and became insulting and was heedless of her appeals for help, it was held that punitive damages were properly allowed. R. L. S.

VERMONT SUPREME COURT.

LENA M. NEIBERG

v.

VICTOR COHEN et al.

(— Vt. —, 92 Atl. 214.)

Husband and wife — imprisonment of husband — action by wife.

A wife cannot, either at common law or under the married woman's act giving her a right to hold separate property and sue alone, recover damages for loss of companionship and support, from persons who have successfully conspired to induce her husband to commit an offense for which he was imprisoned, where they intended to injure him, and not her.

(November 10, 1914.)

EXCEPTIONS by defendants to rulings of the Chittenden County Court made during the trial of an action brought to recover damages for loss of companionship and support of plaintiff's husband alleged to have been caused by defendants conspiring against him, which resulted in a verdict for plaintiff. Sustained.

The evidence tended to show that defendant Cohen was suspicious of the relations between his wife and plaintiff's husband.

On February 29, 1912, Cohen requested a

Note. — No case has been found in which the facts were sufficiently analogous to those in *NEIBERG v. COHEN* to justify its citation by way of annotation as an authority in point. Attention is, however, called especially to the case of *Flandermeyer v. Cooper*, 40 L.R.A. (N.S.) 360, and note thereto on wife's right of action at common law against one selling drugs or liquor to husband. The reasoning of the court in the *Flandermeyer* Case would seem to go far toward supporting the wife's right of action against one who deprived her of his society by such a conspiracy as existed in the *NEIBERG* CASE. See also *Clark v. Hill*, 69 Mo. App. 541, which is sufficiently set out in the latter case.

Generally, as to right of action by wife for injuries to or alienation of affections of husband, see Index to L.R.A. Notes, "Husband and Wife," §§ 65 and 67; also note to *Weber v. Weber*, L.R.A.1915A, 67.

deputy sheriff to arrest Neiberg, offering a substantial money consideration, which the deputy declined to do without the necessary papers. Cohen then said he could pull off the job more successfully in Burlington. Agel, who was present, intimated that he could catch Neiberg in Burlington. Cohen and Agel met in Burlington, and called Neiberg by telephone and made an appointment with him for the following Sunday. Agel met Neiberg on Sunday, spent the afternoon with him, and finally took him to Burlington. They drank intoxicating liquor to some extent, and in the evening entered a public hack and Agel gave directions to drive up a certain avenue upon which defendant Cushing was picked up, and shortly afterward Agel left the hack, and the driver took Neiberg and defendant Cushing to a hotel.

Cohen, early in the evening, went to Burlington and watched on the avenue above referred to for Weiberg, who, Agel told him, would be there in a hack. He followed the hack to the hotel, and when Neiberg went to a room with the woman he secured a warrant, calling an officer, and had Neiberg arrested.

There was evidence that Cohen hired and paid the hackman, and expressed satisfaction over the result.

Neiberg testified that he was not master of himself during the evening in question, and was led around by Agel, and remembered nothing from the time he entered the hotel until his arrest.

Messrs. Theodore E. Hopkins and Sherman R. Moulton, for defendants:

There was no evidence that the defendants did anything to influence plaintiff's husband to commit the crime.

Torrey v. Field, 10 Vt. 353; Boutwell v. Marr, 71 Vt. 1, 43 L.R.A. 803, 76 Am. St. Rep. 746, 42 Atl. 607; Wills v. Central Ice & Cold Storage Co. 39 Tex. Civ. App. 483, 88 S. W. 265; Martin v. Leslie, 93 Ill. App. 44.

An action will not lie for a conspiracy to do a lawful act.

Boutwell v. Marr, 71 Vt. 1, 43 L.R.A. 803, 76 Am. St. Rep. 746, 42 Atl. 607; Adler v. Fenton, 24 How. 407, 16 L. ed. 696; McHenry v. Snerer, 56 Iowa, 649, 10 N. W. 234; Nations v. Pulse, 175 Mo. 86, 74 S. W. 1012; Porter v. Mack, 50 W. Va. 581, 40 S. E. 459; West Virginia Transp. Co. v. Standard Oil Co. 50 W. Va. 611, 56 L.R.A. 804, 88 Am. St. Rep. 895, 40 S. E. 591; Lanyon v. Edwards, 25 C. C. A. 100, 41 U. S. App. 752, 79 Fed. 580; Philbrook v. Newman, 85 Fed. 139.

Mr. E. A. Ashland, for plaintiff:

Defendants were guilty of conspiracy.

F. R. Patch Mfg. Co. v. Protection Lodge, L.R.A.1915C.

I. A. M. 77 Vt. 294, 107 Am. St. Rep. 765, 60 Atl. 74; Com. v. Waterman, 122 Mass. 57; Smith v. People, 25 Ill. 17, 76 Am. Dec. 780.

Though a conspiracy is charged, yet if on the trial the evidence connects but one person with the wrong actually committed, the plaintiff may recover against him as if he had been sued alone.

1 Cooley, Torts, p. 213, note 12; Young v. Gormley, 119 Iowa, 546, 93 N. W. 565; Van Horn v. Van Horn, 56 N. J. L. 318, 28 Atl. 669; Fillman v. Ryon, 168 Pa. 434, 32 Atl. 89.

A conspiracy, though alleged, need not be proved in any case in order to recover against those who actually participated in the wrong charged.

1 Cooley, Torts, p. 213; Young v. Gormley, 119 Iowa, 546, 93 N. W. 565; Brackett v. Griswold, 112 N. Y. 454, 20 N. E. 376.

Mr. H. S. Peck also for plaintiff.

Munson, J., delivered the opinion of the court:

Louis Neiberg was found guilty of committing adultery with Hattie Cushing, and was sentenced to the state prison, and served a part of his term. His wife brings this suit against Victor Cohen, Max Agel, and Hattie Cushing to recover damages for the loss she sustained in being thus deprived of his affection, society, and support, charging that the defendants conspired together to procure, and did procure, the commission of the offense by means of persuasions and the administering of intoxicating liquor and drugs. Hattie Cushing has not been personally served, nor been within the state since the writ issued, and the trial proceeded against Cohen and Agel alone.

The only exception argued is that taken to the refusal of the court to direct a verdict for the defendants. It was claimed below, and is now argued, that there was no evidence tending to establish the alleged conspiracy, and none tending to show that the defendants did anything to influence Neiberg to commit the crime; that in doing all that the evidence tended to establish the defendants did nothing but what they had a legal right to do; and that the motive with which one does a legal act is not material. A somewhat particular presentation of the evidence will be found in the statement of the case.

There was certain evidence tending to show that Cohen and Agel were acting in concurrence in the execution of a plan previously agreed upon. The claim made by the defendants raises the question whether the undertaking which the evidence tends to establish was merely to keep Neiberg under observation to get evidence of a crime

likely to be committed and secure his punishment, or whether it covered a purpose and attempt to bring about the commission of a crime through agencies of their own. The use of the word "persuasions" in the declaration did not confine the plaintiff to influences by word of mouth. The influence may have been exerted through surrounding conditions for which the defendants were responsible. We think the evidence tends to show that Cohen and Agel conspired to bring about the commission of an offense at a time opportune for discovery and proof, by creating conditions calculated to secure the desired result, and that they were actuated therein solely by a desire to injure Neiberg. But it cannot be said that the evidence fairly and reasonably tends to show that Neiberg was so intoxicated as not to be master of himself. We know of no other case like this, and before carrying our conclusions further we give some preliminary consideration to the relation between husband and wife, as bearing upon the latter's rights of action.

The wife had no remedy at common law for the alienation of her husband's affection and the consequent loss of his society and aid. This was partly because of her inability to sue independently of her husband, and partly because she was not considered to have any property interest in her husband's services. *Knapp v. Wing*, 72 Vt. 334, 47 Atl. 1075. But in nearly all jurisdictions where the wife is now empowered to sue alone, and to hold separate property, she is held entitled to recover damages of the person causing the alienation, and this without the aid of any special statute. Note in 46 Am. St. Rep. 472.

In other instances of a wrongful deprivation of the husband's support, the right of recovery is given by statute. The right to recover for the pecuniary injury resulting to a widow from the loss of her husband's support through his death from a wrongful act did not exist at common law and depends wholly upon the statute. *Legg v. Britton*, 64 Vt. 652, 659, 24 Atl. 1016. A wife who has lost the support of her husband through the disabling effects of intoxicating liquor unlawfully furnished recovers solely by force of the statute. Enactments of this nature, known as the "civil damage acts," give a cause of action where none existed at common law. *Campbell v. Harmon*, 96 Me. 87, 51 Atl. 801; *Volans v. Owen*, 74 N. Y. 526, 30 Am. Rep. 337. The recognition of the right of the wife to recover for the loss of support resulting from an alienation of her husband's affection, as a right in existence when her common-law disabilities are removed, is doubtless due to the nature of the marriage relation and the

mutuality of its peculiar obligations. See *Bennett v. Bennett*, 116 N. Y. 584, 590, 6 L.R.A. 553, 23 N. E. 17.

It may aid us somewhat in giving this case its proper status if we contrast it with the familiar cases of our reports. The case is not the ordinary suit for alienation of affection and loss of society through an adulterous intercourse. *Hattie Cushing*, and she alone, would have been the respondent to such a charge. The husband's failure to give his wife the further benefit of his society was not from any lack of willingness on his part, but because he was prevented from living with her by his incarceration. Nor is the case one against relatives or friends who have sought from motives, good or bad, to separate husband and wife. The defendants have not tried to get the plaintiff's husband to abandon her, nor proceeded from any malicious feeling against her, nor in fact caused her any pecuniary loss, except that incident to the husband's punishment for crime.

If this had been the usual suit against the woman whose act is the basis of the plaintiff's claim, there could have been no recovery. A single instance of adultery had by a man accustomed to marital infidelities, with a common prostitute who serves his purpose on a chance occasion, does not constitute the enticement and alienation essential to a recovery. This action is not an alienation suit, but is like it in respect to the damage claimed. The suit seeks a recovery for the same loss of society and support that is sustained in an alienation case, but with the loss due to an imprisonment for the crime of adultery, instead of to an alienation of affection. The immediate cause of the damage sued for was the imprisonment. The more remote cause was the action of the defendants.

It may be said generally that when one is injured by the wrongful act of another, and a third person suffers an indirect and consequential loss because of some contract obligation to the injured party, the loss suffered by such third person does not constitute a cause of action. *Connecticut Mut. L. Ins. Co. v. New York & N. H. R. Co.* 25 Conn. 265, 65 Am. Dec. 571; *Rockingham Mut. F. Ins. Co. v. Boshier*, 39 Me. 253, 63 Am. Dec. 618; *Ashley v. Dixon*, 48 N. Y. 430, 8 Am. Rep. 559; *Anthony v. Slaid*, 11 Met. 290. It has been held, however, that where one is injured by the wrongful act of another, and a third party is indirectly and consequentially injured, the injury of the latter is actionable, although not directly committed upon him, if it was maliciously and fraudulently intended to affect, and did injuriously affect, him in his contract or business relations. *Greg-*

ory v. Brooks, 35 Conn. 437, 95 Am. Dec. 278; McNary v. Chamberlain, 34 Conn. 384, 91 Am. Dec. 732.

The above cases deal with injuries indirectly affecting a third person through his contract obligations to the party immediately injured. There are other cases where the consequential injury is suffered by reason of a natural relation to such injured party. The father, being entitled to the services of his children during their minority, may recover for any injury wrongfully inflicted upon his child which causes a loss of service. A husband has a right to recover for any injury wrongfully inflicted upon his wife, physical or otherwise, which deprives him of her services. The wife has no corresponding general right. But husband and wife each have the same right to recover for an alienation of the other's affection and the consequent loss of society and support. The right of the wife seems not to have been extended beyond this, otherwise than by special enactment.

The position of the wife will appear more fully from a reference to some cases where the loss of the husband's society and support was due to other causes than alienation of affections. In *Clark v. Hill*, 69 Mo. App. 541, the husband, a strong and healthy man, was made incurably insane by the defendant's repeated threats of violence; and the wife brought suit for the loss of her husband's support, comfort, and society, and recovered. The ground stated was that under the statutes then existing a married woman could maintain an action in her own name for this loss. It appears from a case cited in the opinion that the statute referred to specifically included in the rights of action which were a part of the property rights conferred, those growing out of any violation of her personal rights. So the decision may be viewed as a construction of the Missouri statute. No such clause is contained in our statute, and it is not necessary to inquire as to the effect of such a provision upon the common-law rule.

Where the wife has been deprived of the support of her husband by reason of his injury through the negligent act of another, she is held to have no separate remedy. In *Feneff v. New York C. & H. R. R. Co.* 203 Mass. 278, 133 Am. St. Rep. 291, 24 L.R.A. (N.S.) 1024, 89 N. E. 436, decided in 1909, it was said that no case had been referred to or found in which an action for a loss of consortium had been maintained because of a personal injury to the other spouse for which that spouse was entitled to recover full compensation; that persons whose relations to the injured party are purely domestic should not be permitted to share in, nor receive a sum in addition to, the com-

pensation to which the injured person is entitled; that their damages are too remote to be made the subject of an action. It is said in *Lush's Husband & Wife*, 1910 ed. p. 13, that there is no reported case of an action by a wife, or by husband and wife, for consequential damage to the wife through the negligent act of a defendant, causing personal injuries or other damage directly to the husband.

The only cases we know of where the loss of support resulted from the husband's imprisonment for crime were cases which arose under the civil damage acts. Most of these statutes provide that the wife may recover for a loss of the means of support as well as for injuries to person and property. This provision regarding the means of support is held to apply to both the direct and indirect results of the intoxication; and in actions brought under the statutes containing it the wife is allowed to recover for the loss of support which she suffers because of her husband's imprisonment. *Beers v. Walhizer*, 43 Hun, 254; *Homire v. Halfman*, 156 Ind. 470, 60 N. E. 154. In other cases, where the statutory remedy is confined to injuries to person and property, a recovery for the loss of support resulting from the husband's imprisonment is denied. *Bradford v. Boley*, 167 Pa. 506, 31 Atl. 751; see *Dennison v. Van Wormer*, 107 Mich. 461, 65 N. W. 274.

It is evident that the plaintiff cannot recover the damages claimed in the absence of a statutory authorization, unless upon some special ground. It is true that the loss she suffered resulted from an intentional and malicious act. But the malicious purpose and act of the defendants were directed against the husband, and not against the wife. Whatever *Neiberg's* right against the defendants might have been, if their acts had deprived him of his wife, he certainly could not have recovered upon the case as presented. The reasoning in the *Feneff Case*, based upon the husband's right of recovery, is not to be taken as implying that the wife may recover where the husband cannot. It is not the deprivation of the husband's support, but the cause of the deprivation, which determines the question of remedy. If the deprivation is due to an alienation of the husband's affection, the wife has a right of action corresponding to that of the husband. If the deprivation is due to causes for which the husband may recover, his recovery is deemed to be partly for the wife's benefit, and the remedy is clearly to the husband, and not to the wife. If the conduct of the husband was such that he cannot recover, there can be no recovery by the wife, unless upon grounds directly

personal to her. In such a case the damage would be considered immediate, and not consequential. It is said in the work above cited that no action will lie at the suit of the wife for loss of consortium, or, indeed, for any other consequential damages which she may have suffered from an act of trespass to her husband, except possibly when the trespass is committed upon the husband with intent to injure the wife. As this case shows no intent to injure the wife, it is not necessary to pursue the argument further.

As the case stands, the situation is the same as in any case where the head of a dependent family is convicted of crime and sentenced to imprisonment. The rights of all persons entitled to the support of a relative are subject to the right of the state to exact the penalty for his breach of the law. The wife is in a class by herself, but she is not the only one entitled to support. The obligations of support are both natural and statutory. The family may consist of a wife or a dependent child or other relative entitled to support,—as a dependent parent or grandparent, brother or sister, or grandchild,—or of all these together. It would be difficult to place a recovery in this case upon grounds which would not be equally available to other relatives entitled to support.

Our conclusions upon the points considered are such that it is not necessary to characterize the nature of the defendants' acts more fully than was done in opening the discussion; nor to consider the proper application of the rule regarding the motive with which a lawful act is done; nor to inquire as to the rights of private persons with reference to the detection and punishment of crime.

Judgment reversed, and judgment for defendants.

MISSISSIPPI SUPREME COURT.

WESTERN UNION TELEGRAPH COMPANY, Appt.,
v.

J. D. McLaurin.

(— Miss. —, 66 So. 739.)

Telegraph — disclosure of contents of message — liability.

One cannot hold a telegraph company liable in damages for his humiliation and loss

Note. — Liability of telegraph company for disclosing contents of message.

This note does not cover the question whether telegraph companies can be compelled to produce messages in evidence. As L.R.A.1915C.

of social caste and business opportunities through its disclosure to strangers of the contents of a message showing, in connection with the proof that he is compelled to introduce to make a case, that he was maintaining illicit sexual relations with the sender.

(December 14, 1914.)

APPEAL by defendant from a judgment of the Circuit Court for Lauderdale County in plaintiff's favor in an action brought to recover damages for defendant's disclosure of the contents of telegrams sent to plaintiff. Reversed.

The facts are stated in the opinion.

Messrs. Harris & Potter for appellant. Mr. F. V. Brahan for appellee.

Cook, J., delivered the opinion of the court:

This case was begun by appellee against appellant to recover damages for injuries caused by appellant disclosing the contents of two telegrams. The messages were sent from Selma, Alabama, to appellee at Toombs, Mississippi, and were in the following words:

(1) "Call me up at once at 9196. [Signed] Alice."

(2) "Please come home, I am sick. [Signed] Alice."

The first message was dated November 3, 1912, and the second November 4, 1912, and each was delivered to the sendee on the day of their date.

The first telegram was written on a tissue paper train sheet and folded on itself, but was not placed in an envelop or sealed. This message was delivered to a third party by appellant, and the evidence discloses that the third party did not open or read the message. The second message was delivered by the telegraph company to a sister of the sendee, about eleven years of age, and was by her first delivered to her mother, who opened and read it, and it was then delivered to appellee. The last message was written on the same kind of paper as the first, and was not sealed or inclosed in an envelop. After reading the message, appellee's mother asked him if he was married to the sender of the telegram, and it seems from the evidence that she pursued this line of inquiry far enough to learn that "Alice" was a prostitute, and that her son had been her paramour.

It also appears that the messenger of the company at Selma disclosed the contents of

to privilege of message, see note in 35 L.R.A. (N.S.) 583.

Liability at common law.

It appears to be generally recognized that

the telegraphic correspondence to the friends of appellee at Selma, and it is alleged and proven that his relations with the woman of the underworld thus became public property, to his humiliation and shame, caused him to lose caste with women of respectability, and ultimately forced him to resign a lucrative position at Selma to take another elsewhere less lucrative and pleasant. The wags of his acquaintance, after the disclosure of the contents of the messages, commonly called him "Alice," and the urchins of the street promptly tagged him with the same sobriquet. In short, the record tells a story that appeals to the sympathy of the sternest moralist. There can be no doubt that, when his sins had thus found him out, appellee suffered not only men-

tally, but also financially. Doubtless, the messenger boy did not appreciate the enormity or the consequences of his offense when he satisfied the curiosity of inquiring feminine friends of appellee by disclosing that "Alice" was a demirep and appellee was her Don Juan.

We refrain, for obvious reasons, from a further statement of the harrowing details of appellee's humiliation when it dawned on him that he had been exposed, found out, caught. Will the law compensate him for his injured feelings, or for his damaged exchequer, is the question.

It may be suggested that had the disclosures not been made, in all probability, appellee would have continued to stray in the primrose paths of dalliance; whereas and

telegraph companies owe a duty to keep the contents of messages intrusted to them for transmission secret, and that in case of a violation of this duty, and a disclosure to persons other than those to whom a legal delivery is justified, a recovery may be had.

It will be noticed that the court in *WESTERN U. TELEG. CO. v. McLAURIN* held that the telegraph company violated its public duty when it disclosed the contents of the message to persons other than the addressee, but refused a recovery on the ground that without the aid of the plaintiff's immoral acts he could not show that he had suffered damage, holding that when it appears that the plaintiff's right of recovery is based upon his own wrong, the court will bring the case to an end and disregard the wrongs committed by defendant. No other case dealing with this question has been found where the court has applied the "unclean hand maxim" of equity.

It has been held that in every contract for the transmission of a telegraphic message, there is involved an obligation on the part of the transmitting company to keep its contents secret, and that a violation of this duty gives a right of action against the company for actual damages. *Cocke v. Western U. Teleg. Co.* 84 Miss. 380, 36 So. 392. It was held in this case that such an action must be decided without reference to a statute making it a penal offense for employees of telegraph companies to divulge the contents of messages.

In *Cocke v. Western U. Teleg. Co. supra*, it was held that punitive damages would not be allowed where the operator, who was a friend of the addressee, disclosed the contents of a message concerning the court's decision on his brother's appeal from a conviction of murder to other friends of the addressee, the court holding that the message was one relating to a public matter which would necessarily have been general property in a few hours.

In *Woods v. Miller*, 55 Iowa, 168, 39 Am. Rep. 170, 7 N. W. 484, where the production and introduction in evidence of a telegram in an action between the sender and sendee was in question, the court said: "The con-

tents of messages, unlike the contents of letters, are necessarily known to the persons engaged in transmitting them. The interests of business require that they should not be divulged to third persons, but the parties themselves have a right to the messages to prove their contract."

In *Barnes v. Postal Teleg.-Cable Co.* 156 N. C. 150, 72 S. E. 78, where an action was brought to recover for damage claimed to have been sustained because of a delay in the delivery of a message which the telegraph company was unable immediately to telephone to the addressee personally on account of his being at a distance from the telephone office, but which might have been telephoned and delivered by messenger, the court held that the telegraph company could not properly do this without the consent of the sender and sendee, or at least of one or the other, and said: "There was some question as to the right of the telephone company to disclose the contents of the message to a person other than the addressee. This could not be done without the consent of the sender and the sendee, or at least the sender or the sendee, depending upon the nature of the message or the terms of the contract. The telegraph company under its ordinary contract is not required to telephone a message, as it would impair the confidential relations assumed, but it can agree to deliver a message in this manner. . . . It is a part of the undertaking of the telegraph company with respect to the transmission and subsequent handling of the message, that its contents shall not be disclosed to any person whomsoever without the consent of either the sender or addressee, and, if it does divulge the contents without being released from the obligation of secrecy, it acts at its peril. . . . Nor has the company the right to deliver the message, especially by telephone, which necessarily discloses its contents, to one not the agent of the addressee to receive telegrams, unless he is otherwise expressly or impliedly authorized to receive it. . . . We should carefully distinguish between the mode of delivery in respect to telegrams which are to be transmitted by telephone

since the "blessed sunlight of publicity" has caused him to abandon the pleasures of sin, appellee is in fact the winner rather than a loser; but, as the telegraph company does not file this as an offset, we will not consider that feature of the case.

"The test whether a demand connected with an illegal transaction is capable of being enforced at law is whether the plaintiff requires the aid of the illegal transaction to establish his case." *Swan v. Scott*, 11 Serg. & R. 164; *Thomas v. Brady*, 10 Pa. 164; *Scott v. Duffy*, 14 Pa. 18.

If a plaintiff cannot open his case without showing that he has broken the law, a court will not aid him. It has been said that the objection may often sound very ill in the mouth of the defendant, but it is

not for his sake the objection is allowed; it is founded on general principles of policy which he shall have the advantage of, contrary to the real justice between the parties. The principle of public policy is that no court will lend its aid to a party who grounds his action upon an immoral or illegal act.

The principle has been applied in numerous cases wherein its application seems to have been of doubtful propriety, but the principle as stated is undoubtedly sound in logic, and necessarily affords the true test for the guidance of the courts.

Speaking of the principle here invoked, Judge Cooley in his valuable work on Torts (vol. 1, *172), says: "It may be thought that the maxim that the law will not re-

beyond the telegraph company's line, and a delivery of the telegraphic message itself by the messenger of the transmitting company."

As to the duty of telegraph company to deliver message by telephone, see note to *Western U. Teleg. Co. v. Price*, 29 L.R.A. (N.S.) 837.

In *Hellams v. Western U. Teleg. Co.* 70 S. C. 83, 49 S. E. 12, in considering the duty of a telegraph company with reference to telephoning a message for an addressee who had no telephone, the court stated that it did not think that the law imposed upon telegraph companies the duty to telephone a message, as that would seriously impair the confidential relations assumed in the delivery, receipt, and transmission of telegraphic communications.

In *Barnes v. Western U. Teleg. Co.* 120 Fed. 550, the questions of negligence of the telegraph company and consequent injury to plaintiff were held to be for the jury, where plaintiff addressed a message relating to the price of a valuable horse to a horse dealer, and although an inn kept by the addressee, which was frequented by horsemen, was within delivery limits, the message was telephoned to the inn, where it was received by the wife of a rival dealer, who transcribed it and left it exposed to the public, it being alleged that as a result of the publicity given to the message an offer previously made for the horse was withdrawn.

In *Re Renville*, 46 App. Div. 37, 61 N. Y. Supp. 549, refusing mandamus to compel a telegraph company which had entered into an agreement with a stock exchange to furnish members and others of whom the exchange might approve with reports of the exchange, to supply such reports to one whose application had been rejected by the exchange, the court gave, as one of the grounds of the decisions, the duty of a telegraph company not to disclose the contents of messages, and observed that it saw no difference whether a despatch is given to a telegraph company to be communicated to a single individual, to ten, a hundred, or a thousand individuals. The ultimate ques-
L.R.A.1915C.

tion involved in this case as to the duty of the telegraph company to furnish applicants with reports of the exchange is not within the scope of the note.

As to property rights in market quotations, see note to *McDermott Commission Co. v. Chicago Bd. of Trade*, 7 L.R.A. (N.S.) 889. For mandamus to compel delivery by a telegraph company of market quotations to bucket shops, see note to *Western U. Teleg. Co. v. State*, 3 L.R.A. (N.S.) 153.

Statutory liability.

In some states statutes are in force forbidding the disclosure of the contents of telegrams. These, however, appear to be generally directed against the employees of telegraph companies, rather than against the companies. The cases involving the penal liability of such employees for violation of the statute are not within the scope of the note.

In *Western U. Teleg. Co. v. Bierhaus*, 8 Ind. App. 563, 36 N. E. 161, a statute which makes it penal for telegraph companies to fail to transmit messages impartially and in good faith, or to discriminate in rates charged for, or in the manner or conditions of service between patrons, but which did not expressly prohibit the divulging of the contents of messages, was strictly construed in view of its penal character, and held not to authorize the recovery of a penalty from a telegraph company for disclosing the contents of a message. In construing this statute the court took into consideration the fact that by another provision it was made an offense for any employee to reveal the contents of any telegram, and said: "To our minds it is clear that this penalty was intended to punish such wrongful acts only as were not covered by the criminal statutes. Any other construction would impute to the law-making power an intention to assess a double punishment for the same offense. The law, as interpreted in this state, abhors the infliction of double penalties. . . . We do not undertake to declare that a penal law in the nature of the one under construction

lieve a party from the consequences of his own wrongdoing partakes more of severity to the particular person singled out by the plaintiff for pursuit, than it does of general justice. It may be right to punish him, but is it right to exempt from punishment others equally guilty? If strict justice, as between individuals, were all that was aimed at, we should be compelled to answer this question in the negative; and we must therefore look further for the reason of this rule."

The author then proceeds to state the reasons for the rule, as he sees it, this way: "It has already been intimated that the rule, as we have given it, is one of very general application, and not by any means confined to cases of joint torts. Whoever, by his pleadings in any court of justice, avows that he has been engaged with others in an unlawful action, or has concerted with them an unlawful enterprise, and that in arranging for or carrying it out he has been unfairly treated by his associates, or has suffered an injustice which they should redress, will be met by the refusal of the court to look any further than his complaint, which it will at once order dis-

would be invalid if there already existed a criminal statute against the same act, as that question is not before us. But we do give it as our conviction that when one statute declares a given act to constitute a criminal offense, and prescribes a punishment therefor, a second enactment in the nature of a penal or *qui tam* statute should not be so construed as to bring the act constituting the crime or offense within the purview thereof, unless by express terms it is so provided. Here, in our view, both the letter and spirit are against the interpretation contended for, and it is the duty of the court to avoid the penalty by construction, rather than to create it."

It was held immaterial in this case that the message disclosed was of a private business nature, since the statute made no discrimination between such messages and those of any other character, except that messages of public and general interest and those to and from officers of justice were given preference over private despatches. *Ibid.*

It appears from the remarks of the court in *Arkansas & L. R. Co. v. Stroude*, 82 Ark. 117, 100 S. W. 760, that it is made an offense by statute in Arkansas to unlawfully and wilfully reveal the contents of a private telegram. The action in that case, however, was instituted to recover for a failure to deliver a message, and did not involve the disclosure of its contents.

The opinion in *WESTERN U. TELEG. CO. v. MCLAURIN*, in denying the plaintiff's right to recover substantial damages, seems to blend two distinct grounds of decision. (1) That the damages he sustained were the result of his immoral relations rather than

missed. The following reasons may be assigned for this action: (1) The discouragement of all illegal transactions by distinctly apprising every person who engages in them that the risk he incurs is not merely of being compelled to share with the others the loss that may follow, for this, in many cases, would be insignificant, and in all cases would be small in proportion to the size and formidable character of the combination. He is therefore given to understand that whoever takes part in an illegal transaction must do so under a responsibility only measured by the whole extent of the injury or loss; an understanding very well calculated to make men hesitate who, under a different rule, would be disposed to give full scope to evil inclinations. But (2) the state, from a consideration of its own pecuniary interests, and of the interests of other litigants, may wisely refuse to assist in adjusting equities between persons who have been engaged in unlawful action. The expense of administering justice is always a large item in the state's expenditures, and one which must be borne by the common contributions of the people. Where one has suffered from participation

of the disclosure of the contents of the message; (2) the maxim that the plaintiff must come into court with clean hands. It may be questioned whether the decision is right on either ground. Passing over the point that the maxim is, strictly speaking, an equitable one, and not a legal one, it is important to observe the limits of its operation as stated in the following quotation from *Pomeroy's Equity Jurisprudence*, vol. 1, § 399: "The maxim, considered as a general rule controlling the administration of equitable relief in particular controversies, is confined to misconduct in regard to, or at all events connected with, the matter in litigation, so that it has in some measure affected the equitable relations subsisting between the two parties, and arising out of the transaction; it does not extend to any misconduct, however gross, which is unconnected with the matter in litigation, and with which the opposite party has no concern. When a court of equity is appealed to for relief, it will not go outside of the subject-matter of the controversy, and make its interference to depend upon the character and conduct of the moving party in no way affecting the equitable right which he asserts against the defendant, or the relief which he demands."

While in a sense the immorality of the plaintiff was connected with the subject-matter of the action, it does not seem to have been so in the sense of the language employed in the foregoing quotation. It was not a constituent element of the plaintiff's cause of action, but at most a mere circumstance that accounted in part for the nature and extent of the damage inflicted upon him by the wrongful disclosure

in an unlawful undertaking, what justice can there be in any demand on his part that the state shall supply courts and officers and incur expenses to indemnify him against a loss he has encountered through a disregard of its laws? Here the question is not merely one of what is right, as between himself and his associates, but what is best for the interest of the state. When that question is up for consideration, the fact is not to be overlooked that there are unavoidable difficulties and necessary evils connected with litigation which multiply rapidly as the cases increase in number. Courts and juries, at the best, are but imperfect instruments for the accomplishment of justice; and the greater the volume of litigation, the less is the attention which any particular case is likely to receive, and the greater the probability that right may be overcome by artifice, or by a false and deceptive exposition of the facts. Trusty justice must follow after wrong with deliberate and measured tread; and every honest litigant in seeking it must be more or less impeded when those who have no just claim on the consideration of the court are allowed to push their complaints be-

fore it. It is not necessary to look further for reasons in support of the rule to which attention has been directed."

Judge Cooley was discussing joint wrongs where the parties were engaged in a common enterprise, but we can see no reason why the reasons given by him for the enforcement of the principle should not apply in the present case. It is clear from the record that plaintiff's injuries, his humiliation and shame, sprang from his illicit relations with the woman in the case. But for his immoral commerce with the lady of easy virtue, there would have been no shame, no humiliation, and the disclosure of the contents of the telegrams would have caused no pain,—no injury to his reputation. His claim for actual damages is grounded upon and has no foundation save for the fact that he has been violating the Seventh Commandment.

For the reasons mentioned, we are of opinion that plaintiff did not prove any actual damages which would entitle him to invoke the process of the courts. The telegraph company did, however, violate its public duties. Policy requires that a public service corporation should be held responsible for

of the contents of the message. In any event it would seem that the conceded breach of duty by the company would create a cause of action for at least nominal damages, so that the fact of plaintiff's immorality would only affect the amount or character of damages which he might recover. The disclosure of the plaintiff's immorality may have been necessary in order to establish the essential relation between the company's breach of duty in disclosing the contents of the message, and the particular damages of which he complained; but even so, the real basis of his cause of action would seem to have been the disclosure of the contents of the message, irrespective of the truth or falsity of the inferences as to his immorality drawn therefrom; and the fact of his immorality, if pertinent at all, appears to have been a mere circumstance tending to explain the character and extent of the damage resulting from the company's breach of duty, just as other extraneous facts giving rise to a false and unjust impression of immorality might in other circumstances have been relevant in order to explain why the disclosure of the contents of a message innocent enough on its face worked damage.

Doubtless a message may be of such a character, *e.g.*, a message in relation to a contemplated crime or to the movements of an escaped criminal, that no breach of duty on the part of the telegraph company can be predicated upon the disclosure of its contents; but the message in the present case was not of that character, and it is conceded that there was a breach of duty on the part of the company in permitting it to become public.

L.R.A.1915C.

The decision, if followed as a precedent, opens the door upon the private life and conduct of the parties to a message, for the benefit of a telegraph company which concedes that it owes no duty to disclose the contents of the message, but upon the contrary owes a positive duty not to disclose them, and does not even pretend that its breach of duty was prompted by consideration of the interests of morality or public welfare, but admits that it was due entirely to the negligent or mischievous conduct of its employees.

Suppose a man sends to his wife a message which, if disclosed to the public, reveals that he has been guilty of serious misconduct toward her, may a telegraph company, which does not profess to be a censor of public morals or pretend that the disclosure of the message was not a flagrant breach of duty on its part, escape liability to the sender for the resulting humiliation and loss of position and prestige, upon the ground that his damages were not due to the disclosure of the contents of the message, but to his own misconduct, which presumably but for the conceded breach of the company's duty would have remained a secret between the husband and wife, shared only by those employees whose duty required them to transmit and receive the message.

The decision comes dangerously close to denying a person redress for a conceded wrong and injury because of his own immoral conduct, which was not an essential element of his cause of action, but at most a mere matter of inducement, a condition, and not the cause, of his damage.

J. T. W.

the wilful violation of its duties to those entitled to command its services. Punitive or exemplary damages are authorized in proper cases upon the theory that punishment will deter others from committing wilful and wanton wrongs. Punitive damages are not given for the purpose of compensating or enriching individuals, but for their supposed deterrent effect.

In the present case the plaintiff has not shown himself to be entitled to compensation, because this record shows that he wants to be paid for his humiliation, which was brought about by his immoral acts. In the eyes of the law, he has suffered no injury which the courts will aid him to repair. Does it follow that the courts will also decline to penalize the confessedly wanton act of the defendant, because the wrong was done to one who can show no actual damages of which courts will take notice, and because the plaintiff will get the benefit of the award?

The plaintiff cannot travel to actual damages without the aid of his immoral acts, and it is the policy of the state to deny the plaintiff the assistance of the courts for the recovery of such damages. On the other hand, public policy permits the imposition of punitive damages in the interest of the public, without regard to the pecuniary interests of the individual suing.

We think the apparently conflicting principles may be harmonized by holding that, when it appears that plaintiff's right of recovery is based upon his own wrongs, the courts will bring his case to an end and disregard the wrongs of the defendant. Exemplary damages are never recoverable as a matter of right. It is always within the discretion of the jury to refuse to find for such damages. In cases like the present one, we believe that the case should end because the aid of the court cannot be invoked at all to adjust the differences in dispute.

The publication of the telegrams did not disclose the character of the sender. It was necessary for the plaintiff's case that he should disclose her business (if this is the proper word for this sort of traffic) in order that he might thereby show that he was injured. He could not "open his case" without confessing his criminal intimacy with the courtesan, and it was his relations with the woman that brought about his shame,—and it was this shame which produced the injury or actual damages. It was wrong, of course, for the telegraph company to disclose the contents of the telegrams, but the disclosure would not and could not cause any actual injury to complainant, except for his own immoral practices.

Leaving out of view the immorality of plaintiff, the wrongs of the company did L.R.A.1915C.

not injure plaintiff. Without the aid of his immoral relations with the scarlet woman, he cannot show any injury to his self-respect. It thus appears that the courts will not entertain this action at all, although it may appear that the telegraph company has been guilty of a wanton disregard of its public duties. The state will not undertake to punish the wrong, because the plaintiff who brings the controversy into court comes with unclean hands, and the court can enter no judgment except such judgment as will rid it of this entire litigation.

Reversed and dismissed.

CALIFORNIA SUPREME COURT.

W. G. HOLLAND, Respt.,

v.

W. J. HOTCHKISS et al., Appts.

(162 Cal. 366, 123 Pac. 258.)

Tax — suit to set aside sale — repayment.

1. In setting aside a void tax sale at the instance of the taxpayer, the court should make repayment of the tax and those subsequently paid by the purchaser with interest from the respective times of payment less rents received, a condition to affording the relief sought.

Deeds — acknowledgment — form — interpolation.

2. The interpolation of the words "to me" after the word "acknowledge," in the statutory form for certificates of acknowledgment of deeds, is immaterial.

Same — sufficiency of certificate.

3. Failure of the clerk of court to certify that an acknowledgment of a deed was taken in accordance with the law of the place where it was made, which the statute makes proof of such conformity, will not invalidate the deed if the acknowledgment complied with the laws of the place where the land was located.

Same — execution — sign and seal.

4. A certificate that a grantor acknowledged that he "signed and sealed" the instrument sufficiently complies with a statu-

Note. — Reimbursement of taxes paid by purchaser, as condition of equitable relief against invalid tax title.

I. Introduction, 493.

II. Rule in general.

a. Where tax is valid.

1. Generally, 494.

2. To what proceedings the rule applies, 502.

3. Proof of taxes paid by purchaser, 503.

b. Where tax is invalid or has been paid, 503.

tory requirement that he acknowledge that he executed it; and it is immaterial that sealing was not necessary under the statute.

(March 25, 1912.)

A PPEAL by defendants from a judgment of the Superior Court for Fresno County in plaintiff's favor, and from orders refusing a new trial and denying a motion to vacate the judgment, in an action brought to quiet title to certain land. Reversed.

The facts are stated in the opinion.

Messrs. Carter & Carter for appellants.

Messrs. George Cosgrave and Frank Kauke, for respondent:

The purported tax deeds to the state were void.

Johnson v. Taylor, 150 Cal. 201, 10 L.R.A.

(N.S.) 818, 119 Am. St. Rep. 181, 88 Pac. 903; Guptill v. Kelsey, 6 Cal. App. 35, 91 Pac. 409; King v. Samuel, 7 Cal. App. 55, 93 Pac. 391; Wetherbee v. Johnston, 10 Cal. App. 264, 101 Pac. 802.

The defendant, having acquired no title to the land, "was a mere volunteer, paying the taxes without the authority of the landowner or the law," and was not entitled to have tendered or repaid to him anything whatsoever.

Paine v. Germantown Trust Co. 69 C. C. A. 303, 136 Fed. 527; Axtell v. Gerlach, 67 Cal. 483, 8 Pac. 34; Keane v. Cannovan, 21 Cal. 303, 82 Am. Dec. 738.

The certificates of acknowledgment were sufficient.

Reed v. Bank of Ukiak, 148 Cal. 96, 82 Pac. 845; 1 Cyc. 582; Touchard v. Crow,

III. Analogy between position of public and of tax purchaser relatively to complainant, 505.

IV. Who is entitled to reimbursement; successors in interest; form of decree, 506.

V. Effect of operation of statutes of limitation, 508.

VI. Effect of fraud on the part of purchaser, 509.

VII. Effect of refusal to accept offer of reimbursement before suit, 510.

VIII. Amount of reimbursement, 511.

I. Introduction.

The note is confined to consideration of the right to reimbursement in equity where relief is sought against the tax title holder, and does not include the question of the right of a tax title holder to affirmative relief for taxes paid where the owner or other person having an interest in the land is not seeking relief against the tax sale proceedings. Neither does the note include cases dealing with the question as to the rights of the purchaser at an invalid tax sale against the taxing authorities. As to the latter question see note to *Lisso v. Police Jury*, 31 L.R.A.(N.S.) 1141, on the right of the purchaser at an invalid tax sale, in absence of statute, to be reimbursed by taxing authority for the purchase price, or for taxes subsequently paid by him. The note, is moreover, confined to consideration of the question of reimbursement independent of statutes, although in some cases it has been difficult to determine precisely the extent to which statutory provisions may have influenced the decision. In general only cases are included where the question as to the tax title holder's right to reimbursement was discussed on equitable principles. The note does not purport to cover the question of the necessity and sufficiency of a tender of taxes paid as a condition of maintaining the action, so far as this is merely a question of pleading. But cases are, of course, included where the decision as to the necessity of a tender is the equivalent.

of a decision on the question of the substantive right to reimbursement.

As to right of one holding under invalid tax deed to be reimbursed for improvements, see note to *Parker v. Daly*, 34 L.R.A.(N.S.) 549. And, generally, as to recovery of taxes paid, see Index to L.R.A. Notes, "Taxes," §§ 86, 87.

"At common law the purchaser of land at a void tax sale cannot recover from the owner, even to the extent to which his purchase operated as payment of a tax legally chargeable on the land, as such payment is regarded as voluntary, and not made at the request of the owner. But some of the authorities authorize such a recovery when the tax title is set aside for causes not going to the validity of the tax or of the proceedings for its collection, or where the only ground of invalidity is an error in the assessment. And in some states the laws now provide for the reimbursement of the purchaser by the owner to an amount equal to the sum which would have been necessary to discharge the land from the taxes if they had not been paid by the purchaser, or for reimbursement for subsequent taxes paid." 37 Cyc. 1537.

It is also said (37 Cyc. 1525) that "at common law the purchaser at a tax sale assumes the risks of his purchase. The proceedings are of record, and he is chargeable with notice of any defect or irregularity which the records disclose. Moreover, the power of the officer to sell is a naked power, statutory, and not coupled with an interest, and the purchaser is bound to inquire whether it is rightly exercised. Therefore, in the absence of special legislation to the contrary, he comes within the rule of *caveat emptor*;" also (page 1531) it is said that "a mere purchase of land at a tax sale gives no lien enforceable in equity for the reimbursement of the money paid; but where the tax title proves defective, the statutes of many states now create a lien in favor of the purchaser for the amount of the price paid, or to the extent of the taxes paid, either generally or in special cases."

20 Cal. 150, 81 Am. Dec. 108; Dawson v. Hayden, 67 Ill. 52; Hughes v. Powers, 99 Tenn. 480, 42 S. W. 1.

Shaw, J., delivered the opinion of the court:

This is an action to quiet title and determine adverse claims to a section of land. The plaintiff proved a title derived from the United States. The defendant Hotchkiss claims title solely under two deeds from the state of California to one Barthold, executed by the county tax collector of Fresno county, purporting to be made in pursuance of sales and deeds to the state for delinquent taxes. Barthold afterward conveyed the land to Hotchkiss. The defendant Canty

claims a right to purchase from Hotchkiss the undivided one half of the land.

The judgment of the court below was that the plaintiff is the owner of the land, and that his title thereto be quieted as against the defendants; that the defendants have no right, title, or interest in the land, and that they be enjoined from asserting any title, claim, or equity thereto. It further adjudged that the plaintiff be required to pay to the defendant Hotchkiss within thirty days the sum of \$327.58. That sum is the amount, without interest, of the sums paid by Hotchkiss and Barthold to the state as purchase money and for taxes on the land accruing after the sale to the state. Plaintiff alleged a tender thereof by him before suit, and refusal by defendant to accept the

II. Rule in general.

a. Where tax is valid.

1. Generally.

It is well established, in accord with *HOLLAND v. HOTCHKISS*, that in granting affirmative relief against the holder of an invalid tax title by way of cancellation of tax certificates or deeds, or quieting title to the land, a court of equity should require, as a condition precedent to the granting of the relief, that the one seeking it should reimburse the tax title holder the equitable amount to which he is entitled for taxes paid on the land, with interest. This rule is based on the maxim that he who seeks equity must do equity. So that, while the holder of the invalid tax title might not be able to recover the taxes paid from the owner, he has a right in equity to reimbursement as a condition of granting equitable relief to the owner. The rule, of course, presupposes that the taxes were valid, and that the amount to which the holder of the tax title is entitled is ascertainable and has been made to appear. The following cases support the proposition above indicated as to the right of the holder of an invalid tax title to reimbursement as a condition of granting affirmative relief to the tax payer, the usual amount of reimbursement being the purchase price (so far as the same was legal) and subsequent taxes paid by the purchaser, with legal interest (it being intended, agreeably to the limitation of the scope of the note, to confine the citation of cases to those which either rested solely upon the principle or those which clearly recognized it, though in some of the cases of the latter kind the principle may have been aided or re-enforced by statute):

Ark.—*Twombly v. Kimbrough*, 24 Ark. 459; *Cole v. Moore*, 34 Ark. 582; *Files v. Jackson*, 84 Ark. 587, 106 S. W. 960 (purchase price, including taxes, interest, penalties, and expenses, with subsequent taxes paid by purchaser, and interest on entire amount at 6 per cent, declared a lien on L.R.A.1915C.

the land); *Hare v. Carnall*, 39 Ark. 196; see also *Hickman v. Kempner*, 35 Ark. 505; and *Bagley v. Castile*, 42 Ark. 91.

Cal.—*Hibernia Sav. & L. Soc. v. Ordway*, 38 Cal. 679, cited in *HOLLAND v. HOTCHKISS*; *Ellis v. Witmer*, 134 Cal. 249, 66 Pac. 301 (same); *Flannigan v. Towle*, 8 Cal. App. 229, 96 Pac. 507 (same); *Johnson v. Canty*, 162 Cal. 391, 123 Pac. 263, approving and following *HOLLAND v. HOTCHKISS*; *Campbell v. Canty*, 162 Cal. 382, 123 Pac. 266 (same); *Hennessy v. Hall*, 14 Cal. App. 759, 113 Pac. 350.

Conn.—*Adams v. Castle*, 30 Conn. 404.

D. C.—*Knox v. Gaddis*, 1 App. D. C. 326 (holding that owner must tender taxes, interest, and costs as condition of maintaining suit to set aside tax deed); *Buchanan v. Macfarland*, 31 App. D. C. 6.

Ga.—*Picquet v. Augusta*, 64 Ga. 516 (the rule being laid down that the taxes admitted to be due must be tendered where a bill is filed to set aside a tax deed).

Idaho.—*Hole v. Van Duzer*, 11 Idaho, 79, 81 Pac. 109 (holding that the title of the owner would not be quieted against an invalid tax title until he had paid into court for the use of the tax title holder the taxes, penalties, and costs paid by the latter, with interest).

Ill.—*Reed v. Tyler*, 56 Ill. 288; *Barnett v. Cline*, 60 Ill. 205; *Phelps v. Harding*, 87 Ill. 442; subsequent appeal in 96 Ill. 32 (approving general rule); *Moore v. Wayman*, 107 Ill. 192 (holding a complaint to enjoin the making of a tax deed subject to demurrer, unless it contains an offer to refund to the holder of the tax sale certificate the money paid by him at the tax sale and subsequent taxes paid by him, and a decree erroneous which does not require such payment as a condition of the relief sought); *Smith v. Hutchinson*, 108 Ill. 662; *Peacock v. Carnes*, 110 Ill. 99; *Gage v. Nichols*, 112 Ill. 269 (holding it error to render an unconditional decree setting aside tax deed where complainant offered to refund taxes paid by defendant); *Gage v. Waterman*, 121 Ill. 115, 13 N. E. 543; *Alexander v. Merriek*, 121 Ill. 606, 13 N. E. 190; *Gage v. Caraher*, 125 Ill. 447, 17 N. E.

money. Hotchkiss set up these payments in his answer, and asked that, if plaintiff was adjudged the owner, the judgment for him "be made upon the condition" that he repay these sums, with interest, to the said Hotchkiss. The judgment was not made conditional, nor was Hotchkiss given interest on the money paid, or any lien upon the land for the sum the judgment requires plaintiff to pay to him. Hotchkiss and Canty appeal from the judgment, also from an order refusing a new trial, and from an order denying their motion to vacate the judgment and render a different judgment upon the findings.

The original tax sales upon which the defendants' claim rests were made in 1893 and 1894. That for the north half of the

section was in July, 1893; that for the south half in July, 1894. At these respective dates the law provided that, if property sold for delinquent taxes was not redeemed within the time allowed by law, no deed could be made to the purchaser in pursuance of such sale, unless the purchaser had, thirty days before applying for such deed, given notice to the owner or occupant of the land of the amount due and the time when he would apply for the deed. Pol. Code, § 3785; Stat. 1891, p. 134. The deed by the tax collector to the state for the north half of the section was made on November 1, 1898; that for the south half was made on July 18, 1899. The deeds from the state to Barthold, based on these tax sales and deeds to the state, were made on April

777; Johnson v. Huling, 127 Ill. 14, 18 N. E. 786 (holding it error, where the complainant, in seeking to have tax deeds set aside as a cloud on title, offered to make reimbursement to the defendant, to grant the relief prayed without making payment or security thereof a condition of the relief); Ames v. Sankey, 128 Ill. 523, 21 N. E. 579 (offer to refund); Smith v. Prall, 133 Ill. 308, 24 N. E. 521 (same); Miller v. Cook, 135 Ill. 190, 10 L.R.A. 292, 25 N. E. 756; Gage v. Du Puy, 137 Ill. 652, 24 N. E. 541, 26 N. E. 386; Cotes v. Rohrbeck, 139 Ill. 532, 28 N. E. 1110; South Chicago Brewing Co. v. Taylor, 205 Ill. 132, 68 N. E. 732. See also Gage v. Goudy, 141 Ill. 215, 30 N. E. 320 (the court discussing, however, only the sufficiency of the tender to require the defendant to pay the costs); Burton v. Perry, 146 Ill. 71, 34 N. E. 60; Glos v. Goodrich, 175 Ill. 20, 51 N. E. 643; Lauer v. Weber, 177 Ill. 115, 52 N. E. 489; Simons v. Drake, 179 Ill. 62, 53 N. E. 574; Gage v. Eddy, 186 Ill. 432, 57 N. E. 1030; Glos v. Gerrity, 190 Ill. 545, 60 N. E. 833; Gage v. Consumers' Electric Light Co. 194 Ill. 30, 64 N. E. 653; Glos v. Cratty, 196 Ill. 193, 63 N. E. 690; Glos v. Woodard, 202 Ill. 480, 67 N. E. 3, subsequent proceedings in 113 Ill. App. 353; Glos v. Mulcahy, 210 Ill. 639, 71 N. E. 629; Glos v. Garrett, 219 Ill. 208, 76 N. E. 373; Glos v. Cass, 230 Ill. 641, 82 N. E. 827; Brimson v. Arnold, 236 Ill. 495, 86 N. E. 254; Durfee v. Murray, 7 Ill. App. 213 (holding complaint for cancellation of tax certificate demurrable unless it contains an offer to refund taxes paid by defendant on the land); Brophy v. Taylor, 30 Ill. App. 261; Glos v. Dawson, 83 Ill. App. 197; North v. Lehman, 97 Ill. App. 399. As to statutory provision in this state for reimbursement, see Judson v. Freutel, 266 Ill. 24, 107 N. E. 207.

Ind.—Harrison v. Haas, 25 Ind. 281 (holding that a demurrer to a complaint to cancel a tax deed as a cloud on the title should have been sustained where there was no payment or offer to pay the taxes which had been paid by the defendant); McWhinney v. Brinker, 64 Ind. 360; Han-

nah v. Collins, 94 Ind. 201 (holding that tender or payment of taxes was not essential to the maintenance of an action by an administrator to defeat a tax title, where the petition asked that the land be sold subject to any valid claim of the holders of the tax deed, and that the proceeds be applied to payment of debts, including the lien of the purchaser for taxes, if any); Lancaster v. DuHadway, 97 Ind. 565; Peckham v. Millikan, 99 Ind. 352 (complaint held demurrable unless it contains an offer of reimbursement); Rowe v. Peabody, 102 Ind. 198, 1 N. E. 353 (same); Prezinger v. Harness, 114 Ind. 491, 16 N. E. 495; Willard v. Ames, 130 Ind. 351, 30 N. E. 210 (same); Browning v. Smith, 139 Ind. 280, 37 N. E. 540; Reed v. Kalfsbeck, 147 Ind. 148, 45 N. E. 476, 46 N. E. 466 (reimbursement or tender necessary to maintenance of action to quiet title against purchaser). See also as to necessity and sufficiency of tender, Morrison v. Jacoby, 114 Ind. 84, 14 N. E. 546; Kraus v. Montgomery, 114 Ind. 103, 16 N. E. 153; Jackson v. Smith, 120 Ind. 520, 22 N. E. 431; Montgomery v. Trumbo, 126 Ind. 331, 26 N. E. 54; and Schissel v. Dickson, 129 Ind. 139, 28 N. E. 540.

Iowa—Kessey v. Connell, 68 Iowa, 430, 27 N. W. 365; Gardner v. Early, 69 Iowa, 42, 28 N. W. 427 (holding complaint to set aside invalid tax deed demurrable where there was no tender of taxes paid by the purchaser, or offer to pay same); Harrison v. Sauerwein, 70 Iowa, 291, 30 N. W. 571; Barke v. Early, 72 Iowa, 273, 33 N. W. 677. See also Crawford v. Liddle, 101 Iowa, 148, 70 N. W. 97, as to sufficiency of tender; Tabler v. Callanan, 49 Iowa, 362, and Iowa cases cited *infra* this subdivision.

Kan.—Challiss v. Hekelnkaemper, 14 Kan. 474; Knox v. Dunn, 22 Kan. 683 (holding that an action to quiet title against the holder of a tax sale certificate would not lie without paying or offering to pay the valid taxes for which the property was sold); Herzog v. Gregg, 23 Kan. 726 (the court saying that in an equitable action the party claiming the title sought to be quieted should receive whatever is

14, 1905. The notice required by § 3785, as aforesaid, was not given in either case. The failure to give these notices makes the deeds of the tax collector to the state and his subsequent deeds, based thereon, on behalf of the state to Barthold, inoperative and void. They conveyed no title. This proposition was fully considered and decided in *Johnson v. Taylor*, 150 Cal. 201, 10 L.R.A. (N.S.) 818, 119 Am. St. Rep. 181, 88 Pac. 903. See also *King v. Samuel*, 7 Cal. App. 63, 93 Pac. 391; *Wetherbee v. Johnston*, 10 Cal. App. 264, 101 Pac. 802. The appellants concede this. Their principal point is that, as successor of the purchaser at the tax sales, Hotchkiss is entitled not only to reimbursement of the sums paid by him and Barthold in discharge of taxes reg-

ularly levied and assessed against the land, and which had become valid liens thereon, but also to interest thereon from the respective dates of such payments, and that the repayment thereof should have been enforced before judgment, or at least that it should have been made a condition precedent to the taking effect of the judgment in favor of the plaintiff. The question is whether the rule that he who seeks equity must do equity applies to suits in equity to set aside a tax sale or tax deed, or to suits under § 738 of the Code of Civil Procedure, in which a judgment for the plaintiff will, in effect, cancel or annul such sale or deed. The decisions on the subject in this state are inconsistent. The same point is involved in several other cases filed of even

rightfully due from the plaintiff before his title is disturbed); *Corbin v. Young*, 24 Kan. 198; *Millbank v. Ostertag*, 24 Kan. 462 (holding that where the owner obtained forcible possession and sought to quiet his title, equity would follow the law which would have required repayment to the tax purchaser of valid taxes, had the owner brought an action for possession); *Shaw v. Kirkwood*, 24 Kan. 477; *Pritchard v. Madren*, 24 Kan. 486 (payment or tender of the amount of valid taxes paid by the purchaser at tax sale regarded as necessary to entitle the owner to maintain an action to quiet title against the tax deed); *Wilder v. Cockshutt*, 25 Kan. 504 (tender of legal taxes and charges conceded to be due, necessary before equity will grant relief against tax certificates which were invalid because illegal taxes and charges were included in the amount for which the land was sold); *McKeen v. Haxtun*, 25 Kan. 698; *Richards v. Cole*, 31 Kan. 205, 1 Pac. 647; *West v. Cameron*, 39 Kan. 736, 18 Pac. 894 (payment of taxes, it was said, might be adjusted by decree without previous tender, where the complainant believed and alleged that the land was not subject to taxation); *Franz v. Krebs*, 41 Kan. 223, 21 Pac. 99 (payment or tender necessary to maintenance of action to set aside tax certificate); *Black v. Johnson*, 63 Kan. 47, 64 Pac. 988; *Wagner v. Underhill*, 71 Kan. 637, 81 Pac. 177; *Miller v. Dittlinger*, 81 Kan. 9, 26 L.R.A. (N.S.) 595, 105 Pac. 20, 19 Ann. Cas. 261. See also as to necessity and sufficiency of tender, *Cartwright v. McFadden*, 24 Kan. 662, and *Shinkle v. Meek*, 69 Kan. 368, 76 Pac. 837.

La.—*Adams v. Gillis*, *Manning*, *Unrep. Cas. (La.)* 148.

Md.—*Stewart v. Meyer*, 54 Md. 454.

Mass.—See *Curtiss v. Sheffield*, 213 Mass. 239, 50 L.R.A. (N.S.) 402, 100 N. E. 365, Ann. Cas. 1914A, 564.

Mich.—*Sinclair v. Learned*, 51 Mich. 335, 16 N. W. 672 (*obiter*); *Jenkinson v. Auditor General*, 104 Mich. 34, 62 N. W. 163; *Connecticut Mut. L. Ins. Co. v. Wood*, 115 Mich. 444, 74 N. W. 656; *Greenley v. Hovey*, 115 Mich. 504, 73 N. W. 808; *Mor-* L.R.A.1915C.

gan v. Tweddle, 119 Mich. 350, 78 N. W. 121; *Aztex Copper Co. v. Auditor General*, 128 Mich. 615, 87 N. W. 895; *Horton v. Salling*, 155 Mich. 502, 119 N. W. 912; *Morrison v. Semer*, 164 Mich. 208, 129 N. W. 1.

Miss.—*Martin v. Swofford*, 59 Miss. 328 (holding it error to cancel a tax deed without providing for repayment to the purchaser of the amount expended in its purchase and statutory damages and interest); *Ragsdale v. Alabama G. S. R. Co.* 67 Miss. 106, 6 So. 630; *O'Flinn v. McInnis*, 80 Miss. 125, 31 So. 584 (taxes paid by purchaser at void tax sale made a lien on the land by decree declaring the sale void).

Mo.—*Yeaman v. Lepp*, 167 Mo. 61, 66 S. W. 957; *Williams v. Sands*, 251 Mo. 147, 158 S. W. 47 (*obiter*); *Nichols v. Russell*, 141 Mo. App. 140, 123 S. W. 1032.

Mont.—*Casey v. Wright*, 14 Mont. 315, 36 Pac. 191 (complaint demurrable which does not offer reimbursement of legal taxes); *Foster v. Bender*, 28 Mont. 526, 73 Pac. 121 (decree canceling tax deed, but failing to provide for reimbursement to the defendant of taxes paid, remanded for modification); *Larson v. Peppard*, 38 Mont. 128, 99 Pac. 136, 129 Am. St. Rep. 630, 16 Ann. Cas. 800.

Neb.—*Iler v. Colson*, 8 Neb. 331, 1 N. W. 248 (holding complaint demurrable which did not offer reimbursement, the complainant being a purchaser at judicial sale subsequently to the sale for taxes); *Boeck v. Merriam*, 10 Neb. 199, 4 N. W. 962 (holding that a court of equity would not entertain a suit to cancel a tax deed on account of a mere irregularity in the assessment, unless the complainant paid or offered to pay the taxes justly due on the property if legally assessed). See also *Wood v. Helmer*, 10 Neb. 65, 4 N. W. 968, to a similar effect; *Dillon v. Merriam*, 22 Neb. 151, 34 N. W. 344; *Wygant v. Dahl*, 26 Neb. 562, 42 N. W. 735 (where tax title was unenforceable because of statute of limitations); *Weston v. Meyers*, 45 Neb. 95, 63 N. W. 117 (holding that petition stated no ground for equitable relief against a tax title holder, where there was no offer

date herewith. We therefore deem it proper to consider the question at some length.

It is now firmly settled by our decisions that where a property owner applies for equitable relief against the public authorities, as, for example, to restrain proceedings for the collection or enforcement of taxes assessed against it, or to enjoin the execution of a tax deed, or to cancel a lien or charge for taxes of record against his land, and it appears that all or some part of the tax charged is justly and equitably due from the plaintiff, or chargeable upon the land, he must, as a condition of obtaining such relief, first pay or offer to pay the amount justly due, or he must be required to do so before the relief to which he shows himself entitled is given. *Couts v. Cornell*,

of reimbursement of taxes paid at the sale and subsequent taxes); *Browne v. Finley*, 51 Neb. 465, 71 N. W. 34. See also as to necessity and sufficiency of tender, *Payne v. Anderson*, 80 Neb. 216, 114 N. W. 148; *Humphrey v. Hays*, 85 Neb. 239, 122 N. W. 987; and *Hill v. Chamberlain*, 91 Neb. 610, 136 N. W. 999.

N. J.—*Kean v. Asch*, 27 N. J. Eq. 57; *Smith v. Specht*, 58 N. J. Eq. 47, 42 Atl. 599 (suit to redeem based on statutory provision for redemption); *Farmer v. Ward*, 75 N. J. Eq. 33, 71 Atl. 401.

N. C.—*Rexford v. Phillips*, 159 N. C. 213, 74 S. E. 337.

N. D.—*Farrington v. New England Invest. Co.* 1 N. D. 102, 45 N. W. 191 (laying down the general equitable rule, but holding that this case was governed by statute); *Bode v. New England Invest. Co.* 1 N. D. 121, 45 N. W. 197; *Fenton v. Minnesota Title Ins. & Trust Co.* 15 N. D. 365, 125 Am. St. Rep. 599, 109 N. W. 363; *State Finance Co. v. Beck*, 15 N. D. 374, 109 N. W. 357; *Powers v. First Nat. Bank*, 15 N. D. 469, 109 N. W. 361 (county being required by statute to reimburse the purchaser in case the tax sale was invalid); *State Finance Co. v. Trimble*, 16 N. D. 199, 112 N. W. 984; *McKenzie v. Boynton*, 19 N. D. 531, 125 N. W. 1059 (owner held entitled to relief against invalid tax deed only on condition of paying all taxes, interest, and penalties paid by defendant and his grantor to the county, with interest at 7 per cent from date of payment); *Stubbs v. Hoerr*, 20 N. D. 26, 125 N. W. 1062; *Tee v. Noble*, 23 N. D. 225, 135 N. W. 769; *Noble v. McIntosh*, 23 N. D. 59, 135 N. W. 663 (complaint held demurrable which did not offer to do equity by refunding amount paid by defendant at tax sale).

S. D.—*Clark v. Darlington*, 7 S. D. 148, 58 Am. St. Rep. 835, 63 N. W. 771 (complaint in action to quiet title against invalid tax deed need not contain offer to refund taxes where it does not appear from complaint that any tax was due, but reimbursement of tax found to be justly due may be required as a condition of relief); *McKinney v. Minnehaha County*, 17 S. D. L.R.A.1915C.

147 Cal. 560, 109 Am. St. Rep. 168, 82 Pac. 194, and cases there cited; *Grant v. Cornell*, 147 Cal. 565, 109 Am. St. Rep. 173, 82 Pac. 193; *Trippet v. State*, 149 Cal. 530, 8 L.R.A. (N.S.) 1210, 86 Pac. 1084; *Savings & L. Soc. v. Burke*, 151 Cal. 616, 91 Pac. 504; *San Diego Invest. Co. v. Cornell*, 151 Cal. 198, 200, 90 Pac. 1130.

The rule applicable in suits by a property owner against the purchaser at a tax sale, or his grantee or assignee, to quiet title, or to cancel the certificate of sale or the deed thereon, or a suit against such parties, under § 738 of the Code of Civil Procedure, to determine the adverse claim, is not so well established. In some such cases the application of the rule has been

407, 97 N. W. 15 (taxes made a lien on land).

Tenn.—*Bloomstein v. Brien*, 3 Tenn. Ch. 55 (one seeking equitable relief against an invalid tax title being required to reimburse the defendant the amount of taxes, costs, and penalties paid by him at the sale, and subsequent taxes paid on the property, with 6 per cent interest, and such amount being declared a lien on the property).

Tex.—*Henrietta v. Eustis*, 87 Tex. 14, 26 S. W. 619 (recognizing the equitable rule, although the case was controlled by statute). See also to the same effect subsequent appeal in — *Tex. Civ. App.* —, 41 S. W. 720.

Utah.—*Oregon Short Line R. Co. v. Hallock*, 41 Utah, 378, 126 Pac. 394.

Va.—*Kelly v. Gwatkin*, 108 Va. 6, 60 S. E. 749 (it being said that a court of equity would entertain a bill to cancel a tax deed without a formal tender of taxes paid by the purchaser, where, as in this instance, the latter had rejected a sufficient offer to redeem made in proper time on grounds distinct from nonproduction of the money; but that the right of redemption would be enforced in equity only upon terms of payment of the requisite amount).

Wash.—*Denman v. Steinbach*, 29 Wash. 179, 69 Pac. 751; *McManus v. Morgan*, 38 Wash. 528, 80 Pac. 786 (holding that the tender of reimbursement in the complaint in this instance was sufficient, and that the money need not be paid into court, as relief in equity would be granted only on condition that the plaintiff would pay the full amount of taxes, penalties, interest, and costs which were paid by the purchaser at the sale, and also all taxes, with interest, paid by the purchaser or his assignee since the sale).

W. Va.—*Morris v. Roseberry*, 46 W. Va. 24, 32 S. E. 1019 (tender of purchase money and subsequent taxes paid, with interest, regarded as necessary on equitable grounds to maintenance of bill to set aside tax deed); *McClain v. Batton*, 50 W. Va. 121, 40 S. E. 509 (recognizing equitable rule as to necessity of tender as a condition pre-

denied, in others it has been limited, and in still others the rule has been enforced.

The question first arose in *Hibernia Sav. & L. Soc. v. Ordway*, 38 Cal. 679, a suit to foreclose a mortgage. The defendant Anderson held a tax title, and in virtue thereof had obtained judgment against the mortgagors in ejectment for possession. The tax title was held invalid because of irregularities in the sale. The court said: "That, where the tax is valid, but the sale irregular, equity will not cancel the tax deed at the suit of the owner of the land without a tender of the taxes to the purchaser, is not denied." Such relief was there denied because Anderson had fraudulently conspired with the two mortgagors to hold the tax title for them in order thereby to bar

the mortgage lien, thus violating the other maxim that equity will not relieve one who does not come into court with clean hands.

In *Harper v. Rowe*, 53 Cal. 233, the defendant claimed under a tax deed which was void because the state tax for the year 1863, included in the charge for which it was sold, was wholly unauthorized. He also claimed under a tax sale for taxes of 1875, which was invalid because the sale was for a sum greater than the legal charges. The action was brought to determine adverse claims, under § 738, Code of Civil Procedure. The court declined to say whether or not this was an action in equity, but, conceding that it was, said: "If the sale is absolutely void, the payment of the tax by

cedent to maintaining suit to set aside tax deed, although there was also a statute on the question); *Siers v. Wiseman*, 58 W. Va. 340, 52 S. E. 460; *Toothman v. Courtney*, 62 W. Va. 167, 58 S. E. 915; *Collins v. Reger*, 62 W. Va. 195, 57 S. E. 743; *Lohr v. George*, 65 W. Va. 249, 64 S. E. 609 (holding tender in court sufficient where bill failed to make tender); *James v. Piggett*, 70 W. Va. 435, 74 S. E. 667. See also *Mosser v. Moore*, 56 W. Va. 478, 49 S. E. 537.

Wis.—*Hersey v. Milwaukee County*, 16 Wis. 186, 82 Am. Dec. 713; *Pierce v. Schutt*, 20 Wis. 424 (failure to make tender in complaint regarded only as affecting question of costs); *Call v. Chase*, 21 Wis. 512; *Hart v. Smith*, 44 Wis. 213 (failure to make tender only affecting costs); *Fifield v. Marinette County*, 62 Wis. 532, 22 N. W. 705; *Hayes v. Douglas County*, 92 Wis. 429, 31 L.R.A. 213, 53 Am. St. Rep. 926, 65 N. W. 482; *Hill v. Buffington*, 106 Wis. 525, 82 N. W. 712; *Blackman v. Arnold*, 113 Wis. 487, 89 N. W. 513 (recognizing the equitable rule in the absence of statute, although the case was within statutory provisions). See also *Kimball v. Ballard*, 19 Wis. 602, 88 Am. Dec. 705 (the court saying that the tender of the amount of legal taxes, and 7 per cent interest, was sufficient to entitle plaintiff to bring suit to cancel the tax deed).

Fed.—*Gage v. Pumpelly*, 115 U. S. 454, 29 L. ed. 449, 6 Sup. Ct. Rep. 136; *Smith v. Gage*, 11 Biss. 217, 12 Fed. 32; *Parks v. Watson*, 20 Fed. 764; *Rice v. Jerome*, 38 C. C. A. 388, 97 Fed. 719; *Whitehead v. Farmers' Loan & T. Co.* 39 C. C. A. 34, 98 Fed. 10; *Indiana & A. Lumber & Mfg. Co. v. Milburn*, 88 C. C. A. 473, 161 Fed. 531. See also *Craig v. Pollock*, 5 Dill. 449, Fed. Cas. No. 3,335, and *Rannels v. Rowe*, 42 C. C. A. 177, 166 Fed. 425.

The above rule was also recognized in *Paul v. Ferguson*, 14 Grant Ch. (U. C.) 230, the facts, however, not being within the scope of the note.

In the Iowa cases cited supra, the right of the holder of the invalid tax title to reimbursement was distinctly placed on equi-L.R.A.1915C.

table grounds, but in other cases in that state, while the right of reimbursement was recognized and enforced, the equitable rule was not particularly discussed. Among possibly other cases of this class are *Everett v. Beebe*, 37 Iowa, 452; *Light v. West*, 42 Iowa, 138; *Early v. Whittingham*, 43 Iowa, 162; *Besore v. Dosh*, 43 Iowa, 211; *Sexton v. Henderson*, 45 Iowa, 160; *Miller v. Corbin*, 48 Iowa, 150; *Sexton v. Peck*, 48 Iowa, 250; *Crumb v. Davis*, 54 Iowa, 25, 6 N. W. 53; *Roberts v. Merrill*, 60 Iowa, 166, 14 N. W. 235; *Buck v. Holt*, 74 Iowa, 294, 37 N. W. 377.

"It is a fundamental and familiar principle of equity jurisprudence that he who seeks equity must do equity; and there can be no better application of the maxim than the case in which a person seeks to vacate a tax sale as irregular and a tax deed as a cloud upon title, without offering to reimburse to the purchaser at the tax sale or the holder of the tax deed the taxes paid by him, with all proper interest and costs. No such offer is made here. The complainant virtually seeks to get rid of the encumbrance, and at the same time to have the benefit of the taxes paid by the defendant and those under whom the defendant claims. This is not equity. The removal of a tax deed as a cloud on title is the equivalent of redemption from a lien through the processes of a court of equity; and the redemption cannot be allowed without an offer of readiness on the part of the person seeking to redeem to do what ordinary fairness requires from him." *Knox v. Gaddis*, 1 App. D. C. 336.

"If the owner of real estate can wait until his land has been sold for taxes and until the certificate of sale has ripened into a deed, and then upon a mere technicality, without the payment or offer to pay the taxes justly chargeable against his property, have delivered up and canceled at the costs of the tax purchaser, as in this case, the tax deed, he not only entirely escapes the payment of legitimate taxes, but the owner of the tax deed is deprived of a valuable legal right,—that of trial by jury,—and is mulcted in costs for his

the purchaser stands on the footing of a voluntary payment, not made at the request of the owner of the land, and which he is under no obligation to refund. If the tax sale was not void, but only irregular in some respects, and if the owner should go into equity to cancel the sale, and to compel a purchaser in good faith to surrender the evidences of his title, it is possible that the court would not grant relief except on condition that the purchase money was refunded. But that would be a very different case from the present." It is somewhat difficult to understand this reasoning.

No proposition is better settled than this, that proceedings to sell property for taxes are to be strictly followed, and that, if there

is any material irregularity in the assessment or in the subsequent proceedings, the sale, and the certificate and deed based thereon, are absolutely void. In view of this principle, the phrase, "if the tax sale was not void, but merely irregular in some respects," seems meaningless in the connection in which it is used. If there is no material irregularity, the grantee in the tax deed will have the title, and cannot, nor need he, ask reimbursement. If there is a material irregularity, his deed is void. The only explanation is that the court was referring to cases where the tax itself was void, so that, in point of law, the land had not been relieved of any burden by the tax sale. In that case, this was true of only a part of the tax in question. The remark

temerity in purchasing at tax sale, while the party claiming to be the owner of the land takes no hazard of losing his land from an adverse title. But such is not the law. He who seeks to have a tax deed declared void, where the taxes for which the land was sold were lawful taxes, and justly chargeable against the same, if legally assessed, must, as a condition of relief, pay or offer to pay the taxes justly due thereon. Otherwise he states no ground for equitable relief. He does not offer to do equity. He seeks the aid of the court to aid him by giving effect to mere technicalities, to shield him from his just liabilities. It is difficult to imagine a case more utterly barren of equity than this." *Boeck v. Merriam*, 10 Neb. 199, 4 N. W. 962.

And in *Hart v. Smith*, 44 Wis. 213, the court said: "Nor do we understand that the rule, long established in courts of equity, that he who seeks equity must do equity, is qualified or abrogated in favor of a party who seeks to remove a cloud upon his title to real estate by reason of illegal proceedings taken to enforce a valid tax assessed thereon, and that such party may demand as a right from a court of equity, that such cloud shall be removed, without his doing what justice and equity demand, that is, pay the tax. . . . It would be a gross impeachment of the power of a court of equity to deny it the right to demand of its suitors good faith and common honesty before it shall be compelled to grant them any relief."

In overruling earlier decisions in that state regarded as laying down a different rule, and in holding that, as a condition of equitable relief against an invalid tax title, the complainant would be required to reimburse the purchaser for taxes paid on the property, the court in *State Finance Co. v. Beck*, 15 N. D. 374, 109 N. W. 357, said that it did not question the well-established rule that a tax title purchaser buys at his peril, but that "the infirmities of the tax title do not absolve the taxpayer from his obligation to do equity when he seeks equity. . . . But confining the tax L.R.A.1915C.

title purchaser to his strict legal rights is one thing, and relieving the tax debtor from his just share of taxes at the expense of his neighbors is quite another. . . . The owner of the land in this case has not paid a cent of tax on this property for more than twenty years. It is not claimed that any of the taxes were excessive or unfair, or that they otherwise infringed any of the landowner's constitutional rights. The technical requirements of the law as to the procedure have not been followed with precision; and the landowner not only asks to have the tax sales set aside, but declines to pay or offer to pay a cent of the taxes, which are confessedly just. Under the rule heretofore in force, he was sustained in that position. . . . By overturning the precedents on this question established by former decisions, we do not in any way disturb the rules by which the validity of past or future tax sales are to be tested. We disturb no rights which are justly entitled to protection. It surely cannot be claimed that those who have neglected to pay their just taxes are in any position to invoke the doctrine of *stare decisis* to continue immunity from their obligation to do equity when they seek equitable relief. We are satisfied that public policy necessitates this modification of former decisions, and it is further justified by the fact that it restores in this state the rule recognized and applied in other jurisdictions. . . . Chap. 166, p. 232, Laws 1903, is an express legislative establishment of the rule we have been discussing. As indicated above, the court has inherent power, independent of such a statute, to do what the statute requires."

"In the Federal courts," it was said in *Rice v. Jerome*, 38 C. C. A. 388, 97 Fed. 719, "such payment or tender [of taxes, interest, and penalty paid by the tax sale purchaser] is an indispensable condition to the right of the owner to maintain a bill in equity to cancel the tax sale certificates, or remove the cloud cast by them upon his title."

seems to have no application except to that part.

Greenwood v. Adams, 80 Cal. 74, 21 Pac. 1134, denies the right to repayment or to a conditional judgment, in these words: "Parties who purchase property at tax sales acquire the title to the property if all the proceedings for the levy of the taxes and the sale are regular and in strict conformity to law; but if not so, they acquire no rights to the property which either a court of law or equity can enforce." (Italics ours.) The sale in question was void because of an irregularity in the assessment; the owner not having been properly named therein. In *Kittle v. Bellegarde*, 86 Cal. 556, 25 Pac. 55, the judgment canceling a street assessment sale, but not directing reimbursement to the

purchaser for money paid, was affirmed, but the equity rule aforesaid was not discussed or mentioned, and it appears that the assessment upon which the sale was made was utterly void. *Dranga v. Rowe*, 127 Cal. 506, 59 Pac. 944, was a suit against the city of San Diego and others to quiet title. The city answered separately, alleging a lien for taxes assessed upon the property, and praying that no judgment be made quieting plaintiff's title, except on condition that the tax be paid. The city was the sole appellant. It was held that the tax was void. The opinion then states that the appellant claims reimbursement under the equity rule, as if the purpose was to discuss and decide the point. But it then decides the case by affirming the judgment, without further

"Repayment of taxes is properly and universally made a condition precedent to the setting aside of a tax deed or certificate, or to clearing a cloud on title cast thereby." *Bryant v. Nelson-Frey Co.* 94 Minn. 305, 102 N. W. 859, holding, however, that repayment of taxes paid for a number of years on vacant land of another by a stranger to the title, under the mistaken belief that the payer had a tax deed to the land, could not be made a condition precedent to a decree of title in the record owner, where no tax deed or certificate had ever been issued to the person paying the taxes.

In an equitable action for the cancellation of tax certificates, it has been said that "the mere fact that the action is between private parties only is not enough to take it out of the rules applicable to equity cases. It is not an answer to say that the doctrine of *caveat emptor* applies in suits to determine the validity of taxes, sales, or tax deeds. That rule does apply in such cases, but that does not justify a court of equity in holding that a tax sale purchaser shall be compelled to look elsewhere for his money, and the owner relieved from all payments and burdens imposed upon owners of property by the revenue laws." *Powers v. First Nat. Bank*, 15 N. D. 466, 109 N. W. 361.

So, in *Larson v. Peppard*, 38 Mont. 128, 129 Am. St. Rep. 630, 99 Pac. 136, 16 Ann. Cas. 800, it was said that the mere fact that the rule of *caveat emptor* applies to tax sales is not a ground for relieving the landowner from the payment of burdens for which the land was in fact responsible, without first requiring him to do equity when he comes into a court of equity asking equitable relief.

While, as a condition of equitable relief, the owner will be required to pay the purchase money and subsequent taxes paid by the holder of an invalid tax deed, it has been held that where he seeks a decree setting aside the deed he has the right to abandon the action without payment of the taxes, leaving the defendant in the bill in possession of the tax certificate unaffected by the decree, and he cannot be compelled

to pay the amount of the tax; also that the defendant in the bill has no greater right because of the fact that in the suit he filed a cross bill praying that the complainant might be decreed to pay him the purchase money and subsequent taxes which he had paid. *Farwell v. Harding*, 96 Ill. 32.

In *Smith v. Prall*, 133 Ill. 308, 24 N. E. 521, where the complainant, in seeking to set aside an invalid tax title as a cloud on his title, offered to pay the amount for which the land sold, with interest and subsequent taxes, the court said that, "aside from the offer, the general rule established in this class of cases has always required the owner, as a condition to setting aside a tax sale, to refund the amount paid for the land at the tax sale and all subsequent taxes and interest."

Assuming that, where the question was properly presented, the holder of an invalid tax title was entitled to reimbursement for taxes paid as a condition of quieting title in a suit by the owner against him, the court in *Buck v. Canty*, 162 Cal. 226, 121 Pac. 924, and *Cohen v. Anderson*, 22 Cal. App. 634, 135 Pac. 1096, held that the pleadings in those cases did not properly present the question as to the right of the purchaser at a tax sale to reimbursement for taxes paid, the complaint merely alleging the assertion by the defendant of an adverse claim without right, and the defendant in his answer and in the trial not claiming reimbursement.

And in *McLaughlan v. Bonyng*, 15 Cal. App. 239, 114 Pac. 798, it was held that where the pleadings in an action to quiet title under the Code did not show that the defendant's asserted title was based upon a sale of the property for the nonpayment of taxes, the plaintiff need not tender any tax as a condition of maintaining the action.

On the ground that taxes paid by a tax title claimant in his own name did not, under the Constitution and laws of that state, inure to the benefit of the owner or exempt him from paying taxes on the same land for the same years, it was held in

mention of the question. It decides the case, but does not decide the question except by implication. It may be added that the appeal presented a case against the city alone, and the decision is directly in the teeth of *Couts v. Cornell* and the other like cases first above cited, and it must now be considered as overruled by those cases.

The last decision of this court on the precise point is *Ellis v. Witmer*, 134 Cal. 249, 66 Pac. 301. Witmer had bought a lot at a sale by the city treasurer to satisfy a bond issued upon a street assessment. The owner sued Witmer and the treasurer to cancel the certificate, and restrain the execution of a deed thereon to Witmer. It was held that the assessment and bond were valid, but that the sale was void. The judg-

ment was reversed because the plaintiffs had not offered to pay the amount due on the bond, and because the court below had not inserted such condition in the judgment. The court said that the plaintiffs "cannot successfully invoke the assistance of a court of equity against the irregularities in the sale complained of, unless on the condition of paying what is due from them."

There are two decisions on the subject by the district court of appeal of the third district. In the first—*Flannigan v. Towle*, 8 Cal. App. 229, 96 Pac. 507—the court quoted and followed the rule as stated in *Ellis v. Witmer*, *supra*. In the other case—*Hotchkiss v. Hansberger*, 15 Cal. App. 603, 115 Pac. 957—that court overruled *Flannigan v. Towle*, and followed the decision of

Simpson v. Edmiston, 23 W. Va. 675, that the owner, as a condition of relief against the tax deed, which was invalid, would not be required to reimburse the defendant for such taxes, paid by him on the land.

Where tax deeds are wrongfully taken out by the purchaser at the tax sale after the amount due on the certificates has been paid to him by the owner, the latter will, of course, not be required again to reimburse the purchaser as a condition precedent to canceling the deeds. *Walker v. Glos*, 245 Ill. 253, 91 N. E. 1074.

And where it was the duty of the purchaser at the tax sale to pay the taxes, it was held in a suit to set aside the tax deed, that there was no necessity of a tender of taxes paid. *Fuller v. Edens*, 70 W. Va. 248, 73 S. E. 821, Ann. Cas. 1913E, 544.

The equitable rule requiring an owner to reimburse the holder of an invalid tax title for taxes paid which were legally due on the land was said in *Peckham v. Millikan*, 99 Ind. 352, not to be changed by the statute in that state authorizing the holder of a tax title to bring an action of ejectment to recover possession of the property, and providing that in case judgment is rendered against him the court should ascertain the amount due him for taxes and improvements, and decree the payment thereof within a reasonable time, and on default thereof order the land sold.

—minority decisions.

A few cases appear to oppose the general equitable rule above indicated. Some of these—as, for instance, the earlier California cases—have, however, been overruled. The case of *HOLLAND v. HOTCHKISS* is opposed by several earlier cases in the same state, set out in that opinion. *Harper v. Rowe*, 53 Cal. 233; *Greenwood v. Adams*, 80 Cal. 74, 21 Pac. 1134; and *Hotchkiss v. Hansberger*, 15 Cal. App. 603, 115 Pac. 957. See also *Axtell v. Gerlach*, 67 Cal. 483, 8 Pac. 34.

A distinction was made in *Hotchkiss v. Hansberger*, 15 Cal. App. 603, 115 Pac. L.R.A.1915C.

957, between cases where the tax deed is void upon its face and the sale absolutely void, and cases where there is merely an irregularity in the proceedings leading up to the sale, or in the sale, not rendering the deed void on its face, the court admitting that in the latter cases the purchaser might have an equitable claim against the owner for reimbursement for taxes paid, while holding that no such right existed in the former cases as a condition of relief against the tax deed.

Although distinguishing the case from others holding to the contrary, on the ground that here the tax title holder had refused an offer of reimbursement, the court in *Perham v. Haverhill Fibre Co.* 64 N. H. 485, 14 Atl. 462, seems to disapprove of the general principle that the holder of an invalid tax title has an equitable right to reimbursement as a condition of granting relief to the owner, it being said that the purchaser must be held to have taken the tax deed at his own risk and the risk of a failure in the proper execution of the power of assessment and sale, and that, taking it at his own risk, the doctrine of *caveat emptor* applies in its full force, and he has no claim, legal or equitable, against the former owner for refunding the purchase money.

See also *Preston v. Banks*, 71 Miss. 601, 14 So. 258.

—reimbursement by subsequent purchaser.

In *Gage v. Consumers' Electric Light Co.* 194 Ill. 30, 64 N. E. 653, the rule was laid down that it is immaterial, so far as the authority is concerned to impose the condition of reimbursement in a decree canceling or setting aside tax deeds, whether the action is by the owner who held the title at the time of the tax sale, or by a subsequent owner. As authority for this proposition the court cited *Phelps v. Harding*, 87 Ill. 442; *Gage v. Schmidt*, 104 Ill. 106; *Gage v. Nichols*, 112 Ill. 269; *Alexander v. Merrick*, 121 Ill. 606, 13 N. E. 190; *Miller v. Cook*, 135 Ill. 190, 10 L.R.A. 292, 25 N. E. 756; *Gage v. DuPuy*, 137 Ill. 652, 24 N.

the supreme court in *Greenwood v. Adams*, supra. It distinguished *Couts v. Cornell* and other similar cases, including *Ellis v. Witmer*, by the statement that they were suits against public officials where some tax was justly owing to the state or city, apparently failing to observe that *Ellis v. Witmer* was a suit against a purchaser and the city treasurer, and that the assessment was owing to the purchaser, and not to the city.

The confusion thus apparent seems to have arisen from the failure to observe the difference between the cases where the tax purchaser is the actor and those in which relief in equity is sought against him. If the purchaser, claiming title under his tax deed, sues for possession of the land, or if,

perceiving that the deed is invalid, he sues the owner to recover the tax paid, as money paid to his use, the general rule is that he cannot prevail; that the rule of *caveat emptor* will be strictly applied against him; that a proceeding to assess and collect taxes creates no contract by the owner to pay the tax assessed, and that the law will not imply a contract by the owner to refund such tax to one who has paid the same upon a tax sale which is void; and this is true in cases where the tax was legally assessed, but the proceedings to sell defective, as well as where the assessment itself is unauthorized and void, or where the tax had been previously paid. Mr. Pomeroy says: "In the first place, the rule only applies where a party is appealing as actor to a court of

E. 541, 26 N. E. 386; *Cotes v. Rohrbeck*, 139 Ill. 532, 28 N. E. 1101; *Burton v. Perry*, 146 Ill. 71, 34 N. E. 60. While the facts in these cases bring them apparently within the rule announced (the suits appearing generally to be by purchasers of the land after the taxes were due), the point does not appear to have been specially considered except in the case of *Alexander v. Merrick*, 121 Ill. 606, 13 N. E. 190, in which it is said: "But the fact that he [the complainant] bought the property without actual knowledge of the tax sales, and received a covenant of warranty from his vendors that the land was free from tax liens, entitles him to no other or different relief as against the holders of the tax certificates, than would have been granted to him if he had been the owner of the property at the time it first became subject to the lien of the taxes and special assessments. In *Phelps v. Harding*, 87 Ill. 442, the party applying for relief against the tax certificates was not the owner of the land described in such certificates when the sales for taxes took place. It is the complainant, and not his grantor, who is asking for the removal of the certificates owned by the appellants. The latter have nothing to do with the rights of the complainant under the covenants of warranty entered into by his grantors." See also *Simons v. Drake*, under *V. infra*.

2. To what proceedings the rule applies.

The rule requiring an owner who seeks to set aside a tax deed as a cloud on his title, to refund taxes paid on the land as a condition of obtaining relief, has been held not to apply to a partition suit by one of two tenants in common claiming under a tax deed, in which the owner was made a party defendant, and successfully pleaded, by way of bar to the prosecution of the suit, a judgment in ejectment in his favor. *Thomsen v. McCormick*, 136 Ill. 135, 26 N. E. 373. The owner, it was said, was asking no affirmative relief, but was simply standing upon the defensive.

So, where, before the filing of a bill for L.R.A.1915C.

equitable relief against a tax title, an action of ejectment was pending between the parties, which was decided in favor of the complainants in the equity suit, and the latter was dismissed for want of prosecution, it was held that the defendant in the suit, who sought relief by cross petition, which was dismissed on the merits, was not entitled to reimbursement for taxes paid by him on the property. *Gage v. Eddy*, 186 Ill. 432, 57 N. E. 1030. It was said that the equitable rule relative to the repayment of taxes was deduced from the fundamental maxim of equity that he who asks equity must do equity, and is applicable only when relief is granted to a complainant in the way of canceling liens or deeds as clouds on his title, and is not to be applied under an independent bill by the holder of a tax title asking that he be reimbursed, nor to the defendant in this case under his cross petition, for to this extent the cross petition was in the nature of an original petition; that if the power of a court of chancery is asked by a property holder to cancel tax deeds, it will be exercised only on equitable conditions, but that an independent bill in equity cannot be maintained by the holder of a tax deed for a decree against the owner requiring repayment of the amount paid in discharging taxes against the property.

But where the holder of a tax title, by leave of court, intervenes in a suit for partition of the property, and the complainant files a replication to the answer of the tax title claimant, and the latter is defeated, it being found that he has no interest in the property, reimbursement should be made to the intervener for the taxes paid by him, as in cases where the owner brings a suit for relief against an invalid tax deed. *North v. Lehman*, 97 Ill. App. 399.

And that an application for the initial registration of the title to property under the Illinois statute of 1897 is in effect an application to cancel tax deeds held by adverse claimants, so as to require the complainant, as a condition of canceling tax deeds against his title, to refund taxes paid by the defendant on the property, see

equity in order to obtain some equitable relief. . . . The rule may apply, and under its operation an equitable right may be secured, or an equitable relief awarded to the defendant which could not be obtained by him in any other manner,—that is, which a court of equity, in conformity with its settled methods, either would not, or even could not, have secured or conferred or awarded by its decree in a suit brought for that purpose by him as the plaintiff." 1 Pom. Eq. Jur. § 386. The doctrine is thus stated in Cooley on Taxation: "The rule of *caveat emptor* applies to tax-purchasers. The purchaser at a tax sale will therefore lose what he had paid if his deed is subject to fatal infirmity. This is the rule unless the statute recognizes an equity in him and

provides for it. . . . Unless legislation in terms gives it, the purchaser will have no lien upon the land for the sum paid on the purchase." Vol. 2, p. 1017. The author here speaks concerning rights which the purchaser can enforce by action, not of limitations in equity upon the right of the owner to sue for a cancellation of the sale or deed. As to the latter, he says: "In vacating a tax or a sale for taxes as a cloud upon title, it is proper to require the complainant to pay any sum that is either a legal or an equitable charge against him, and which will be affected by the decree. And this will be required, although an action against him for such sum would be barred by the statute of limitations. If the tax were wholly illegal in its essentials, of course, no

Gage v. Consumers' Electric Light Co. 194 Ill. 30, 64 N. E. 653.

It should be observed, as indicated above, that the note does not include cases in which the tax title holder sought affirmative relief, and the taxpayer was beyond question simply standing on the defensive.

See also HOLLAND v. HOTCHKISS.

3. Proof of taxes paid by purchaser.

The rule has been laid down that in a proceeding in equity to declare void a tax deed, it is not error for the court to declare the deed void without making provision for the payment by the complainant to the defendant of taxes and disbursements, where the defendant makes no proof as to the amount of taxes and disbursements which he claims should be refunded to him by the complainant. Hughey v. Winborne, 44 Fla. 601, 33 So. 249.

And that payment of the valid taxes will not be made a condition of relief against a sale for taxes, part of which were void, where the amount of valid taxes is not proved, see Hebard v. Ashland County, 55 Wis. 145, 12 N. W. 437, and Hersey v. Milwaukee County, 16 Wis. 186, 82 Am. Dec. 713.

So, in establishing title under the "burnt records act," it has been held not error to establish the plaintiff's title without requiring him to repay any amount to the defendant for the acquisition of tax titles to the land, where the defendant did not in his answer claim a tax title or offer evidence thereof at the hearing, although there was an offer of reimbursement in the complaint in case it was found that the defendant claimed under tax titles and the tax deeds were declared void. Gage v. Dupuy, 134 Ill. 132, 24 N. E. 866.

b. Where tax is invalid or has been paid.

If the defect or illegality is not merely in the proceedings for the sale of the land, but is of such a nature as renders the tax itself invalid, or if the tax for which the land was sold had previously been paid L.R.A.1915C.

by the owner, a court of equity will not make reimbursement of the tax title holder, at least as to the invalid tax upon which the sale was based, a condition of annulling the tax sale. Machado v. Canty, 18 Cal. App. 35, 122 Pac. 77 (where land was not subject to taxation). See also Kittle v. Bellegarde, 86 Cal. 556, 25 Pac. 55, cited in HOLLAND v. HOTCHKISS; Bode v. New England Invest. Co. 6 Dak. 499, 42 N. W. 658, 45 N. W. 197, decision reversed on other grounds on rehearing in 1 N. D. 121, 45 N. W. 197; Wilmerton v. Phillips, 103 Ill. 78 (where land was sold for nonpayment of a personal property assessment for which there was no liability); Maher v. Brown, 183 Ill. 575, 56 N. E. 181 (holding where taxes had been paid by the owner, he was not bound to refund taxes paid by the holders of the tax deeds on the property under another description); Langlois v. Cameron, 201 Ill. 301, 66 N. E. 332; Boals v. Bachmann, 201 Ill. 340, 66 N. E. 336; Glos v. Shedd, 218 Ill. 209, 75 N. E. 887 (taxes paid by owner before the sale); La Salle Varnish Co. v. Glos, 254 Ill. 326, 98 N. E. 538 (same); Glos v. Cannata, 121 Ill. App. 215; Glos v. Collins, 110 Ill. App. 121; Morrill v. Lovett, 95 Me. 165, 56 L.R.A. 634, 49 Atl. 666; State Finance Co. v. Beck, 15 N. D. 375, 109 N. W. 357; State Finance Co. v. Trimble, 16 N. D. 199, 112 N. W. 984 (where assessment was void because of lack of proper description of the land); State Finance Co. v. Bowdle, 16 N. D. 193, 112 N. W. 76 (where tax was invalid because assessment was of an entire tract of land composed of smaller tracts owned by different parties whose titles were of record); State Finance Co. v. Halstenson, 17 N. D. 145, 114 N. W. 724 (no assessment of the land on account of failure to describe it); Title Trust Co. v. Aylsworth, 40 Or. 20, 66 Pac. 276 (void assessment); Marsh v. Clark County, 42 Wis. 502 (same); Hayes v. Douglas County, 92 Wis. 429, 31 L.R.A. 213, 53 Am. St. Rep. 926, 65 N. W. 482 (same); Gage v. Kaufman, 133 U. S. 471, 33 L. ed. 725, 10 Sup. Ct. Rep. 406 (it being said that if there were no taxes unpaid on the land for which

such requirement could be made, for it would not be supported by any equity." Vol. 2, p. 1455. And further: "As in removing cloud from title, he who seeks relief against a tax deed must pay or offer to pay whatever taxes, interest, costs, etc., are justly chargeable against the land, and payment will be required by the decree; otherwise, where the taxes were absolutely void." Vol. 2, p. 1458. These we consider accurate statements of the true rule. A large number of cases are cited in the footnotes. We have not deemed it necessary to examine them all. The following will be found to support the text: *Farwell v. Harding*, 96 Ill. 32; *Gage v. Nichols*, 112 Ill. 269; *Phelps v. Harding*, 87 Ill. 445; *Barnett v. Cline*, 60 Ill. 205; *Adams v. Castle*, 30 Conn. 404;

Lancaster v. Du Hadway, 97 Ind. 566; *Morrison v. Jacoby*, 114 Ind. 84, 14 N. E. 546, 15 N. E. 806; *Montgomery v. Trumbo*, 126 Ind. 332, 26 N. E. 54; *Peckham v. Millikan*, 99 Ind. 355; *Knox v. Dunn*, 22 Kan. 683; *Browne v. Finley*, 51 Neb. 468, 71 N. W. 34; *Dillon v. Merriam*, 22 Neb. 152, 34 N. W. 344; *Wood v. Helmer*, 10 Neb. 65, 4 N. W. 968; *Boeck v. Merriam*, 10 Neb. 201, 4 N. W. 962; *Powers v. First Nat. Bank*, 15 N. D. 469, 109 N. W. 361; *Lohr v. George*, 65 W. Va. 249, 64 S. E. 609; *Toothman v. Courtney*, 62 W. Va. 185, 58 S. E. 915. We have found no well-considered case to the contrary. For statements of the general rule that "he who seeks equity must do equity," see 1 *Story*, Eq. Jur. 13th ed. § 64e; 1 *Pom. Eq. Jur.* §§ 385, 388.

it could have been sold, the owner was not bound to pay any taxes as a condition of relief against the tax deed; *Paine v. Germantown Trust Co.* 69 C. C. A. 303, 136 Fed. 527, citing *Sheets v. Paine*, 10 N. D. 103, 86 N. W. 117. See also *Barber v. Evans*, 27 Minn. 92, 6 N. W. 445, and *Early v. Whittingham*, under VIII. *infra*. The rule also seems to have some support in the following cases in North Dakota, although there was, it appears, a statute providing for tender of taxes as a condition of bringing an action to cancel a tax deed, and permitting the entry of judgment against the owner for taxes paid where he brought an action to cancel the deed: *Power v. Larabee*, 2 N. D. 141, 49 N. W. 724; *O'Neil v. Tyler*, 3 N. D. 47, 53 N. W. 434; *Eaton v. Bennett*, 10 N. D. 347, 87 N. W. 188; *Sheets v. Paine*, 10 N. D. 103, 86 N. W. 117.

"It is a maxim in chancery that he who seeks equity must do equity, and we have always held that, upon a bill to set aside a tax sale or tax deed, relief will be granted the complainant only upon condition that he repay the legal taxes and costs paid out by the purchaser. But that rule can have no application to a case where the tax is illegal and void, for the simple reason that to require the payment of an unauthorized tax as a condition precedent to setting aside the sale would result in compelling, by indirection, the payment of the unauthorized tax." *Boals v. Bachmann*, 201 Ill. 340, 66 N. E. 336.

A mere irregularity in the tax proceedings will not, however, defeat the right of the purchaser at the tax sale to reimbursement as a condition of the relief sought by the owner in an action to quiet the title against the deed. *Parks v. Watson*, 20 Fed. 764. Exceptions were taken to the report of a master to whom the case was referred for a report of the amount of legal taxes paid by the defendants and their grantors. It was said: "The master in his conclusions seems to have been of the opinion that the defendants were entitled to be reimbursed only such taxes paid by them as were supported by proceedings techni-

cally perfect, resting, perhaps, upon the language of the reference to him to report 'the amount of legal taxes.' In this I think he is mistaken. This is an equitable action, and in it each party must be required to do equity. The court will inquire, not simply as to the legal, but also as to the equitable, rights. Every owner of property owes the duty of contributing in taxes his just proportion of the expenses of maintaining the government. The complainant in this case neglected that duty, and the defendants discharged it for him. The state has a lien on the land for all taxes until they are paid. Neb. Comp. Stat. p. 426, § 138. When paid by other than the owner of the land, the state must be considered as transferring its lien to such party; and the only way in which equity should relieve the owner from the burden of such lien is by payment. It will not do to say that if, in consequence of the defects in the proceedings, the lien was in no condition to be enforced by the state, the purchaser at the tax sale took nothing; because it is within the undoubted power of the state, if tax proceedings are defective, to renew them again and again, and until they result in the payment of the tax. If one, without stopping to question the regularity of the proceedings, comes forward and pays the tax, he ought to be entitled, not merely to the benefit of the proceedings then already had, but also to the full benefit of all the state's rights. The inquiry, therefore, is not whether the taxes are legal in the sense that the proceedings are all regular and correct, and such that a full title to the land could be obtained by carrying them on to completion, but whether they are legal in the sense that they are just and equitable impositions upon the land. In other words, was the land subject to taxation? was the tax authorized by law and imposed by the proper tribunal? were the proceedings so far in substantial compliance with the statute that the court can see that equitably the lot owner should have paid the taxes,—that they were simply his just contribution to the support of the government? If so,

In view of this weight of authority and the inconsistency of our own cases on the subject, the decisions which deny the applications of the rule to tax cases should be deemed overruled, and the correct principle declared. Where the owner comes into equity asking equitable relief to remove or cancel a tax deed or sale as a cloud upon his title, or to obtain a judgment which, in effect, will invalidate such sale or deed, the court should refuse any relief except upon the condition that he first repay to the tax purchaser, or his grantee or assignee, the taxes, penalties, interest, and costs justly chargeable upon the land, and which the purchaser has paid at the sale, or afterward upon the faith of it, with legal interest from the time of such payment, less

rents received, if any, if the purchaser has been in possession.

Respondent suggests that this rule is applicable only in suits which, under the division of actions between courts of law and equity formerly prevailing in England, would have been cognizable only in equity; that an action to determine adverse claims under § 738, Code of Civil Procedure, being an action authorized by statute, is an action at law, in which the equity rule cannot be enforced. It is sufficient to say on this point that the decisions hold that the rule applies in such actions to the same extent as in suits of the character formerly cognizable in equity to remove a cloud or cancel an instrument. *Benson v. Shotwell*, 87 Cal. 60, 25 Pac. 249; *Hancock v. Plum-*

before the court will relieve him from the cloud of a tax deed, it should require payment by him of such taxes and interest."

See also *Mumm v. McCloskey*, 28 Tex. Civ. App. 83, 66 S. W. 853, as to right in equity of purchaser at a tax sale which was void because the land was sold for the taxes of one who had no interest in the land, to be subrogated to the right of the state to taxes paid.

III. Analogy between position of public and of tax purchaser relatively to complainant.

Regarding the distinction in the conditions of equitable relief against an invalid tax sale where the relief is sought against the public authorities, and where it is sought against the purchaser at the tax sale, it was said in *Whitehead v. Farmers' Loan & T. Co.* 39 C. C. A. 34, 98 Fed. 10: "If the officers of the state or any municipal subdivision of the state cannot be interfered with in the performance of their duty by the owner, until he shall do equity by paying the taxes justly due, it is, in our opinion, equally true and important that the purchasers who come to the aid of the state in the performance of its functions should not be interfered with without a like offer to do equity. If the sale to such purchaser is irregular, or if, for any reason other than that the land was not subject to taxation, it is ineffectual to carry title, it is not reasonable that such purchaser should be deprived of equitable protection any more than the officers of the county who take the first step towards collecting the revenue. The efficiency of the whole scheme must be maintained, or it fails to accomplish its purpose. If it were understood that a purchaser at a sale of lands for delinquent taxes is a mere volunteer, and not entitled to the protection of equitable principles in case of the invalidity of the sale because of some mere irregularity attending it, there would probably be few purchasers, and, as a result, the machinery of the state for securing its revenue would be seriously crippled. We see no reason why L.R.A.1915C.

a rule should be applied to this case different from that applicable to one which might have been brought against the officers of the county in an earlier stage of the process of collecting its revenue."

Regarding the same point it was said in *Powers v. First Nat. Bank*, 15 N. D. 466, 109 N. W. 361: "Upon mature consideration we conclude that no sound distinction can be drawn between such actions [between private parties to determine the validity of a tax sale or of a tax certificate or deed] and those against public officers that will warrant the application of this equitable principle in the one case and withholding it in the other." In both cases it was said that the public was deprived of the taxes; a statute requiring it to reimburse the tax sale purchaser in case the sale was declared invalid.

So, in *Peckham v. Millikan*, 99 Ind. 352, the contention was denied that a distinction should be made where the controversy is between the landowner and a purchaser at the tax sale, and where it is between the state and the landowner, in regard to requiring the payment of taxes by the owner as a condition of equitable relief against the tax sale, the court regarding the owner in either case liable for legal taxes, and as owing a duty to the purchaser to reimburse him if he had paid taxes which it was the owner's duty to pay.

And in regard to the equitable rule requiring reimbursement of taxes paid as a condition of relief against an invalid tax deed, the court in *Farrington v. New England Invest. Co.* 1 N. D. 102, 45 N. W. 191, said: "It will be noticed that this is not an action to restrain the collection of a tax. It is an action brought after tax sale, to declare the tax void and cancel the certificates issued thereon. It has been frequently held, however, that the same equitable rules apply in both cases."

But in *Henderson v. Ward*, 21 Cal. App. 520, 132 Pac. 470, the court said: "It is held without dispute that a property owner in an action against the officers having the duty to collect taxes and make sale of property because of delinquency thereof,

mer, 66 Cal. 338, 5 Pac. 514; Brandt v. Wheaton, 52 Cal. 433, 1 Mor. Min. Rep. 145.

It will be observed from the statements of the rule above given that the defendant, who has removed encumbrances or paid claims which the plaintiff ought justly to repay to him as a condition of obtaining the equitable relief sought by the suit, is entitled to interest on the sums so paid, and to have the repayment secured to him in some manner. This may be done either by requiring such repayment to be made or deposited in court before giving the judgment, or by inserting in the judgment a clause that it shall not take effect until such repayment be made. The judgment in the

present case did not do either. The latter mode may properly be adopted in cases where the defendant is directed by the judgment to do something himself, as to execute a prescribed deed or release, or where the judgment directs the officers of the court to cancel a deed or enter satisfaction of a lien of record, as and for the defendant in case he refuses. But in cases where the judgment declares and adjudges the title outright, the more convenient and effective method is to require restitution to be made by the plaintiff before or at the time of rendering the judgment. The defendant Hotchkiss was entitled to a judgment allowing interest in addition to the principal, and by inserting a clause which would have made his claim for restitution

where he seeks in equity to restrain proceedings looking to the issuance of a tax deed, must make a tender of the amount of taxes justly assessed against him as a prerequisite to bringing his action. . . . But the rule requiring tender to be made in cases where the action is against some department of the government, or its officers, does not apply where a decree is sought against a purchaser at a tax sale whose deed has conveyed to him no title," citing Preston v. Hirsch, 5 Cal. App. 485, 90 Pac. 965. Henderson v. Ward, supra, was followed in Henderson v. Bostwick, 21 Cal. App. 797, 132 Pac. 473.

See also HOLLAND v. HOTCHKISS.

IV. Who is entitled to reimbursement; successors in interest; form of decree.

It has been held error in setting aside a tax deed and a quitclaim deed from the purchaser at the tax sale to a third party, to direct repayment of taxes to the purchaser, although the taxes were paid before the giving of the quitclaim deed; but reimbursement should be made to the grantee in the quitclaim deed, on the ground that the deed amounts to an assignment of the purchaser's right under the tax deed. Glos v. O'Toole, 173 Ill. 366, 50 N. E. 1063.

And in Glos v. Mulcahy, 210 Ill. 639, 71 N. E. 629, it was held that reimbursement for taxes paid on the property by a purchaser at a tax sale should be made not to the purchaser, but to his grantee in a quitclaim deed, as the deed operated as an assignment of a purchaser's interest. To the same effect is Glos v. Woodard, 202 Ill. 480, 67 N. E. 3.

But in Warden v. Glos, 236 Ill. 511, 86 N. E. 116, it was held that reimbursement of taxes paid on the land, required of the complainant as a condition of relief against an invalid tax deed, might be made entirely to the holder of the deed, although the bill alleged that the holder had conveyed a portion of his alleged title to his wife, where the latter, who was a party to the suit, did not show the extent of her interest.

L.R.A.1915C.

In case of doubt as to which one or more of the defendants are entitled to receive reimbursement from the complainant, it was said in Johnson v. Huling, 127 Ill. 14, 18 N. E. 786, that the money should be ordered paid into court for the use of the party thereto entitled.

So, where, after the filing of a bill to set aside tax deeds, and service of summons, the purchaser at the tax sale executed a deed to the property to his wife, it was held in Glos v. Hanford, 212 Ill. 261, 72 N. E. 439, that it was proper before final decree canceling the deeds, to require the complainant to deposit in court the amount found due for interest and costs, for the use of the purchaser and his grantee, as their interests might thereafter be determined.

Following Glos v. Hanford, supra, the court in Glos v. Ault, 221 Ill. 562, 77 N. E. 939, held that it was proper in a suit to remove a tax deed as a cloud on the title, to render a decree providing for a deposit to be paid to the defendants "as their respective rights may hereafter be determined," where the holder of the invalid tax deed had conveyed part of the property by a quitclaim deed to another defendant.

And in Glos v. Ambler, 218 Ill. 269, 75 N. E. 764, it was held that where, pending a suit to set aside a tax deed, the purchaser conveyed an undivided third of the property to his wife, it was not error to provide in the decree setting aside the deed, that the amount due for taxes should be paid into court for the use of the purchaser and his assigns, without making provision for reimbursement to the wife of her proportionate share.

It has been held that a decree setting aside tax deeds on the condition that the complainant refund to the defendant the amount of taxes paid on the land is erroneous where no time for the payment is fixed. Gage v. Thompson, 161 Ill. 403, 43 N. E. 1062; Glos v. Brown, 194 Ill. 307, 62 N. E. 622; Glos v. Cratty, 196 Ill. 193, 63 N. E. 690.

In Gage v. Thompson, 161 Ill. 403, 43 N. E. 1062, the court said: "The decree fixed

effectual and the judgment conditional and dependent upon reimbursement to him.

Appellant makes the further objection that the plaintiff's evidence did not show that the title to the land was vested in him. This objection is based on alleged defects in the certificates of acknowledgment of two deeds comprising a part of plaintiff's chain of title. The objections are without merit. In one of the deeds the officer certified that the grantor "acknowledged to me" the execution of the deed. The statutory form for such certificates in force at that time did not contain the words "to me." The effect is the same, and variation is immaterial.

The other deed was acknowledged before a notary public of the state of Washington. Our law authorizes a notary of another

state to take acknowledgments of deeds conveying lands within this state. Civ. Code, § 1182, subdiv. 4. Section 1189 of the Civil Code provides that an acknowledgment taken without the state in the manner provided by the law where it is made is good in this state. It further provides that the certificate of the clerk of a court of record of the county where such foreign acknowledgment is made, to the effect that such acknowledgment was taken in accordance with the laws of the place where it was made, is sufficient proof of such conformity. Compliance with this formality was not made in the case of this deed. The provision of § 1189 in regard to certificates of the clerk is applicable only to cases where the certificate of acknowledgment does not

no time within which the money should be paid to appellant in case the complainant elected to make such payment and take the benefit of the decree, and made no provision for interest upon the amount found due, from the date of the decree until it should be paid, or for any other disposition of the bill as to appellant in case the money should not be paid, and in these particulars we think it was erroneous. The proper practice in such cases is to fix the terms, and in case the complainant declines or refuses to comply with them, to dismiss the bill. . . . As to fixing a time within which the money must be paid, and providing for dismissing the bill, it is claimed that a reasonable time was implied, and that appellant could go into court and have a supplemental order entered fixing the time and making the provision for dismissal. There was no new fact or matter not already appearing in the record to be brought to the attention of the court by the appellant for the purpose of having the terms of the decree changed or modified, and under such circumstances she was not bound to seek for a supplemental decree merely for the correction of an error."

And in *Glos v. Brown*, 194 Ill. 307, 62 N. E. 622, a decree was regarded as erroneous that a tax deed should be canceled as a cloud upon the complainant's title, "upon condition, however, and it is hereby made a condition precedent to the relief herein granted, that said complainants pay to said defendant, . . . or upon his refusal to accept same, to pay to the clerk of this court for his use," the sum found due as the amount paid at the tax sale, with subsequent taxes and costs, "which amount is hereby made a lien on said premises;" in that it failed to fix a definite time within which the complainant should pay the amount, with interest, awarded to the defendant, and failed to provide that in case payment should not be made the bill should be dismissed.

Where there are several defendants in a suit to set aside an invalid tax deed, it has been held that a decree is sufficient which requires payment into court of the money

to which the defendants are entitled as a condition of relief, for the use of the defendants as their rights might thereafter be determined, without declaring their respective rights thereto. *Glos v. Cass*, 230 Ill. 641, 82 N. E. 827; *Brimson v. Arnold*, 236 Ill. 495, 86 N. E. 254. See also *Glos v. Hanford* and *Glos v. Ault*, *supra*.

In *Buchanan v. Macfarland*, 31 App. D. C. 6, a decree was entered vacating a sale of lots for failure to pay an assessment, and canceling the certificate issued to the purchaser at the sale, "upon condition, however, that the complainants shall, within some reasonable time, to be fixed by the court, pay into court for the use of the defendants as they may be entitled, the entire amount of said assessment, with interest thereon required by the law."

So, in *Fenton v. Minnesota Title Ins. & Trust Co.* 15 N. D. 365, 125 Am. St. Rep. 599, 109 N. W. 363, the decree for the plaintiff in a suit for relief against an invalid tax title was that, as a condition precedent to relief, the plaintiff should pay the defendants, or into court for them, the amount of taxes paid by the purchaser of the tax title and the subsequent taxes paid by his assignee, with 7 per cent interest; that such payment should be made within thirty days, and upon compliance with this condition final judgment should be entered for the plaintiff; and that on failure to comply with these conditions, judgment should be entered that the plaintiff was entitled to no equitable relief, and that the defendants should recover their costs and disbursements.

In *Gage v. Du Puy*, 137 Ill. 652, 24 N. E. 541, 26 N. E. 386, a suit to set aside tax deeds as a cloud on the title, it was said that while there was a general direction that the complainant pay the defendant for taxes paid, this was not required to be done as a condition to the relief granted, but that the tax deeds were declared void, and the defendant left to collect the amount the owner was to pay him as best he could; that this was error; that the decree should have required the amount to be paid to the defendant, and in the event of his refusal

show an acknowledgment which would be good under our own statutes. If it would be good here, and the officer is one authorized by our statutes to take proof of acknowledgments without the state, no certificate from the clerk of the other state is required. The notary certified that the grantor "appeared before me, being personally known to me to be the same person described in and who executed the foregoing instrument, and acknowledged that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein mentioned." As acknowledgment seldom succeeds, or even accompanies,

actual delivery to the grantee, it is clear the word "executed" in the statutory form prescribed (Civ. Code, § 1189) should not be construed to include such actual delivery. But the words used, taken altogether, mean substantially the same thing as the word "execution," and the certificate is sufficient. *Jamison v. Jamison*, 3 Whart. 457, 31 Am. Dec. 536; *McIntire v. Ward*, 5 Binn. 296, 6 Am. Dec. 417; *Hall v. Thompson*, 1 Smedes & M. 443, 489; *Davar v. Cardwell*, 27 Ind. 478; *Woodruff v. Garner*, 27 Ind. 4, 89 Am. Dec. 477. Substantial compliance with the statute is sufficient, and, if the words used are equivalent in meaning to those pre-

to accept it, to an officer of the court, subject to his order, as a condition precedent to the setting aside of the tax deed.

And in *Oregon Short Line R. Co. v. Halllock*, 41 Utah, 378, 126 Pac. 394, the court quoted with approval the rule that it is not enough merely to decree repayment of taxes paid by the purchaser in annulling the tax sale, but that the decree should make such repayment a condition of setting aside the tax deed.

Also, in *Brophy v. Taylor*, 30 Ill. App. 261, a suit to set aside certificates of sale on a delinquent assessment, it was said that the decree should have required the owner, as a condition precedent to the relief granted, if the defendant would not take the money, to deposit in court for his use the amount he paid at the sale, and any subsequent taxes he had paid, with interest at 6 per cent on all; and in default thereof within a limited time to be fixed by the decree, that the bill should be dismissed.

As to the form of conditional relief, it was said in *Lohr v. George*, 65 W. Va. 241, 64 S. E. 609: "It has been suggested in some of our decisions that a decree might be entered setting aside a void tax deed conditionally, that is, on the payment of the purchase money. While this may be proper, it seems to us the court should make a finality of the cause by requiring the money to be paid to the defendant or into court, or by setting aside the deeds and decreeing a lien on the land in favor of the defendant for the taxes, interests, and costs."

But as to whether the decree in a suit to set aside a tax deed as a cloud on the title should make the relief conditional on reimbursement to the defendant of taxes paid, or merely render a judgment for such taxes in favor of the defendant and make it a lien on the land, it was said in *Charlton v. Kelly*, 24 Colo. 273, 50 Pac. 1042: "Complaint is also made by the appellant [defendant] that the court below erred in rendering an absolute decree in favor of the plaintiff without first requiring her to pay to the defendant, or to deposit in court for his benefit, the amount found to be due, as a condition precedent to the taking effect of the decree. We think the point is good. The court entered an absolute decree adjudging the plaintiff to be the owner of L.R.A.1915C.

the lot, and then rendered a money judgment in favor of the defendant making the same a lien against the property. This is not proper. The court should have entered a preliminary order adjudging the plaintiff to pay into court for the use of defendant the amount found to be due, and, if compliance was had therewith, then have entered an absolute decree establishing the ownership in the plaintiff; or, in lieu thereof, the court might have entered a decree to take effect only upon condition that the amount found to be due from the plaintiff to the defendant was, within a reasonable time, paid into court. It was not just to the defendant to render a decree of such a character as that, if the plaintiff failed to make the required payment, the defendant would be obliged to bring his suit to foreclose the lien created."

In *Larson v. Peppard*, 38 Mont. 128, 129 Am. St. Rep. 630, 99 Pac. 136, 16 Ann. Cas. 800, the trial court rendered a decree quieting the plaintiffs' title against an invalid tax deed, subject to a lien in favor of the defendant upon the property for taxes paid. On appeal the court said: "We think that the better practice would be in a case of this kind, for the trial court to enter an order requiring the plaintiffs to make such payment within a reasonable time, say thirty days. If the payment is made, then the decree quieting the title should be made and entered; but if the payment be not made within the time allowed, then the plaintiffs should be denied any relief whatever."

And in *Indiana & A. Lumber & Mfg. Co. v. Milburn*, 88 C. C. A. 473, 161 Fed. 531, a decree quieting title as against purchasers at a tax sale was made on the condition that within a specified time the complainant reimburse the defendant for the amount of its tax payment, and on default thereof that the bill should be dismissed.

V. Effect of operation of statutes of limitation.

The statute of limitations has no application to the tax title holder's right to reimbursement for taxes paid by him in good faith after his purchase, as a condition of setting aside the tax deed at the instance

scribed, the certificate is good. *Reed v. Bank of Ukiah*, 148 Cal. 96, 82 Pac. 845; *Duckworth v. Watsonville Water & Light Co.* 150 Cal. 534, 89 Pac. 338. The fact that it also certified to the sealing of the instrument does not vitiate the acknowledgment, although such sealing is unnecessary in this state.

There are no other points requiring notice. The record shows the amounts paid by the defendant as taxes on the lands to be \$327.58. This does not include interest. It includes payments of taxes accruing after the sales, amounting to \$134.80, but the dates of these payments do not appear, and

of the owner. *Harber v. Sexton*, 66 Iowa, 211, 23 N. W. 635. In this case the contention was denied that the holder of the tax title should be reimbursed only for subsequent taxes paid by him during the five years preceding the commencement of the suit.

And that the statute of limitations cannot be invoked by the complainant as an excuse for not doing equity by reimbursing the tax title holder against whom he seeks relief, see also *Barke v. Early*, 72 Iowa, 273, 33 N. W. 677.

So, where one claiming title by adverse possession sought to remove a cloud on his title cast by a tax deed which, as a means of affirmative relief, was barred by the statute of limitations, it was held that the plaintiff, as a condition of equitable relief, would be required to do equity by reimbursing the defendant for taxes paid on the property, with interest. *Wygant v. Dahl*, 26 Neb. 562, 42 N. W. 735.

Payment or tender of taxes paid by the purchaser at a tax sale was held in *Denman v. Steinbach*, 29 Wash. 179, 69 Pac. 751, to be necessary before an action could be maintained to quiet title against tax certificates, although, by failure to take out a tax deed within the time required by statute, the tax certificates and sale had become absolutely null. Another statute created a lien on property for taxes until the same were paid, and the lien was regarded as subsisting in favor of the purchaser at the tax sale, with legal interest from the time of payment.

But the rule was laid down in *Laffitte v. Superior*, 142 Wis. 73, 125 N. W. 105, that where the rights of a tax title claimant have been extinguished by the statute of limitations, the owner of the property has a right to have the cloud upon the title created by the record of the tax deed removed, and that he has a right to a remedy therefor, "unburdened by any equity in favor of the one whose rights have ceased to exist, to refund taxes paid or to compensate for tax liens acquired by him." The statute of limitations was said in this state to extinguish the right, and not merely to affect the remedy.

In *Kelle v. Egan*, 256 Ill. 45, 99 N. E. 859, it was held that a holder of certificates L.R.A.1915C.

the interest accrued thereon cannot be computed. Enough appears, however, to show that the amount tendered by the plaintiff did not cover the principal and interest of the purchase money and the subsequent taxes paid by defendant and his grantor. This is important only upon the question of the stoppage of interest (Civ. Code, § 1504; *Leet v. Armbruster*, 143 Cal. 668, 77 Pac. 653), and the question of the imposition of costs, which in such cases rests largely in the discretion of the trial court (*Gray v. Dougherty*, 25 Cal. 282). A new trial will be necessary, but it should be limited to the inquiry as to the amount of the pay-

of tax sales had no right to reimbursement for the purchase money in an action to establish title under the "burnt records act," where the time for the execution of the deed on the certificates had expired, and they were by statute absolutely void on their face.

And in an action by the owner to establish title against an invalid tax deed, it was held in *Gage v. Caraher*, 125 Ill. 447, 17 N. E. 777, that while the plaintiff would be required to pay to the holder of the deed the taxes and cost of the sale and subsequent taxes paid, with interest, he would not be required as a condition of relief to pay a sum paid by the defendant on a special assessment sale made before the tax sale, where no deed had ever been taken out on the special assessment sale and the time limited therefor had expired, and by statute the certificates of the sale were absolutely void.

To a similar effect is *Simons v. Drake*, 179 Ill. 62, 53 N. E. 574, holding that while the complainant in a suit to set aside tax deeds as a cloud on the title should be required as a condition of relief to reimburse the holder of the tax deeds for taxes paid by him for which the complainant was liable as owner of the property, he would not be required as a condition of relief to refund an amount paid at a special assessment sale before the complainant became the owner of the property, where, by operation of the statute of limitations, the tax deed was rendered nugatory upon the complainant's title.

VI. Effect of fraud on the part of purchaser.

In *Nichols v. Russell*, 141 Mo. App. 140, 123 S. W. 1032, a fraudulent combination of bidders at the tax sale to prevent competition, on account of which the tax deed was declared void in a suit by the owner, was held to preclude the purchaser from asserting the equitable principle which would otherwise have entitled him to reimbursement for taxes paid as a condition of relief.

But in *Noble v. McIntosh*, 23 N. D. 59, 135 N. W. 663, it was held that, in a suit by the owner to cancel a tax certificate,

ments made by Hotchkiss and Barthold and interest thereon, to which defendant is entitled before judgment quieting plaintiff's title is made. All other facts involved in the case were fully tried and found by the court, and the evidence shows that as to them no other result should follow. The court, upon rendering judgment, will, of course, again consider the question who should pay the costs of suit in the trial court, and may take additional evidence on that point.

The judgment is vacated, and the order denying a new trial is reversed, so far as

the question of the amounts paid by the defendant and his grantor, and interest, the deposit of the same in court, and the right to recover costs of suit, are concerned. The cause is remanded for a new trial of these issues alone. The findings on all other issues are to stand. The court below is directed, after determining these questions, to proceed with the case, and to render judgment in accordance with this opinion.

We concur: Angellotti, J.; Lorigan, J.; Henshaw, J.; Melvin, J.

the equitable rule applied that the complainant must offer to pay the amount paid by the defendant at the sale, although the sale was invalid by reason of an unlawful combination or agreement between the bidders to stifle competitive bidding. The purchaser was held entitled to reimbursement for the amount of taxes, interest, and penalty due to the county at the day of the sale, but not to any subsequent interest or penalty. The court, after referring to the case of *Nichols v. Russell*, supra, in which disapproval was expressed of the Iowa cases holding that "where tax deeds are set aside for fraud or on other grounds, the holder of the tax title may recover from the owner of the land an amount equal to the sum which would have been necessary to discharge the land from taxes if they had not been paid by the purchaser" (*Besore v. Dosh*, 43 Iowa, 211; *Light v. West*, 42 Iowa, 138; *Everett v. Beebe*, 37 Iowa, 452, being cited to this proposition), stated that it was unable to concur in the criticism of the decisions of the Iowa court, but that it did not adopt the Iowa rule *in toto*, deeming it "more consistent with a wise public policy, as well as more equitable, to require the plaintiff to pay or tender to the defendant merely the amount paid by him at the sale, without any interest from such date. This justly deprives the defendant of any profit out of the transaction, but at the same time compels the landowner to pay as a condition to equitable relief what he should have paid to the county as his share of the public burden." *Noble v. McIntosh* was followed in *Tee v. Noble*, 23 N. D. 225, 135 N. W. 769, a case involving the same tax certificate.

And in *James v. Piggott*, 70 W. Va. 435, 74 S. E. 667, the rule was laid down that, notwithstanding the fact that a tax purchaser had fraudulently prevented the owner from redeeming, he was nevertheless entitled to reimbursement on the setting aside of the tax deed, if the taxes for which the land was sold were a proper charge on the land. The purchaser in this instance had incorrectly informed the plaintiff, when the latter desired to redeem the land, that the plaintiff's grantor had paid the taxes.

It has been held that in a suit to have a L.R.A.1915C.

tax sale declared fraudulent and void, the complainant need not offer to refund the taxes paid by the purchaser at the sale, where the latter fraudulently prevented the former from buying the property at the sale. *Taylor v. Snyder*, Walk. Ch. (Mich.) 490.

See also *Hibernia Sav. & L. Soc. v. Ordway*, 38 Cal. 679, set out in *HOLLAND v. HOTCHKISS*; *Mendenhall v. Hall*, 134 U. S. 559, 33 L. ed. 1012, 10 Sup. Ct. Rep. 616 (holding the Louisiana constitutional provision requiring tender of purchase money and 10 per cent interest to the purchaser before annulling a tax sale did not require tender by a mortgagee seeking to enforce his lien as against a tax deed issued on a sale for taxes against the mortgagor, where the latter and the purchaser fraudulently combined to defeat the mortgage lien by means of a sale for taxes); and *Pueblo Realty Co. v. Tate*, 32 Colo. 67, 75 Pac. 402 (as to effect of unlawful combination of bidders at the tax sale to stifle competition, to which the one seeking relief was a party).

VII. Effect of refusal to accept offer of reimbursement before suit.

Where the holder of an invalid tax title refused an offer of reimbursement for taxes paid, it was held in *Perham v. Haverhill Fibre Co.* 64 N. H. 485, 14 Atl. 462, that, in a subsequent action by the offeror to set aside the tax deed as a cloud on the title, the plaintiff would not be required as a condition of relief to repay the purchaser the amount of taxes and expenses of sale which he has paid as a consideration for his deed. It was said: "Without admitting the validity of the defendant's title, or his right to have the purchase money refunded in case of a failure of the title, the plaintiff offered to pay a larger sum for a reconveyance, and this was refused. The defendant elected to stand upon his title. Having refused the offer of reimbursement, and put the plaintiff to the burden of litigating his title, he cannot, after defeat upon his own ground, resort to a different ground which by election he has abandoned, and claim the benefit of an offer which he has once refused. The ground upon which his title was defeated was the ground upon

which he chose to stand, and he cannot after defeat, turn around and interpose a claim upon a ground inconsistent with that. The plaintiff, having succeeded in defeating the defendant's claim of title, cannot be called upon to lose or suffer diminution of the fruits of his contest, by a claim for restitution of what the defendant deliberately refused to take, and which, by electing to stand upon his title, he abandoned. . . . The claim for refunding the taxes and expenses of sale was abandoned, if it ever existed, by the defendant's selection to stand upon his title. Suffering upon that ground defeat, against which, at the time of his purchase, he took the risk without covenant or promise, no ground remains which entitles the defendant to equitable recoupment or reimbursement as terms of granting the relief sought by the plaintiff, and to which he is fully entitled."

See also *Hotchkiss v. Hansberger*, 15 Cal. App. 603, 115 Pac. 957, cited in *HOLLAND v. HOTCHKISS*, where the fact that the purchaser at the tax sale had refused an offer of reimbursement for taxes, made by the owner before bringing suit for relief against the tax deed, was noted as a ground for refusing to require reimbursement as a condition of granting the relief sought.

But it should be observed that in the cases generally reimbursement of taxes paid by the purchaser was made a condition of relief against the tax deed, even where there was a tender and refusal before bringing suit, the tender being generally regarded as necessary to the maintenance of the suit.

And in *Hole v. Van Duzer*, 11 Idaho, 79, 81 Pac. 109, the trial court held that, the tax title holder not having accepted the money tendered by the owner by way of reimbursement for taxes, costs, and penalties paid on the land, and having claimed title to the property instead of a lien thereon, and having shown no right to the property, the owner, who, in an action to quiet title, had paid the money into court to reimburse the defendant, was entitled to a return of the money. On appeal this was held error, and the plaintiff was held entitled to a decree quieting his title only on condition of reimbursement of the defendant for the payments made by the latter, with statutory interest.

VIII. Amount of reimbursement.

It has been held that, as a condition of equitable relief against the tax sale, the complainant may be required to reimburse the defendant for delinquent taxes paid by the latter on the land for the year preceding that for which the land was sold, as well as for subsequent taxes paid by the defendant; but that if the defendant has been in possession of the premises, and requires such reimbursement, he must account for the rents and profits, in other words, the annual occupation value of the land. *Smith v. Specht*, 58 N. J. Eq. 47, 42 Atl. 599.

But in *Lauer v. Weber*, 177 Ill. 115, 52 L.R.A.1915C.

N. E. 489, it was held that evidence by the holder of an invalid tax title as to payment of taxes on the land for the year preceding that for the nonpayment of which the land was sold was properly excluded in a suit to cancel the tax deed, as it was immaterial who paid the taxes prior to the sale, the proper conditions to be imposed upon the setting aside of the tax deed being to require the owner to refund the amount paid at the sale, with all subsequently paid taxes and interest.

In *Larson v. Peppard*, 38 Mont. 128, 129 Am. St. Rep. 630, 99 Pac. 136, 16 Ann. Cas. 800, it was held error to allow interest at the rate of 2 per cent per month upon payments for taxes by the defendant, in requiring reimbursement of taxes paid with interest as a condition of relief against an invalid tax deed, the court saying that this was not a proceeding to redeem from the tax sale, and that interest only at the legal rate should have been allowed.

And in *Glos v. Gerrity*, 190 Ill. 545, 60 N. E. 833, it was held that in a suit to remove a tax deed as a cloud on the title, the complainant as a condition of relief would be required to pay only the legal rate of interest on the amount paid by the defendant at the tax sale, and not interest at the rate per cent bid as for a penalty under statutory provisions, though necessary to be paid to effect a redemption from the sale under the statute.

So, in *Gage v. Du Puy*, 137 Ill. 652, 24 N. E. 541, 26 N. E. 386, it was held that, as a condition of relief against an invalid tax deed, the complainant was not required to pay 100 per cent on the amount for which the property was sold, as in case of redemption.

As regards the rate of interest which the owner should be required to pay to the holder of an invalid tax deed as a condition of relief in equity, it was said in *Barnett v. Cline*, 60 Ill. 205, that "a court of equity seldom requires, in the absence of a contract to the contrary, a greater rate than 6 per cent, or the rate fixed by the statute, when money is required to be refunded. That is the rate which should have been allowed by the court in decreeing the repayment of the taxes and interest. It then follows that the court erred in allowing 10 per cent per annum instead of 6."

That, in requiring reimbursement to the holder of an invalid tax title as a condition of granting relief to the owner, equity will follow the law in allowing the tax title holder the rate of interest fixed by statute in case of an action of ejectment against him by the owner, see *Corbin v. Young*, 24 Kan. 198.

"We have uniformly held that in cases where tax deeds are set aside for fraud or on other grounds, the holder of the tax title may recover from the owner of the land an amount equal to the sum which would have been necessary to discharge the land from taxes if they had not been paid by the purchaser." *Beaore v. Dosh*, 43 Iowa, 211, this being the general rule as to amount of re-

covery in the Iowa cases cited under II. a, supra.

But in *Roberts v. Merrill*, 60 Iowa, 166, 14 N. W. 235, where action was commenced before the execution of a deed, to redeem from an invalid tax sale, it was held that the plaintiff should be required to pay the purchaser the amount of his bid and 6 per cent interest. Other Iowa cases were cited to the effect that the owner seeking relief against invalid tax sales must pay "the amount he would have to pay to the treasurer in order to satisfy all taxes if they had not been paid by the purchaser." But the court distinguished these cases on the ground that in them a deed had been executed to the purchaser, which vested in him all the interest of the state and county, and which entitled him to such interest and penalty as the county would have been entitled to if there had been no sale, although the deed, at the election of the owner, would be set aside. But in the case before it the court said that the certificate of sale did not vest in the purchaser the title and interest of the state and county, and that the owner should be required to pay what was justly and equitably due the defendant, and no more; that the defendant had paid certain taxes which the plaintiff was legally bound to pay, and the latter should pay such sum with 6 per cent interest, because the money was paid for the use and benefit of the plaintiff, and that there was no principle of law or equity which would entitle the defendant to more than this.

And in *Early v. Whittingham*, 43 Iowa, 162, it was held that where the tax itself was invalid on account of an insufficient assessment and levy, the owner would not be required to reimburse the purchaser the amount of taxes for which the property was sold, but should refund the subsequent taxes paid by the purchaser, because their payment was beneficial to the owner, who had offered in this case to pay the taxes paid by the purchaser with interest. It was held, however, that the owner should not be compelled to pay the statutory interest or penalty, as in cases where the taxes are not paid, but only the amount of subsequent taxes paid by the purchaser with 6 per cent interest from the time of payment.

In *Barke v. Early*, 72 Iowa, 273, 33 N. W. 677, an action to quiet title and set aside tax deeds under which the defendant claimed title, the relief claimed by the plaintiff was granted on condition that he reimburse the defendant for the taxes for which the land was sold and taxes subsequently paid by him, with penalties, interests, and costs provided by the statute to be paid upon redemption from a tax sale, except the penalties on taxes paid after the sale and before the tax deed was executed, for which the defendant had not filed duplicate receipts as required by statute.

In *Hickman v. Kempner*, 35 Ark. 505, it was held that the owner, to be entitled to relief from a void tax sale, must tender to the purchaser the taxes actually due on the L.R.A.1915C.

land, with interest, but without penalties or costs of sale.

And in *Hamilton v. Brownsville Gaslight Co.* 115 Tenn. 150, 90 S. W. 159, it was held that, the tax sale being void, the complainant in a suit for relief against the tax deed would be required to reimburse the holder of the tax title the amount paid for taxes upon the land, with interest, but not the costs or penalties which it may have paid. See, however, *Bloomstein v. Brien*, 3 Tenn. Ch. 55, where, in granting relief against invalid tax sales, the complainant was required to reimburse the defendant for the amount of taxes, costs, and penalties paid by him at the sale, with subsequent taxes paid by the defendant, with 6 per cent interest, the point, however, as to the amount of reimbursement, not being discussed.

Although a sale for taxes was voidable because of a mistake in the advertisement as to the name of the owner, and because of irregularities in the sale, it was held in *Rogers v. Moore*, — Tex. Civ. App. —, 94 S. W. 114, that the owner, in an action to set aside the tax deed, should be required to pay the amount of the purchaser's bid, which should be a lien on the property, the contention being denied that he was not chargeable with the costs incurred by the irregular advertising and sale. But see *Crosby v. Terry*, 41 Tex. Civ. App. 594, 91 S. W. 652.

"The practice in courts of equity, or requiring a party who seeks equitable relief to submit to equitable terms, is based on the maxim 'that he who seeks equity must do equity.' . . . Upon this principle, courts of equity refuse to remove a tax title as a cloud except upon repayment of the taxes and costs paid at the tax sale, and taxes subsequently paid under the tax certificate or deed, with legal interest thereon. The taxes paid subsequent to the sale will be presumed to have been paid under, and for the support and protection of, the title thus acquired." *Gage v. Caraher*, 125 Ill. 447, 17 N. E. 777.

The amount which the complainant should be required to pay in order to entitle him to a decree removing tax certificates as a cloud on his title was held in *Ames v. Sankey*, 128 Ill. 523, 21 N. E. 579, to be the amount paid at the tax sale, together with the subsequent taxes paid, and interest at 6 per cent. This was said to be the uniform rule laid down by that court in a long line of decisions.

And in *Woodard v. Glos*, 113 Ill. App. 353, it was held error to require the owner, as a condition of relief against an invalid tax deed, to pay the purchaser the amount of money which would have been required to redeem the property from the tax sale, if the sale was redeemed upon the last day of redemption, with interest at 6 per cent from the date of the redemption period to that of the decree, the court saying that the owner should not have been required to pay any penalty, and that the amount which he should be required to pay to the holder of the deed was the amount of money paid

at the tax sale and subsequently paid taxes, with legal interest. To a similar effect is *Gage v. Waterman*, 121 Ill. 115, 13 N. E. 543.

Although the case of *Gage v. Busse*, 102 Ill. 592, in which the court was of the opinion that the owner, seeking relief against an invalid tax deed, should be required to pay the amount of redemption money allowed by statute, had the judgment and sale been for the proper amount of taxes, has been disapproved in so far as it might be deemed an authority that such amount is required as a condition generally of setting aside an invalid tax sale, attention is called to the reasons for the decision. In that case the court said that "to permit parties, with full knowledge, to lie by, neglect to pay the true amount of their taxes, neglect to assert their objections when judgment is sought against their land, having a full opportunity to do so, and, after another has invested his money on the faith of such judgment, to come into a court of chancery and escape by paying, at this late day, simply the taxes which they ought to have paid, and 6 per cent interest thereon, would be to invite men to omit to pay their taxes, and to speculate, without danger of losing their land, upon the chances of showing some erroneous tax embraced in the judgment for taxes."

This case was, however, distinguished in *Gage v. Pirtle*, 124 Ill. 502, 17 N. E. 34, from other cases in that state declaring a different rule as to the amount of reimbursement to which the tax title purchaser is entitled, the court saying that, "under the circumstances of that case, it was not the intention there to depart from the long line of the former uniform decisions of the court, that the condition of the equitable relief granted upon the setting aside of a tax deed should be the payment of the amount paid at the tax sale, subsequent taxes paid, and interest."

But in *Smith v. Gage*, 11 Biss. 217, 12 Fed. 32, it was said that the complainant, having come into a court of equity for relief against the tax title, should be required to make the defendant whole to the same extent as if she had redeemed in apt time from the tax purchase, and that the court should not set aside the tax title except on condition that the complainant pay the amount required to redeem the premises when the time for redemption expired, with interest at 6 per cent since that time, and also all taxes paid by the defendant since his purchase, with 6 per cent interest.

The rule that the amount which the owner should be required to pay to the holder of an invalid tax title as a condition of setting aside the tax deed was the sum paid at the tax sale and all subsequent taxes paid by the purchaser, with interest thereon, and not such a sum as would have been required to make a redemption, with interest, was held in *Gage v. Pirtle*, supra, not to be affected by a statute providing that any decree setting aside a tax deed should provide that the claimant should pay to the

holder of the deed "all taxes and legal costs, together with all penalties, as provided by law," which the holder of the deed had paid, as the statute simply enacted what had been previously held should be paid as a condition of setting aside a tax deed.

And the rule that one seeking to set aside an invalid tax deed as a cloud on the title must reimburse the purchaser for the purchase money and subsequent taxes paid by him, with interest, was held in *Smith v. Prall*, 133 Ill. 308, 24 N. E. 521, to require reimbursement of subsequent taxes on the property paid by a third party by mistake, and refunded to the latter by the purchaser.

In *Morrison v. Semer*, 164 Mich. 208, 129 N. W. 1, it was held that the defendant in a suit by the owner to quiet title against an invalid tax deed was not equitably entitled, as a condition of relief, to more than the amount she had paid the purchaser at the tax sale for his quitclaim deed to her. And as to taxes paid while in possession of the land, the rule was laid down that the defendant was not entitled to reimbursement, but must content herself with the benefits obtained from the land during her occupancy thereof.

The Colorado cases, such as *Charlton v. Kelly*, 24 Colo. 273, 50 Pac. 1042, approved and followed in *Pueblo Realty Co. v. Tate*, 32 Colo. 67, 75 Pac. 402, and other later decisions, dealing with the amount of reimbursement to which the tax title holder is entitled in an action against him for cancellation of tax deeds or certificates, or to quiet title, are based on statutory provisions in that state as to the recovery by the purchaser of taxes paid in case of an action by the owner for possession, or of redemption without suit.

See also cases under *V. supra*, and *Noble v. McIntosh*, under *VI. supra*. R. E. H.

INDIANA SUPREME COURT.

HENRY R. SPICKERMAN et al., Appts.,
v.

JOSEPH A. GODDARD et al.

(— Ind. —, 107 N. E. 2.)

Elections — voting machines — local option.

1. A constitutional provision that all elections by the people shall be by ballot, although adopted before the invention of voting machines, does not preclude the use of such machines, and therefore a local option election is not invalidated by the fact that

Note. — The question whether the use of voting machines violates the constitutional requirement that all elections shall be by ballot is considered in the notes to *Elwell v. Comstock*, 7 L.R.A.(N.S.) 621, and *State ex rel. Karlinger v. Deputy State Supers*, 24 L.R.A.(N.S.) 188.

The question whether rejected ballots are to be counted in determining the total vote

the voting was done by machines instead of paper ballots.

Same — statutory form of ballot — effect.

2. A provision in a statute authorizing a local option election, giving the form of the "ballot," does not preclude the use of voting machines in such elections, if the statute further provides that all provisions of the general election laws of the state shall apply so far as applicable, and such general laws provide for the use of machines, nothing in the construction of which renders their use inapplicable to local option elections.

Same — majority — how ascertained.

3. Prohibition will be adopted at a local option election if a majority of the votes cast are in favor of it, in which a number of voters entering the booth failed to register their votes, under a statute providing that if a majority of the legal votes cast shall be in favor of prohibition, it shall be adopted, although the statute also provides that prohibition shall continue in force until a majority of the legal voters shall decide to the contrary.

(December 10, 1914.)

A PPEAL by contestants from a judgment of the Circuit Court for Delaware County affirming a judgment of the Board of Commissioners declaring that a local option election was legal and that a majority of the legal votes cast favored prohibition. Affirmed.

The facts are stated in the opinion.

Messrs. George Shirts and White & Haymond for appellants.

Mr. R. C. Minton for appellees.

Morris, J., delivered the opinion of the court:

Appellees filed a petition for a local option election in the city of Muncie under the provisions of the act of 1911, commonly called the "Proctor law." Acts 1911, p. 363; §§ 8316 et seq., Burns's Anno. Stat. 1914. An election was held March 9, 1914. The return of the canvassing board showed that a majority of the legal votes cast favored prohibition of the sale of intoxicating liquors in the city. Appellants challenged the correctness of the return, and filed remonstrances. There was a hearing before

cast is considered in the note to State ex rel. Short v. Clausen, 45 L.R.A.(N.S.) 714.

The basis upon which a majority essential to the adoption of a constitutional or other special proposition submitted at a general election should be computed is considered in the note to State ex rel. Blair v. Brooks, 22 L.R.A.(N.S.) 478.

For the effect of a tie vote at a local option election, see the note to Yent v. State, 49 L.R.A.(N.S.) 1204.
L.R.A.1915C.

the board of commissioners, which entered a judgment declaring the election legal, and that a majority of the legal votes cast favored prohibition. Appellants then appealed to the circuit court. A trial there resulted in a like judgment.

At the election in question voting machines were used. They were purchased in 1906 by the county commissioners under the law of 1901. Acts 1901, p. 591; Burns's Anno. Stat. 1914, §§ 7021 et seq. When the machines were purchased the precinct boundaries in Muncie were established so as to include, in each, approximately 600 voters. These boundaries were never changed, and the machines had been used at all elections held since their purchase.

Appellants contend that our statute which authorizes the use of voting machines in elections by the people is void because in conflict with § 13 of article 2 of the Constitution of Indiana, which provides that "all elections by the people shall be by ballot; and all elections by the general assembly, or by either branch thereof, shall be *viva voce*."

It is contended that when the Constitution was adopted (1851) the meaning of the word "ballot" was plain and well understood, and the word as used meant "a printed or written expression of the voter's choice, upon some material capable of receiving and reasonably retaining it, prepared or adopted by each individual voter, and passing by the act of voting from his exclusive control into that of the election of officers, to be by them accepted as the expression of his choice." State ex rel. Karlinger v. Deputy State Supers. 80 Ohio St. 471, 24 L.R.A.(N.S.) 188, 89 N. E. 33.

The constitutionality of acts authorizing the use of voting machines has been determined by various American courts, and generally they have been upheld. The machines have been in use in portions of this state for so long a period that we would not be inclined to consider at length the reasons urged against the law, were it not that the supreme judicial court of Massachusetts in Nichols v. Election Comrs. (Nichols v. Minton) (1907) 196 Mass. 410, 12 L.R.A.(N.S.) 280, 124 Am. St. Rep. 568, 82 N. E. 50, held their use in conflict with the Constitution of that state, which provides that certain officers shall be "chosen by written votes," and, further, that the supreme court of Ohio in State ex rel. Karlinger v. Deputy State Supers. supra, has decided that the use of voting machines is prohibited by a constitutional provision that "all elections shall be by ballot."

The purpose of the framers of a constitutional provision must be sought and given effect, if found. Our organic law was

framed to better secure to the people of the state their right to life, liberty, and the enjoyment of the fruits of their industry. It was designed for the use of common practical people while pursuing their varied occupations, and not as rigid mold to fetter their growth and development. It was written by statesmen selected for their wisdom, while in convention assembled, and was designed for practical use rather than as a declaration of abstract principles. In seeking its purposes, it must be viewed from the standpoint of the statesmen who formulated it, rather than that of lexicographers and philologists who neither participated in the work nor considered its provisions. Story, Const. §§ 400, 454; Moore-Mansfield Constr. Co. v. Indianapolis N. & T. R. Co. (1913) 179 Ind. 356, 44 L.R.A.(N.S.) 816, 101 N. E. 296; Elwell v. Comstock, 99 Minn. 261, 7 L.R.A.(N.S.) 621, 109 N. W. 113, 698, 9 Ann. Cas. 270; Detroit v. Inspectors of Election, 139 Mich. 548, 69 L.R.A. 184, 111 Am. St. Rep. 430, 102 N. W. 1029, 5 Ann. Cas. 861. It is important that the end sought by the framers of this constitutional provision be not confounded with the means adopted to secure it.

The object the framers had in view was secrecy in the people's choosing of officers or measures, and publicity in choosing by the members of the general assembly. Williams v. Stein, 38 Ind. 89, 10 Am. Rep. 97. Voting by ballot involves secrecy, while *viva voce* voting insures publicity. The word "ballot" was used as a symbol of secrecy, while *viva voce* was used as the symbol of publicity. There was nothing sacred in the contrivance of a strip of paper with names or questions printed thereon, which the framers sought to preserve by the use of the word "ballot;" nor was there any imperative necessity for the use of the voice of the legislator which moved the convention to decree its perpetual exercise in legislative elections. The constitutional limitation is not violated by dispensing with the use of the paper contrivance in the one case, or the legislator's natural voice in the other, if in the former the people may choose in secret, and in the latter the legislator must make a public expression of his choice. Ibid. It can scarcely be doubted, unless resort be had to technical quibbles, that the constitutional mandate would be satisfied by the legislator publicly raising his right hand to express his choice in a legislative election, instead of using his voice for such purpose.

Our Constitution (art. 7, § 5) requires the opinions of this court to be given "in writing." At the time of the convention, the opinions were delivered in the handwriting of the judges, with the pen or quill as

the mechanical device used. The object, of course, was not to preserve the mere handwriting of the judges, but to provide a permanent record of the court's reasons for its mandates. An opinion as then written could be filed as a permanent record, and consequently the word "writing" was used to symbolize the purpose of requiring a permanent record. In recent years the court's opinions have been printed on type-writing machines, and thereby the inconvenience resulting from poor handwriting has been eliminated, and no one has been so narrowly technical as to claim the Constitution has been violated by the innovation.

Of course, the framers of our Constitution knew nothing of voting machines; nor did they of the Australian ballot. Neither did they dream of the telephone or electric railway. They must have contemplated the use of new inventions, for during their own lives the industries of the state were greatly modified by railroad construction, and the electric telegraph had arrived. Because they did not know of telephones or electric railways would furnish no argument for their escape from taxation, nor for burdening them with an unequal rate of assessment, in the absence of a constitutional amendment. In reading the debates of the convention which framed our Constitution, one must be impressed with the fact that the members of that body not only contemplated the marvelous growth and progress of the state that have taken place, but in some respects anticipated even a greater development. That they did not deem it necessary to amend the Constitution to meet the requirements of changing industries and of increasing and shifting populations occasioned by new inventions or the broadened use of old ones is evidenced by the fact that they made provision for amendment only after approval by two sessions of the general assembly.

The structure of our organic law is sufficiently capacious to meet the requirements of any changes in the election laws designed to prevent fraud or promote a nearer approach to absolute secrecy in voting. That such was the purpose of the 1901 act authorizing the use of machine voting is apparent, and we hold it not violative of the constitutional provision in question. Lynch v. Malley, 215 Ill. 574, 74 N. E. 723, 2 Ann. Cas. 837; Elwell v. Comstock, 99 Minn. 261, 7 L.R.A.(N.S.) 621, 109 N. W. 113, 698, 9 Ann. Cas. 270, *supra*; Detroit v. Inspectors of Election, 139 Mich. 548, 69 L.R.A. 184, 111 Am. St. Rep. 430, 102 N. W. 1029, 5 Ann. Cas. 861, *supra*; Re McTammany Voting Machine, 19 R. I. 729, 36 L.R.A. 547, 36 Atl. 716; U. S. Standard

Voting Mach. Co. v. Hobson, 132 Iowa, 38, 7 L.R.A.(N.S.) 512, 119 Am. St. Rep. 539, 109 N. W. 458, 10 Ann. Cas. 972.

It is contended that, conceding the constitutionality of the voting machine law, nevertheless the election in question was void because the Proctor act, by necessary implication, excludes the use of voting machines in elections held under its provisions. Section 4 of the act reads as follows:

"The ballot in a special election held under the provisions of this act shall be in the following form: Shall the sale of intoxicating liquors as a beverage be prohibited in (here inserting the particular territory in which such election is held)? All ballots marked with a cross in the square containing the word 'Yes' shall be

☐ Yes counted in favor of prohibiting the sale of intoxicating liquors as a beverage in such territory, and all ballots

☐ No marked with a cross in the square containing the word 'No' shall be counted opposed to prohibiting such sale therein." Burns's Anno. Stat. 1914, § 8319.

Section 10 of the act contains the following provisions: "In all elections hereunder, and in all matters and proceedings not herein otherwise specified, all the provisions, including penalties, of the general election laws of the state, shall apply as far as the same are applicable."

Section 1 of the act provides for holding local option elections in any incorporated city, in any township not containing an incorporated city, and the territory in any township exclusive of that occupied by such city. The section further provides that "such election shall be held at the usual places for holding general elections."

The Australian ballot act was passed in 1889. Acts 1889, p. 157. Section 1 of the act, as amended in 1907, provides that each precinct shall contain approximately 250 voters, but this limitation is not applicable to counties where voting machines may be in use. Acts 1907, p. 659; Burns's Anno. Stat. 1914, § 6882.

Section 4 of the voting machine act of 1910, as amended, provides that, in counties containing a city of 36,000 population or more, the county commissioners shall, and in other counties may, procure voting machines meeting the requirements of the act, for use in the various precincts of the county. The same section further provides that precincts where voting machines are used shall contain approximately 600 voters. Acts 1903, p. 278; Burns's Anno. Stat. 1908, § 7024.

Section 3 of the voting machine act L.R.A.1915C.

(Burns's Anno. Stat. 1908, § 7023) requires that voting machines must be provided with seven pairs of "yes" or "no" counters, "with the operating or voting devices therefor." Section 8 (Burns's Anno. Stat. 1908, § 7030), relating to ballot labels, provides for printing thereon a statement of a proposed constitutional amendment, "or other question or proposition to be voted on." Section 9 (Burns's Anno. Stat. 1908, § 7035), relating to the announcement of the result by the inspector, provides that "he shall also in the same manner announce the vote on each constitutional amendment, proposition, or other question voted on."

It is apparent that the voting machines provided for by the statute are adapted to the use by electors in voting on the question of prohibiting the sale of intoxicating liquors in the territory contemplated by the Proctor act, and nothing in the construction of the machines renders their use inapplicable to local option elections. Does the language of § 4 of the Proctor act denote a legislative intention to exclude such use? Appellants contend that the use of the word "ballot," of itself, as found in that section, indicates that the legislators had in mind the paper ballot therein described, and by the use of that word intended to distinguish between a vote cast by such ballot and one that might be cast on a voting machine. We cannot concur in such view. It is unnecessary to repeat what has been said about the word "ballot" as found in our Constitution. The same reasoning in the main is applicable here. When the act was passed in 1911, the members of the general assembly knew (because it was a matter of common knowledge) that in a great number of the counties of the state voting machines were not in use, and in such counties voting was done under the provisions of the Australian ballot act. In such counties it was necessary to make provision for a form of ballot that would be applicable to the Australian act, or make independent provision for ascertaining the will of the voters. The form of the ballot prescribed by § 4 was adaptable to use under the general provisions of the Australian ballot law, and, as the voting machines were adapted for the use of ascertaining the will of the electors, nothing more was required than to provide for the application of the general election laws to elections under the Proctor act. Indeed, without such provision, it is probable that such intent would have been implied, for in the absence of an express intent to the contrary, it would be fairly presumable that the general assembly did not intend to burden the taxpayers of territory where voting machines were ready for service with the needless extra expense occasioned

by dispensing with their use; particularly so when it must be remembered that the justification for the great expense incurred by counties in purchasing such machines was the assumed fact that their use would not only prevent fraud and further safeguard the secrecy of the ballot, but that the machines would soon pay for themselves by reducing the number of election board. The use of voting machines was lawful.

3,393 "yes" and 2,931 "no" votes were cast. The names of 6,821 voters were entered on the poll lists, making a difference of 497 between the poll list number and the number of votes cast. The election commissioners canvassed the returns and certified that "yes" had a majority of 462 votes. The certificate contains a tabulation, by precincts, under the following headings: "Precinct No., Yes, No, Unaccounted, Total." Under the heading "unaccounted" was placed the number representing the difference between the total number of names on the poll lists in each precinct and the total number of yes and no votes cast. In each precinct there was an "unaccounted" number, ranging from 13 in the sixth to 72 in the eighth. The evidence shows that all the 6,821 persons whose names appear on the poll lists went behind the machine and into the voting booth, and operated the lever; when the voters came out most of them said they had voted; "lots of men" did not respond to the question put by the clerk, asking them if they had voted, but in all cases the clerk announced, "voted," when the voter passed out, and the word, "voted," was written after his name on the poll list. No voter demanded a ballot, though there were ballots at each precinct, designed for use if the machine failed to work.

The machines in controversy are known as the "Columbian machines." As shown by the evidence, the method of their operation is as follows: The end of a lever extends to the back of each voting machine. As the voter goes in he raises this lever and turns it over until the end extends toward the front; he then steps behind the steel end of the machine, and, to vote, turns a vote registering key to a perpendicular position; he then comes out, turning the lever over with him, and leaves it in the position he found it; this turning of the lever turns down the voting key he left standing, and registers the vote. If the voter turns the key to a perpendicular, and then turns it down, before turning over the lever, no vote is registered; if he fails to raise the key to the proper position, no vote is registered. He may turn the lever, go behind the machine, turn the lever back, and come out without attempting to vote. Another device registers the number of voters passing

behind the machine, but this has no connection with the vote-registering device. No one but the voter can know whether he attempts to vote. The machines were all inspected the day before the election, and found in proper working order, and were in like condition when the polls opened. There is no direct evidence that any machine failed in any particular to perform its proper function during the day of the election, and the trial court was warranted in finding that the discrepancy between the number of votes cast and the number of voters who passed behind the machines was not caused by any defect in the machines or working thereof. It is well known that frequently when questions are submitted at elections, a large percentage of the electors who enter the voting booths fail or refuse to cast any vote on such questions. At the last general election thousands of voters who were given ballots on which to vote for or against the calling of a constitutional convention failed to vote on the question. We have no compulsory voting laws in Indiana, and the only rational inference to be drawn from the evidence here is that 497 voters intentionally refrained from voting, or through ignorance of the working of the machines failed to so adjust the voting key as to register their intentions.

It is finally contended by appellants that in determining the vote basis the 497 "unaccounted" voters must be considered, in which event the 3,393 "yes" votes did not constitute a majority. In support of this proposition, they cite *Re Denny*, 156 Ind. 124, 51 L.R.A. 722, 59 N. E. 359, and a number of cases from other states.

Section 7 of the Proctor act provides that "*if a majority of the legal votes cast at said election shall be in favor of prohibiting the sale of intoxicating liquors as a beverage in the territory, . . . it shall thereafter be unlawful for said commissioners or any court to grant a license, . . . and the board . . . thereafter shall have no power . . . to hear . . . applications for license . . . in such territory until at a subsequent election . . . a majority of the legal voters . . . voting at such subsequent election shall vote against prohibiting the sale,*" etc. (Italics ours.)

The first clause we have italicized also appears in § 8 in describing "dry" territory, and in § 9 describing "wet" territory.

Appellants claim that a different rule for determining the result was not intended to apply to the two elections contemplated by § 7, and a reasonable construction of the entire section must result in concluding that it was intended that the majority contemplated is a majority of the electors tak-

ing part in the election. We cannot concur in this conclusion. While we are of the opinion that the same rule applies to the determination of the result of all elections held under the act, we are also of the opinion, on a consideration of all the provisions of §§ 7, 8, and 9, that the basis intended was the number of all the legal votes cast.

In the case of *Re Denny*, 156 Ind. 104, 59 N. E. 359, 51 L.R.A. 722, this court held that under § 1, art. 16, of our Constitution, which requires a constitutional amendment to be ratified by a majority of the "electors of the state," a proposed amendment submitted at a general election, at which more than 650,000 votes were cast for governor, and only 240,031 were cast for the amendment, failed of ratification, though only 144,072 votes were cast against it. The same doctrine was declared in *State v. Swift* (1880) 69 Ind. 505, and reaffirmed in the case of *Re Boswell* (1913) 179 Ind. 292, 100 N. E. 833. In view of the language used in article 16, § 1, of our Constitution, it might seem strange that the intent of the provision was ever considered doubtful, but we fail to see how these decisions have any just application to the provision in controversy here, viz., "a majority of the legal votes cast." Appellants cite *Lodoen v. Warren*, 118 Minn. 371, 126 N. W. 1031, which was decided under a statute which forbade the granting of license unless, at the election in controversy, a "majority of the votes cast" favored such granting. At the election, 321 ballots were cast. Of these 154 favored, and 149 opposed, the granting of license, while 17 blank ballots were deposited and one was not intelligibly marked. It was held that the proposition for license failed. Blank ballots and the unintelligible one were considered as a part of the aggregate.

Appellees cite *State ex rel. Short v. Clausen*, 72 Wash. 409, 45 L.R.A. (N.S.) 714, 130 Pac. 479, which held that under a statute requiring a proposition to issue bonds to be ratified by "three fifths of the qualified voters of the said city," ballots rejected as unintelligible or illegal should not be counted in determining the aggregate.

In *South Bend v. Lewis*, 138 Ind. 512, 37 N. E. 986, there was involved the question of the annexation of a town to that city. The question was voted on at the time of the regular city election. In *South Bend* there were cast 1,750 votes for annexation, and 237 votes against it. In the town there were 39 votes for and 6 against. The total number of votes cast for candidates at the same time, in the city, was over 5,000. The 1st section of the statute, authorizing the consolidation, provided that "a majority of the qualified voters of the town, and a ma-

jority of the qualified voters of the city, shall vote in favor thereof." The 6th section, relating to the canvass and return, provided that if "a majority of the votes given . . . are in favor of . . . annexation," a declaration of union should follow. This court held that only the voters who voted on the proposition could be considered in fixing the basis for the determination of the majority.

There appears much conflict in the conclusions reached by various courts of last resort as to the proper basis for calculation under statutes similar to the Minnesota, Washington, and Indiana ones above noted. In the monographic note to *State ex rel. Short v. Clausen*, 45 L.R.A. (N.S.) pages 715 et seq., appears a comprehensive collection of authorities on the subject. In our judgment, by the greater weight of American authority, under statutes of the character indicated, blank and illegal ballots must be rejected in fixing the basis.

In this case, however, as we view the statute, it is essentially different from those above discussed, and eliminates from serious consideration important questions presented by those statutes or others of like import. This statute fixes the "legal votes cast" as the basis. Had the election been held by paper ballots instead of machines, it is manifest that a blank ballot cast could not be deemed a legal vote. If the voter honestly, but through ignorance or carelessness, failed to mark his ballot in substantial compliance with the provisions of § 4 of the act, the ballot deposited could not constitute a legal vote. And so with voting on the machine. One who through ignorance or carelessness, failed to so adjust the voting key as to register his choice, cannot be held to have cast a legal vote. In our opinion, under the provisions of the Proctor act, the decision of the trial court was correct, and its judgment is affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

CHARLES E. ALLEN, Admr., etc., of Albert H. Bird, Deceased,
v.

PURITAN TRUST COMPANY.

(211 Mass. 409, 97 N. E. 916.)

Judgment — probate decree — fixing defalcation — effect.

1. A probate decree on an account filed

Note. — Liability of bank for failure to prevent misappropriation of funds by a fiduciary.

I. In general, 519.

by the successor and administrator of the administrator of an estate, who died after filing an account which was not acted upon, fixing the amount of the defalcation of the first administrator, cannot be collaterally attacked in an action by the successor to hold a bank liable to make good the loss for aiding the defalcation.

Estoppel — defalcation of administrator — aid of bank — failure to complain.

2. The liability of a bank which aids an administrator in appropriating money of the estate to his own use is not affected by the fact that the surety on the administrator's bond pays its liability thereon, and that the next of kin did not discover the defalcation, as they might have done by the exercise of diligence.

Same — failure to enforce indemnity — effect.

3. The failure of the surety to enforce an indemnity agreement given by an administrator to secure its signature to the administration bond does not affect the liability of one who aided the administrator in misappropriating assets of the estate.

Bank — administrator's account — misappropriation — knowledge.

4. A bank in which funds of an estate have been deposited by an administrator under express contract showing their source may be found to have had such knowledge of the misappropriation of the funds as will charge it with liability therefor, if it permits the administrator to transfer the funds of the estate by a series of checks to his individual account to meet his overdrafts upon such account.

Same — inquiry — feasibility.

5. A bank which permits an administrator to transfer funds of the estate to his individual account cannot escape liability for the loss to the estate by the fact that inquiry of the administrator might have elicited a reasonable explanation, if it could have learned of the misappropriation by pushing the inquiry until the truth was ascertained.

Same — breach of trust — liability.

6. A bank with knowledge that a fund on deposit with it is a trust fund cannot appropriate that fund for its private benefit, or, where charged with knowledge of the conversion, join in assisting another to appropriate it for his private benefit, without being liable to refund the money if the appropriation is a breach of trust.

Same — transfer of funds — absence of knowledge.

7. A bank is not liable for loss to an estate through the transfer of the funds by the administrator to his individual account, if it has no notice that the transfer was for the purpose of effecting a misappropriation of the funds.

Same — collecting checks — misappropriation — liability.

8. A bank which cashes and places to the individual account of an administrator checks upon funds of the estate in another bank cannot, after collecting them from the drawee, be held personally liable for misappropriation of the funds by the administrator.

(March 5, 1912.)

II. Where bank violates deposit contract, 522.

III. Where deposit is used to pay fiduciary's debt to the bank, 525.

IV. Where bank knows or is chargeable with knowledge of fraud.

a. In general, 526.

b. Where fiduciary was also an officer of the bank, 528.

c. Where bank permits the deposit of trust funds in the personal account of the fiduciary, 528.

d. What constitutes notice of intended misappropriation, 530.

I. In general.

The subject of this note presupposes that the fund on deposit was a trust fund; and for the purpose of this note it is assumed that the bank had knowledge of that fact.

There are three ways in which a bank may incur liability and be compelled to make good deposits that have been misappropriated by the fiduciary: (1) By a violation on its part of the contract, express or implied, between it and the owner of the fund. The reason for the bank's liability is based upon the general principle that the bank cannot discharge its obligation to a depositor except by payment in strict conformity to the contract of deposit. (2) By L.R.A.1915C.

appropriating the fund, either with or without the fiduciary's consent, to the payment of the latter's debt to the bank. The reason for the bank's liability is based upon the general theory that the owner of a fund may follow it into the hands of and recover it from any person who has not innocently given value therefor. The action for money had and received is an appropriate form of action in this class of cases. (3) By assisting the fiduciary to accomplish the misappropriation, the bank having knowledge, actual or constructive, that the fraud is being or about to be perpetrated by the fiduciary. The reason for the bank's liability is that it knowingly makes itself a party to a fraud, and must make good the loss that results from the misappropriation.

While the three grounds of liability are independent, it is clear that a given set of facts may be such that the bank might be held liable upon any one or all of the three grounds. This fact may account in some degree for the wrong interpretation that is frequently given to certain cases. *Duckett v. National Mechanics' Bank*, 86 Md. 400, 39 L.R.A. 84, 63 Am. St. Rep. 513, 38 Atl. 983, has been cited incorrectly in many cases. A check drawn to the order of the cashier "to deposit to the credit of H. W. C., trustee," was collected by the bank and the

RESERVATION by the Supreme Judicial Court for Suffolk County for the determination of the full bench of exceptions by both parties to the report of a master upon a bill filed to recover the amount of certain checks drawn on the defendant and on a certain bank by one as administrator of the estate of plaintiff's intestate, to his personal order, indorsed by him and deposited in his personal account with the defendant. Exceptions overruled.

The facts are stated in the opinion.

Messrs. E. K. Arnold and W. B. Luther for plaintiff.

Messrs. A. Whiteside and A. E. Pillsbury for defendant.

Braley, J., delivered the opinion of the court:

The master to whom the case was referred reports that William L. Baker, the first administrator of the estate of Albert H. Bird, opened two accounts with the defendant. By the terms of deposit as entered on its books, the first stood in his name individually, while the second, consisting wholly of moneys belonging to the estate, appeared in the name of the estate, followed by his own name as administrator. But while the money deposited could be disposed of by the defendant subject only to the obligation to pay an equivalent sum on demand, or to his order, the checks of the depositor

proceeds entered to the personal account of H. W. C., who drew upon it for his own purposes, and the bank was held liable. That the liability was based upon the fact that the bank had violated its contract as expressed upon the check is clear, as the court holds that the words upon the check were mandatory instructions as to the form of entry of the deposit. That the bank's violation of its contract is the basis of the liability is made still clearer by the fact that the bank was held to be not liable upon another check drawn the same as the one just mentioned, except the instructions were, "for deposit to credit of H. W. C., being the balance of purchase money due him as trustee from John R. Coale." The bank was held to have followed these instructions by depositing the proceeds of this check in the personal account of H. W. C., from which he drew it for his own use. But because of some language used by the court in the discussion the case has been cited in support of the third ground of liability in cases where there was no violation of contract alleged on the part of the bank. It is clear that cases where the deposit was made contrary to instruction, as was the case here, and cases where the bank paid out the money on orders or checks of the fiduciary for which he had no authority, or made in his private capacity, should all be based upon the first ground, and that such cases ought not to be followed where the facts show no violation of the deposit contract.

On the other hand, cases that should be based upon the third ground, *supra*, ought not to be based upon lack of authority in the fiduciary, *i. e.*, it should not be said that a fiduciary had general authority to draw a check, but that he had no authority to do so if the bank knew that he intended to misappropriate the proceeds. This knowledge of the bank ought not to be treated as a limitation upon his authority to draw the check, but it should be treated as the basis of an allegation that the bank was a party to the fraud. The confusion that arises out of a failure to observe this distinction is illustrated by a situation arising in New York. The treasurer of a corporation drew three checks against the

corporation's deposit, signing the corporate name and his own as treasurer in the exact manner in which its checks had all been signed, but these three checks were made payable to himself as an individual. He indorsed these checks as an individual and deposited them with a bank, not the drawee bank, in a personal account in his own name, upon which he drew for his own use, exhausting the personal deposit. That bank collected the corporation's checks from the drawee bank, which paid them without objection, and entered the proceeds to the credit of the personal account of the treasurer without further inquiry than what is implied in its presentation of the checks to the drawee bank for payment. The corporation brought against the bank which collected the checks and in which the personal deposit was made, an action for money had and received. (This form of action is appropriate where the plaintiff bases his case upon the second ground of liability stated *supra*, and of course implies that plaintiff expects to prove that the defendant received the benefit of the fund that was misappropriated.) A demurrer to the complaint was filed on the ground that it did not state facts sufficient to constitute a cause of action. The court, in *Havana C. R. Co. v. Knickerbocker Trust Co.* 198 N. Y. 422, L.R.A.1915B, 720, 92 N. E. 12, reversing 135 App. Div. 313, 119 N. Y. Supp. 1035, sustained the demurrer. The court pointed out that the defendant merely collected the checks, never had a beneficial interest in the fund, and had already paid out the deposit. It distinguished this case from other cases cited for plaintiff on the ground that in the other cases the fund had been used to pay fiduciary's debts to the bank. Thus the court's actual holding is plain. But it went on to consider another allegation in the complaint, *i. e.*, "that he [meaning the treasurer] had no right or authority to draw upon the account of the plaintiff or to use its funds except for the purpose of plaintiff's business, and in substance that these checks were not drawn for such purposes, as the defendant might have ascertained upon proper inquiry." (Just how this allegation was material in an action for money had and received is not

would not transfer the debt, or title to the debt, to the payee without the defendant's consent. *Carr v. National Security Bank*, 107 Mass. 45, 48, 9 Am. Rep. 6; *Gregory v. Merchants' Nat. Bank*, 171 Mass. 67, 69, 50 N. E. 520; *Heath v. New Bedford Safe Deposit & T. Co.* 184 Mass. 481, 483, 69 N. E. 215; *National Bank v. Millard*, 10 Wall. 152, 157, 19 L. ed. 897, 899; *Phoenix Bank v. Risley*, 111 U. S. 125, 28 L. ed. 374, 4 Sup. Ct. Rep. 322. The master finds that either to reimburse the defendant for overdrafts, or for his own private purposes, Baker, as administrator, transferred the money of the estate to his personal account by checks drawn to his own order, and that

it also accepted checks in similar form drawn on the funds of the estate deposited in a national bank, and credited him with the amounts. The report further states that there was no evidence to show that the administrator had authority in fact to make any of these transfers for his own use, and there having been none in law, the plaintiff, who is the second administrator of the Bird estate, having been partially reimbursed by the payment of the surety company on the first administrator's bond, brings this bill in equity to recover from the defendant the full amount of the embezzled deposits.

The second and third of the defendant's nine exceptions to the report having been

discussed. If the pleader meant to state a cause of action on the third ground above noted, he should not have alleged lack of authority to draw the check, but rather that defendant had participated in the perpetration of the fraud with constructive notice that a fraud was being committed. This would have raised the question whether knowledge of the fact that the defendant was transferring money from a corporate fund to his own personal account would be notice that a fraud was being committed.) The court apparently treated this allegation as an attempt to allege a cause of action on the ground stated as number one, *supra*, i. e., that the money had been paid out in violation of the deposit contract. It said that the responsibility for paying the money out on a check which the fiduciary had no authority to draw is upon the drawee bank; that the presentation of the check to that bank for payment and its payment thereof is all the inquiry needed in regard to the question of authority to draw the check, since the bank that holds the deposit is the agent of the depositor to determine whether or not a particular check had been drawn without authority. Therefore, conceding the truth of the allegation, as the court was compelled to do on demurrer, there was no cause of action stated as to the defendant bank. An action was then brought by the same plaintiff against the drawee bank, and it was held in *Havana C. R. Co. v. Central Trust Co.* L.R.A.1915B, 715, 123 C. C. A. 72, 204 Fed. 546, writ of certiorari denied in 234 U. S. 755, 58 L. ed. 1578, 34 Sup. Ct. Rep. 673, that, in the absence of knowledge that the treasurer had deposited the proceeds of the check in his own personal account, the drawee bank was not liable for having paid the checks without inquiry, for the reason that the treasurer had authority to draw checks in the form that these checks were drawn, so that the "face, form, and contents of the checks" were such that the drawee bank was not put upon inquiry as to the use that would be made of the proceeds, but the court distinctly states that if the defendant had had knowledge that the checks were being deposited to the credit of the officer's personal account, it would L.R.A.1915C.

have been put upon inquiry, and it would have been liable if it had made none. This court distinctly repudiated the theory of the state court that the drawee bank is the agent of the depositor to determine all questions of authority to draw the check, but it is evident that this court construed the term "authority" as having a much broader meaning than that ascribed to it by the state court. The Federal court said: "A check misused by a corporate officer cannot be regarded by a bank having notice of its misuse as an authorized order," and the whole context of the opinion shows that this court would consider a case where the bank paid out the deposit with notice of the fraudulent use that was being made of the money by the fiduciary, as properly based upon want of authority in the fiduciary to draw, rather than on the theory that the bank was privy to the fraud, as most courts do. See subd. IV. *infra*. It may not be wholly incorrect to use the term "authority" in this broad sense, but to do so is likely to confuse. To say that a corporate officer has authority to draw a check on the corporation's deposit, payable to himself as an individual, indorse the check and procure the collection thereof by the indorsee, but that he does not have the authority to do so if the drawee bank has knowledge that he intends to use the proceeds for his individual benefit, is, to say the least, making use of the term "authority" in two entirely different senses, and is therefore confusing. It is much more conducive to clearness to say that the law will not permit the bank to execute an authorized order if it knows that the fiduciary is using his authority to perpetrate a fraud, thereby making itself a party to the fraud. Then the case will properly turn upon the question as to whether the bank had constructive notice of the fraud.

Another objection to that broad use of the term "authority" is that when an attempt is made to base the fraud rule upon lack of authority the bank can, in perhaps every case, avoid liability by availing itself of another well-settled rule, as stated in *Mott Iron Works v. Metropolitan Bank*, 78 Wash. 294, 139 Pac. 36, where the court held that "it is not a general rule of law

expressly waived, we first consider the first, fifth, and sixth, which raise the questions whether the finding of the master that the decree of the probate court upon the second administrator's account was conclusive as to the amount of Baker's embezzlement, and his rulings that the plaintiff's right of recovery was not affected by the conduct of the surety company, or defeated by the failure of the next of kin of Bird to discover his misconduct and protect the estate, and the exclusion of evidence offered in support of these alleged defenses, were erroneous. The surety company was obliged to pay the amount fixed by the probate decree until the penal sum was exhausted, and Baker having filed only a first account on which no action was taken by the court until after

his death, the decree upon the second probate account presented by the administrator of Baker's estate is decisive as to the amount of the defalcation, and cannot be collaterally attacked in the present litigation. *Rev. Laws*, chap. 162, § 2; *Bennett v. Pierce*, 188 Mass. 186, 187, 74 N. E. 360; *Connors v. Cunard*, S. S. Co. 204 Mass. 310, 322, 26 L.R.A. (N.S.) 171, 134 Am. St. Rep. 662, 90 N. E. 601, 17 Ann. Cas. 1051. If it had not paid, the plaintiff could have sued, and the failure of the next of kin to ascertain that the estate was being misappropriated would not have defeated the suit. *Oberlin College v. Fowler*, 10 Allen, 545; *Hayes v. Hall*, 188 Mass. 510, 514, 74 N. E. 935; *Choate v. Arrington*, 116 Mass. 552, 556.

that an agent having general authority to indorse checks belonging to his principal may not assign title of such check to himself. Nor is it a general rule of law in such a case that, when an agent does indorse a check with his principal's name and offers it for deposit to his private account in a bank, that the bank must inquire as to his authority to so deposit it before accepting the check, on the pain of being liable to the principal for the proceeds of the check. An agent having general authority to indorse checks of his principal must, of necessity, have authority to direct the disposition of the proceeds of the checks. His authority in this respect can, of course, be limited, but, in the absence of limitations known to the person receiving checks so indorsed, such person has the right to assume that the agent's powers with reference to the disposition of the proceeds of the check are unlimited."

In *Toronto Club v. Imperial Trust Co.* 25 Ont. L. Rep. 330, where the secretary of a club was found to have been given general authority to indorse checks drawn to its order, so that a trust company that had collected many checks so indorsed, and placed the proceeds in his personal account, from which he had drawn for his personal use, could not be held liable on the ground that the checks were not properly indorsed, the court adopted the other theory and held that, under the peculiar circumstances, it had made itself a party to the fraud and therefore liable. See same case as cited under subd. IV. c, *infra*.

Cases turning upon the right of a husband to control the wife's deposit are not included in this note.

II. Where bank violates deposit contract.

Assuming that a bank has knowledge of the trust character of a fund, the relation of debtor and creditor exists between it and the *cestui que trust* for the full amount of the deposit, and it is not relieved of its obligation to pay the debt unless it has paid out the money in strict compliance L.R.A.1916C.

with the terms of the deposit contract. The fiduciary's agreements, orders, or instructions in reference to the fund are, if he acts in his individual capacity, simply those of a stranger. So it has been held that a bank is liable for the amount misappropriated by the fiduciary—

—where a clerk deposited money, taking a deposit certificate payable directly to his employer "or order on return of this certificate properly indorsed," both the clerk and the employer being utter strangers to the bank, the clerk having written in the bank's signature book his employer's name, followed by his own, thus: "N. Honig by A. Peyser," and having indorsed the certificate in the manner indicated in the signature book, withdrew the money thereon and fled before the employer had any knowledge whatever that the deposit had ever been made, *Honig v. Pacific Bank*, 73 Cal. 464, 15 Pac. 58;

—where the bank was designated by the court as the depository of a fund in the hands of a receiver, the order of court providing that the money could be drawn only upon checks by the receiver as such, and countersigned by the court, and the bank paid out the fund to the receiver, who appropriated it to his own use, without the checks having been countersigned by the court, *American Nat. Bank v. Fidelity & D. Co.* 129 Ga. 126, 12 Ann. Cas. 666;

—where a bank received a deposit, issuing a certificate in the name of a corporation, and afterward, at the request of the treasurer, and without notice to any other officer of the corporation, transferred the account to the personal account of the treasurer, who checked upon it for his own benefit, *Cushman v. Illinois Starch Co.* 79 Ill. 281;

—where the purchaser of property from a married woman deposited, under an agreement with her and a private banker, with the latter, a part of the purchase money to her credit, for the purpose of indemnifying the purchaser against a mortgage of a third party against the property, the banker, without her knowledge or consent, entered the deposit as that of her husband, and,

The plaintiff, if he preferred, could resort to the bond, rather than litigate the alleged equitable claims now presented against the defendant, which, if fully recovered, would have been insufficient to exonerate the surety. By relying on the bond he did not waive his right to proceed subsequently against the defendant, even if by agreement between them the expenses of the present litigation are to be borne by the surety, and if successful, the amount recovered is to be divided in certain proportions for its benefit, and the benefit of the estate. *O'Herron v. Gray*, 168 Mass. 573, 40 L.R.A. 498, 60 Am. St. Rep. 411, 47 N. E. 429. Moreover, the surety would have been subrogated to the excess, after the difference between the penalty of the bond and the

amount of the probate decree with the costs of recovery had been satisfied from any proceeds recovered from the defendant, and could have enforced this right by suit. *Johnson v. Bartlett*, 17 Pick. 477; *Hart v. Western R. Co.* 13 Met. 99, 46 Am. Dec. 719; *Wall v. Mason*, 102 Mass. 313, 316; *Thayer v. Finnegan*, 134 Mass. 62, 66, 45 Am. Rep. 285. It may be assumed that if the next of kin had been diligent the misconduct of the administrator might have been discovered earlier; but they are not shown to have known of the transactions or been possessed of any information which should have aroused their suspicion, and their inaction by failing to compel the administrator to account, or to inquire as to his administration of the estate, did not

after satisfying the mortgage out of the fund, applied the balance to a debt owed to the bank by the husband (This decision does not turn upon the fact that the husband had control of his wife's deposit as a fiduciary), *Robards v. Hamrick*, 39 Ind. App. 134, 79 N. E. 386;

—where the deposit was in the joint names of two trustees as such, and the bank paid out the money on a check signed by but one trustee, payable to a creditor of a company of which the drawer of the check was sole trustee, in payment of his claim, even though the name of the other trustee was added to the check after it was paid, in such manner and to indicate that his name had been signed by the trustee who drew the check by authority of the absent trustee, *Swift v. Williams*, 68 Md. 236, 11 Atl. 835;

—where a debt due to an estate was paid by means of a check drawn in favor of the cashier of a bank, upon which check the drawer placed a plain, positive order that the proceeds were to be deposited in the bank to the credit of the trustee of the estate as trustee, but the bank entered the deposit in the trustee's personal account, and the trustee drew out the money for his own use, *Duckett v. National Mechanics' Bank*, 86 Md. 400, 39 L.R.A. 84, 63 Am. St. Rep. 513, 38 Atl. 983;

—where the deposit was made in such manner as to show an intention on the part of the depositors, who were husband and wife, that the interest was to be paid to them or the survivor of them, and after the death of the survivor the fund was to go to certain designated persons, but after the death of the husband the bank paid out part of the corpus of the fund on the checks of the surviving wife, *Baker v. Baker*, 123 Md. 32, 90 Atl. 776;

—where a bank permitted the guardian of an administratrix to receive a deposit, due to the ward in her representative capacity, there being no debts against the estate of which she was administratrix, and she being the only heir, the guardian having squandered the fund, *Ryan v. North End Sav. Bank*, 168 Mass. 215, 46 N. E. 620; L.R.A.1915C.

—where the bank paid over to the assignee in bankruptcy of one who was county treasurer money belonging to the county, deposited with it in the name of the treasurer with the word "treasurer" added to his name, *Schuyler County v. Bank of Havana*, 5 Hun, 649, affirmed in 76 N. Y. 598;

—where a deposit was made in the name of an infant by her special guardian, in conformity to an order of court, and a certificate was issued payable to the infant, and delivered to the guardian; later the bank, at the instance of the guardian, canceled the certificate and issued a new one to him by name as "special guardian of *Lula E. Semcken*," after which the guardian checked out the fund to his own use (the original certificate was in strict conformity to the order of court, and the guardian had no authority to draw the money; hence, when the bank made the change, it violated the contract of deposit; although it did not see the order of court, it was held that the facts within its knowledge put it upon inquiry), *Walker v. State Trust Co.* 40 App. Div. 55, 57 N. Y. Supp. 525;

—where the bank had paid out money belonging to an estate, deposited in the name of the executor, with the word "executor" added to his name, to the receiver in bankruptcy of the executor, upon the demand of the receiver, *Scrantom v. Farmers' & Mechanics' Bank*, 24 N. Y. 424;

—where an agent with authority to collect rents for his principal received a check in payment of rent, made payable to the principal, indorsed the same to himself for deposit, signing the principal's name as well as his own, and indicating the fact that the principal did not sign personally, deposited the check to his own personal credit, and later checked out the proceeds, it being held that his authority to collect rent did not give him authority to indorse the check, *Robinson v. Chemical Nat. Bank*, 86 N. Y. 404;

—where a check upon one bank was made payable to another, sent to the latter by the agent of the drawer, who caused the bank to enter the deposit in the agent's

mislead the defendant, with whom they sustained no contractual relations. *Stiff v. Ashton*, 155 Mass. 130, 29 N. E. 203. The agreement of indemnity which Baker gave to procure the contract of suretyship having been for the protection only of the surety, its failure to enforce it does not estop the plaintiff from pursuing the defendant if a participator in the administrator's betrayal of the trust.

But if these exceptions are not tenable, the fourth, seventh, eighth, and ninth exceptions present the principal questions upon which the defendant's liability depends. It broadly contends that the master's findings that on and after the date of the first overdraft, which was paid by a check drawn on the estate's account, the defendant, if

judged from the point of view of a reasonably prudent banker, had knowledge of such facts as should have led it to suspect that the funds of the estate were being wrongly used, were unwarranted either in law or upon the evidence, and that it cannot be held for any part of the moneys taken by the administrator. The personal property of the estate was held by him in a fiduciary capacity, and the source and nature of the respective accounts were fully disclosed by the contract. *Robins v. Hope*, 57 Cal. 493, 497; *Hayes v. Hall*, 188 Mass. 510, 511, 74 N. E. 935; *J. G. Brill Co. v. Norton & T. Street R. Co.* 189 Mass. 431, 2 L.R.A.(N.S.) 525, 75 N. E. 1090; *Quinn v. Burton*, 195 Mass. 277, 279, 81 N. E. 257. And in the discharge of their several du-

name as trustee for the drawer, and later checked out the proceeds and appropriated the money to his own use (the agent had been instructed to make the deposit in the name of the principal; it was held that the fact that the check was made payable to the bank, and not to the agent, was sufficient to inform the bank that the drawer did not wish the deposit to be made in the name of the agent in any capacity), *Sims v. United States Trust Co.* 103 N. Y. 472, 9 N. E. 605;

—where the president of a corporation, who had no authority to draw checks upon its funds or to indorse checks payable to it, those duties having been assigned to its treasurer, indorsed checks payable to it, had the bank upon which they were drawn deposit the proceeds to his personal account, and then drew out the money for his own use, *Niagara Woolen Co. v. Pacific Bank*, 141 App. Div. 265, 126 N. Y. Supp. 890;

—Where an employee had authority to stamp a special indorsement upon checks payable to his employer, which special indorsement made the checks payable to a particular bank, but the employee had no authority to indorse in any other way or to any other persons, and the defendant, the drawee bank, accepted checks indorsed as per authority, but instead of paying the proceeds to the indorsee, entered the amount of the checks as credits to the personal account of the employee, who drew checks against the account and used all the fund as his own, *Deri v. Union Bank*, 65 Misc. 531, 120 N. Y. Supp. 813;

—where the bank paid the deposit belonging to one who had been adjudged incompetent to the party named by the court as the committee in lunacy before the party had qualified for the appointment by filing the bond required by the order of the court, upon a check signed by such person as committee, *Thayer v. Erie County Sav. Bank*, 160 App. Div. 300, 145 N. Y. Sup. 808;

—where money belonging to W. K. was deposited in the bank by V. K., the entry L.R.A.1915C.

being "in account with W. K., by V. K., Dr.," etc., and drawn out by V. K. on checks signed, "W. K. by V. K.," *Kerr v. People's Bank*, 158 Pa. 305, 27 Atl. 963;

—where an agent who had no authority to draw checks upon his principal's fund, but had authority to indorse checks in the principal's name, where they were made payable to the principal, indorsed such a check, deposited it to the principal's credit, and was permitted by the bank to transfer the amount of the check from the principal's account to his own account, from which he drew the money for his own use (this was held to be equivalent to drawing a check upon the principal's fund), *Mott Iron Works v. Metropolitan Bank*, 78 Wash. 294, 139 Pac. 36;

—where the bank paid out a partnership fund upon checks signed by and in the name of an individual partner (but it was here held that if the bank could show that the money was all used in the partnership business for the benefit of the firm, it would not be liable), *Coote v. Bank of United States*, 3 Cranch, C. C. 50, Fed. Cas. No. 3,203;

—where the president of a corporation, who had no authority to draw checks against its deposit, fraudulently wrote his name in the signature book, showing the manner in which the checks were to be signed, and drew checks thereon for his personal benefit with the knowledge on the part of the bank that he did not have the authority (as a fact, however, it was here found that the bank did not have the knowledge, and was therefore not liable), *Fulton Bank v. New York & S. Canal Co.* 4 Paige, 127;

—where the bank paid a check drawn upon the trust fund by one other than the trustee by canceling a debt owed to the bank by the drawer of the check, who was interested in the estate, but had no authority to draw on the fund, *Bridgman v. Gill*, 24 Beav. 302;

—where the plaintiff sent money to the bank for deposit to account of "F., trustee," and it was credited to the account of "F.," who drew out the money and used the same, F. being at the time cashier of the bank

ties, which were fully detailed by the master, the officers and agents of the defendant were charged with knowledge of the scope and effect of the various entries relating to the deposit as shown on the defendant's books. *Foster v. Essex Bank*, 17 Mass. 479, 489, 9 Am. Dec. 168, 1 Am. Neg. Cas. 502; *Elliott v. Worcester Trust Co.* 189 Mass. 542, 545, 75 N. E. 944; *East Hartford v. American Nat. Bank*, 49 Conn. 539; *Bundy v. Monticello*, 84 Ind. 119; *American Exch. Nat. Bank v. Loretta Gold & S. Min. Co.* 165 Ill. 103, 56 Am. St. Rep. 233, 46 N. E. 202; *Cutler v. American Exch. Nat. Bank*, 113 N. Y. 693, 4 L.R.A. 328, 21 N. E. 710; *Duncan v. Jaudon*, 15 Wall. 185, 21 L. ed. 142; *Bodenham v. Hoskyns*, 2 DeG. M. & G. 903, 21 L. J. Ch. N. S. 864, 16 Jur. 721;

Pennell v. Deffell, 4 De G. M. & G. 372, 1 Eq. Rep. 579, 23 L. J. Ch. N. S. 115, 18 Jur. 273, 1 Week. Rep. 499; *Bailey v. Finch*, L. R. 7 Q. B. 34, 4 L. J. Q. B. N. S. 83, 25 L. T. N. S. 871, 20 Week. Rep. 294. If the primary relation was that of debtor and creditor, nevertheless, on the face of a specific contract the money belonged to the estate, and the defendant must be held to have known that if the administrator appropriated it to his own use, the appropriation would be a breach of his trust. *Shaw v. Spencer*, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115; *McCarthy v. Provident Inst. for Sav.* 159 Mass. 527, 34 N. E. 1073; *O'Herron v. Gray*, 168 Mass. 573, 40 L.R.A. 498, 60 Am. St. Rep. 411, 47 N. E. 429; *Gerard v. McCormick*, 130 N. Y. 261, 14

and transacting the business for the bank, *Ihl v. Bank of St. Joseph*, 26 Mo. App. 129.

III. Where deposit is used to pay fiduciary's debt to the bank.

The broad rule that misappropriated trust funds may be followed and recovered from the one receiving the benefit thereof without value is frequently applied so as to hold a bank liable where the trust funds have, with or without the consent of the fiduciary, gone to pay a debt owed by the fiduciary to the bank, even though there may have been no technical violation of the deposit contract.

The question of the bank's liability where it appropriates the fund to the payment of the fiduciary's debt without knowledge of the trust character of the fund, as well as what constitutes notice that the fund is a trust fund, is covered in the note to *Shotwell v. Sioux Falls Sav. Bank*, L.R.A.1915A, 715, and notes to which reference is there made. In the present note knowledge of the fiduciary character of the fund is assumed, all cases where the bank did not have such knowledge being excluded.

On the question as to the agent's power to use property of his principal in payment of his own debt, see note to *Gerard v. McCormick*, 14 L.R.A. 234.

As to right of one who takes commercial paper of a corporation in payment of, or security for, an individual debt of an officer, see note to *Kenyon Realty Co. v. National Deposit Bank*, 31 L.R.A.(N.S.) 169.

Where the bank applies to the payment of the fiduciary's individual indebtedness to it, either with or without the consent of the fiduciary, trust funds on deposit, it is liable and must replace the amount so appropriated. *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 26 L. ed. 693; *Walker v. Manhattan Bank*, 25 Fed. 247, reversed in 130 U. S. 267, 32 L. ed. 959, 9 Sup. Ct. Rep. 519; *Union Stock Yards Nat. Bank v. Moore*, 25 C. C. A. 150, 49 U. S. App. 153, 79 Fed. 705; *Sayre v. Weil*, 94 Ala. 466, 15 L.R.A. 544, 10 So. L.R.A.1915C.

546 (but, as between the bank and the fiduciary, the agreement is valid); *First Nat. Bank v. Nelson*, 105 Ala. 180, 16 So. 707 (a check payable to the principal or bearer applied by the bank to pay the debt of the agent); *East Hartford v. American Nat. Bank*, 49 Conn. 539 (rule applied where a town treasurer had paid to the bank out of the town fund, town notes given to the bank by himself as treasurer, without authority to do so, for the purpose of covering shortages caused by his own embezzlements, the bank accepting the notes in good faith; the notes were held to represent his individual indebtedness to the bank); *Munnerlyn v. Augusta Sav. Bank*, 94 Ga. 356, 21 S. E. 575 (the rule acknowledged but not applied for the reason that the trustee brought the action, joining with him the *cestui que trust*, and the suit was regarded as having been brought by the trustee); *American Trust & Bkg. Co. v. Boone*, 102 Ga. 202, 40 L.R.A. 250, 66 Am. St. Rep. 167, 29 S. E. 182; *State Nat. Bank v. Payne*, 56 Ill. App. 147; *Bundy v. Monticello*, 84 Ind. 119; *Robards v. Hamrick*, 39 Ind. App. 134, 79 N. E. 386; *Washbon v. Linscott State Bank*, 87 Kan. 698, 125 Pac. 17 (bank aided the treasurer of a lodge to conceal his defalcations; permitted and paid overdrafts on the fund, and when his accounts were to be audited issued to him a deposit certificate for the shortage, payable to the lodge, and took from him notes as collateral for the return of the certificate; after the audit the certificate was returned and canceled, the collateral returned to him, and the shortage reappeared; the court held that a loan had been made to him personally upon the collateral, and that he paid it out of the lodge's fund by permitting the bank to cancel its deposit certificate); *Tough v. Citizens' State Bank*, 89 Kan. 583, 132 Pac. 174 (the principal not applied, as the bank had no knowledge that the deposit was a trust fund); *Farmers' & T. Bank v. Fidelity & D. Co.* 108 Ky. 384, 56 S. W. 671 (funds appropriated were used to pay a note given by the trustee without authority, in the name of the estate; so that the debt paid was re-

L.R.A. 234, 29 N. E. 115; Central Nat. Bank v. Connecticut Mut. L. Ins. Co. 104 U. S. 54, 26 L. ed. 693. The money due to the defendant for overdrafts was paid with its knowledge and consent by checks drawn on the administrator's account, which were in excess of the debt, and were correspondingly credited in his private account. If, as the defendant urges, the legal title to the personal property of the estate was in the administrator, the beneficial interest was in the next of kin of the intestate, who not only could demand, but could enforce, an accounting. Rev. Laws, chap. 150; Bard v. Wood, 3 Met. 74; Choate v. Jacobs, 136 Mass. 297; Silsby v. Young, 3 Cranch, 249, 2 L. ed. 429. And the nature of the fund was not changed by its having been divert-

ed, and placed to the personal credit of the administrator. Morrill v. Raymond, 28 Kan. 415, 42 Am. Rep. 167; Central Nat. Bank v. Connecticut Mut. L. Ins. Co. 104 U. S. 54, 26 L. ed. 693; Union Stock Yards Nat. Bank v. Gillespie, 137 U. S. 411, 34 L. ed. 724, 11 Sup. Ct. Rep. 118; Bailey v. Finch, L. R. 7 Q. B. 34, 41 L. J. Q. B. N. S. 83, 25 L. T. N. S. 871, 20 Week. Rep. 294.

It is not a sufficient answer, that if inquiry had been made, doubtless the administrator might have given an explanation which would have appeared to be reasonable. Having notice of the trust, the defendant was dealing with trust funds, and was bound by the information which it could have obtained if an inquiry had been pushed until the truth had been ascertained.

garded as his personal debt); First Nat. Bank v. Greene, — Ky. —, 114 S. W. 322 (deposit entered to credit of personal account of the guardian, although bank was instructed to pass it to a separate account); First Nat. Bank v. Eastern Trust & Bkg. Co. 108 Me. 79, 79 Atl. 4 (money was deposited in the name of the fiduciary, but the real owner had notified the bank of his ownership, and explained his title); First Denton Nat. Bank v. Kenney, 116 Md. 24, 81 Atl. 227, Ann. Cas. 1913B, 1337 (principle not applied because bank had no knowledge of the trust character of the fund); Loring v. Brodie, 134 Mass. 453 (funds appropriated to payment of notes which trustee, without authority, had given in name of estate, and the proceeds of which he appropriated to his own use); Burtnett v. First Nat. Bank, 38 Mich. 630; State Bank v. McCabe, 135 Mich. 479, 98 N. W. 20 (principle stated, but not applied); McStay Supply Co. v. Stoddard, 35 Nev. 284, 132 Pac. 545 (agent deposited principal's money in his personal account, but bank had knowledge as to the true owner); Armour-Cudahy Packing Co. v. First Nat. Bank, 69 Miss. 705, 11 So. 29 (applied to payment of personal overdrafts); Johnson v. Payne & W. Bank, 56 Mo. App. 257 (even if the court has made an allowance to the guardian from the estate of the ward, the bank cannot appropriate the amount of the allowance to the payment of the guardian's debt to it if, on the whole, the guardian is indebted to the ward); Clark v. First Nat. Bank, 57 Mo. App. 277; Ward v. City Trust Co. 192 N. Y. 61; Bank of Greensboro v. Clapp, 76 N. C. 482; Emerald Farmers' Elevator Co. v. Farmers' Bank, 20 N. D. 270, 29 L.R.A.(N.S.) 567, 127 N. W. 522; Fidelity & D. Co. v. Rankin, 33 Okla. 7, 124 Pac. 71; Walters Nat. Bank v. Bantock, post, 531; First Nat. Bank v. Peisert, 2 Pennyp. 277; Pittsburg v. First Nat. Bank, 230 Pa. 176, 79 Atl. 406; Custer County v. Walker, 10 S. D. 594, 74 N. W. 1040 (applied to payment of personal note of treasurer, proceeds of which had been deposited to make good prior default); Anderson v. Walker, 93 L.R.A.1915C.

Tex. 119, 53 S. W. 821 (substantially same situation as in preceding case); Interstate Nat. Bank v. Claxton, 97 Tex. 569, 65 L.R.A. 820, 104 Am. St. Rep. 885, 80 S. W. 604; Boyle v. Northwestern Nat. Bank, 125 Wis. 498, 1 L.R.A.(N.S.) 1110, 110 Am. St. Rep. 851, 103 N. W. 1123, 104 N. W. 907; Commercial & Agri. Bank v. Jones, 18 Tex. 811; Anderson v. Walker, 93 Tex. 119, 53 S. W. 821; United States Fidelity & G. Co. v. Adoue, 104 Tex. 379, 37 L.R.A.(N.S.) 409, 137 S. W. 648, 138 S. W. 383, Ann. Cas. 1914B, 667 (bank had issued a certificate of deposit in the name of the estate, for which the guardian deposited his own personal securities, thus replacing funds he had already embezzled from the estate; after the certificate had served the purpose of concealing the shortage, the bank canceled it and returned the securities to the guardian); Miller v. Hobdy, — Tex. Civ. App. —, 159 S. W. 96; Bradfield v. Bank of Ottawa, 19 Ont. Week. Rep. 671 (cashier, who was acting as confidential adviser of an executrix, persuaded her to lend the trust money to an insolvent debtor of the bank); Ex parte Kingston, L. R. 6 Ch. 632, 40 L. J. Bankr. N. S. 91, 25 L. T. N. S. 250, 19 Week. Rep. 910; Foxton v. Manchester & L. Dist. Bkg. Co. 44 L. T. N. S. 406; Pannell v. Hurley, 2 Colly. Ch. Cas. 241 (the trust account was drawn upon by the trustee, and placed to his personal account, which was overdrawn at the time); Bodenham v. Hoskyns, 2 De G. M. & G. 903, 21 L. J. Ch. N. S. 864, 16 Jur. 721.

IV. Where bank knows or is chargeable with knowledge of fraud.

a. In general.

That the bank had knowledge of the trust character of the fund is here assumed, so that cases where the bank was held to be not liable because of a lack of knowledge of the trust character of the fund are not included. Cases like Frazier v. Erie Bank, 8 Watts & S. 18, and First Nat. Bank v. Bache, 71 Pa. 213, where a person other

Shaw v. Spencer, 100 Mass. 382, 389, 391, 97 Am. Dec. 107, 1 Am. Rep. 115; Loring v. Brodie, 134 Mass. 453, 459; Ex parte Kingston, L. R. 6 Ch. 632, 40 L. J. Bankr. N. S. 91, 25 L. T. N. S. 250, 19 Week. Rep. 910. The transformation of the account in the manner adopted was furthermore a voluntary participation on the part of the defendant with an agreement to credit and pay the amount of the excess to Baker individually. The defendant places much reliance upon the case of Gray v. Johnston, L. R. 3 H. L. 1, 18 Week. Rep. 842, where a single check on the funds of the estate having been drawn by the executrix, not to her individual order, but to the order of the firm to whose membership she succeeded on the death of her husband, the defendant was

held not to be responsible for the misappropriation, as it might well have been assumed by the bank that the check was properly given in settlement of the accounts between the partnership and her husband's estate. The decision in Fillebrown v. Hayward, 190 Mass. 472, 77 N. E. 45, rests upon the ground that the defendant received the checks of the treasurer drawn on funds of the corporation in payment of his individual debts in good faith, and without any actual knowledge or information which should have put her upon inquiry as to the source from which he obtained the sums sent her. So also in Batchelder v. Central Nat. Bank, 188 Mass. 25, 73 N. E. 1024, the single justice found that the bank had no reason to believe that the trustee, who de-

than the depositor claims the deposit, and notifies the bank that the depositor was his agent, etc., are not included in the present note. See note to Jaselli v. Riggs Nat. Bank, 31 L.R.A. (N.S.) 763, as to one phase of the question involved in cases of this class; and as to the effect of deposit by unauthorized person to credit of owner of the fund, see note to Patek v. Patek, 35 L.R.A. (N.S.) 461.

Even though there was no technical violation of the deposit contract and the fund was not appropriated to the payment of the bank's claims against the fiduciary as an individual, a bank is liable to make good the amount that a fiduciary has misappropriated, if, knowing that the fund was being or about to be misappropriated, it acted in such manner as to enable the fiduciary to misappropriate the fund, its action being such as to make it a privy to the fraud. The courts appear to be unanimous in support of this general principle. But it will be seen, infra, that they are not in complete harmony as to what particular actions on the part of the bank will make it a participant in the fraud. There is also some dissension both upon the question of what constitutes a misappropriation, and of what constitutes notice to the bank of an intended misappropriation.

The question as to whether the rule here under discussion is applicable where the bank has derived no benefit from the fund has been discussed by the courts. But the discussion in most cases appears to be confined to "benefits" such as the bank would derive by appropriating the fund to the payment of some debt due to the bank, not properly payable out of the fund. Such was the case in Lowndes v. City Nat. Bank, 82 Conn. 8, 22 L.R.A. (N.S.) 408, 72 Atl. 150, where the cashier of the bank, who was also the fiduciary, paid drafts, etc., of a corporation of which he was manager, out of the trust fund, the drafts, etc., never having been entered against the corporation's account, although they had been paid by the bank. The court held that there was sufficient benefit to the bank, or that it would be liable independently of the L.R.A.1915C.

question of benefits. So, in Newburyport v. First Nat. Bank, 216 Mass. 304, 103 N. E. 782, it is held that a bank having no pecuniary interest in the transaction is not liable where it pays out money on deposit on the fraudulent order of the person who, by the terms of the deposit, had a right to draw on the account, unless it is a privy to the fiduciary's fraud, and the court declares that this is the holding in ALLEN v. PURITAN TRUST Co. Practically all of the cases disclose the fact that being privy to the fraud constitutes an independent ground for the decision. There are, however, some cases in which "benefits" accrue to the depository other than those derived from the receipt of the fund in payment of a debt to it. Such is the case in Toronto Club v. Imperial Trust Co. 25 Ont. L. Rep. 330, where the court referred to the fact that the defendant was not an ordinary bank, but a trust company that received all interest above 4 per cent on the time deposit, making the defendant a participator in the profits of the transaction. But this fact was not referred to as one necessary to the liability of a bank in all cases, but as a circumstance by reason of which it would be required to maintain a higher degree of care than it would if it derived no benefit from the transaction. The conclusion is that the rule here stated may be applied where the bank receives no benefit from the transaction, but where it does receive benefits, it must exercise a greater degree of care if it would avoid liability.

This rule as to benefits was clearly stated by the lord chancellor in Gray v. Johnston, L. R. 3 H. L. 1, as follows: "In order to hold a banker justified in refusing to pay a demand of his customer, the customer being an executor, and drawing a cheque as an executor, there must, in the first place, be some misapplication, some breach of trust, intended by the executor, and there must, in the second place, as was said by Sir John Leach, in the well-known case of Keane v. Robarts, 4 Madd. Ch. 357, 20 Revised Rep. 306, be proof that the bankers are privy to the intent to make this misapplication of the trust funds. And to that

posited the check in his individual account, which was payable to his own order as trustee, was acting dishonestly, while in *Newburyport v. Spear*, 204 Mass. 146, 134 Am. St. Rep. 652, 90 N. E. 522, the city treasurer having paid his own debt by a check drawn against the city's funds, it was said that "in the absence of suspicious circumstances the bank had no duty to concern itself with that subject."

In the present case, however, during a period from January 25, 1902, to December 23, 1902, there were numerous checks differing in amount, but each of the same general tenor and fraudulent nature, and two distinct accounts plainly indicating the different capacities in which Baker transacted business with the defendant. The payments

to itself, with the accompanying transfers from the estate's account to his private account, could not have been accomplished without the active instrumentality of the defendant. If the doctrine of constructive notice has no application where there is no duty of inquiry resting upon the banker, the fifth and sixth general findings establish the fact that the unlawful transfers were made under such conditions that the defendant was charged with knowledge of the irregularities. *Kennedy v. Green*, 3 Myl. & K. 699, 21 Eng. Rul. Cas. 820; *Wood v. Carpenter*, 101 U. S. 135, 25 L. ed. 807. The findings, having been amply warranted by the master's statement of the evidence, are decisive as to the defendant's knowledge, as well as of its participation, for which it

I think I may safely add, that if it be shown that any personal benefit to the bankers themselves is designed or stipulated for, that circumstance, above all others, will most readily establish the fact that the bankers are in privity with the breach of trust which is about to be committed." But the court in this case was speaking of a benefit such as would be derived by the bank if it appropriated the fund to the payment of its claim against the fiduciary.

And, as noted under subd. I. *supra*, there is some confusion as to the ground upon which particular cases are properly based. Cases where there was clearly a violation of the deposit contract, or where the fund was taken to pay the fiduciary's debt to the bank, are not included here even though the court may have discussed the principle underlying the cases here cited. Only cases that could not be based upon the grounds discussed in subds. II. and III. *supra*, are here included.

b. Where fiduciary was also an officer of the bank.

On the ground that the bank by its actions made itself a party to the fraud, it has been held that it is liable to replace the misappropriated funds—

—where the administrator of an estate, who was also cashier of the bank, drew a check upon the account of the estate, which check was used to pay overdrafts against the account of a corporation of which the cashier was manager, which overdrafts had as yet neither been paid by the bank nor charged to the corporation's account, *Lowndes v. City Nat. Bank*, 82 Conn. 8, 22 L.R.A. (N.S.) 408, 72 Atl. 150;

—where the fiduciary, who was also cashier of the bank, drew checks against a special personal account, in favor of one who was connected with a corporation of which the cashier was manager, certified them payable at another bank, at a time when there were not sufficient funds in his special account to pay them, and later transferred sufficient trust funds to his special account to meet the certified checks, the transfer L.R.A.1915C.

being accomplished by checks regularly drawn upon the trust fund, payable to himself personally, and properly indorsed by him, *Ibid.*;

—where the fiduciary, who was also cashier of the bank, drew a check upon the trust account in favor of another bank, presented it to the drawee bank and obtained a deposit certificate therefor, which certificate he indorsed and deposited with his own bank in a personal account, and later checked it out for his own uses, *Ibid.*;

—where the money was given to the president of the bank to deposit for the owner, but was deposited in the name of the president as attorney for the owner, and afterwards it was paid out to the use of the president on his check, after which he absconded, *Smith v. Anderson*, 57 Hun, 72, 10 N. Y. Supp. 278;

—where a draft payable to a bank was mailed to its president, for the purpose of paying for stock of the bank which was supposed to be about ready for issue, indorsed by the bank, collected by it, and the proceeds entered as a deposit in the name of its president as trustee, who drew out the money on his check as such trustee, and used it for his own use, *First State Bank v. Shannon*, — Tex. Civ. App. —, 159 S. W. 398.

c. Where the bank permits the deposit of trust funds in the personal account of the fiduciary.

It has been held that if the bank permits the deposit of the trust fund, knowing it to be such, in the personal account of the fiduciary, it is liable for his misappropriation on the theory that it is privy to the fraud. (This holding is based either upon the theory that such deposit is, in and of itself, a misappropriation, or upon the theory that the act is sufficient notice to the bank of the fact that the fiduciary intends to misappropriate the fund); *Havana C. R. Co. v. Central Trust Co.* L.R.A. 1915B, 715, 123 C. C. A. 72, 204 Fed. 546, writ of certiorari denied in 234 U. S. 755, 58 L. ed. 1578, 34 Sup. Ct. Rep. 673 (an indirect

must be held accountable. *School Dist. v. First Nat. Bank*, 102 Mass. 174, 176; *Merchants' Nat. Bank v. Haverhill Iron Works*, 159 Mass. 158, 34 N. E. 93; *National Revere Bank v. Morse*, 163 Mass. 383, 385, 40 N. E. 180; *J. Regester's Sons Co. v. Reed*, 185 Mass. 226, 227, 70 N. E. 53.

The principle governing the defendant's liability is that a banker who knows that a fund on deposit with him is a trust fund cannot appropriate that fund for his private benefit, or, where charged with notice of the conversion, join in assisting others to appropriate it for their private benefit, without being liable to refund the money if the appropriation is a breach of the trust. *Shaw v. Spencer*, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115; *Fisher v. Brown*,

104 Mass. 259, 261, 6 Am. Rep. 235; *American Exch. Nat. Bank v. Loretta Gold & S. Min. Co.* 165 Ill. 103, 56 Am. St. Rep. 233, 46 N. E. 202; *American Nat. Bank v. Fidelity & D. Co.* 129 Ga. 126, 58 S. E. 867, 12 Ann. Cas. 666; *Swift v. Williams*, 68 Md. 236, 11 Atl. 835; *Duckett v. National Mechanics' Bank*, 86 Md. 400, 39 L.R.A. 84, 63 Am. St. Rep. 513, 38 Atl. 983; *Bank of Greensboro v. Clapp*, 76 N. C. 482; *Ihl v. Bank of St. Joseph*, 26 Mo. App. 129, 141; *Commercial & Agri. Bank v. Jones*, 18 Tex. 811; *East Hartford v. American Nat. Bank*, 49 Conn. 539; *Bundy v. Monticello*, 84 Ind. 119; *Ward v. City Trust Co.* 192 N. Y. 61, 84 N. E. 585; *Farmers' Loan & T. Co. v. Fidelity Trust Co.* 30 C. C. A. 247, 56 U. S. App. 729, 86 Fed. 541; *Central Nat. Bank v.*

holding; see same case, as cited under subd. I. supra, showing that the holding would be based upon the theory that the fiduciary did not have authority); *Harris & Co. v. Chipman*, 84 C. C. A. 429, 156 Fed. 929 (an indirect holding where actual notice of fraud was alleged); *Farmers' Loan & T. Co. v. Fidelity Trust Co.* 30 C. C. A. 247, 86 Fed. 541, 56 U. S. App. 729 (the fact that agent asked for certificate of deposit in his own name of funds which the bank knew belonged to the principal was held to be notice to the bank that the agent intended to misappropriate the fund); *Bank of Hickory v. McPherson*, 102 Miss. 852, 59 So. 934 (here a check payable to "G. B. H., Commissioner," was properly indorsed and deposited in his personal account, from which it was drawn for the use of G. B. H. personally); *United States Fidelity & G. Co. v. People's Bank*, 127 Tenn. 720, 157 S. W. 414 (this decision is based upon the theory that such an entry of a trust fund is, in and of itself, a conversion of the fund); *United States Fidelity & G. Co. v. Adoue*, 104 Tex. 379, 37 L.R.A.(N.S.) 409, 137 S. W. 648, 138 S. W. 383, Ann. Cas. 1914B, 667. There are several cases sometimes erroneously cited to this proposition that have been cited under subd. II. supra. They are not in point here for the reason that the entry of the deposit in the personal account of the fiduciary constituted a violation of the deposit contract, or of positive instructions to enter it in another form, *Duckett v. National Mechanics' Bank* (see citation under subd. II. supra) is perhaps most frequently cited erroneously.

And it has been held that a bank is liable where a deposit for the special business of and belonging to a copartnership firm was transferred to the personal account of one of the members of the firm, by means of checks drawn by him, and then checked out by him and used in his own private business, the bank knowing that he was using the firm's money in stock speculations, and making no inquiry of the other members of the firm regarding his right to do so. *Billings v. Meigs*, 53 Barb. 272.

Also the bank has been held liable where

it paid without question checks on a principal's fund, drawn by the agent, and the bank had notice that the proceeds were being used by him in speculating in cotton futures, and that the sole purpose of the fund was to enable the agent to pay for spot cotton purchased by him for his principal. *Miller v. Hobdy*, — Tex. Civ. App. —, 159 S. W. 96.

In *Toronto Club v. Imperial Trust Co.* 25 Ont. L. Rep. 330, a trust company that received and placed to the credit of the time deposit of the secretary of a club the proceeds of numerous checks drawn by members of the club, payable to the club, and authoritatively indorsed by the secretary, was held liable to the club for the amount that the secretary had withdrawn from the deposit for his own use. But in this case the court pointed out that the defendant was a participator in the benefits of the transaction, also that there was a great number of the checks. On the latter point the court said: "And, while one or more of the plaintiff's checks might have passed with impunity, it seems to me quite impossible so to regard the large and almost continuous stream of them received in such a short space of time, without inquiry from Harbottle himself even, so far as appears, as to how he claimed to have become entitled to deal with them as his own."

But the weight of authority supports the proposition that the mere act of entering trust funds in the personal account of the fiduciary, knowing them to be trust funds, will not make the bank liable for the fiduciary's later misappropriation thereof. *United States Fidelity & G. Co. v. First Nat. Bank*, 18 Cal. App. 437, 123 Pac. 352 (it was here held to be legal to deposit trust funds in the personal account of the trustee, hence the bank is not liable for permitting such deposit); *Goodwin v. American Nat. Bank*, 48 Conn. 550; *Batchelder v. Central Nat. Bank*, 188 Mass. 25, 73 N. E. 1024 (it was here held that the bank had no reason to believe that the trustee was acting dishonestly by depositing trust funds in his individual account);

Connecticut Mut. L. Ins. Co. 104 U. S. 54, 26 L. ed. 693. Compare *Goodwin v. American Nat. Bank*, 48 Conn. 550.

The master's seventh general finding, that the defendant did not have any actual knowledge or suspicion that the administrator by the subsequent transfers was misappropriating the funds of the estate, and that it was not privy to them, is not inconsistent with the fifth and sixth findings, and disposes of the plaintiff's further contention, that the defendant should be charged with the amount of these embezzlements. We are not unmindful of the strength of the plaintiff's argument, that even if the defendant was under no obligation to supervise the application of the money, yet it could not have been compelled to honor and credit his individual account with checks drawn on trust funds to his individual order by which the numerous fraudulent transfers from one account to the other, covering a period of two years, were effected, and that by the respective contracts of deposit the individual and representative accounts were plainly distinguishable. *Thatcher v. State Bank*, 5 Sandf. 121; *Chicago M. & F. Ins. Co. v. Stanford*, 28 Ill. 168, 173, 81 Am. Dec. 270; *Gerard v. McCormick*, 130 N. Y. 261, 14 L.R.A. 234, 29 N. E. 115; *Hunt v. Manire*, 34 Beav. 157, 160, 11 Jur. N. S. 28, 11 L. T. N. S. 469, 13 Week. Rep. 312. But while upon their face these circumstances well might have led the defendant to suspect that

a misappropriation was taking place, and that money of the estate was being applied to the administrator's private use, the question whether the defendant had notice of the irregularities was one of fact, and the master's finding, not appearing to be clearly wrong, should not be reversed. *School Dist. v. First Nat. Bank*, 102 Mass. 174, 176; *Fillebrown v. Hayward*, 190 Mass. 472, 77 N. E. 45.

The five checks drawn by Baker to his own order on funds of the estate deposited in a national bank, which the defendant discounted, and placed to his individual credit, are also covered by the master's finding. It presented the checks in good faith to the bank on which they were drawn, and had the right to rely on the representation of the bank by the payment of the money, that the checks were not being used for Baker's personal advantage. *Rev. Laws*, chap. 73, §§ 69, 72, 73; *Havana C. R. Co. v. Knickerbocker Trust Co.* 198 N. Y. 422, L.R.A.1915B, 720, 92 N. E. 12.

The exceptions of each party to the master's report, therefore, must be overruled, and the report confirmed, and the defendant is to be charged only for the amounts received in payment of the overdrafts and the amounts transferred to Baker's individual account in the settlement of the overdrafts, with interest from the dates stated in the report.

Decree accordingly.

Bldg. & Loan Asso. v. National Bank, 126 Mo. 82, 27 L.R.A. 401, 47 Am. St. Rep. 630, 28 S. W. 633; *Mills v. Nassau Bank*, 52 Misc. 243, 102 N. Y. Supp. 1119; *Safe Deposit & T. Co. v. Diamond Nat. Bank*, 194 Pa. 334, 44 Atl. 1064; *Hood v. Kensington Nat. Bank*, 230 Pa. 508, 70 Atl. 714 (check payable to a guardian as such, indorsed by him in the same capacity, was deposited by a firm in which the guardian was a partner to the credit of the firm, and the bank collected the check from the drawee bank; the suit was against the bank that received the check for collection); *Mott Iron Works v. Metropolitan Bank*, 78 Wash. 294, 139 Pac. 36; *Gray v. Johnson*, L. R. 3 H. L. 1, 16 Week. Rep. 842; *Shields v. Bank of Ireland* [1901] 1 I. R. 222 (bank had positive knowledge that the fund was a trust fund when it entered the deposit to the credit of a coexecutor, but it was held that it had no notice of an intended misappropriation); *Coleman v. Bucks & O. Union Bank* [1897] 2 Ch. 243, 66 L. J. Ch. N. S. 564, 76 L. T. N. S. 684, 45 Week. Rep. 616.

In *Havana C. R. Co. v. Knickerbocker Trust Co.* 198 N. Y. 422, L.R.A. 1915B, 720, 92 N. E. 12, the court appears to have assumed this to be the law, and held that a bank was not liable where it entered, as a personal credit to the treasurer of a corporation, a check drawn by him upon the

deposit of the corporation in another bank, made payable to him personally and indorsed by him, it having collected the check from the drawee bank, and he having checked out the proceeds for his own use later.

d. What constitutes notice of intended misappropriation.

The question as to constructive notice to the bank of an intended misappropriation of the fund by the fiduciary is governed largely by the facts and circumstances of the individual case. The question is usually an incidental one and there are not many cases where it was directly considered. By reference to the cases cited under subd. IV. b, supra, it will appear that the courts assume that a bank has imputed knowledge of the fraud if its own officer is also the fiduciary, even though he is acting in a matter of personal interest to himself; but in *Bank of Hartford v. McDonald*, 107 Ark. 232, 154 S. W. 512, where the president of the bank and two other persons borrowed money from the bank with which to deal in the purchase and sale of lands, the president of the bank being authorized to take title, sell the lands, and deposit the money derived from the sale to pay the loan, it was held that the knowledge of the president that the money belonged to all three

and was held for the special purpose could not be imputed to the bank after the president had deposited it in his own name, and died before the loan was paid. The holding is based upon the fact that the officer was acting in a matter in which he was individually interested. On the general question as to imputation of knowledge of bank officers to the bank where officers are personally interested, see notes to *Lilly v. Hamilton Bank*, 29 L.R.A.(N.S.) 558, and *First Nat. Bank v. Burns*, 49 L.R.A.(N.S.) 764. See also, in this connection, note to *Brookhouse v. Union Pub. Co.* 2 L.R.A.(N.S.) 993.

By reference to subd. IV. c, supra, it will appear that a few courts hold that a bank has knowledge of an intended misappropriation by reason of the fact that the fiduciary deposits trust funds in his own personal account, while most courts hold that such action by the fiduciary is no evidence that he intends to misappropriate the funds.

It has been held that where an agent has authority to draw upon the deposit of his principal for spot cotton, the fact that the bank has positive knowledge that the principal is not dealing in cotton futures, and has further knowledge that a check drawn by the agent in regular form is drawn in favor of a "bucket shop" which it knows is dealing only in futures, and has further knowledge that the agent has been gambling in cotton futures for himself, is sufficient to put it upon inquiry as to whether or not the agent is defrauding his principal, and if it pays the checks without such inquiry, it cannot charge the same to the principal's deposit. *Miller v. Hobdy*, — Tex. Civ. App. —, 159 S. W. 96.

The fact that the bank had express knowledge that county bonds in the hands of third parties were void was treated, in *Howard v. Deposit Bank*, 80 Ky. 496, as notice to the bank that the county authorities were misappropriating the county funds on deposit in the bank by drawing orders on the fund to pay the void bonds, so that the bank, in paying out county funds upon the orders and taking up the bonds as directed in the orders, was held to be a party to the fraud and was liable to the county, at the instance of taxpayers, for the amount of the deposit without deducting the amount of the orders.

On the question of imputing notice to a bank, of intended misappropriation of corporate funds on deposit, by the mere fact that the check was made payable to the order of the officer who drew it, see *Havana C. R. Co. v. Central Trust Co.* L.R.A. 1915B, 715, note.

A bank is not liable for the fiduciary's misappropriation of the trust fund, where it does not know that the fund is being misappropriated, and it has been held that sufficient knowledge to make it liable will not be imputed to it—

—where the managing partner in a firm has authority to draw upon the firm's deposit not only for firm business purposes, but for his personal use in an amount equal L.R.A.1915C.

to one half the profits, since the bank could not be expected to know whether or not the partner was drawing for his own use an amount in excess of his share of the profits, *Evans v. Evans*, 82 Iowa, 492, 48 N. W. 929;

—where it lends to the executor of an estate a sum of money upon his note as executor, with shares of stock belonging to the estate as collateral, upon his representation that he is borrowing the money to pay legacies in preference to selling the stock, even though it entered the loan as a credit in the executor's personal deposit account, from which account he drew the money and misappropriated it, *Goodwin v. American Nat. Bank*, 48 Conn. 550;

—where a bank in which the trustee has no account as trustee permits him to deposit in his personal account a check payable to him as trustee, and he misappropriates the proceeds thereof. (*Batchelder v. Central Nat. Bank*, 188 Mass. 25, 73 N. E. 1024); and see cases both for and against this proposition, cited under subd. IV. c, supra;

—where the managing partner checked out money belonging to the firm, and used it for his own use on checks upon which he had made memoranda indicating the use to which the proceeds were being appropriated, which memoranda were made apparently for the use or convenience of the drawer, *Eyrich v. Capital State Bank*, 67 Miss. 60, 6 So. 615;

—where an executrix drew a check in her fiduciary capacity upon the deposit of the estate, and had the amount thereof credited to the deposit of a partnership firm of which she was a member, from which the fund was drawn in the regular course of the firm's business, *Gray v. Johnson*, L. R. 3 H. L. 1, 16 Week. Rep. 842;

—where the bank had direct notice that money brought to it by one coexecutor belonged to the estate, and at his request entered it as a deposit to his personal account, he later becoming insolvent, so that the fund was lost to the estate, *Shields v. Bank of Ireland* [1901] 1 I. R. 222.

J. W. M.

OKLAHOMA SUPREME COURT.
(Division No. 2.)

WALTERS NATIONAL BANK, Plff. in
Err.,
v.

H. BANTOCK,

(41 Okla. 153, 137 Pac. 717.)

Bank — appropriation of trust fund —
liability.

1. A bank generally has the right to ap-

Headnotes by BREWER, C.

Note. — The question of bank's liability where it appropriates trust funds to the

propriate the funds of a depositor to the extent of the indebtedness due from him; but if the deposit, or any part thereof, is a trust fund, and the bank has notice of this fact, it will be liable to the true owner if it appropriates such fund to the discharge of an indebtedness due from the depositor.

Same — check as assignment.

2. Ordinarily the drawing of a check in the usual form by a depositor against his account in a bank does not operate as an equitable assignment, *pro tanto*, of the fund before such check has been accepted or certified.

Same — escrow — transfer of fund.

3. Where the depositor of a trust fund in a bank enters into a contract with another person that such fund shall be deposited and held in escrow to insure the completion of a sale of land, and such parties go to the bank and fully disclose their intentions so to use the fund, and the bank advises both parties that a check for the amount of the fund will be paid, and to satisfy them thereof takes a check already executed for the full amount of the deposit, and writes into the face of the check "in escrow," and the check, in lieu of the money, is then placed with the contract in the hands of the bank's cashier to be held in escrow, pending the completion of the sale of the land, and which sale is later completed and the check is delivered over according to the escrow agreement, held, that the transaction operated as an equitable assignment of the fund; that there was privity between the bank and the payee of the check, who, upon the bank's refusal to pay the same, had a right to sue and recover the amount of the fund.

Verdict — scope.

4. A general finding by a jury in favor of a party includes a finding in his favor on all the material issues in the case.

Appeal — interference with verdict.

5. Where the evidence in a case is conflicting, the verdict of a jury thereon will not be disturbed, where the evidence and the inferences legitimately to be drawn therefrom support the verdict.

Contract — illegal — enforcement.

6. A lawful agreement between parties will be enforced, even though it may be incidentally or indirectly connected with a contract that is illegal, where such lawful agreement is supported by an independent consideration, and can be proved without the aid of the illegal contract.

(December 20, 1913.)

payment of a debt due to it from the fiduciary as an individual is covered in two separate notes,—where it has no knowledge of the trust character of the fund, note in L.R.A.1915A, 715; where it has knowledge of the trust character of the fund, note to Allen v. Puritan Trust Co. ante, 518, subsec. III.
L.R.A.1915C.

ERROR to the District Court for Comanche County to review a judgment in plaintiff's favor in an action brought to recover the amount of a check held in escrow by the defendant bank pending completion of a sale of certain land. Affirmed.

The facts are stated in the Commissioner's opinion.

Messrs. R. J. Ray and Charles Mitschrich for plaintiff in error.

Messrs. Gray & McVay, H. F. Tripp, and I. K. Revelle, for defendant in error:

An agreement will be enforced, even if it is incidentally or indirectly connected with an illegal transaction, provided that it is supported by an independent consideration, or if the plaintiff will not require the aid of the illegal contract to make out his case.

Citizens' Nat. Bank v. Mitchell, 24 Okla. 488, 103 Pac. 720, 20 Ann. Cas. 371; Armstrong v. American Exch. Nat. Bank, 133 U. S. 433, 33 L. ed. 747, 10 Sup. Ct. Rep. 450; Fearnley v. DeMainville, 5 Colo. App. 441, 39 Pac. 73; Buck v. Albee, 26 Vt. 184, 62 Am. Dec. 564; Phalen v. Clark, 19 Conn. 421, 50 Am. Dec. 253; Johnston v. Smith, 70 Ala. 108; Ingram v. Mitchell, 30 Ga. 547; Woodworth v. Bennett, 43 N. Y. 273, 3 Am. Rep. 706.

After an illegal contract has been fully executed, a party in possession of the gains and profits resulting from the illegal traffic or transaction will not be permitted to set up illegality as a defense.

Union P. R. Co. v. Durant, 95 U. S. 576, 24 L. ed. 391; Hipple v. Rice, 28 Pa. 406; Gilliam v. Brown, 43 Miss. 641; California Cured Fruit Asso. v. Stelling, 141 Cal. 713, 75 Pac. 320.

The defense of illegality cannot be invoked by a third person.

Union P. R. Co. v. Durant, 95 U. S. 576, 24 L. ed. 391; Tenant v. Elliott, 1 Bos. & P. 3, 4 Revised Rep. 755; Farmers' & M. Bank v. Detroit & M. R. Co. 17 Wis. 373; Clark v. Gibson, 12 N. H. 386; Ellsworth v. Mitchell, 31 Me. 247.

A bank cannot charge a debt of an individual against the account of the firm.

1 Morse, Banks & Bkg. § 326; Coote v. Bank of United States, 3 Cranch, C. C. 95, 6 Fed. Cas. 3,204; Bank of LaGrange v. Cotter, 101 Ga. 134, 28 S. E. 644; Dawson v. Wilson, 55 Ind. 216; Watts v. Christie, 11 Beav. 546, 18 L. J. Ch. N. S. 173, 13 Jur. 244, 845; Dawson v. Real Estate Bank, 5

As to the right of a bank to apply special deposits to indebtedness of a depositor, see note to Smith v. Sanborn State Bank, 30 L.R.A.(N.S.) 517.

And as to the right of bank to set off unmatured claims against deposit of debtor, see notes in 27 L.R.A.(N.S.) 711, and 46 L.R.A.(N.S.) 1059.

Ark. 283; Ferry v. Home Sav. Bank, 114 Mich. 321, 68 Am. St. Rep. 487, 72 N. W. 181.

Brewer, C., filed the following opinion:

The defendant in error, Bantock, as plaintiff below, sued the Walters National Bank for the sum of \$1,000, and upon a trial before a jury was given a verdict for the sum claimed. The defendant bank has appealed on case-made to this court.

Bantock employed the W. E. Wilson Realty Company, a copartnership, composed of W. E. Wilson and W. W. Graves, to sell a farm belonging to his mother-in-law. The realty company found a purchaser who lived in Nebraska, who agreed to take the farm for \$5,450, and sent to the realty company a draft for the sum of \$1,000 to be applied to the purchase. This draft arrived in Walters, Oklahoma, October 28, 1907, simultaneously with what has been called the bankers' panic of that year. The farm proposed to be sold was a homestead entry, in the name of plaintiff's mother-in-law, and the final proof had not been completed; at least, title could not at the time be conveyed. As to the handling of the sale and the use of this \$1,000 draft out of which this suit arose, the evidence is conflicting. Plaintiff's evidence shows: That, when this draft was received, Mr. Sultan, the cashier of defendant bank, was shown the same and was told about the land sale and the purpose of the draft, and insisted that, as the bank needed exchange badly, the draft be deposited in the bank, and it could be used in the land trade through a check against it. That it was so deposited on October 28, 1907. That next day, plaintiff and the members of the realty firm went into the bank and showed the cashier a contract that had been entered into providing for the sale of the farm, one of the provisions of which was that each party, Bantock upon the one hand and the realty firm on the other, should deposit \$1,000 each to insure faithful performance of the contract of sale. To accomplish this the realty company executed its check for \$1,000, and Bantock executed his for a like amount, and these checks and the contract of sale were read and understood by the cashier of the bank. That one of the realty men and also Bantock asked the cashier if that check would be good for the money upon plaintiff's completing the sale, and that the cashier assured them it would, and stated he would fix it so it would be good, and, taking the check which had been already prepared, inserted in its face the words "in escrow." That the cashier then took the papers, put them in an envelop, and held them for the parties. About April, 1908, Bantock had L.R.A.1915C.

the farm conveyed, in everything fulfilling the contract so to do, and the contract and checks were delivered to him by the bank. The check for the \$1,000 was presented, and the bank refused to pay it on the ground of "no funds." The bank explained the disappearance of the fund by saying that the \$1,000 deposited by the W. E. Wilson Realty Company had been appropriated by the bank towards the liquidation of the individual notes of the partners in the realty firm.

The circumstances of the deposit of the \$1,000 are best told by W. E. Wilson of the realty firm, who, after stating that he received the draft from the purchaser of the farm in Nebraska, made payable to W. E. Wilson Realty Company, and told the cashier of the matter, says:

A. Well, I told Mr. Sultan I had a draft there. I had been out to see Mr. Bantock, and he was to come in next day, and I told Mr. Sultan.

A. I told Mr. Sultan I had a \$1,000 draft for Bantock, and Mr. Sultan asked me to deposit the draft. I says, "I don't feel like depositing the draft until he comes in and fixes the deal up," but he says: "You go ahead and deposit that draft, I want this draft in exchange."

A. Well, I went and talked to Mr. Graves (his partner) and we deposited the draft in our name, but we had it understood with Mr. Sultan it was Mr. Bantock's money, and he told us we could check on this thousand dollars and close the deal next day, etc.

This deposit was the only one ever made by the realty company. The cashier of the bank in a way denies this evidence.

The next day after making the deposit the plaintiff, Bantock, also both Wilson and Graves, of the realty firm, testify that they went into the bank and met the cashier, Sultan, and explained the nature of the contract for the sale of the farm; showed him the contract, which he read; and Mr. Wilson states what was done as follows:

A. When I and Mr. Bantock and Mr. Graves went to see Mr. Sultan about this deal, I says to Mr. Sultan, I says, "Was our check good for a thousand dollars to Mr. Bantock?" and Mr. Sultan says, "Most assuredly it is," and Mr. Bantock asked him then if it is good, and he says, "Give me the check and I will make it good," and he takes it and wrote that word in there, taking it to the desk, and took his pen and wrote that on the check, and Mr. Bantock accepted the check.

The words referred to as having been written in the check by the cashier are "in escrow." That this was written by the cashier to satisfy Bantock that the check

would get the money upon the completing of the contract is positively stated by the three witnesses mentioned. Mr. Sultan denied writing the words in the check; in fact, he set up an alibi and disclaimed any knowledge, at the time, of the escrow agreement. For the purpose of comparison of handwriting, the cashier introduced a number of papers he had written in which the word "escrow" appears. The court and jury evidently had the benefit of a comparison of these writings with the one in dispute; but we have not the same opportunity, as nothing but typewritten copies are before us. Six of these exhibits have the word "escrow" on them spelled "escroe," as it was on the check in suit.

We do not understand this to be the usual way of spelling the word, and this circumstance that defendant had spelled the word in this peculiar manner in the exhibits may have had weight with the jury. At all events, we take it the jury found against defendant on this point, as well as on the point that the cashier understood the nature and purposes of the draft deposited, who it came from, and how it was to be used, and that it was not the property of the real estate firm, for the reason that a general finding in favor of a party by a jury includes a finding in his favor on all the material issues in the case.

The assignments of error go to: (1) The refusal of the court to direct a verdict for defendant. (2) The admission of incompetent evidence. (3) The refusal to give certain instructions. (4) The giving of certain instructions. The greater part of the brief is devoted to the first of these assignments.

Notwithstanding the vast amount of industry and ingenuity employed by appellant to convince this court otherwise, from a study of the facts of this case, it does not seem to us that many words are required to show that the bank can assert no justification in law or equity for withholding this deposit and appropriating it as has been done. Assuming that plaintiff's evidence is true, as evidently believed by the jury, the bank in receiving this deposit full well knew that it was not the property of the realty company; that in fact it was the property of the Nebraskan placed in trust with the realty company, to become the property of plaintiff, upon the completion of the sale of the land. Its trust character was well known, as well as the exact and specific use intended by the parties to be made of the fund. Yet the bank with this knowledge appropriated the fund, which it knew did not belong to the realty firm or either of the partners therein, to the payment of the notes owing by those individual partners. L.R.A.1915C.

It had no right to do so, and acquired no title to the funds by reason of its attempted appropriation. The principle announced in the cases of *Shawnee Nat. Bank v. Wootten*, 24 Okla. 425, 103 Pac. 714, and *Fidelity & D. Co. v. Rankin*, 33 Okla. 7, 124 Pac. 71, fully sustain the views above expressed. In the *Rankin Case*, supra, the depositor of the trust fund joined the bank in an effort to appropriate the same to the payment of his individual indebtedness to it by executing his check in his trust capacity. But the court held that the bank could not thus acquire title to the money thus obtained, where it had knowledge of the trust character of the funds and that they were being improperly applied. In the *Rankin Case*, supra, the authorities are collected, and it is not necessary to set them out again. There is nothing in *Forbes v. First Nat. Bank*, 21 Okla. 206, 95 Pac. 785, in conflict with the views expressed herein. But if it may be doubted that those expressions of our own court are fully applicable, and decisive of this case, we refer to the following authorities: *Judy v. Farmers' & T. Bank*, 81 Mo. 404; *Deal v. Mississippi County Bank*, 79 Mo. App. 263; *Paul v. Draper*, 73 Mo. App. 566; *Bessemer Sav. Bank v. Anderson*, 134 Ala. 343, 92 Am. St. Rep. 38, 32 So. 716; *American Exch. Nat. Bank v. Loretta Gold & S. Min. Co.* 165 Ill. 103, 56 Am. St. Rep. 233, 46 N. E. 202; *American Trust & Bkg. Co. v. Boone*, 102 Ga. 202, 40 L.R.A. 250, 66 Am. St. Rep. 167, 29 S. E. 182; *Duckett v. National Mechanics' Bank*, 86 Md. 400, 39 L.R.A. 84, 63 Am. St. Rep. 513, 38 Atl. 983; *Union Stockyards Nat. Bank v. Gillespie*, 137 U. S. 411, 34 L. ed. 724, 11 Sup. Ct. Rep. 118; *Parker v. Hartley*, 91 Pa. 465; *Jeffray v. Towar*, 63 N. J. Eq. 530, 53 Atl. 182; *Van Alen v. American Nat. Bank*, 52 N. Y. 1; *Jamison v. Howard Lockwood & Co.* 26 Misc. 730, 56 N. Y. Supp. 1085; *Union Stockyards Nat. Bank v. Moore*, 25 C. C. A. 150, 49 U. S. App. 153, 79 Fed. 705; *Globe Sav. Bank v. National Bank*, 64 Neb. 413, 89 N. W. 1030; *Cady v. South Omaha Nat. Bank*, 46 Neb. 756, 65 N. W. 906.

It having been determined that the bank's attempt to appropriate the deposit utterly failed, it still remains to be seen whether, under the circumstances, plaintiff has a cause of action for the amount of the deposit against the bank.

Ordinarily the drawing of a check in the usual form by a depositor against his account in a bank does not operate as an equitable assignment, *pro tanto*, of the fund, before such check has been accepted or certified. *Guthrie Nat. Bank v. Gill*, 6 Okla. 560, 54 Pac. 434; *First Nat. Bank v. School Dist.* 31 Okla. 139, 39 L.R.A.(N.S.) 655, 120

Pac. 614; Rev. Stat. 1910, § 4239. And it seems the weight of authority is that the holder of such check cannot, ordinarily, maintain a suit thereon against the bank for want of privity of contract (*National Bank v. Millard*, 10 Wall. 152, 19 L. ed. 897; *First Nat. Bank v. Whitman*, 94 U. S. 343, 24 L. ed. 229; *Ætna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82, 7 Am. Rep. 314); but whether our statute would change this general rule against the maintenance of such a suit need not be inquired into nor decided here, for reasons that will appear as we proceed.

A very clear discussion of the rule adverted to, admitting the exceptions which it is believed removes this case from its application, assuming the rule to prevail here, is found in two of the cases last cited (*National Bank v. Millard* and *First Nat. Bank v. Whitman*, *supra*). In the *Millard* Case, after discussing the rule and collecting the authorities, the court say: "On principle, there can be no foundation for an action on the part of the holder, unless there is a privity of contract between him and the bank. How can there be such a privity when the bank owes no duty and is under no obligation to the holder? The holder takes the check on the credit of the drawer, in the belief that he has funds to meet it, but in no sense can the bank be said to be connected with the transaction. If it were true that there was a privity of contract between the banker and holder when the check was given, the bank would be obliged to pay the check, although the drawer, before it was presented, had countermanded it, and although other checks, drawn after it was issued, but before payment of it was demanded, had exhausted the funds of the depositor."

In *First Nat. Bank v. Whitman*, *supra*, Justice Hunt, for the Supreme Court of the United States, after holding: "The payee of a check which has not been accepted by the bank on which it is drawn cannot maintain an action upon it against the bank. Until acceptance there is no privity of contract between the payee and the bank,"—proceeds to explain that privity of contract between the check holder and the bank may take the case out of the general rule, and authorize a suit by such holder against the bank, and he says: "It is not to be doubted, however, that it is within the power of the bank to render itself liable to the holder and payee of the check. This it may do by a formal acceptance written upon the check, in which case it stands to the holder in the position of a drawer and acceptor of a bill of exchange. *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. 604, 19 L. ed. 1008; *Espy v. First Nat. Bank*, 18 L.R.A.1915C.

Wall. 604, 21 L. ed. 947. It may accomplish the same result by writing upon it the word 'good,' or any similar words which indicate a statement by it that the drawer has funds in a bank applicable to the payment of the check, and that it will so apply them. *Cooke v. State Nat. Bank*, 52 N. Y. 96, 11 Am. Rep. 667. And such certificate, it is said, discharges the drawer. As to him it amounts to a payment. *First Nat. Bank v. Leach*, 52 N. Y. 350, 11 Am. Rep. 708; *Meads v. Merchants' Bank*, 25 N. Y. 143, 82 Am. Dec. 331; *Mussey v. Eagle Bank*, 9 Met. 311; *Willets v. Phoenix Bank*, 2 Duer, 121. Whether this certificate be obtained by the drawer before the check is delivered, and is thus made an inducement to the payee to receive the same, or whether it is made upon the application of the payee for his security, is of no importance. It is a contract recognized by the law, valid in its character, which essentially changes the position of the parties. The privity of contract with the drawee, which before pertained to the drawer alone, is now imparted to the payee, and the duty which before existed only to the drawer now exists to the payee."

See, also for full discussion of what circumstances will constitute an equitable assignment of a fund, *Fourth Street Nat. Bank v. Yardley*, 41 L. ed. 855, and copious note, (165 U. S. 634, 17 Sup. Ct. Rep. 439).

When we view what transpired in the bank when the check was drawn on this fund, where all the parties in interest were assembled for the express purpose of providing how this fund should be used, in the light of the knowledge possessed by the cashier, we think a privity of relation and contract sufficient to authorize the maintenance of this suit by plaintiff is fully established. The fund consisted of the one item; the ownership and purposes for which it was intended being known to the bank when deposited. When the parties met the day following the deposit, the contract relative to the sale of the land had been written. It provided that each of the contracting parties deposit \$1,000 in money, with the contract to secure its faithful performance. Instead of taking the cash out of the bank and putting it physically in escrow, it was decided to represent it by the check; this was to the decided advantage of the bank, in those panicky times, regardless of who proposed the plan. The realty firm and the plaintiff both inquired of the banker if this check would get the money, meaning of course the identical fund in question: the banker assured both parties it would get the money; then, to reassure them, he took the check already executed, and said he would "fix it." He then wrote in the face

of the check "in escrow," which could have been for no other purpose than to convince the parties that the fund represented by that check would be set apart and held for the payment of that check upon the completion of the contract.

Some considerable time is used in an argument that it was illegal to contract for the sale of this land before final proof had been completed, and for that reason the suit against the bank for this deposit must fail. We do not think so. This is not an action on an illegal contract, but is to recover a deposit held by the bank in trust, and which it wrongfully appropriated to its own use and refused to turn over as it had under the course of dealings become bound to do. A lawful agreement between parties will be enforced, even though it may be remotely, incidentally, or indirectly connected with a contract that is illegal and therefore unenforceable, where such lawful agreement is supported by an independent consideration, and which can be proved without the aid of the illegal contract. *Citizens' Nat. Bank v. Mitchell*, 24 Okla. 488, 103 Pac. 720, 20 Ann. Cas. 371.

It is also asserted that the contract between the plaintiff and the realty company as agent, put in escrow, was illegal because it provided for a forfeiture. We think the real purpose of the contract was to secure a faithful and prompt completion of the sale, and that the \$1,000 deposited by the purchaser was certainly intended to be turned over as a payment of the consideration of the sale. This is what the parties attempted, and the bank has thus far frustrated. We fail to see wherein it is the business of the bank to censor the contracts of its clients, in which it has no concern, and apply to such contracts a construction that would render them invalid, when the parties themselves have acted upon them, thus construing them, in a way that shows the intention not to be illegal.

2. The point that incompetent evidence was admitted is not well taken. The witness was asked how he came to make the deposit of this particular draft. An objection was made and overruled. We think the circumstances and disclosures made to the bank was making this deposit were competent and material. And while the witness in proceeding in narrative form may have stated some things not strictly competent, no further objections were made, and we do not feel called upon to consider the evidence in detail.

3. The instructions to the jury, taken as a whole, are substantially correct. The theory of defendant was presented, if we mistake not, in the language of its own counsel. And in the light of our holding L.R.A.1915C.

herein as to the law of the case the instructions were as liberal to defendant as it could have possibly expected. No good service would be rendered in prolonging this opinion with a recital of the instructions given and those refused, together with an analysis thereof.

The cause should therefore be affirmed.

Per Curiam:

Adopted in whole.

MICHIGAN SUPREME COURT.

CATHERINE M. MURPHY, Admr., etc.,
of Alexander L. Murphy, Deceased,

PERE MARQUETTE RAILROAD COMPANY, Plff. in Err.

(— Mich. —, 150 N. W. 122.)

Carrier — attempting to board moving train — negligence.

A railroad company is not liable for injury to a passenger who, having left the car at an intermediate station for exercise, is some distance from the train when the starting signal is given, and, with parcels in his hands, runs to and attempts to board the train, when it is rapidly picking up speed, so that he collides with an express truck left standing beside the track, and falls under the train.

(December 19, 1914.)

ERROR to the Circuit Court for Berrien County to review a judgment in plaintiff's favor in an action brought to recover damages for the death of her intestate, alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Gore & Harvey, S. L. Merriam, and J. C. Bills, with Messrs. Parker, Shields, & Brown, for plaintiff in error:

If there was any negligence at all in placing the truck where it stood, it was the act of a stranger.

Mynning v. Detroit, L. & N. R. Co. 64 Mich. 101, 8 Am. St. Rep. 804, 31 N. W. 147, 67 Mich. 677, 35 N. W. 811; *Manos v. Detroit United R. Co.* 108 Mich. 102, L.R.A. —, 130 N. W. 664; *Michigan Land & Iron Co. v. L'Anse Twp.* 63 Mich. 700, 30 N. W. 331; *Lendberg v. Brotherton Iron*

Note. — As to negligence of passenger in getting on or off moving train, see notes to *Carr v. Eel River & E. R. Co.* 21 L.R.A. 354; *Hoylman v. Kanawha & M. R. Co.* 22 L.R.A. (N.S.) 741; and *Hayden v. Chicago M. & G. R. Co.* ante, 181; and see last note for references to annotation on allied questions.

Min. Co. 75 Mich. 84, 42 N. W. 675; French v. Detroit, G. H. & M. R. Co. 89 Mich. 537, 50 N. W. 914, 4 Am. Neg. Cas. 115; Missouri, K. & T. R. Co. v. Foreman, 98 C. C. A. 231, 174 Fed. 383; McGrath v. Eastern R. Co. 74 Minn. 363, 77 N. W. 136, 5 Am. Neg. Rep. 179; Southern R. Co. v. Rhodes, 50 C. C. A. 157, 58 U. S. App. 349, 86 Fed. 422, 4 Am. Neg. Rep. 733; Jakoboski v. Grand Rapids & I. R. Co. 106 Mich. 440, 64 N. W. 461.

The defendant was not guilty of negligence.

Flint & P. M. R. Co. v. Stark, 38 Mich. 717, 4 Am. Neg. Cas. 19; Grand Rapids & I. R. Co. v. Huntley, 38 Mich. 546, 31 Am. Rep. 321; 2 Elliott, Railroads, § 619; 6 Cyc. 608; McCormick v. Detroit, G. H. & M. R. Co. 141 Mich. 20, 104 N. W. 390, 18 Am. Neg. Rep. 484; Crowe v. Michigan C. R. Co. 142 Mich. 695, 106 N. W. 395; Pere Marquette R. Co. v. Strange, 171 Ind. 160, 20 L.R.A.(N.S.) 1041, 84 N. E. 819, 85 N. E. 1026; Serviss v. Ann Arbor R. Co. 169 Mich. 564, 135 N. W. 343; White, Personal Injuries, § 629; Woods v. White Star Line R. Co. 160 Mich. 544, 27 L.R.A.(N.S.) 992, 125 N. W. 396; Walthers v. Chicago & N. W. R. Co. 72 Ill. App. 354; Dotson v. Erie R. Co. 68 N. J. L. 679, 54 Atl. 827, 13 Am. Neg. Rep. 655; Mynning v. Detroit, L. & N. R. Co. 67 Mich. 677, 35 N. W. 811; Manos v. Detroit United R. Co. 168 Mich. 155, L.R.A. —, 130 N. W. 664; Goodlett v. Louisville & N. R. Co. 122 U. S. 391, 30 L. ed. 1230, 7 Sup. Ct. Rep. 1254.

Plaintiff's intestate was guilty of contributory negligence.

Lake Shore & M. S. R. Co. v. Miller, 25 Mich. 274; Putt v. Grand Rapids & I. R. Co. 171 Mich. 227, 137 N. W. 132; Michigan C. R. Co. v. Coleman, 28 Mich. 440, 4 Am. Neg. Cas. 1; French v. Detroit, G. H. & M. R. Co. 89 Mich. 537, 50 N. W. 914, 4 Am. Neg. Cas. 115; White, Personal Injuries, §§ 778, 794; Berry v. Harbor Springs R. Co. 173 Mich. 181, 138 N. W. 1038; Haas v. Grand Rapids & I. R. Co. 47 Mich. 401, 11 N. W. 216; Soderstrom v. Holland-Emery Lumber Co. 114 Mich. 83, 72 N. W. 13; Mynning v. Detroit, L. & N. R. Co. 64 Mich. 93, 8 Am. St. Rep. 804, 31 N. W. 147, 67 Mich. 677, 35 N. W. 811; Guntermann v. Michigan C. R. Co. 168 Mich. 37, 133 N. W. 940; Blair v. Grand Rapids & I. R. Co. 60 Mich. 124, 26 N. W. 855, 16 Am. Neg. Cas. 146; Grostick v. Detroit, L. & N. R. Co. 90 Mich. 594, 51 N. W. 667; Pzolla v. Michigan C. R. Co. 54 Mich. 273, 20 N. W. 71; Bedell v. Berkey, 76 Mich. 435, 15 Am. St. Rep. 370, 43 N. W. 308; Bradley v. Grand Trunk R. Co. 107 Mich. 243, 65 N. W. 102; Perego v. Lake Shore & M. S. R. Co. 158 Mich. 225, 122 N. W. 535; Lake Shore & M. S. R. Co. L.R.A.1915C.

v. Bangs, 47 Mich. 470, 11 N. W. 276, 4 Am. Neg. Cas. 29; McCaslin v. Lake Shore & M. S. R. Co. 93 Mich. 557, 53 N. W. 724, 4 Am. Neg. Cas. 142; Smith v. Preferred Mut. Acci. Asso. 104 Mich. 634, 62 N. W. 990; Jacob v. Flint & P. M. R. Co. 105 Mich. 450, 63 N. W. 502, 4 Am. Neg. Cas. 189; Apsey v. Detroit, L. & N. R. Co. 83 Mich. 440, 47 N. W. 513; Hutchins v. Priestly Exp. Wagon & Sleigh Co. 61 Mich. 252, 28 N. W. 85; Freeman v. Duluth S. S. & A. R. Co. 74 Mich. 86, 3 L.R.A. 594, 41 N. W. 872; Knickerbocker v. Detroit, G. H. & M. R. Co. 167 Mich. 596, 133 N. W. 504; Levy v. Houghton County Street R. Co. 164 Mich. 572, 129 N. W. 683; Strong v. Grand Trunk Western R. Co. 156 Mich. 66, 120 N. W. 683; Cousins v. Lake Shore & M. S. R. Co. 96 Mich. 386, 56 N. W. 14, 4 Am. Neg. Cas. 152; St. Louis & S. F. R. Co. v. Dewees, 82 C. C. A. 190, 153 Fed. 56; Browne v. Raleigh & G. R. Co. 108 N. C. 34, 12 S. E. 958, 6 Am. Neg. Cas. 106; Hunter v. Cooperstown & S. Valley R. Co. 112 N. Y. 371, 2 L.R.A. 832, 8 Am. St. Rep. 752, 19 N. E. 820, 5 Am. Neg. Cas. 280, 126 N. Y. 18, 12 L.R.A. 429, 26 N. E. 958, 5 Am. Neg. Cas. 289; Missouri P. R. Co. v. Texas & P. R. Co. 36 Fed. 879, 7 Am. Neg. Cas. 570; Tobin v. Pennsylvania R. Co. 211 Pa. 457, 60 Atl. 999, 18 Am. Neg. Rep. 602; Haldan v. Great Western R. Co. 30 U. C. C. P. 89; 4 Elliott, Railroads, § 1642; Orth v. Saginaw Valley Traction Co. 162 Mich. 357, 127 N. W. 330; Fisher v. Chicago & G. T. R. Co. 77 Mich. 546, 43 N. W. 926; Eason v. Ft. Wayne & B. I. R. Co. 110 Mich. 494, 68 N. W. 298; Lewis v. Flint & P. M. R. Co. 54 Mich. 66, 52 Am. Rep. 790, 19 N. W. 744; Toomey v. Eureka Iron & Steel Works, 89 Mich. 249, 50 N. W. 850.

Messrs. O'Hara & O'Hara, for defendant in error:

The proximate and dominant cause of Murphy's death was wrongfully and negligently permitting the express truck to be and remain where it was. And it matters not who placed it where it was.

Irvin v. Missouri P. R. Co. 81 Kan. 649, 26 L.R.A.(N.S.) 739, 106 Pac. 1063; Atchison, T. & S. F. R. Co. v. Calhoun, 213 U. S. 1, 53 L. ed. 671, 29 Sup. Ct. Rep. 321.

Plaintiff's intestate was not guilty of contributory negligence as matter of law.

McCaslin v. Lake Shore & M. S. R. Co. 93 Mich. 553, 53 N. W. 724, 4 Am. Neg. Cas. 142; Cousins v. Lake Shore & M. S. R. Co. 96 Mich. 386, 56 N. W. 14, 4 Am. Neg. Cas. 152; Irvin v. Missouri P. R. Co. supra; Atchison, T. & S. F. R. Co. v. Holloway, 71 Kan. 1, 114 Am. St. Rep. 462, 80 Pac. 31, 18 Am. Neg. Rep. 82; Mills v. Missouri, K. & T. R. Co. 94 Tex. 242, 55 L.R.A. 497, 59 S. W. 874; Wooten v. Mobile & O. R. Co. 79

Miss. 26, 29 So. 61; Illinois C. R. Co. v. Glover, 24 Ky. L. Rep. 1447, 71 S. W. 630; Fulks v. St. Louis & S. F. R. Co. 111 Mo. 335, 19 S. W. 818, 4 Am. Neg. Cas. 709; Creech v. Charleston & W. C. R. Co. 66 S. C. 528, 45 S. E. 86; Distler v. Long Island R. Co. 151 N. Y. 424, 35 L.R.A. 762, 45 N. E. 937, 1 Am. Neg. Rep. 135; Johnson v. West Chester & P. R. Co. 70 Pa. 357; Central R. & Bkg. Co. v. Miles, 88 Ala. 256, 6 So. 696, 2 Am. Neg. Rep. 29; Louisville & N. R. Co. v. Crunk, 119 Ind. 542, 12 Am. St. Rep. 443, 21 N. E. 31, 3 Am. Neg. Cas. 229; New York, P. & N. R. Co. v. Coulbourn, 69 Md. 380, 1 L.R.A. 541, 9 Am. St. Rep. 430, 16 Atl. 208, 3 Am. Neg. Cas. 700.

Stone, J., delivered the opinion of the court:

This action was brought by the administratrix of his estate to recover damages resulting from the death of Alexander L. Murphy, on July 23, 1910, caused by the alleged negligence of the defendant. The declaration alleges that plaintiff's intestate became a passenger on one of defendant's trains, having purchased a ticket from Chicago, Illinois, to Bangor, Michigan; that it was the duty of the defendant to keep its depots, with their platforms, along such railroad between Chicago and Bangor in safe condition, and to safely carry said Murphy to his destination. It is alleged that Murphy, upon arrival of the train, left it at Benton Harbor, an intermediate station, for a few minutes' rest and invigoration, and that while there it was defendant's duty to keep its station platform in safe condition for passengers in getting on and off the cars at said station. That, disregarding this duty, and while the plaintiff's intestate was on its station platform, it "carelessly and negligently allowed and permitted a large baggage or express truck to be and remain upon said platform, within a few inches from the edge thereof, adjacent to the track of said defendant upon which the said passenger train was remaining aforesaid, and near to and within a few inches of the coaches of said train. Plaintiff further says that when the conductor of said passenger train announced that the train was ready to depart, plaintiff's intestate, being all the time in the exercise of due care and caution on his part, and not knowing of the dangerous proximity of said truck to the said train, attempted to board said train from said platform, got hold of the handlebars or railing on the steps leading to the platform of one of the coaches of said passenger train, with perhaps not more than one foot upon said coach steps, when the said train started, and by reason of the said truck standing where it did, the said

truck in some manner, not fully known, caught plaintiff's intestate and brushed him off the said car steps, hurling him to the ground between the said station platform and the track of the defendant's said railroad, and onto the said railroad track, and several of the cars of said defendant's train passed over his body, and then and there on said day killed him."

At the trial it appeared that plaintiff's decedent, as a passenger, took defendant's train at Chicago on the day in question, and rode as far as Benton Harbor, Michigan. The train was composed of an engine, tender, and seven or eight cars. It made two stops at Benton Harbor, the first about three car lengths from the depot, to coal, and the other at the depot. Murphy alighted at the first stop, and walked towards the depot. After the train pulled ahead to the depot, it stood there some five or six minutes. The length of the depot building, known as the Union Depot, was 135 feet. The express and baggage rooms were located at the west end of the depot. The whole length of the cement platform along the tracks was 305 feet. The conductor registered his train as arriving at Benton Harbor at 5:20 P. M. When the train stopped at the station he shouted, "All aboard," and after he had registered his train, he came out on the platform and again shouted, "All aboard," and then proceeded to the engine which stood near Fifth street at the easterly end of the platform. He remained near the cab of the engine while the engineer read a train order to him. He then looked at his train to see if all passengers had gotten onto the train. Everything appearing clear, he gave the engineer the signal to proceed by raising his hand, and stepped onto the front end of the first coach. After the train started Murphy was seen running from the depot some 75 feet in a diagonal direction, and along with the train about a coach length, attempting to board the train. At the time deceased attempted to get on the train, it was going somewhere between 4 and 7 miles an hour. A number of witnesses testified that at this time deceased had an umbrella in his right hand, or under his right arm, and a small paper in his left hand. Other witnesses testified that they did not see deceased have an umbrella or paper, but their testimony was of a negative character, and it must be said that the great weight of the affirmative testimony was as first above stated. An express truck stood on the platform near the easterly end thereof, towards Fifth street. Its exact distance from the edge of the platform or track was a disputed question. One of plaintiff's principal witnesses testified: "The last I saw of Dr.

Murphy he was on the run, and the train was moving."

Another of plaintiff's witnesses testified: "I seen Dr. Murphy as soon as they holered, 'All aboard; I seen him start for the train. He ran; the train was going about 4 miles an hour, or anyway as fast as a man will walk. . . . He took hold of the train with his left hand, and the train was going easterly. He reached with both hands and only got one, and catching with that hand rather threw him this way. . . . When I first saw him I was standing in front of the depot, and he started from the south end. Where he had been I do not know, and the train was pulling out, and he started to run, and he wanted to board the train, and as he got hold of the grab, the handlebar, he struck the truck, the American Express truck, standing right beside the train. The platform was a concrete stone platform. The truck was right alongside the train, and as he tried to board that train he struck his hip against that truck, and that knocked his feet out from under him, and he went headlong down between the truck and the train."

Whether deceased got one foot upon the step of the car or was running beside the train with his hand on the hand rail when he hit the truck, was a question about which the testimony differed.

Another witness for the plaintiff testified: "When the accident happened I was about 20 feet from the main entrance. I was to the east of the main entrance. I was sitting on the curb. . . . I was looking northeast; they call it north there. I was looking toward the track. I saw the conductor going towards the engine; the engine was very near on Fifth street. It was not across the street, but facing Fifth street. Mr. Murphy, he ran diagonally from this window. I didn't notice Mr. Murphy at the window. . . . Mr. Murphy came on a trot diagonally across here, and I sat here, and the first coach that passed he tried to get on; the people were standing on the platform and the train was going so slow that he missed the next coach; instead of catching the next coach he caught the hind end of the third coach; that is the coach he tried to catch at the head. Q. How did he catch it? A. He reached his left hand up like that and pulled himself, with his foot upon the platform, upon the step. As he did that the truck pushed him between the cars, in between two, I should say the two coaches, and that doubled him up in such a way the steps hit him in the back, I should say right there some place [indicating], and there was about 12 inches between the step and the earth, I should call it about that, and the

step rolled him out, and the train kept on going, and it threw him back under the next coach wheel."

The plaintiff's intestate was killed instantly. He was thirty-six years of age, weighed about 130 pounds, and was active and in good health.

At the close of the plaintiff's testimony, and again at the close of all the testimony, counsel for defendant moved the court to direct a verdict for defendant for the following reasons:

"1. Because it is undisputed upon all the testimony that the contributory negligence of the deceased is conclusively established.

"2. Because reasonable minds cannot differ that the deceased was negligent in attempting to get on the moving train, and such minds cannot differ that such negligence contributed to his injury and death.

"3. Because no negligence whatever is shown on the part of the defendant or any of its employees.

"4. Because there is no proof that the defendant neglected any duty it owed the plaintiff in the premises.

"5. The plaintiff cannot complain that the truck was left at the end of the platform, opposite the baggage car, while the train was at rest; the train being at rest and no part of the truck being where passengers could collide with it while getting on the train when the train was at rest; the track could not possibly interfere with a passenger rightfully and properly attempting to get aboard such train.

"6. The platform of the defendant being absolutely safe for the deceased to have entered any of the coaches while the train was at rest, the truck could not have been made to cut any figure in the case, except by the negligence of the deceased, and such negligence bars a recovery."

The motions were overruled, and exceptions duly taken. The trial resulted in a verdict and judgment for the plaintiff.

The above-quoted points, and others, were urged upon a motion for a new trial, which was denied, and the denial duly excepted to by defendant, and the questions are now before us upon proper assignments of error.

A careful reading of this record has impressed us with the claim of the defendant that, under all of the testimony in the case, the plaintiff's intestate was guilty of such negligence in attempting to board a moving train as to bar a recovery. We think that it is undisputed upon all of the testimony that the contributory negligence of the deceased was conclusively shown. By the overwhelming weight of the evidence, it appears that deceased was handicapped and at a disadvantage by having an umbrella under his right arm; there had been ample

notice, time, and opportunity given to board the train while at rest, and an ample and clear platform provided upon which to reach the train while standing at the station. One who under such circumstances attempts to board a moving train which, as in this case, was rapidly picking up speed, is guilty of contributory negligence as matter of law; especially is this so when the undisputed evidence shows that the person had ample time and a reasonably safe ingress to the train while it stood at the station. The act of deceased was so palpably reckless as to be inexcusable. He was guilty of contributory negligence in attempting to board a moving train as he did, and no fault of the defendant or its employees, short of gross or wanton carelessness, could excuse him from the results of such negligence. It has always been regarded as negligence for a passenger to attempt to enter a car in a running train. *Blair v. Grand Rapids & I. R. Co.* 60 Mich. 124, 26 N. W. 855, 16 Am. Neg. Cas. 146.

In *Lake Shore & M. S. R. Co. v. Bangs*, 47 Mich. 470, 11 N. W. 276, 4 Am. Neg. Cas. 29, where a passenger jumped from a moving train, Justice Campbell said: "We have reluctantly felt ourselves compelled to hold that in our judgment such conduct is beyond any question negligence, and that the jury should have been so instructed. The fact that many persons take the risk of leaving cars in motion does not make them any the less risks which they have no right to lay at the door of the railroad companies. No company can use effectively coercive powers to keep passengers from doing such things. All persons of sound mind must be held responsible for knowledge of the usual risks of such traveling. Everyone is supposed to know that a fall beside a moving train is very likely to bring some part of the body or limbs in danger of being crushed. Everyone is supposed to know that in jumping from a vehicle running 6 miles an hour, or much less, he stands a good many chances of falling, or being unable to fully control his movements and that falling near a train is always dangerous. No doubt everyone who tries such an experiment persuades himself that he will escape, but it is impossible to suppose anyone of common sense does not know that there is danger. . . . If it was negligent to do as Bangs did, the rule of the law deprives him of any redress, because there is here no doubt that it was the immediate occasion of the mischief. The case is a very hard one, and he probably did what some others might have done in his place. But the courts cannot allow hard cases to change the rules that they are compelled to administer." *Werbowsky v. Ft. L.R.A.*1915C.

Wayne & E. R. Co. 86 Mich. 236, 24 Am. St. Rep. 120, 48 N. W. 1097, 4 Am. Neg. Cas. 112; *Jacob v. Flint & P. M. R. Co.* 105 Mich. 450, 63 N. W. 502, 4 Am. Neg. Cas. 189.

The opinion in the last-cited case is worthy of examination, as it distinguishes the case from *McCaslin v. Lake Shore & M. S. R. Co.* 93 Mich. 553, 53 N. W. 724, 4 Am. Neg. Cas. 142, and *Cousins v. Lake Shore & M. S. R. Co.* 96 Mich. 386, 56 N. W. 14, 4 Am. Neg. Cas. 152, cited by plaintiffs counsel in the instant case. In the *Cousins* Case, Justice Montgomery said: "The law upon the subject ought no longer to be in doubt. It is undoubtedly *prima facie* negligent for a passenger to attempt to alight from or board a moving train, but it is not in all cases negligence *per se* to attempt to do so. If one is, by the wrongful act of the carrier, placed in a position where, under a sudden impulse to save himself from serious inconvenience, he attempts to alight from a moving train, where the danger is not imminent, and where persons of ordinary care and caution would make the attempt, it is not necessarily negligent."

We understand the doctrine of the last-cited case to be that, on first view, or on the face of the act, it is negligent for a passenger to attempt to alight from or board a moving train, but there may be attending circumstances, like a wrongful act of the carrier, or where the danger is not imminent, or the like, where it would not necessarily be negligent. We have examined the record in vain to find any such attending circumstances here. The train had been standing at the station five or six minutes, the signals for starting the train were ample and timely, no fault on the part of the carrier is claimed at this point, and it does appear that deceased was simply loitering about the station at a time when he should have been upon the train. *Burden v. Lake Shore & M. S. R. Co.* 104 Mich. 101, 62 N. W. 173; *Michigan C. R. Co. v. Coleman*, 28 Mich. 440, 4 Am. Neg. Cas. 1; *Foley v. Detroit & M. R. Co.* 179 Mich. 586, 146 N. W. 186.

Many more of our own cases might be cited in support of the general doctrine here stated. See *Smith v. Preferred Mut. Acci. Asso.* 104 Mich. 634, 62 N. W. 990. We see nothing in the circumstances which could change the general rule, or excuse the act.

In *St. Louis & S. F. R. Co. v. Dewees*, 82 C. C. A. 190, 153 Fed. 56, Van Devanter, C. J., used the following appropriate language: "It is undoubtedly true that cases are not lightly to be withdrawn from the jury, and that ordinarily negligence is so far a question of fact that it should be sub-

mitted to and determined by them, but it is equally true that when the evidence and the inferences to be reasonably drawn from it are undisputed, or are of such conclusive character that the exercise of a sound judicial discretion would permit the court to give effect to but one verdict, the case may and should be withdrawn from the jury, and a verdict directed for the plaintiff or the defendant, as the one or the other may be proper."

We have examined the authorities cited from other states.

In *Browne v. Raleigh & G. R. Co.* 108 N. C. 34, 12 S. E. 958, 6 Am. Neg. Cas. 106, the conductor of a train had ordered a passenger to go to a coach and get in, and then signaled the engineer to start the train without waiting to see whether the passenger had gotten on. It was held that the company was not liable for the injuries received by the passenger in trying to get on the car in motion, where the train had already been stopped a reasonable time and the passenger had wilfully delayed to get on it, and that, in order to avoid the imputation of contributory negligence in so boarding the moving train, the passenger must show that he did so without manifest risk to himself, or that the train did not stop long enough for him to board it while it was stationary. The court said: "The general rule is that passengers who are injured while attempting to get on or off a moving train, cannot recover for the injury. *Phillips v. Rensselaer & S. R. Co.* 49 N. Y. 177, 5 Am. Neg. Cas. 166; *Beach, Railway Law*, § 987. But, of course, this, like all other general rules, is subject to some exceptions. Where a train is stopped at a station, and, after passengers are told to go aboard, it suddenly started before they have had time to do so, and when, without unreasonable delay, they are trying to get upon it, if a passenger who is in the act of getting upon the platform is injured by the sudden jerk of starting without a signal, the court may submit the question of negligence to the jury. But the company is under no obligation to delay the departure of the train beyond the usual time because a passenger has purposely or negligently deferred getting on it till the last moment, though he had abundant time to do so while it was standing still."

In *Hunter v. Cooperstown & S. Valley R. Co.* 112 N. Y. 371, 2 L.R.A. 832, 8 Am. St. Rep. 752, 19 N. E. 820, 5 Am. Neg. Cas. 280, the New York court of appeals held that endeavoring to board a train moving at the rate of 6 miles an hour is an act of such danger as to prevent any recovery from the railroad company for the death of the person attempting it, even though the train

was about to pass the station where it was advertised to stop, and where he was waiting for it, without stopping, and the conductor called to him to jump on if he was going. In that case *Peckham, J.*, delivered the opinion of the court, and reviews the New York cases, quoting the language of *Andrews, J.*, in *Solomon v. Manhattan R. Co.* 103 N. Y. 437, 57 Am. Rep. 760, 9 N. E. 430, 5 Am. Neg. Cas. 261, as follows: "Negligence, no doubt, is usually a question of fact of which the jury must inquire, but the inference of negligence in a given case may be so clear and convincing that the judge may direct a verdict. The conclusion that it is prima facie dangerous to alight from a moving train is founded on our general knowledge and common experience, and it is akin to the conclusion, now generally accepted, that it is in law a dangerous, and therefore negligent, act, unless explained and justified by special circumstances, to attempt to cross a railroad track without looking for approaching trains. In boarding a moving train there is generally less excuse than in alighting from one. The party attempting it is not often under the same stress of circumstances as frequently happens in the former case. He may be compelled to wait for another train, but this is an inconvenience merely, which does not justify exposing himself to hazard. . . . If men will take hazards, they must bear the consequences of their own rashness; and it is no just reason for visiting the consequences upon another that his negligence co-operated in producing the result."

Judge *Peckham* continues: "We think that the facts in this case are so overwhelming in their nature that no reasonable judgment can be formed as to the act of the deceased in attempting to jump upon this moving train other than that it was dangerous and reckless, and that the injury resulting therefrom was contributed to by him. We do not regard it as of the slightest importance, under the circumstances of this case, that the conductor of the train notified the deceased to jump on. That notification certainly cannot be interpreted to mean more than that the train would not stop or go slower than it was then going, and that if the deceased wanted to take it he must jump on at that moment. That does not alter the highly dangerous nature of the act itself. The deceased was in absolute safety at the time the direction was given. It created no emergency which called for the exercise of immediate judgment in the choice between two dangers. It was a simple question of possible inconvenience, . . . and it afforded not the slightest justification or excuse for attempt-

ing to board a train moving at that rate of speed, and when he did it, he did it at his own risk. We think the plaintiff, upon this state of facts, should have been nonsuited."

This case was before the court of appeals again, and is found reported in *Hunter v. Cooperstown & S. Valley R. Co.* 126 N. Y. 18, 12 L.R.A. 429, 26 N. E. 958, 5 Am. Neg. Cas. 289. A new trial had been had in which the plaintiff had recovered on some new evidence that the speed of the train was between 1 and 2 miles an hour. The court said: "Of these witnesses, two had previously testified to a speed of 4 to 6 miles an hour, and the other had not testified upon that subject. In view of the doubt justly resting upon the character and correctness of this evidence, we might very properly say that it was open to the court to take as the fact concerning the speed of the train the evidence given by the other witnesses in the case for both parties, which placed it at about 6 miles an hour. But we shall, for the purposes of the case, assume that the evidence as now given left it a question . . . as to how fast the train was moving past the station. We will accept that rate of speed deemed by the plaintiffs as most favorable to their contention, and still we must hold that the plaintiffs were not entitled to a recovery on their case. The conclusion was irresistible from the facts that the conduct of the plaintiffs' intestate was negligent, and that his act contributed to his injuries and death."

In *Missouri P. R. Co. v. Texas & P. R. Co.* the circuit court for the eastern district of Louisiana, 36 Fed. 879, 7 Am. Neg. Cas. 570, the intervener sought to recover of the Texas & Pacific Railroad Company damages for injuries received while attempting to board the defendant's train, operated by receivers of said road. The master reported adversely to the claim, and the intervener excepted. Pardee, J., said: "The evidence establishes, as the master reports, that the intervener received the injuries of which he complains in attempting to get on the passenger train of the Texas & Pacific Railway Company while the same was in motion, and before it stopped at a regular station on the line; that in so getting on the train he was neither advised nor compelled by the agents of the company, and that the intervener's said attempt contributed directly to his injuries. It is the settled jurisprudence of Louisiana, whose laws control as to the responsibility in this case, that no person can recover damages for injuries received where he has himself contributed to the negligence which caused the injury. See *Knight v. Pontchartrain R. Co.* 23 La. Ann. 462, 3 Am. Neg. Cas. 510, and cases there cited. Attempting to mount

a moving railroad train without the advice and direction of the railroad's agents is negligence, according to all respectable authorities, text-books, and adjudged cases. See *Shearm. & Redf. Neg.* § 283; *Hutchinson, Carr.* § 641; 2 *Rorer, Railroads*, 1111."

In *Tobin v. Pennsylvania R. Co.* 211 Pa. 457, 60 Atl. 999, 18 Am. Neg. Rep. 602, the *per curiam* opinion is so short that we quote the same: "The plaintiff was injured at a station where the tracks of the defendant's road were elevated to avoid crossing a city street at grade. The station platform was 13 feet wide and 340 feet long, and extended to the side of the street. Across the end of the platform above the street there was a fence 3½ feet high for the protection of passengers. A train reached the station when the plaintiff was on the street below, and when he was at the top of the stairs which led from the street to the platform, it was standing, or, if started, was moving so slowly that he did not observe its motion. He walked slowly across the platform and got on the first step of the car, which was then in motion. Before he mounted the second step, his back was struck by the end of the fence, which was 7 inches from the side of the car and about 22 feet from the place where he got on the step. No conclusion could have been reached from the plaintiff's testimony that would have relieved him from the imputation of negligence. There was nothing in the circumstances to make the case an exception to the rule that it is negligence *per se* to step on a moving train. Nor can it be said that the plaintiff escaped the risk which he assumed, and was afterwards injured by some negligent act of the railroad company. He was never safely on the train, nor in a position in which his body did not extend at least 7 inches beyond the side of the car during the time he was carried forward 22 feet to the fence. No negligence of the company was shown. There was no sudden start or jar of the car as the plaintiff was getting on, and there was nothing of an unusual character in the construction of the station platform or fence."

The judgment for defendant was affirmed. See *Elliott on Railroads*, § 1642; *San Antonio & A. P. R. Co. v. Trigo*, — Tex. Civ. App. —, 101 S. W. 254.

The following cases are cited by plaintiff's counsel: In *Irvin v. Missouri P. R. Co.* 81 Kan. 649, 26 L.R.A.(N.S.) 739, 106 Pac. 1063, it was held that it was not negligence *per se* to get on or off a moving train; that, generally, whether it is negligence or not is a question for the jury. In that case the question of contributory negligence was especially pleaded and relied upon as a defense. There was a gen-

eral verdict for the plaintiff upon all the issues presented, and the court held upon appeal that it was too late to raise the question then. The parties were concluded by the verdict. Two persons got upon the rear step of the rear car, and the plaintiff, being upon the lower step, was prevented from getting upon the other step by reason of the obstacle presented by the other passenger, and he was injured by striking against a truck upon the platform. It was held that the case presented a question for the jury.

In an earlier Kansas case, that of *Atchison, T. & S. F. R. Co. v. Holloway*, 71 Kan. 1, 114 Am. St. Rep. 462, 80 Pac. 31, 18 Am. Neg. Rep. 82, the person had entered the station and purchased a ticket intending to take a passenger train soon to arrive, and the case holds that such a party acquired the status of a passenger, and it became the duty of the railroad to exercise reasonable care to provide him a safe approach to the train, and reasonable time and opportunity to get aboard; that the running of a freight train between the station and the passenger train, thus blocking the access of passengers to the passenger train during the time it stopped at the station, was negligence as to the awaiting passenger, who suffered injury by reason of insufficient opportunity to get aboard. That an attempt of a passenger to board a moving train, although attended with some danger, is not, under all circumstances, contributory negligence. It was held that if the speed of the train and the difficulties in the way of boarding it are so obviously dangerous that a person of ordinary prudence would not attempt to get on the train, a passenger who makes the attempt and is injured is guilty of such contributory negligence as would bar a recovery.

In this case, the injured passenger, a strong, able-bodied man, accustomed to getting on and off cars, attempted to board a train moving at the rate of 4 miles an hour, which he was waiting to take, and which he had not been afforded a reasonable opportunity to get on while it was at rest. The day was clear, and the ground where he made the attempt was smooth. Held, that it cannot be said, as matter of law, that the attempt was so obviously dangerous as to constitute contributory negligence, and that whether there was such negligence was a proper question to leave to the jury. The court said: "It is the duty of a passenger to be reasonably alert and prompt in boarding a train, but, considering that the freight train concealed the incoming passenger train and blocked the passage from the station to it, we cannot say that Holloway was not reasonably prompt and diligent in his efforts to get on board the cars. The L.R.A.1915C.

stop of the passenger train was very brief, altogether too much so, considering the surrounding circumstances."

The court quotes the following rule from *Thompson on Negligence*, § 2995: "It cannot be affirmed that a person is guilty of contributory negligence as matter of law from the mere fact that he attempts to board a railway train while it is in motion. If the train does not stop at the proper stopping place for a sufficient length of time to enable the passenger to get on before it starts, and the passenger, thus coerced by the negligence of the company, attempts to board the train while it is slowly moving, and is injured in the attempt, contributory negligence will not be imputed to him, but he will be allowed to recover damages." The court also cited *Johnson v. Westchester & P. R. Co.* 70 Pa. 357, 6 Am. Neg. Cas 264.

It is said in that case that the train had started before the passengers had had sufficient time to get on board, and the plaintiff, encumbered with a valise and a number of packages, missed his footing and his arm was crushed by the wheels of the car. It was urged that it should have been declared, as a matter of law, that he was negligent. The court said: "The fact appears to be clear that a reasonable time for the transfer was not given, and that the plaintiff, with all his effort to make haste, was unable to make the connection in consequence of this want of time. Now, though the train was distinctly in motion, so that a bystander, cool and unconcerned, could see it visibly running on the track, are we to say as a matter of law binding on the jury, that a passenger having a right to go on the train, and seeing himself about to be left improperly by the wayside, is guilty of culpable legal negligence if he should essay to reach his destination, no matter how slow the motion in running might be, or how little danger was apparent to him? He may be guilty of negligence, but of this the jury should judge under the circumstances."

In *Wooten v. Mobile & O. R. Co.* 79 Miss. 26, 29 So. 61, the defendant, a railway company, had tickets for an excursion, but none were on sale in the town where the decedent lived. Decedent, wishing to go, arranged to have tickets from the next station brought to him by the baggage master on the excursion train. As soon as the train arrived he took the tickets, signed them as required by the company, and attempted to board the train, which was already moving slowly, and was hurled against a baggage truck, thrown under the cars and killed. His wife, niece, and granddaughter had been helped on board by a friend, and had no time to get their seats before the

train started. Held, that the question of decedent's contributory negligence should have been submitted to the jury. The court said: "Mr. Wooten's situation was even more urgent than that of an ordinary passenger. He had arranged for tickets to be brought to him there. They were sent by the company. They were useless until he signed them, which he did as soon as he could, but the train actually started before his family were comfortably seated,—before they could get their basket of fruit into the car. Under these circumstances . . . the jury should have been allowed . . . to pass on the question of negligence."

In *Illinois C. R. Co. v. Glover*, 24 Ky. L. Rep. 1447, 71 S. W. 630, the question of whether a passenger who got off his train at an intermediate station, and undertook, under the direction of the conductor, to board it again while moving, was guilty of contributory negligence, was held to be a question for the jury. The court said: "While there is some conflict in the authorities, the later cases sustain the rule that, where a passenger gets off his train at an intermediate station, and then undertakes to board it while moving slowly, by the direction of the conductor or servant in charge, he is not *per se* guilty of negligence; but it is a question for the jury whether, considering the speed of the train, the direction he received, and other circumstances, he exercised proper care."

Mills v. Missouri, K. & T. R. Co. 94 Tex. 242, 55 L.R.A. 497, 59 S. W. 874. In that case there was evidence that the defendant failed to perform its duties which it owed to the plaintiff. It was claimed that the passenger had been denied the opportunity to get a ticket, and it appeared that, by reason of the absence of the ticket agent, he was unable to reach the train until it commenced to move. Under those circumstances it was held that it was not negligence *per se* to attempt to go upon a slowly moving train.

We think that it appears that the cases cited by plaintiff's counsel are exceptional cases, and do not change the general rule.

It may be said that the cases are uniform in holding that boarding a moving train is at least *prima facie* negligence, and that in the instant case the plaintiff offered no testimony which showed, or tended to show, any justification or excuse on the part of the deceased. Under the facts in the case and the law applicable thereto, the trial court should have withdrawn the case from the jury, and directed a verdict for the defendant, on the ground of the contributory negligence of plaintiff's decedent.

This conclusion renders it unnecessary to consider the other assignments of error.
L.R.A.1915C.

For the error pointed out, the judgment of the Circuit Court is reversed, and ~~no~~ new trial granted.

OKLAHOMA SUPREME COURT. (Division No. 2.)

C. B. HALE, Plff. in Err.,

ST. LOUIS & SAN FRANCISCO RAIL-
ROAD COMPANY.

(39 Okla. 192, 134 Pac. 949.)

Corporation — foreign — statute of limitations — right to benefit.

The general policy of the state to require nonresident corporations to become resident persons, by a compliance with § 43, art. 9, of the Constitution, § 260, Williams's Anno. Const., in order that the state may regulate and control same, in intrastate matters, and in order that all intrastate controversies between such corporations and citizens of the state, whatever the amount involved may be, shall be determined under the laws of the state and adjudicated by the courts of the state, is paramount to a contingent statute authorizing service of process on local agents, where the corporations have refused to comply with the law. And when such corporations refuse to submit themselves to the law, and persist in doing business within the state in violation of such state policy, they cannot avail themselves of the benefits of a statute of limitations enacted for the exclusive benefit of resident citizens.

(January 21, 1913.)

Headnote by HARRISON, C.

Note. — Right of foreign corporation to avail itself of statute of limitations.

- I. In general, 544.
- II. Theory that corporation can be present nowhere outside of state where originally incorporated, 545.
- III. Theory that corporation is present wherever it can be legally served with process, 547.
- IV. Effect of failure to comply with statutory requirements.
 - a. In general, 551.
 - b. Where the narrow theory has been adopted, 551.
 - c. Where the broad theory has been adopted, 552.
- V. In actions for possession of real estate, 553.

I. In general.

Practically all general statutes of limitation have "saving clauses." Of course the wording of the clauses is not uniform, but the general purpose of the saving clause is to suspend the operation of the general stat-

ERROR to the District Court for Kiowa County to review a judgment sustaining a demurrer to the petition in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the Commissioner's opinion.

Messrs. O. B. Reigel and Moss, Turner, & McInnis, for plaintiff in error:

The statute of limitations cannot be invoked by the defendant in this case, because it is a foreign corporation to the state of Oklahoma, and had not appointed a service agent within the state, in compliance with the law.

Williams v. Metropolitan Street R. Co. 68 Kan. 17, 64 L.R.A. 794, 104 Am. St. Rep. 377, 74 Pac. 600, 1 Ann. Cas. 6; Land Grant

R. & Trust Co. v. Coffey County, 6 Kan. 245; North Missouri R. Co. v. Akers, 4 Kan. 453, 96 Am. Dec. 183; Bonifant v. Doniphan, 3 Kan. 35; State ex rel. Godard v. Topeka Water Co. 61 Kan. 547, 60 Pac. 341; Provident Loan Trust Co. v. McIntosh, 68 Kan. 452, 75 Pac. 498, 1 Ann. Cas. 906; Metropolitan Street R. Co. v. Warren, 74 Kan. 244, 86 Pac. 131, 89 Pac. 656; Gibson v. Simmons, 77 Kan. 461, 94 Pac. 1013; State ex rel. Jackson v. St. Louis & S. F. R. Co. 81 Kan. 404, 105 Pac. 685; Wojtylak v. Kansas & T. Coal Co. 188 Mo. 260, 87 S. W. 506; Parker v. Kelly, 61 Wis. 552, 21 N. W. 539; Larson v. Aultman & T. Co. 86 Wis. 281, 39 Am. St. Rep. 893, 56 N. W. 915; Travelers' Ins. Co. v. Fricke, 99 Wis. 367, 41 L.R.A. 557, 74 N. W. 372, 78 N. W. 407; Robinson v. Imperial Silver Min. Co. 5 Nev.

ute while the debtor is outside of the state, thereby giving to the creditor, for the purpose of bringing action, the full period allowed by the statute, not counting time during which he could not have sued in the state because of debtor's absence therefrom. (Some courts, however, stick to the literal wording, and hold that the statute does not run while the debtor is out of the state, even if the creditor could have sued on his claim within the state. This difference is important, as it has led to two opposing theories in regard to foreign corporations.) For various interpretations of these saving clauses, see the following notes in 23 L.R.A.(N.S.) 547; 25 L.R.A.(N.S.) 24; 34 L.R.A.(N.S.) 436; and 47 L.R.A.(N.S.) 309, supplementing note in 17 L.R.A. 225.

That a foreign corporation is a person or debtor within the meaning of these saving clauses, and for that reason the general statutes of limitation do not run in its favor during the time when the creditor could not have sued it within the state, is a proposition that is necessarily conceded by the court in every case cited in this note. There are a few cases in which the court did not go beyond this elementary proposition: North Missouri R. Co. v. Akers, 4 Kan. 453, 96 Am. Dec. 183; Aetna L. Ins. Co. v. Koons, 26 Kan. 215 (a later Kansas case, however, goes beyond this holding. See Williams v. Metropolitan Street R. Co. infra, II.); Olcott v. Tioga R. Co. 20 N. Y. 210, 75 Am. Dec. 393 (reversing 26 Barb. 147 and overruling Faulkner v. Delaware & R. Canal Co. 1 Denio, 441); Mallory v. Tioga R. Co. 3 Keyes, 354; Robeson v. Central R. Co. 76 Hun, 444, 28 N. Y. Supp. 104; Thompson v. Tioga R. Co. 36 Barb. 79 (there are other New York cases in which the court does go beyond this holding. See II., infra); Johnson & L. Dry Goods Co. v. Cornell, 4 Okla. 412, 46 Pac. 860; Reeves & Co. v. Block, 31 S. D. 60, 139 N. W. 780.

But two lines of reasoning, or theories, have been used by the courts in reaching the conclusion just stated, owing to the different views taken of the general purpose

of the saving clause, as noted, supra. The one theory is stated and discussed under II., infra, and the other under III., infra. The one theory compels the court to go beyond the proposition above stated, and to hold that a foreign corporation cannot have the benefit of the statute of limitation in any case until there is express legislation to that effect. The other theory enables the foreign corporation to successfully claim the benefit of the statute of limitations in every case where the fact that it could have been served with process at any time during the limitation period is proved, at least where the fact is notorious.

The Federal courts have considered themselves bound by the decisions of the state court, hence have followed the decisions of the state in which the action is brought; provided, of course, that the state courts had previously decided the question.

II. Theory that corporation can be present nowhere outside of state where originally incorporated.

The courts of but four states (Possibly the court in HALE v. ST. LOUIS & S. F. R. CO. meant to adopt this theory. See discussion IV., infra. If so, another state is added to the four.) have adopted the theory that a foreign corporation, being an artificial body, is legally confined to the territory of the state in which it was originally incorporated, hence it must be out of all other states. Taking the narrower view of the purpose of the saving clause, as stated in parenthesis under I., supra, these courts hold that even though process could be served upon the corporation within the state, it cannot, in the absence of an express statutory provision, have the benefit of the general statute of limitation. They argue that since this rule is applied to a natural person it must be likewise applied to an artificial one. This view is narrow and leads to inconsistencies. It is held that a foreign corporation may have abundance of property within the state, may have officers and agents at permanent offices within the state

44, 10 Mor. Min. Rep. 370; *State v. Central P. R. Co.* 10 Nev. 47; *Barstow v. Union Consol. Silver Min. Co.* 10 Nev. 386; *Boardman v. Lake Shore & M. S. R. Co.* 84 N. Y. 157; *Rathbun v. Northern C. R. Co.* 50 N. Y. 656; *Olcott v. Tioga R. Co.* 20 N. Y. 210, 75 Am. Dec. 393; *Hanchett v. Blair*, 41 C. C. A. 76, 100 Fed. 817; *Tioga R. Co. v. Blossburg & C. R. Co.* 20 Wall. 137, 22 L. ed. 331; *Kirby v. Lake Shore & M. S. R. Co.* 14 Fed. 261; *Wood, Limitations*, § 250, p. 490.

Messrs. **W. F. Evans, R. A. Kleinschmidt, and Fred E. Suits**, for defendant in error:

If the plaintiff is precluded from obtaining service of process upon the foreign

upon whom process could be served, and yet be out of the state within the meaning of the saving clause, so that it cannot plead the statute of limitation when sued upon stale claims unless the right to do so has been expressly granted by statute. The view is so narrow, and the inconsistencies so glaring, that the overwhelming majority of courts have refused to adopt the theory. See III., *infra*. Nevertheless the theory has been adopted in—

Kan.—*Williams v. Metropolitan Street R. Co.* 68 Kan. 17, 64 L.R.A. 794, 104 Am. St. Rep. 377, 74 Pac. 600, 1 Ann. Cas. 6.

Nev.—*Robinson v. Imperial Silver Min. Co.* 5 Nev. 44, 10 Mor. Min. Rep. 370; *State v. Central P. R. Co.* 10 Nev. 47; *Barstow v. Union Consol. Silver Min. Co.* 10 Nev. 386; *Sutro Tunnel Co. v. Segregated Belcher Min. Co.* 19 Nev. 121, 7 Pac. 271 (in this case there was merely an approval of the other holdings); *Union Consol. Silver Min. Co. v. Taylor*, 100 U. S. 37, 25 L. ed. 541 (bound by Nevada decisions); *Hanchett v. Blair*, 41 C. C. A. 76, 100 Fed. 817 (the court, considering itself bound by the Nevada decisions, applied the theory where the suit was to foreclose a mortgage).

N. Y.—*Olcott v. Tioga R. Co.* 20 N. Y. 210, 75 Am. Dec. 393 (overruling *Faulkner v. Delaware & R. Canal Co.* 1 Denio, 441); *Mallory v. Tioga R. Co.* 3 Keyes, 354; *Robeson v. Central R. Co.* 76 Hun, 444, 28 N. Y. Supp. 104; *Thompson v. Tioga R. Co.* 36 Barb. 79; *Londrigan v. New York, N. H. & H. R. Co.* 17 Jones & S. 526, 5 N. Y. Civ. Proc. Rep. 73, 12 Abb. N. C. 273 (the principle not applied); *Rathbun v. Northern C. R. Co.* 50 N. Y. 656; *Boardman v. Lake Shore & M. S. R. Co.* 84 N. Y. 157. In the two cases last cited the court applied the rule here stated in spite of the fact that the corporation had property and many agents, and could have been served with process, within the state. In the other New York cases the facts in that respect do not appear; but the courts adopted the theory here under discussion so that the facts in that respect were immaterial. Legislation has modified the rule in New York, but the interpretation given to the same is in absolute

harmony with the old theory. Section 432 of the Code of Civil Procedure, enacted in 1877, entitled, "How Personal Service of Summons Made upon a Foreign Corporation," provides that "personal service of the summons upon a defendant, being a foreign corporation, must be made by delivering a copy thereof, within the state, as follows:

Johnson & L. Dry Goods Co. v. Cornell, 4 Okla. 412, 46 Pac. 860, 25 Cyc. 1242; *Huss v. Central R. & Bkg. Co.* 66 Ala. 472; *Lawrence v. Ballou*, 50 Cal. 258; *Hubbard v. United States Mortg. Co.* 14 Ill. App. 40; *Pennsylvania Co. v. Sloan*, 1 Ill. App. 364; *Wall v. Chicago & N. W. R. Co.* 69 Iowa, 498, 29 N. W. 427; *Winney v. Sandwich Mfg. Co.* 86 Iowa, 608, 18 L.R.A. 524, 53 N. W. 421; *St. Paul v. Chicago, M. & St. P. R. Co.* 45 Minn. 387, 48 N. W. 17; *Louisville & N. R. Co. v. Pool*, 72 Miss. 487, 16 So. 753; *Sidway v. Missouri Land & Live Stock*

lute harmony with the old theory. Section 432 of the Code of Civil Procedure, enacted in 1877, entitled, "How Personal Service of Summons Made upon a Foreign Corporation," provides that "personal service of the summons upon a defendant, being a foreign corporation, must be made by delivering a copy thereof, within the state, as follows:

. . . To a person designated for the purpose by a writing, under the seal of the corporation, and the signature of its president, vice president, or other acting head, accompanied with the written consent of the person designated, and filed in the office of secretary of state. The designation must specify a place, within the state, as the office or residence of the person designated; and if it is within a city, the street, and street number, if any, or other suitable designation of the particular locality. It remains in force, until the filing in the same office of a written revocation thereof, or of the consent, executed in like manner." Section 401, Code of Civil Procedure, provides: "If, when the cause of action accrues against a person, he is without the state, the action may be commenced within the time limited therefor, after his return into the state. If, after a cause of action has accrued against a person, he departs from the state, and remains continuously absent therefrom for the space of one year or more,

. . . the time of his absence . . . is not a part of the time, limited for the commencement of the action. But this section does not apply, while a designation, made as prescribed in § 430, or in subdivision second of § 432, of this act, remains in force." Since these enactments, a foreign corporation that has strictly complied with § 432, *supra*, is entitled to the benefit of the statute of limitations. *Wehrenberg v. New York, N. H. & H. R. Co.* 124 App. Div. 205, 180 N. Y. Supp. 704. And a foreign corporation that has not so complied, is not so entitled. *McClure v. Supreme Lodge, K. H.* 41 App. Div. 131, 59 N. Y. Supp. 764 (see discussion of these two cases, IV. b. *infra*). And if the person so designated leaves the state before the limitation period has expired, the statute ceases to

Co. 187 Mo. 649, 86 S. W. 150; King v. National Min. & Exploring Co. 4 Mont. 1, 1 Pac. 727; Colonial & U. S. Mortg. Co. v. Northwest Thresher Co. 14 N. D. 147, 70 L.R.A. 814, 116 Am. St. Rep. 642, 103 N. W. 915, 8 Ann. Cas. 1160; Turcott v. Yazoo & M. Valley R. Co. 101 Tenn. 102, 40 L.R.A. 768, 70 Am. St. Rep. 661, 45 S. W. 1067; Thompson v. Texas Land & Cattle Co. — Tex. Civ. App. —, 24 S. W. 856; Connecticut Mut. L. Ins. Co. v. Duerson, 28 Gratt. 630; United States Exp. Co. v. Ware, 20 Wall. 543, 22 L. ed. 422; Taylor v. Union P. R. Co. 123 Fed. 155; Southern R. Co. v. Mayes, 51 C. C. A. 70, 113 Fed. 84; McCabe v. Illinois C. R. Co. 4 McCrary, 492, 13 Fed. 827; Waterman v. A. & W. Sprague Mfg. Co. 55 Conn. 554, 12 Atl. 240; Koons v.

Chicago & N. W. R. Co. 23 Iowa, 493; Cobb v. Illinois C. R. Co. 38 Iowa, 601; Hall v. Vermont & M. R. Co. 28 Vt. 401; Abell v. Penn Mut. L. Ins. Co. 18 W. Va. 400; Clarke v. Bank of Mississippi, 10 Ark. 516, 52 Am. Dec. 248; Burns v. White Swan Min. Co. 35 Or. 305, 57 Pac. 637; Cooper v. Ft. Smith & W. R. Co. 23 Okla. 139, 99 Pac. 785; Wright v. Lee, 2 S. D. 596, 51 N. W. 706; Harrigan v. Home L. Ins. Co. 128 Cal. 531, 58 Pac. 180, 61 Pac. 99; Volivar v. Richmond Cedar Works, 152 N. C. 656, 68 S. E. 200, 21 Ann. Cas. 623; Omaha & F. Land & T. Co. v. Parker, 33 Neb. 775, 29 Am. St. Rep. 506, 51 N. W. 139.

Harrison, C., filed the following opinion:
This action was begun in the district

run at least while he is out of the state. Norris v. Atlas S. S. Co. 37 Fed. 426. In the following cases the courts, considering themselves bound by the New York decisions, applied the narrow theory as above stated: Tioga R. Co. v. Blossburg & C. R. Co. 20 Wall. 137, 22 L. ed. 331; Blossburg & C. R. Co. v. Tioga R. Co. 5 Blatchf. 387, Fed. Cas. No. 1,563; Kirby v. Lake Shore & M. S. R. Co. 14 Fed. 261, affirmed on other grounds in 120 U. S. 130, 30 L. ed. 569, 7 Sup. Ct. Rep. 430. But the theory was not applied in Penfield v. Chesapeake, O. & S. W. R. Co. 134 U. S. 351, 33 L. ed. 940, 10 Sup. Ct. Rep. 566, to prevent a foreign corporation from pleading that part of the New York statute of limitations which bars, except in certain cases, an action against a nonresident on a cause of action arising in another state, and is there barred.

Wis.—Larson v. Aultman & T. Co. 86 Wis. 281, 39 Am. St. Rep. 893, 56 N. W. 915; Travelers' Ins. Co. v. Fricke, 99 Wis. 367, 41 L.R.A. 557, 74 N. W. 372, rehearing denied in 99 Wis. 377, 78 N. W. 407; State v. National Acci. Soc. 103 Wis. 208, 79 N. W. 220.

III. Theory that corporation is present wherever it can be legally served with process.

The broader and more reasonable view is that since it is the object of the saving clause merely to prevent the creditor's being deprived of the right to sue in the courts of the state, by reason of impossibility to have process served on his absent debtor, without the creditor's having had a chance to sue during the full period of limitation, a foreign corporation, like a natural person, is not absent from the state, within the meaning of the saving clause, during the time that process could be served upon it within the state. Therefore, the statute runs in its favor during all such time. A possible exception to this statement is made in Winney v. Sandwich Mfg. Co., *infra*, in order to prevent a foreign corporation from taking an unfair advantage of the creditor, but the general rule is recognized. Of course the process L.R.A.1915C.

meant is a process that will sustain a personal judgment, so the mere fact that the defendant had attachable property in the state is not sufficient. See Waterman v. A. & W. Sprague Mfg. Co. 55 Conn. 554, 12 Atl. 240, *infra*. The great weight of authority favors the general theory as here stated.

The question whether or not service could have been had within the state upon the foreign corporation for the prescribed period of time has been held to be the test in determining whether or not it can have the benefit of the statute of limitations:

—where a statute provided for service upon a foreign corporation by service upon its managing agent if it had one in the state, and the defendant had such agent in the state during the limitation period. (This case was tried in the Nebraska district court and removed to the Federal courts. It does not appear that the court was bound by any state decisions.) United States Exp. Co. v. Ware, 20 Wall. 543, 22 L. ed. 422;

—where the statute provided that "when any person is absent from the state, during the period within which a suit might have been brought against him, such period or periods of time must not be computed as a portion of the time necessary to create a bar under this chapter," and the Constitution of the state subjects foreign corporations, doing business within the state, to suit in any court, within whose jurisdiction they are doing business, by service of process upon any of defendant's agents anywhere in the state, and requires the corporation to have at least one known place of business and an authorized agent or agents therein. (The corporation was allowed to plead the statute.) Huss v. Centrol R. & Bkg. Co. 66 Ala. 472;

—where there was apparently no statute requiring formalities precedent to the transaction of business in the state, the foreign corporation had a managing agent in the state exercising his authority as such without fraudulent concealment for the full period of limitation, and the statutes enabled service of process upon such manag-

court of Kiowa county December 17, 1909, by C. B. Hale against the St. Louis & San Francisco Railroad Company for injuries alleged to have been received through the negligence of the company on November 20, 1907. Defendant's demurrer to plaintiff's petition was sustained on the ground that the petition showed on its face that the alleged injuries were received more than two years before the filing of the suit. Plaintiff refused to plead further, and brought the case here on a transcript.

The sole proposition involved in the case is whether a foreign corporation which has refused to comply with the laws of the state by filing a copy of its articles of incorporation within the state and to appoint an agent, as required by law, upon whom

ing agent. *Lawrence v. Ballou*, 50 Cal. 258. Certain *dictum* contained in *Pierce v. Southern P. Co.* 120 Cal. 163, 40 L.R.A. 350, 47 Pac. 874, 52 Pac. 302, 1 Am. Neg. Rep. 211, 3 Am. Neg. Rep. 636, is contrary to this holding, but in *Harrigan v. Home L. Ins. Co.* 128 Cal. 531, 58 Pac. 180, 61 Pac. 99, the *dictum* is disapproved, and the former holding approved;

—where the foreign corporation had complied with all of the statutory requirements applicable to its particular kind of corporation, *i. e.*, insurance companies, and was by agent within reach of process at all times. *Harrigan v. Home L. Ins. Co.* supra;

—where the statute provided that, "if when the cause of action accrues against a person, he is out of the state, the action may be commenced within the time herein limited after his coming into or return to this state," and foreign corporations are permitted to transact business in the state without formality (*Pennsylvania Co. v. Sloan*, 1 Ill. App. 364), but the corporation must show affirmatively that it could have been served with process within the state at any time during the period (*Hubbard v. United States Mortg. Co.* 14 Ill. App. 40);

—where the statute provided that, "the time during which a defendant is a non-resident of the state shall not be included in computing any of the period of limitations prescribed," and foreign corporations had the right to transact business within the state without conditions. *Wall v. Chicago & N. W. R. Co.* 69 Iowa, 498, 29 N. W. 427 (where the court says that in *Koons v. Chicago & N. W. R. Co.* 23 Iowa, 493, and in *Cobb v. Illinois C. R. Co.* 38 Iowa, 601, the court had assumed that a foreign corporation could avail itself of the statute of limitations); *Winney v. Sandwich Mfg. Co.* 86 Iowa, 608, 18 L.R.A. 524, 53 N. W. 421. In the last case it was also held that while the running of the statute does not depend upon the creditor's knowledge or lack of knowledge of the fact that the corporation could be reached by process, yet if it is engaged in a business within the state such as could be carried on without a resident agent or manager upon whom

service of process may be had, may receive the benefits of the statutes of limitations. It is contended by the railroad company that plaintiff's cause of action, being for personal injuries, is barred by subd. 3, § 5550, Comp. Laws 1909 (Rev. Laws 1910, § 4657), which reads as follows: "Within two years: An action for trespass upon real property; an action for taking, detaining, or injuring personal property, including actions for the specific recovery of personal property; an action for injury to the rights of another, not arising on contract, and not hereinafter enumerated; an action for relief on the ground of fraud—the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud." On the other hand,

service could be had, it cannot start the statute running by appointing at any time or times an agent in the state upon whom service could be had. The court distinguished the case from one where a railroad company is compelled by the nature of its business to be in position at all times to be served with process;

—where the statute provided that "the time during which a defendant is a non-resident of the state shall not be included in computing any of the periods of limitation above described," and the foreign corporation had agents within the state upon whom service of process could have been made. (This is an Iowa case, and the court was unable at the time to cite an Iowa case directly in point, but did cite several where the state court had used language indicating to some extent its position, so the holding is to some extent the independent opinion of the Federal court.) *McCabe v. Illinois C. R. Co.* 4 *McCrary*, 492, 13 Fed. 827;

—where the cause of action arose in Iowa, suit was brought in Nebraska, and the defendant, incorporated in Utah, was operating a railroad and maintaining agents upon whom service could have been had in either Iowa or Nebraska at any time during the limitation period, the court holding that by the decisions of both states the corporation could plead the statutes, and that since the action was barred in Iowa, where the cause of action arose, it was also barred in Nebraska. *Taylor v. Union P. R. Co.* 123 Fed. 155;

—where the statute provided that "if, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the times herein limited after his return to the state; and if, after the cause of action accrues, he departs from and resides out of the state, the time of his absence is not part of the time limited for the commencement of the action." *St. Paul v. Chicago, M. & St. P. R. Co.* 45 Minn. 387, 48 N. W. 17. (While this decision was based upon the broader ground that agents who held possession of real estate could be ejected without regard

it is contended by plaintiff that defendant, being a foreign corporation, cannot claim the benefit of the statute of limitation because of § 5553, Comp. Laws 1909 (Rev. Laws 1910, § 4660), which reads as follows: "If, when a cause of action accrues against a person, he be out of the state, or has absconded or concealed himself, the period limited for the commencement of the action shall not begin to run until he comes into the state, or while he is so absconded or concealed; and if, after the cause of action accrues, he depart from the state, or abscond, or conceal himself, the time of his absence or concealment shall not be computed as any part of the period within which the action must be brought." The railroad company meets the effect of this

section by § 5607, Comp. Laws 1909 (Rev. Laws 1910, § 4719), which reads as follows: "If any railroad or stage company, or corporation, fail to designate or appoint such person, as in the preceding sections is provided and required, such process may be served on any local superintendent of repairs, freight agent, agent to sell tickets, or station keeper, of such company or corporation in such county, or such process may be served by leaving a copy thereof, certified by the officer to whom the same is directed, to be a true copy, at any depot or station of such company or corporation, in such county, with some person in charge thereof, or in the employ of such company or corporation, and such service shall be held deemed complete and effectual."

to the absence or presence of their principal, the court said: "And if it be true that a corporation created under the laws of another state, but authorized by the laws of this state to transact its business within it, and having officers or agents within the state upon whom process to commence actions against it may be served, is, within the meaning of § 15, to be deemed all the time out of the state, then the defendant does not come within the second clause of the section; for never having been in, it could not depart from, the state. The mere theoretical domicil of a corporation in another state, by reason of its having been created under the laws of such state, does not make it out of the state, any more than does the theoretical domicil of a natural person make him out of the state, where it is practically within the state for all the purposes of its courts acquiring full and complete jurisdiction over it. The purpose of the statute of limitations in allowing specified times for commencing actions, and in making exceptions to the running of such times, is a practical one. It is to give to plaintiff what the legislature deemed a reasonable opportunity to seek a remedy. No mere theoretical absence from the state, not preventing in any way a full and complete remedy, for the times specified, can have been intended by § 15.");

—where it had complied with all the statutory requirements for transacting business in the state, and had thus become domesticated. *Sidway v. Missouri Land & Live Stock Co.* 187 Mo. 649, 86 S. W. 150;

—where, although the statute, requiring a foreign corporation, before it can transact business within the state, to file with the secretary of the territory and also with the recorder of the county where it proposes to carry on business a copy of its charter, is mandatory, yet expressly provides that in case it fails to do so any person bringing an action against it need not prove its incorporation except by reputation, and the corporation had failed to file the copy of its charter. (It was held that the corporation could plead the statute, since process could have been served upon it L.R.A.1915C.

at any time during the limitation period.) *King v. National Min. & Exploring Co.* 4 Mont. 1, 1 Pac. 727;

—where a foreign corporation, an insurance company, had not complied with a statute by appointing an agent as required in order that it should be enabled "to take risks or transact any business of insurance within this state," but had appointed an agent under the general statutes of the state upon whom service could have been had at any time during the limitation period, the subject-matter of the suit not being such as could be construed as "the taking of a risk or transacting insurance business." *O'Connor v. Aetna L. Ins. Co.* 67 Neb. 122, 93 N. W. 137, 99 N. W. 845;

—where the foreign corporation had during the limitation period complied with a statutory requirement that it maintain an agent within the state upon whom service could be served. *Volivar v. Richmond Cedar Works*, 152 N. C. 656, 68 S. E. 200, 21 Ann. Cas. 623 (reversing on rehearing 152 N. C. 34, 67 S. E. 42, expressly overruling *Green v. Hartford L. Ins. Co.* 139 N. C. 309, 1 L.R.A.(N.S.) 623, 51 S. E. 887, 4 Ann. Cas. 360, and approving expressions in *Williams v. Iron Belt Bldg. & L. Asso.* 131 N. C. 267, 42 S. E. 607); *Bennett v. Western U. Teleg. Co.* 162 N. C. 671, 68 S. E. 202, ruled by the *Volivar* Case;

—where the statute provided that "if when the cause of action accrue, or judgment be rendered, or docketed against any person, he shall be out of the state, such action may be commenced, or judgment enforced, within the time, herein respectively limited, after the return of such person, into this state, and if, after such cause of action shall have accrued, or judgment rendered or docketed, such person shall depart from, and reside out of the state, or remain continuously absent therefrom, for the space of one year or more, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action, or the enforcement of such judgment." (It was held that a foreign corporation operating a railroad with agents and officers in the state could

The contentions of the two parties, briefly summed up, are: By the plaintiff: That, a foreign corporation being out of the state, having refused to comply with the laws of the state, and being a nonresident, under § 5553, supra, it cannot claim the benefits of the statutes of limitations. And by the railroad company: That, notwithstanding it has failed to comply with the laws of the state, it may yet claim the benefit of the statute of limitation, because § 5607, supra, provides that service of process may be had on any local superintendent of repairs, freight agent, agent to sell tickets, or station keeper of such company. Numerous authorities are cited by opposing counsel in support of their respective contentions.

plead the statute of limitations. This was a North Carolina case, but the court makes no reference to decisions of that state.) *Southern R. Co. v. Mayes*, 51 C. C. A. 70, 113 Fed. 84, writ of certiorari denied in 186 U. S. 483, 46 L. ed. 1260, 22 Sup. Ct. Rep. 942;

—where, during the whole limitation period, the foreign corporation had been engaged in business in the state, had maintained an agent in the state upon whom process could be served, and had complied with all the laws of the state. *Colonial & U. S. Mortg. Co. v. Northwest Thresher Co.* 14 N. D. 147, 70 L.R.A. 814, 116 Am. St. Rep. 642, 103 N. W. 915, 8 Ann. Cas. 1160;

—under the saving clause in the Oklahoma statute as quoted in *HALE v. ST. LOUIS & S. F. R. Co.*, the defendant being authorized to do business in the state, and having maintained officers and agents therein during the limitation period. (But *HALE v. ST. LOUIS & S. F. R. Co.* may have overruled this case. See discussion, IV., infra.) *Tiller v. St. Louis & S. F. R. Co.* 189 Fed. 994;

—where the foreign corporation had been transacting business and maintaining agents or officers within the state for the period of limitation, the statutes of the state in regard to process made service upon such agents or officers good against the corporation, but the corporation had failed to comply with the requirement of a statute in regard to filing a copy of its charter. *Turcott v. Yazoo & M. Valley R. Co.* 101 Tenn. 102, 40 L.R.A. 768, 70 Am. St. Rep. 661, 45 S. W. 1067;

—where the foreign corporation could have been served with process within the state at any time during the limitation period by reason of its having had agents and officers transacting its business at regular places. *Thompson v. Texas Land & Cattle Co.* — Tex. Civ. App. —, 24 S. W. 856;

—where, although the foreign corporation had officers and agents within the state, there was no law by which service of process upon them would be good as against the corporation and there was no known way L.R.A.1915C.

As there is such a marked conflict between the two lines of decisions on this question, it becomes necessary to review some of the leading cases, and to ascertain the reason upon which they are based, in order to a proper comparison of their weight. A number of states, to wit, Kansas, Nevada, Wisconsin, Missouri, and New York, hold, under statutes similar to § 5553, supra, that foreign corporations, although, under statutes similar to § 5607, supra, they may be served with process within the state, yet cannot avail themselves of the benefits of the statute of limitations. While, on the other hand, a greater number of states, under statutes somewhat similar, have held the contrary. The point of divergence seems to be over what

by which the corporation could have been brought into court. (It was here held that the statute did not run.) *Hall v. Vermont & M. R. Co.* 28 Vt. 401;

—where the foreign corporation had a "local existence and domicile in the state for the purpose of being sued." *Connecticut Mut. L. Ins. Co. v. Duerson*, 28 Gratt. 630;

—where a foreign corporation was, from the fact that it was transacting business in the state regularly, presumed to have been within reach of process, but later ceased to transact business in the state, (It was held that the statute ran while it was in the state with its agents, but ceased to run when it withdrew them.) *Abell v. Penn Mut. L. Ins. Co.* 18 W. Va. 400.

In *Burns v. White Swan Min. Co.* 35 Or. 305, 57 Pac. 637, a case in which it was not necessary to decide the point, the court reviews the decisions both for and against the principle of making availability for service of process the test, and states that the rule is more consonant with reason than the opposing principle is.

In *Waterman v. A. & W. Sprague Mfg. Co.* 55 Conn. 554, 12 Atl. 240, the rule that a nonresident who was never in the state cannot have the benefit of the statute of limitations merely because he has attachable property in the state, was applied to a foreign corporation. No point of distinction between it and a natural person was raised or discussed. This decision is based upon the ground that the process that can be served must be one that will lead to a personal judgment.

In *Louisville & N. R. Co. v. Pool*, 72 Miss. 487, 16 So. 753, it was held that a corporation, for the purpose of limitation of actions against it, may be a resident of more than one state, therefore, its plea that it was a resident of Alabama was not equivalent to a plea that it was not a resident of Mississippi, for the purpose of enabling it to plead the Alabama statute on a cause of action arising in that state but sued upon in Mississippi, by virtue of the Mississippi Code, which provides: "When a cause of action has accrued in some other state, or in a foreign country,

constitutes the test of the question. The former states, on the theory that a foreign corporation is a person without the state, make the question of residence the test. Some of the other line of decisions make the question "whether or not service may be had within the state" the test, while others, partially at least, qualify the latter test.

In *Williams v. Metropolitan Street R. Co.* 68 Kan. 17, 64 L.R.A. 794, 104 Am. St. Rep. 377, 74 Pac. 600, 1 Ann. Cas. 6, wherein the sole question involved was whether a foreign corporation transacting business in that state could plead the statute of limitations in bar of an action originating in that state, in favor of a resident plaintiff, is a case which, although decided in December, 1903, some ten years subsequent

to the adoption of our Code from that state, is based upon a line of decisions which have been followed by the Kansas court from the earliest decisions of the state. And inasmuch as the court speaking through Mr. Justice Smith, exhaustively reviews all the leading decisions on the question, not only from the state of Kansas, but from other jurisdictions, we quote at length from the opinion. After stating the proposition involved, the court said: "In *Lane v. National Bank*, 6 Kan. 74, it was held that the personal absence of the debtor from the state, even if he retained a residence here at which process against him might be served, was sufficient to take the case out of the statute. This case has been followed repeatedly. *Hoggett v. Emerson*,

and by the law of such state or country, or of some other state or country where the defendant has resided before he resided in this state, an action thereon cannot be maintained by reason of lapse of time, an action thereon shall not be maintained here."

IV. Effect of failure to comply with statutory requirements.

a. In general.

In *HALE v. ST. LOUIS & S. F. R. Co.* the decision was apparently made to turn, in the last analysis, upon the fact that the foreign corporation had failed to comply with the general policy of the state as expressed in legislation, notwithstanding the fact that process could have been served upon it, at any time during the limitation period, within the state. That position is inconsistent with the narrow theory, since according to it a foreign corporation is incapable of coming into the state within the meaning of the saving clause of the statute of limitation. Even the New York legislation (see New York cases cited under IV. b, *infra*) does not bring the foreign corporation into the state within the meaning of the saving clause, but by suspending that clause, on certain conditions, the general statute is permitted to run. Clearly, in the absence of legislation expressly permitting a foreign corporation to avail itself of the statute of limitation, it cannot do so, under this theory, no matter if it does comply with all the statutory requirements.

On the other hand, the adoption of the broad theory by the court, without some qualification, would have compelled a different conclusion than the one reached. See IV. c, *infra*. There are some indications, however, that the court intended to adopt the broad theory with certain qualifications, somewhat analogous to those set out in *Winney v. Sandwich Mfg. Co.* as cited under III., *supra*. By that course of reasoning it could consistently hold that a foreign corporation can come into the state within the meaning of the saving clause, but L.R.A.1915C.

that in order to do so it must comply with all statutory requirements intended to domesticate foreign corporations, without regard to the fact that it could be otherwise served with process within the state. By this course of reasoning the court would bring about, without legislation, about the practical result that has been brought about in New York by express legislation. See New York cases cited under IV. b, *infra*. But it must be remembered that the adoption of this course of reasoning means the absolute rejection of the narrow theory upon which the New York decisions are based, so that no decision based upon the narrow theory would be authority therefor. See IV. b, *infra*.

b. Where the narrow theory has been adopted.

Consistency demands that the courts, in states where the narrow theory (see II., *supra*) has been adopted, treat the fact of compliance or noncompliance with statutory requirements on the part of foreign corporations as absolutely immaterial to the question as to whether or not such corporations may have the benefit of the statute of limitation, in the absence of statutory provisions expressly making the fact material. According to that theory, the corporation is out of the state, cannot come in, and nothing short of express legislation extending to it the right to plead the statute will enable it to do so. If the court in *HALE v. ST. LOUIS & S. F. R. Co.* really meant to adopt the theory upon which the Kansas cases are decided, then it wasted considerable time discussing the defendant's failure to comply with the statutes, for consistency would require it to deny to the defendant the right to plead the statute of limitations whether it had complied with the statutes or not. See cases cited under II., *supra*. But it probably did not intend to adopt that theory. See discussion under IV. a, *supra*.

In New York, where the courts early adopted the narrow theory (see II., *supra*) a statute provides that a foreign corpora-

8 Kan. 262; *Morrell v. Ingle*, 23 Kan. 32; *Conlon v. Lamphear*, 37 Kan. 431, 15 Pac. 600; *Ament v. Lowenthal*, 52 Kan. 706, 35 Pac. 804; *Coale v. Campbell*, 58 Kan. 480, 484, 49 Pac. 604; *Investment Securities Co. v. Berghthold*, 60 Kan. 813, 58 Pac. 469. In the early case of *Bank of Augusta v. Earle*, 13 Pet. 519, 588, 10 L. ed. 274, 307, Chief Justice Taney said: 'It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law, and where that law ceases to operate, and is no longer obligatory, the corporation can

have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty.' . . . In *Shaw v. Quincy Min. Co.* 145 U. S. 444, 450, 36 L. ed. 768, 771, 12 Sup. Ct. Rep. 935, 937, Mr. Justice Gray, after quoting the above language of Chief Justice Taney, said: 'This statement has been often reaffirmed by this court, with some change of phrase, but always retaining the idea that the legal existence, the home, the domicile, the habitat, the residence, the citizenship of the corporation, can only be in the state by which it was created, although it may do business in other states whose laws permit it.'

tion may file with the secretary of state certain information designating a person as its representative and the place where service of process may be made upon him, and it must have the consent of the person so designated, etc.; and the statute makes service of process upon such designated person valid as against the corporation. In *Wehrenberg v. New York*, N. H. & H. R. Co. 124 App. Div. 205, 108 N. Y. Supp. 704, it was held that a strict compliance with all the requirements of this statute by the foreign corporation would entitle it to the benefit of the statute of limitation, but the decision is based solely upon the ground that the last sentence in the saving clause (see clause quoted in the same case cited under II., supra), expressly provides that the whole clause is to be suspended where the corporation has complied with the requirements of the other clause. And in *McClure v. Supreme Lodge*, K. H. 41 App. Div. 131, 59 N. Y. Supp. 764, it was held that a foreign corporation that had not complied strictly with the provisions of the statute could not be allowed the benefit of the statute of limitation. *Norris v. Atlas S. S. Co.* 37 Fed. 426, gives practically the same interpretation to the statute. When the whole saving clause is suspended, according to the view of these courts, the general statute runs no matter how it affects the parties or where they abide, and a strict compliance with the section regarding a designation, etc., suspends the whole saving clause, for the reason that the last sentence in the saving clause expressly provides that it shall have that effect.

In *Green v. Hartford L. Ins. Co.* 139 N. C. 309, 1 L.R.A.(N.S.) 623, 51 S. E. 887, 4 Ann. Cas. 360, the court construed a statute which authorized the service of process upon foreign corporations by service upon a state officer for it; the defendant had complied with all requirements, and the court, adopting the narrow theory, held that it could not have the benefit of the statute of limitation. The court said: "That service can thus be had upon a non-resident corporation may be a reason why the general assembly should amend § 162 of the Code, so as to set the statute running in such cases, but it has not done so, and L.R.A.1915C.

the courts cannot." But in *Volivar v. Richmond Cedar Works*, 152 N. C. 656, 68 S. E. 200, 21 Ann. Cas. 623, exactly the same situation was before the court, and it overruled its former holding, in the *Green Case*, on the express ground that the broad theory is the correct one, thus admitting that under the narrow theory the first decision was correct. It had to change its premise to avoid the conclusion.

c. Where the broad theory has been adopted.

In states where the broader theory is adopted (see III., supra), the fact of the foreign corporation's compliance or non-compliance with statutory requirements, except as it may determine whether or not process could have been served, is not material. If the court in *HALE v. ST. LOUIS & S. F. R. Co.* intended to base its decision upon this theory, without any modifications, it reached an erroneous conclusion, since the defendant could have been served with process within the state at any time during the limitation period. There did not appear to be any express provision in the statute depriving foreign corporations of the right to plead the statute upon failure to comply with the requirements. But see discussion under IV. a, supra, as to possible modification which would harmonize this theory with the court's holding.

However, in most cases the statutory requirements have been established for the purpose of enabling the service of process upon foreign corporations. Where that is the case a failure to comply with the requirements usually, though not always, places the foreign corporation in such position that no service of process within the state can be made upon it, and in such case of course it is deprived of the right to plead the statute of limitation. But it is so deprived because it fails to meet the test as stated supra, III., and not because it has failed to comply with some policy of the state. This fact is clearly shown by the cases cited, infra.

On the power of a state to require foreign corporations to designate some person upon whom process may be served, as a condition

Lafayette Ins. Co. v. French, 18 How. 404, 15 L. ed. 451, is also reviewed, citing *Clark & M. Priv. Corp.* 356; and, after quoting from *Mr. Justice Valentine in Land Grant R. & Trust Co. v. Coffey County*, 6 Kan. 253, the court resumes:

"The corporation sued in this action, like all others, is, in the words of Chief Justice Marshall, 'an artificial being, invisible, intangible, and existing only in contemplation of law.' In *State ex rel. Godard v. Topeka Water Co.* 61 Kan. 547, 558, 60 Pac. 337, 341, it was said: 'A corporation exists by the will of a sovereign power. To

this superior authority it owes an allegiance which it cannot abjure.'

"If the Metropolitan Street Railway Company was, in contemplation of law, present in this state from May, 1894, until June, 1901, then the action was barred. The corporation was sued. It is not contended that the body corporate moved itself into this state, but that, having agents here, their presence, while transacting business in its behalf, amounted to the presence of the corporation itself, within the meaning of the statute of limitations above set out. If, as stated by Chief Justice Taney, a corporation cannot mi-

to the right to do business within the state, see note to *State v. St. Mary's Franco-American Petroleum Co.* 1 L.R.A.(N.S.) 558.

In *King v. National Min. & Exploring Co.* 4 Mont. 1, 1 Pac. 727, it was expressly held that the foreign corporation's failure to file authenticated copies of its charter as required by statute did not deprive it of the benefit of the statute of limitation, if during the whole limitation period it was accessible for service of process in the courts of the state by reason of the fact that it had regular places of business within the state. And the statute requiring the filing of the copies, etc., in this case, was mandatory.

And in *Turcott v. Yazoo & M. Valley R. Co.* 101 Tenn. 102, 40 L.R.A. 768, 70 Am. St. Rep. 661, 45 S. W. 1087, it was held that a foreign corporation, notwithstanding its failure to comply with a statute the "scope and purpose" of which were "to require corporations to file and register their charters in order that they might do business, own, or acquire property, and be enabled to sue," could plead the statute of limitation if, during the prescribed period, it had officers and agents in the state upon whom service could have been made at any time.

In *O'Connor v. Aetna L. Ins. Co.* 67 Neb. 122, 93 N. W. 137, 99 N. W. 845, the defendant insurance company, incorporated in another state, had failed to appoint an agent resident at the county seat, with authority to accept service of process, as foreign insurance companies were required by statute to do in order to enable them to "take risks or transact any business of insurance in this state," but it had complied with the general statute of the state by appointing an agent in the state upon whom process could be served; and it was held that it was enabled to plead the statute of limitations by the fact that process could have been served upon it at any time during the limitation period. The subject-matter of the suit, however, did not arise out of transactions "taking risks or out of insurance business."

In a number of cases cited under III, *supra*, the test as to service of process was applied where the corporation had complied L.R.A.1915C.

with requirements of various kinds, so that the court was not required to decide what the effect of a failure to comply would have been.

But of course where the statute expressly provides that a foreign corporation shall not be given the benefit of the statute of limitations unless it has complied with the prescribed conditions for transacting business in the state, the above test cannot be applied if the corporation has failed to fully comply. *Pierce v. Southern P. Co.* 120 Cal. 163, 40 L.R.A. 350, 47 Pac. 874, 52 Pac. 302, 1 Am. Neg. Rep. 211, 3 Am. Neg. Rep. 636; *Black v. Vermont Marble Co.* 1 Cal. App. 718, 82 Pac. 1060 (compliance with the conditions starts the statute running only from the date of compliance. So compliance after suit brought has no effect); *O'Brien v. Big Casino Gold Min. Co.* 9 Cal. App. 283, 99 Pac. 209.

V. In actions for possession of real estate.

It has been held that where the suit involves the possession of real estate of which a foreign corporation has had possession during the limitation period by means of an agent or a tenant, the statute of limitations runs in its favor, and the saving clauses with reference to debtor's absence from the state, etc., have no application, for the reason that those in possession could have been brought into court and their right to possession determined without regard to the question as to whether they held as representatives or as principals. *St. Paul v. Chicago, M. & St. P. R. Co.* 45 Minn. 387, 48 N. W. 17; *Scottish American Mortg. Co. v. Butler*, 99 Miss. 56, 54 So. 666, Ann. Cas. 1913C, 1236.

But the narrow theory as stated under II, *supra*, meets with such favor in the Nevada courts that a foreign corporation is denied the benefit of the statute even in this class of actions. *Robinson v. Imperial Silver Min. Co.* 5 Nev. 44, 10 Mor. Min. Rep. 370 (overruling *Chollar-Potosi Min. Co. v. Kennedy*, 3 Nev. 361, 93 Am. Dec. 409); *Barstow v. Union Consol. Silver Min. Co.* 10 Nev. 386. J. W. M.

grate from one state to another, then the intangible body which was sued in this action was at all times absent from this state and present in the state of Missouri. . . .

"In the brief of counsel for the street railway it was said: 'The full object and purpose of our law has been subserved when a plaintiff for the full period of limitation has been in a position to sue upon his claim and recover a personal judgment against the defendant.'

"The same argument was made in behalf of Senator Lane in 6 Kan. supra, who maintained a residence in Lawrence, in this state, where personal service could have been had by leaving a copy of the summons, under § 64 of the Code (Gen. Stat. 1901, § 4494), and a personal judgment obtained thereon, which would be good everywhere. The court, however, held that the statute of limitations, which excludes the time during which the debtor is absent from the state, should receive the natural meaning the words used import. The plaintiff in the Lane Case was nowise obstructed or delayed in bringing his action by the absence of the debtor in Washington, for during the whole time of such absence he could have obtained service of summons as valid in all respects as if had personally on Mr. Lane in this state. . . ."

"It will be noted that the court," referring to Bonifant v. Doniphan, 3 Kan. 35, "applied the language of § 4449 of the present statute, supra, to an artificial being,—a corporate body,—and gave it the same effect as if an absent individual were defendant in the action. The same application of the statute was made in *Ætna L. Ins. Co. v. Koons*, 26 Kan. 215, the third paragraph of the syllabus reading: 'Where the petition alleges that the defendant is a foreign insurance corporation, created and existing under the laws of Connecticut, with its principal office in the city of Hartford, in that state, it sufficiently appears therefrom that the defendant is a nonresident, and not present in the state.'

"While a valid judgment may be taken against a corporation in this state by service here on its officers or agents transacting business for it, yet such fact does not compel us to hold that, within the meaning of our limitation law, it is personally present in the state when served. In the case of Senator Lane a valid personal judgment could have been obtained against him by his creditor by service of summons left at his usual place of residence in Kansas, although at the time he was temporarily absent in Washington in discharge of his official duties. In *Foster-Cherry Commission Co. v. Caskey*, 66 Kan. 600, 72 Pac. L.R.A.1915C.

268, it was held that, although the principal business of a foreign corporation was transacted in this state, such fact did not authorize the taxation of its capital stock here. The case of *Com. v. Standard Oil Co.* 101 Pa. 119, 146, was quoted: 'The domicile of the Standard Oil Company is in the state of Ohio. Being a corporation, it is an invisible, artificial, and intangible thing. When it sent its agents to this state to transact business, it no more entered the state in point of fact than any other foreign corporation, firm, or individual who sends an agent here to open an office or branch house.'

"Wisconsin has a limitation statute like ours. The clause relevant here reads: 'If, when the cause of action shall accrue against any person, he shall be out of this state, such action may be commenced within the terms respectively limited (six years) after such person shall return or remove to this state.'

"This provision was held to apply to the temporary absence of a resident of the state, although during such absence a summons might have been served by leaving it at his usual place of abode. *Parker v. Kelly*, 61 Wis. 552, 555, 21 N. W. 539. Following this, in *Larson v. Aultman & T. Co.* 86 Wis. 281, 286, 39 Am. St. Rep. 893, 56 N. W. 915, it was decided that a foreign corporation came within the purview of the limitation statute above quoted. The court said that the word 'person' being applicable to corporations as well as to individuals, it was obvious that when the cause of action accrued the corporation was 'out of the state.' In *Travelers' Ins. Co. v. Fricke*, 99 Wis. 367, 377, 41 L.R.A. 557, 74 N. W. 372, 78 N. W. 407, the case of *Larson v. Aultman & T. Co.* supra, was followed. On a motion for rehearing it was said: 'The appellant argued that . . . a foreign corporation which has acquired a domicile in this state for the purposes of litigation is not a nonresident in such sense as to suspend the operation of the statute of limitations against it. 6 *Thomp. Corp.* § 7841. The motion was denied.'

"In most of the cases cited by counsel for defendant in error the right of a foreign corporation to plead the statute of limitations is made to depend on whether valid service could be had on it in the state where sued. *Winney v. Sandwich Mfg. Co.* 86 Iowa, 608, 18 L.R.A. 524, 53 N. W. 421; *Turcott v. Yazoo & M. Valley R. Co.* 101 Tenn. 102, 40 L.R.A. 768, 70 Am. St. Rep. 661, 45 S. W. 1067. As we have shown, such is not the test in this state. The last case cited expressly recognizes that the doctrine contended for by defendant in error does not obtain in Kansas. It may be said

that a foreign corporation doing business in this state through agents is constructively present here for the purposes of valid service of summons on it, although it is actually out of the state. *Merchants' Mfg. Co. v. Grand Trunk R. Co.* 21 Blatchf. 109, 13 Fed. 358. The constructive presence of Senator Lane in Kansas at his place of abode in Lawrence, where valid service might have been had, did not avail him during his actual absence from the state.

"An examination of the decisions of different states on the subject in hand will disclose that in almost all of them, where it has been held that a foreign corporation situated like defendant in error may invoke the limitation laws of the jurisdiction where it is sued, statutory provisions differing from ours exist. A notable exception, however, is found in Nebraska, where, under a statute like § 4449, General Statutes of 1901, *supra*, the doctrine of the Lane Case and others cited above is denied. In *Bauserman v. Blunt*, 147 U. S. 647, 657, 37 L. ed. 316, 320, 13 Sup. Ct. Rep. 466, 470, the court said: 'But what may be the law of Nebraska is immaterial. The case at bar is governed by the law of Kansas, and the duty of this court to follow as a rule of decision, the settled construction by the highest court of Kansas of a statute of that state, is not affected by the adoption of a different construction of a similar statute in Nebraska or in any other state.'

"On the question involved see also *Boardman v. Lake Shore & M. S. R. Co.* 84 N. Y. 157, and cases cited; *State v. National Acci. Soc.* 103 Wis. 208, 79 N. W. 220; *Hanchett v. Blair*, 41 C. C. A. 76, 100 Fed. 817; *Bartow v. Union Consol. Silver Min. Co.* 10 Nev. 386; *Clarke v. Bank of Mississippi*, 10 Ark. 516, 52 Am. Dec. 248."

Inasmuch as the foregoing opinion presents a review of all the leading cases bearing directly on the point in issue, we deem it unnecessary to cite or quote from other authorities on this view, further than to cite *Clarke v. Bank of Mississippi*, 10 Ark. 516, reported in 52 Am. Dec. 248, and notes, for the reason that the converse of the proposition is therein discussed, and the theory of the case rested upon the same doctrine announced by the line of decisions upon which *Williams v. Metropolitan Street R. Co.* 68 Kan. 17, 64 L.R.A. 794, 104 Am. St. Rep. 377, 74 Pac. 600, 1 Ann. Cas. 6, was decided. Defendant in error quotes from the rule announced in 25 Cyc. 1242, as follows: "A corporation created by the laws of the state of the forum must be treated as a citizen of that state, and the absence of its officers will not necessarily carry such ideal person beyond the limits of the state. But there is a conflict of authority upon L.R.A.1915C.

the question whether a foreign corporation is within the saving clause relating to absence or nonresidence from the state, at least in so far as the question of its right to plead the statute of limitations is concerned. Certainly the corporation is absent or nonresident in the sense that it cannot plead the statute, when it has never been subject to the process of the courts. But the predominating judicial opinion is that a corporation, although created by the laws of another state, should be deemed to be present in the state of the forum if it is there for the purpose of its business, in compliance with the laws of the state in that behalf, so that it is subject to the process of the state; that such a presence will avail the foreign corporation under a plea of limitations, and a want of such presence will deprive it of this advantage, under the saving clause as to absence or nonresidence."

This text is supported by decisions from the following states, to wit: Alabama, California, Illinois, Iowa, Minnesota, Mississippi, Missouri, Montana, North Dakota, Tennessee, Texas, Virginia, and United States Supreme Court. Also, *Thompson v. Texas Land & Cattle Co.* — Tex. Civ. App. —, 24 S. W. 856, is cited and exhaustively quoted from by defendant in error. In this opinion the Texas civil court of appeals says: "A corporation can only be present in any locality, outside of that in which it created, by and through its agents and officers, and the facts that it was doing business in Texas, and had two officers who were resident citizens of the state, and that service could be and was obtained on it, show that, whether a citizen or not, appellee was a foreigner, resident in the state of Texas, and was residing here at the time of the filing of the suit. The presumption would be, in the absence of an allegation to the contrary, that the foreign corporation doing business in Texas was conducting it under the laws of the state."

Also, in the opinion in *King v. National Min. & Exploring Co.* 4 Mont. 1, 1 Pac. 727, quoted from by defendant in error, we find the following language: "The transcript in this case does not disclose how service was had upon the respondent, as it does not contain a copy of either the summons or return thereof, or any other method of service. But as the facts above stated in relation to its having an agent upon whom process might have been served do appear in the record, it will be presumed that service of the summons was had upon such agent. We have, therefore, in this case a foreign corporation (the respondent) within the jurisdiction of the district court, and during the period above stated, doing the

business for which it was incorporated openly and publicly, and for this purpose having an office within such jurisdiction, and an agent and superintendent residing therein, and also owning and being possessed of real and personal property within the territory."

Numerous other authorities are cited and extensively quoted from in defendant in error's brief; but, as the cases above quoted from discuss the real basis of most of the opinions cited in the brief, it is unnecessary for the purposes of the case at bar to review all of them. However, it will be observed that neither of the foregoing opinions makes the question of obtaining service on a local agent the sole test; but in each opinion, as well as the text quoted from 25 Cyc., there are other reasons by which the rule is partially supported, other grounds upon which it is partially rested, other elements in the test, to wit: "If it is there for the purpose of doing business in compliance with the laws of the state" (25 Cyc. supra), or "has an agent and office within the state" (Thompson v. Texas Land & Cattle Co. supra), "and was doing business in Texas and conducting it under the laws of the state" (Id.), or "having an office within such jurisdiction and an agent and superintendent residing therein (King v. National Min. & Exploring Co. supra).

We cannot say to what extent these qualifications may have influenced the courts in the above decisions. Nor do we undertake to say what they would have been with such qualifications eliminated. Some states, as Nebraska and Illinois, have apparently elected to stand on the one foot, *i. e.*, that, if service may be had within the state, then "limitation will run." But it is not disclosed from the decisions cited from those states whether they have other statutes and constitutional provisions requiring the same things to be done by foreign corporations which our statutes and Constitution require.

Section 260, Williams's Anno. Const., provides: "No corporation, foreign or domestic, shall be permitted to do business in this state without first filing in the office of the corporation commission a list of its stockholders, officers, and directors, with the residence and postoffice address of, and the amount of stock held by each. And every foreign corporation shall, before being licensed to do business in the state, designate an agent residing in the state; and service of summons or legal notice may be had on such designated agent and such other agents as now are or may hereafter be provided for by law. Suit may be maintained against a foreign corporation in the county where an agent of such corpo-

rations may be found, or in the county of the residence of plaintiff, or in the county where the cause of action may arise."

Section 5605, Comp. Laws 1909 (Rev. Laws 1910, § 4717), provides: "Every railroad company or corporation, and every stage company doing business in Oklahoma, or having agents doing business therein for such corporation or company, is hereby required to designate some person residing in each county, into which its railroad line or stage route may or does run, or in which its business is transacted, on whom all process and notices issued by any court of record or justices of the peace of such county may be served."

Section 5606, Comp. Laws 1909 (Rev. Laws 1910, § 4718), provides: "In every case such railroad company or corporation, and stage company, shall file a certificate of the appointment and designation of such person, in the office of the clerk of the district court of the county in which such person resides; and the service of any process upon the person so designated, in any civil action, shall be deemed and held to be as effectual and complete as if service of such process were made upon the president, or other chief officer of such corporation or stage company. . . ."

From the foregoing provisions of the Constitution and statutes, it is the evident policy of the state to require foreign corporations, doing business within the state, to become residents of the state, to comply with its laws, to submit themselves to state control, and their intrastate controversies, whatever the amount involved may be, to the courts of the state. This policy permeates the entire framework of our organic law; it is the paramount policy of the state in its regulation and control of foreign corporations doing business within the state. The maintenance of such policy is of vital importance to the state, and its soundness is to be determined exclusively by the state. It is important to the state in the maintenance of its theory of state government that its residents, whether they be natural or legal persons, be justly and impartially protected in all their rights, and that such rights shall be determined under the laws of the state and adjudicated by the courts of the state. This policy is partially thwarted, and its effectiveness materially impaired, by the refusal of nonresident corporations to comply with the law by which they may become resident persons (for legal purposes), and by their persistence in doing business within the state in open violation and flagrant disregard of the state laws. Thus, by their own actions and of their own accord, they openly disavow their residence within the state.

The question then arises, For whose benefit was the statute of limitations put in force? Evidently for those residing within the state, for even citizens of the state cannot avail themselves of the benefit of such statutes during their absence from the state, "and if, after the cause of action accrues, he depart from the state . . . the time of his absence . . . shall not be computed as any part of the period within which the action must be brought." § 5553, Comp. Laws 1909 (Rev. Laws 1910, § 4660). This was the settled construction of these statutes by the courts of Kansas long prior to their adoption by Oklahoma.

In *North Missouri R. Co. v. Akers*, 4 Kan. 453, 96 Am. Dec. 183, it was held that to deny a citizen the benefit of the limitation laws during an absence from the state,—under the statutes, valid service could be had during such absence,—and then give a nonresident corporation the benefit of such limitation laws because, under the statutes, service could be had on it, would be to discriminate in favor of nonresident corporations.

But it is contended by defendant in error, and held by some of the authorities cited in its brief, that the reason for this law is removed by a statute authorizing service of process to be had on local agents. This position is not wholly tenable. The full purpose of the law is not met by a statute authorizing service of process on a local agent. Complications might arise under which such a law would not be wholly adequate. The foreign corporation might have no property in the state out of which a judgment could be satisfied, thus necessitating the collection of such judgment in a foreign state, where it is possible for the question to arise whether a judgment obtained upon such service of process was such a judgment, *in personam*, as could be satisfied out of defendant's property found in a foreign state. But whether the latter question should arise or not, the remedy is yet not as speedy, not as free from probable complications and delay, as in actions between residents of the state. The statute authorizing service on a local agent was not put in force for the purpose of affecting or qualifying the statutes of limitation, nor for the purpose of justifying foreign corporations in violating the law; it was enacted for the purpose of affording a remedy, as nearly adequate as possible, against foreign corporations who refuse to comply with the law. Therefore, viewing the object and purpose for which they were enacted, the one being a statute of repose, the benefits of which are given only to residents of the state, the other being a contingent remedy,

available only where foreign corporations have refused to comply with the law, it is obvious that the purpose of the two statutes grew out of the general policy of the state to require foreign corporations to become citizens, subject to state control, in order that equal rights, and facilities for the adjudication of same, might be afforded to all residents, whether they be legal or natural persons.

In reaching this conclusion we have not overlooked the fact that the state of Kansas, since the adoption of our statutes from that state, and since the decision in *Williams v. Metropolitan Street R. Co.* 68 Kan. 17, 64 L.R.A. 794, 104 Am. St. Rep. 377, 74 Pac. 600, 1 Ann. Cas. 6, was rendered by the supreme court of that state, has amended its statute of limitations as follows: "*Provided, this act shall not apply to any foreign corporation authorized to do business in the state upon which service of process can be had within the state.*" (Italics ours.) Gen Stat. (Kan.) 1909, § 5613 (Code Civ. Proc. § 20). Nor do we undertake to say whether, by this amendment, the state of Kansas meant to change its former state policy. The inference is that it did not. For, in the above amendment, we observe the following significant clause, "authorized to do business in the state." Now, for a foreign corporation to be authorized to do business within our state, it is required to comply with certain laws. By a compliance with such laws, it becomes a resident of the state for all legal purposes, and entitled to the benefit of all laws enacted exclusively for the benefit of resident citizens, and the policy of the state is unimpaired.

For these reasons, the order sustaining the demurrer should be reversed, and the cause remanded for trial.

Per Curiam:

Adopted in whole.

Petition for rehearing denied September 2, 1913.

WEST VIRGINIA SUPREME COURT OF APPEALS.

CHARLES FRANKLIN et al.

v.

M. L. BROWN, Warden.

(— W. Va. —, 81 S. E. 405.)

Constitutional law — cruel punishment — robbery.

1. Section 12, chapter 144, Code 1913

Headnotes by MILLER, P.

(serial § 5163), prescribing penalties for robbery, is not void, as contravening § 5, article 3, of the Constitution, providing against "cruel and unusual punishment," and that "penalties shall be proportioned to the character and degree of the offense.

Same — right to habeas corpus.

2. Nor is a judgment of imprisonment for life on conviction of robbery under said § 12, chapter 144, of the Code, void as in violation of said provisions of the Constitution entitling the accused to discharge on habeas corpus.

Robbery — life imprisonment — validity.

3. Nor is said § 12, chapter 144, of the Code, in contravention of the 14th Amendment or any other provision of the Federal Constitution.

(March 24, 1914.)

Note. — Cruel and unusual punishment.

I. General principles governing punishments.

- a. Cruel and unusual, 558.
- b. Legislative control, 559.
- c. Discretion of court, 560.

II. Nature of punishments.

- a. Penitentiary, 560.
- b. Transfer from reformatory to state prison, 560.
- c. Indeterminate 560.
- d. Capital punishment; electrocution.
 - 1. Generally, 561.
 - 2. Crimes committed by convicts, 561.
- e. Convict labor, 562.
- f. Hard labor, 562.
- g. House of correction; training school, 563.
- h. Imprisonment for costs, 563.
- i. Fines, 563.
- j. Statute fixing no maximum punishment, 565.
- k. Bread and water, 565.
- l. Imprisonment of insane person on acquittal, 565.
- m. Disbarment of attorney, 565.
- n. Forfeiture, 565.

III. Punishment for particular crimes.

- a. Abortion, 565.
- b. Assault and battery, 565.
- c. Bribery, 566.
- d. Burglary, 566.
- e. Conspiracy; blackmail, 566.
- f. Disorderly houses and persons, 566.
- g. Fishery and game law offenses, 566.
- h. Larceny, 567.
- i. Lottery, 567.
- j. Liquor law offenses, 567.
- k. Murder and manslaughter, 569.
- l. Rape, 569.
- m. Robbery, 569.
- n. Unlawful publications, 569.
- o. Unlawful use of mails, 569.
- p. Violation of ordinances, 569.
- q. Contempt, 570.
- r. Carrying concealed weapons, 570.

L.R.A.1915C.

APPPLICATION for a writ of habeas corpus to secure petitioners' discharge from imprisonment in the state penitentiary, to which they have been committed for life upon their conviction in the Criminal Court of McDowell County for robbery. Writ refused.

The facts are stated in the opinion.

Mr. Everett F. Moore, for petitioners:

The punishment imposed in the case of petitioners is in violation of § 5 of article 3 of the Constitution of West Virginia, and also violates the 8th Amendment of the Constitution of the United States so far as it secures any fundamental rights under the due process of law clause of the 14th Amendment.

Weems v. United States, 217 U. S. 349, 54 L. ed. 793, 30 Sup. Ct. Rep. 544, 19

III.—continued.

- s. Desertion and nonsupport, 570.
- t. Gambling, 570.
- u. Libel, 570.
- v. Disturbing religious meeting, 570.
- w. Embezzlement, 570.
- x. Malicious mischief, 570.
- y. Usury, 570.
- z. Miscellaneous, 570.

IV. Extent of United States Constitution, 570.

Scope.

The earlier cases upon the subject under annotation will be found in the note to State ex rel. Garvey v. Whitaker, 35 L.R.A. 561, the limitations of which also govern the present note.

The question of increased punishment for second offense as cruel and unusual punishment, considered in the note to State ex rel. Garvey v. Whitaker, is treated in the note on enhancing penalty for crimes when committed by habitual criminals or prior offenders, attached to Re Miller, 34 L.R.A. 400, and continuations of that note attached to Com. v. McDermott, 24 L.R.A. (N.S.) 431, and to Jones v. State, 48 L.R.A. (N.S.) 204, and so is not repeated here.

As to a sexualization or sterilization of criminals or defectives, see note to State v. Feilen, 41 L.R.A. (N.S.) 418.

As to cumulative sentences, see note to Harris v. Lang, 7 L.R.A. (N.S.) 124.

I. General principles governing punishments.

a. Cruel and unusual.

Supplementing note in 35 L.R.A. 561.

Cruel and unusual punishments are punishments of a barbarous character and unknown to the common law. The words, when they first found place in the Bill of Rights, meant not a fine or imprisonment, or both, but such punishment as that inflicted by the whipping post, the pillory, burning at the stake, breaking on the wheel, and the like; or quartering the culprit,

Ann. Cas. 705; *McDonald v. Com.* 173 Mass. 322, 73 Am. St. Rep. 293, 53 N. E. 874; *State v. Driver*, 78 N. C. 423, 2 Am. Crim. Rep. 487.

Petitioners are persons within the jurisdiction of the state of West Virginia, and they are denied by said state the equal protection of the laws.

Hodgson v. Vermont, 168 U. S. 262, 272, 273, 42 L. ed. 461, 464, 18 Sup. Ct. Rep. 80; *Hayes v. Missouri*, 120 U. S. 68, 71, 30 L. ed. 578, 580, 7 Sup. Ct. Rep. 350; *Duncan v. Missouri*, 152 U. S. 377, 382, 38 L. ed. 485, 487, 14 Sup. Ct. Rep. 570; *Caldwell v. Texas*, 137 U. S. 692, 697, 698, 34 L. ed. 816, 818, 11 Sup. Ct. Rep. 224; *State v. Lewin*, 53 Kan. 679, 37 Pac. 168; *Budd v. State*, 3 Humph. 483, 39 Am. Dec. 189;

cutting off his nose, ears, or limbs, or strangling him to death. They were such severe, cruel, unusual punishments as disgraced the civilization of former ages, and made one shudder with horror to read of them. *Re O'Shea*, 11 Cal. App. 568, 105 Pac. 776.

Our laws inflict pain not in a spirit of vengeance, but in order to promote the essential purposes of public justice. Severity is not cruelty. The punishment ought to bear a due proportion to the offense. Crimes of great atrocity ought to be visited with such penalties as would check, if not prevent, their commission. *Mitchell v. State*, 82 Md. 527, 34 Atl. 247.

The right to punish a person who commits an offense depends upon the right of society to protect itself. Those crimes should be severely punished which are most destructive to public safety and to the peace and quiet of the community. The extent of the punishment upon conviction ought to be such as is warranted by law, and such as appears to be best calculated to answer the ends of precaution necessary to deter others from the commission of like offenses, in addition to punishing the individual offender. *Jackson v. United States*, 42 C. C. A. 452, 102 Fed. 473.

It is the character, and not the extent, of the punishment inflicted as a penalty for the commission of a crime, which is struck at by the constitutional provision prohibiting cruel and unusual punishment. *State v. Griffin*, 84 N. J. L. 429, 87 Atl. 138, affirmed in 85 N. J. L. 613, 90 Atl. 259.

So, it is the laws providing for cruel and unusual punishment that the Constitution refers to and prohibits, and not sentences by courts under constitutional laws. *People v. Cook*, 147 Mich. 127, 110 N. W. 514.

Nor the punishment assessed by the jury within the limits fixed by the statute. *Shields v. State*, 149 Ind. 395, 49 N. E. 351.

A sentence within the limits fixed by statute for the offense will not be set aside L.R.A.1915C.

Rogers v. Alabama, 192 U. S. 226, 48 L. ed. 417, 24 Sup. Ct. Rep. 257.

Mr. A. A. Lilly, Attorney General, for the respondent:

Imprisonment for crime is not a cruel and unusual punishment.

State v. Woodward, 68 W. Va. 66, 30 L.R.A.(N.S.) 1004, 69 S. E. 385; *Aldridge v. Com.* 2 Va. Cas. 447; *Com. v. Wyatt*, 6 Rand. (Va.) 694.

The penalty allowed to be inflicted by the statute punishing robbery is proportioned to the character and degree of the offense.

Houston v. Com. 87 Va. 266, 12 S. E. 385.

Miller, P., delivered the opinion of the court:

On writ of habeas corpus petitioners seek discharge from imprisonment in the state

on the ground that it is cruel and unusual. *Rogers v. State*, 11 Ga. App. 814, 76 S. E. 366; *Harper v. State*, 14 Ga. App. 603, 81 S. E. 817; *Siberry v. State*, 149 Ind. 684, 39 N. E. 936, 47 N. E. 458.

And a penalty prescribed for a crime committed in state's prison is not cruel and unusual where it is in the same degree as though the crime were committed outside of the wall. *People v. Huntley*, 112 Mich. 569, 71 N. W. 178.

And undue leniency in one case does not transform a reasonable punishment in an other case to a cruel one. *Howard v. Fleming*, 191 U. S. 126, 48 L. ed. 121, 24 Sup. Ct. Rep. 49.

b. Legislative control.

Supplementing note in 35 L.R.A. 562.

It is for the legislature, and not for the courts, to determine what the punishment for crime shall be, provided it is neither cruel nor unusual. *State v. Durnam*, 73 Minn. 150, 75 N. W. 1127, 11 Am. Crim. Rep. 179.

The power to declare what shall and what shall not be deemed to be a crime, to determine the maximum and minimum of the fine or of the term of imprisonment to be imposed as a punishment for a crime so declared, is a power which is committed by the people of the state to the legislative, and not to the judicial, branch of the government. *State v. Griffin*, 84 N. J. L. 429, 87 Atl. 138, affirmed in 85 N. J. L. 613, 90 Atl. 259.

And so the fact that the legislature provides a punishment for a given crime more severe than the courts approve affords no ground for judicial interference; for such interference would be nothing more nor less than an attempted usurpation of legislative power by the judiciary. *Ibid.*

The amount of the fine which the legislature may properly impose depends largely upon the object designed to be accomplished by the imposition of the fine, and the widest latitude is to be given to the discretion and judgment of the legislature

penitentiary, where, by the judgment of the circuit court of McDowell county, they were committed for life on an indictment for robbery.

The indictment, made a part of the return of the warden, charges that petitioners "did, in and upon one William Creasy, feloniously make an assault, and him, the said William Creasy, did then and there feloniously put in bodily fear and danger of his life, and silver coin consisting of two 50-cent pieces of the value of 50 cents each, good and lawful money of the United States of America, of the property of the said William Creasy, from the person and against the will of the said William Creasy, then and there feloniously and violently did steal, take, and carry away, against the

peace and dignity of the state." This is the common-law form of indictment where no dangerous weapon is used. Mayo's Guide, 596; *Houston v. Com.* 87 Va. 257, 265, 266, 12 S. E. 385; 1 Whart. Precedents of Indictments & Pleas, 4th ed. §§ 410-413.

"Robbery," at common law, "is the felonious and forcible taking from the person of another of goods or money to any value, by violence or putting in fear." *State v. McAllister*, 65 W. Va. 97, 131 Am. St. Rep. 955, 63 S. E. 758; *Houston v. Com.* supra. Our statute, § 12, chapter 144, Code 1913, serial § 5163, which does not define robbery, but only prescribes the punishment, provides: "If any person commit robbery, being armed with a dangerous weapon, he

in determining the amount of the fine necessary to accomplish that object. *State v. Griffith*, 83 Conn. 1, 74 Atl. 1068.

But in *Central of Georgia R. Co. v. Railroad Commission*, 161 Fed. 925, reversed on another ground in 95 C. C. A. 117, 170 Fed. 225, it was held that the provision of the Alabama Constitution that "excessive fines shall not be imposed" is addressed more directly to the court; it also imposes limitations upon the exercise of legislative power, and so the legislature must not coerce the discretion of the judges by fixing the minimum fine on conviction so high as to compel an excessive fine.

In *Weems v. United States*, 217 U. S. 349, 54 L. ed. 793, 30 Sup. Ct. Rep. 544, 19 Ann. Cas. 705, in discussing the power of the legislature to define crimes and their punishment, the court said: "We concede the power in most of its exercises. We disclaim the right to assert a judgment against that of the legislature of the expediency of the laws or the right to oppose the judicial power to the legislative power to define crimes and fix their punishment, unless that power encounters in its exercise a constitutional prohibition. In such case, not our discretion, but our legal duty, strictly defined and imperative in its direction, is invoked. Then the legislative power is brought to the judgment of a power superior to it for the instant. And for the proper exercise of such power there must be a comprehension of all that the legislature did or could take into account,—that is, a consideration of the mischief and the remedy. However, there is a certain subordination of the judiciary to the legislature. The function of the legislature is primary, its exercises fortified by presumptions of right and legality, and is not to be interfered with lightly, nor by any judicial conception of their wisdom or propriety. They have no limitation, we repeat, but constitutional ones, and what those are the judiciary must judge. We have expressed these elementary truths to avoid the misapprehension that we do not recognize to the fullest the wide range of power that the legislature possesses to L.R.A.1915C.

adapt its penal laws to conditions as they may exist, and punish the crimes of men according to their forms and frequency."

c. Discretion of court.

Supplementing note in 35 L.R.A. 563.

The imposition of a maximum punishment is within the discretion of the judge who tries the case, and who is well advised as to the facts. *Jackson v. United States*, 42 C. C. A. 452, 102 Fed. 473.

II. Nature of punishments.

a. Penitentiary.

Supplementing note in 35 L.R.A. 564.

A sentence to the penitentiary, instead of to hard labor on the public roads, on conviction of conspiracy to defraud, is not cruel or unusual punishment. *Howard v. Fleming*, 191 U. S. 126, 48 L. ed. 121, 24 Sup. Ct. Rep. 49.

b. Transfer from reformatory to state prison.

In *Stagway v. Riker*, 84 N. J. L. 201, 86 Atl. 440, it was contended that the transfer of an inmate of a reformatory to the state's prison, under a statute permitting such transfer, was cruel and unusual punishment in that without notice or further hearing an indeterminate sentence in the reformatory was by the transfer transmuted into a determinate sentence in state's prison, but the court said that from an inspection of the mere record it could not say that what had been ordered done was of such an unusual character in its application to the one so transferred as to be subject to the charge of cruel and unusual punishment.

c. Indeterminate sentence.

Cruel and unusual punishment is not made by an indeterminate sentence not more than the maximum nor less than the minimum prescribed by statute for the specified crime. *Miller v. State*, 149 Ind. 607, 40 L.R.A. 109, 49 N. E. 894.

shall be confined in the penitentiary not less than ten years; if not so armed, he shall be confined therein not less than five years." As we said in *State v. McAllister*, supra, the offense referred to in this statute is the common-law offense of robbery.

The main ground, indeed the only ground, on which petitioners rely to obtain their discharge, is that our statute, which prescribes only minimum penalties, and leaves it within the power of the court to pronounce judgment of imprisonment for life, a "cruel and unusual punishment," is void, contravening § 5 of article 3 of our Constitution, providing among other things against "cruel and unusual punishment," and that "penalties shall be proportioned to the character and degree of the offense."

And no constitutional right of accused is violated by a statute permitting an indeterminate sentence, where the maximum term is provided by statute, although authority to shorten rests with the commission. *State v. Duff*, 144 Iowa, 142, 24 L.R.A.(N.S.) 625, 138 Am. St. Rep. 269, 122 N. W. 829.

And the Michigan indeterminate sentence law (Act No. 184, 1905) does not provide for any cruel or unusual punishment. *People v. Cook*, 147 Mich. 127, 110 N. W. 514.

In *Williams v. State*, 91 Neb. 605, 136 N. W. 1011, while upholding the constitutionality of an indeterminate sentence act, the court criticized the holdings under practically similar statutes, because they deprived the trial courts of all discretion and so prevented the fixing of an indeterminate sentence within the statutory limits stating that it could not give unqualified approval to such a construction of the act, as one sentenced for not less than a minimum or longer than the maximum term provided by a statute might, if strangers and without friends who would become interested in their behalf, remain in prison for the full maximum term, which might in some instances amount to a cruel and unjust punishment.

d. Capital punishment; electrocution.

1. Generally.

For earlier cases on this point, see note in 35 L.R.A. 575, under the heading, "Murder and Manslaughter."

The execution of a criminal by electricity is not cruel or unusual punishment within the meaning of the constitutional prohibition of such punishment. *Storti v. Com.* 178 Mass. 549, 52 L.R.A. 520, 60 N. E. 210.

So, the New Jersey electrocution act (Pamph. Laws 1906, p. 112) does not provide for cruel and unusual punishment within the meaning of such a constitutional provision. *State v. Tomassi*, 75 N. J. L. 739, 69 Atl. 214.

L.R.A.1916C.

We deem it quite unnecessary to enter upon any extended discussion as to what is meant by "cruel and unusual punishment," interdicted by the Constitution, and by that other clause thereof respecting what penalties may be imposed. These questions were elaborately and ably gone into by Judge Brannon in *State v. Woodard*, 68 W. Va. 66, 30 L.R.A.(N.S.) 1004, 69 S. E. 385. As said in that case, the clause, "cruel and unusual punishment," originally occurring in the Bill of Rights of 1688, was there inserted as a provision against cruel judgments like those inflicted in the days of the tyrant Stuarts, and which found its way naturally into our Constitution, and into the Constitutions of most of the states. But Judge Brannon says it refers only to punishments

Penalty of death, in the discretion of the court, for attempt to commit rape, is not within the inhibition of the Constitution against cruel and unusual punishment. *Dutton v. State*, 123 Md. 373, 91 Atl. 417.

Nor is an act which permits the infliction of capital punishment in train robbery cases within the constitutional inhibition against cruel and unusual punishment. *Territory v. Ketchum*, 10 N. M. 718, 55 L.R.A. 90, 65 Pac. 169; *State v. Stubblefield*, 157 Mo. 360, 58 S. W. 337. In the *Stubblefield Case*, the court stated that "punishment is not to be regarded as either cruel or unusual because never inflicted before on a certain class of criminals. The legislature is not necessarily restricted in inflicting the death penalty because such legislation is newly enacted. The primary object of such a law is its deterrent effect, and the legislature has the right to so increase the punishment of crimes as to strike terror into the hearts of those who, but for such intimidation, might be more strongly tempted to commit them. Passengers on trains, as well as express agents, engineers, conductors, and firemen, have some title to consideration and some hold on legislative and constitutional protection,—perhaps as great as those who seek to wreck trains, or rob or murder passengers."

2. Crimes committed by convicts.

Punishment of death for an assault with a deadly weapon with malice aforethought, by one undergoing a life sentence in a state prison, is not violative of the provision of the state Constitution prohibiting cruel or unusual punishment. *People v. Oppenheimer*, 156 Cal. 733, 106 Pac. 74; *Re Finley*, 1 Cal. App. 198, 81 Pac. 1041.

The court said in the *Finley Case* that "it must be admitted that every person, whether felon or freeman, should be punished for making a deadly assault on another. This then suggests an inquiry as to the punishment which could be inflicted on a guilty life convict if the judgment of death be not permissible. Through his own misconduct such convict has forever forfeited

of such cruel character as he there describes, and was not intended as a limitation on the general powers of the legislature to say what are offenses and to prescribe punishments therefor.

Robbery, from the earliest times, has always been regarded a crime of the gravest character. At common law the punishment for robbery was death, with or without benefit of clergy, according to varying statutes. 4 Sharswood's Bl. Com. 243. Now, by statute the punishment for robbery in England is penal servitude for life. 9 Laws of England (Halsbury) 664, § 1333. While the punishment inflicted on petitioners in this case is the same as prescribed in the English statute, the extreme limit under our statute, our law allows a lesser punishment and

down to the minimum punishment prescribed. The statutes of the different states vary greatly in regard to the punishment prescribed for robbery. In Virginia the statute prescribes death if accomplished with violence in certain ways, or, in the discretion of the jury, not less than eight nor more than eighteen years; if committed in any other mode, a maximum and minimum imprisonment is prescribed, not less than five nor more than ten years. The indictment does not charge petitioners with having committed the offense "being armed with a dangerous weapon;" but we do not know what aggravating circumstances, if any, may have been shown on the trial, justifying imprisonment for life. Our cases of Moody

his liberty and has suffered civil death. The only remaining right or privilege he can forfeit is his physical life. The limit of ordinary punishment has been reached, and if this only remaining penalty cannot be inflicted, then such convict stands immune from further human retribution. The necessity for such punishment cannot be questioned."

e. Convict labor.

Supplementing note in 35 L.R.A. 566.

A sentence to work on the streets or other public places for illegal sale of intoxicating liquors is not cruel or unusual punishment. *Loeb v. Jennings*, 133 Ga. 796, 67 S. E. 101, 18 Ann. Cas. 376.

Nor is two years' imprisonment, to be worked on the roads, for a particularly outrageous assault on an old man, accompanied with robbery, cruel or unusual punishment. *State v. Apple*, 121 N. C. 584, 28 S. E. 469.

And it was also so held as to a like punishment imposed on conviction of carrying a concealed weapon, in *State v. Hamby*, 126 N. C. 1066, 35 S. E. 614.

In *State v. Lee*, 166 N. C. 250, 80 S. E. 977, it was contended that a sentence of nine years and six months on the county roads, upon conviction of highway robbery, was under the evidence cruel and unusual punishment, it being within six months of the maximum punishment permitted under the statute. The court stated that, while it would not hold that, as a matter of law, the punishment was in excess of the powers of the judge, it was frank to say that it did not commend itself to it as being at all commensurate with the offense under the evidence; that there was neither aggravation nor circumstances which tended to show that the punishment should approximate the highest limit allowed by law in such cases.

f. Hard labor.

Supplementing note in 35 L.R.A. 566.

See *State v. Borgstrom*, 69 Minn. 508, 72 N. W. 799, 975; *Kinkaid v. Jackson*, 66 Fla. 378, 63 So. 706, *infra*, II. i; *Hendrix L.R.A.*1915C.

v. United States, 2 Okla. Crim. Rep. 240, 101 Pac. 125; *Clampitt v. United States*, 6 Ind. Terr. 92, 89 S. W. 666, 10 Ann. Cas. 1087, *infra*, III. h; *Rinker v. United States*, 81 C. C. A. 579, 151 Fed. 755, *infra*, III. o.

A statute relating to desertion and non-support of a wife by her husband, which provides the penalty of hard labor in a penitentiary or reformatory for not exceeding two years, upon conviction, is not void as containing a punishment that is unusual. *State v. Gillmore*, 88 Kan. 835, 47 L.R.A. (N.S.) 217, 129 Pac. 1123.

So, also, imprisonment at hard labor for the offense of a tramp in threatening to do personal injury to another person was upheld as constitutional in *State v. Hogan*, 63 Ohio St. 202, 52 L.R.A. 863, 81 Am. St. Rep. 626, 58 N. E. 572.

A sentence to pay a fine of \$100 and to be imprisoned in the county jail for one year at hard labor, or to be confined at hard labor in the state penitentiary for one year, is not cruel or unusual punishment for disturbing a religious meeting. *State v. Sheppard*, 54 S. C. 178, 32 S. E. 146.

Nor is sentence of five years in a penitentiary at hard labor on conviction of criminal libel, the maximum punishment, although it may be severe, cruel and unusual punishment. *Raymond v. United States*, 25 App. D. C. 555, writ of certiorari denied in 200 U. S. 619, 50 L. ed. 623, 26 Sup. Ct. Rep. 755.

But cruel and unusual punishment forbidden by the Philippine Bill of Rights is inflicted by the provisions of the Philippine Penal Code under which the falsification by a public official of a public and official document must be punished by fine and imprisonment at hard and painful labor for a period ranging from twelve years and one day to twenty years, the prisoner being subject, as accessory, to the main punishment, to carrying during his imprisonment a chain at the ankle and hanging from the wrist, to deprivation during the term of imprisonment of civil rights, and to perpetual absolute disqualification to enjoy political rights, hold office, etc., and the surveillance of the authorities during life. *Weema*

v. State, 1 W. Va. 337; State v. Jackson, 26 W. Va. 250, and the Virginia case of Houston v. Com. supra, and other cases, furnish no precedents for inflicting the severest punishment. As said, however, the evidence is not before us, and we have no means of knowing the aggravating facts and circumstances, if any, justifying the punishment. However, as the statute prescribes only minimum penalties for both forms, leaving it to the court to say what the punishment shall be, we cannot say, in view of the law and facts presented, that the judgment is violative of the Constitution and void. If we have any power to review or revise such judgment it is by writ of error, not upon habeas corpus.

But does the statute or judgment of im-

prisonment contravene the provision of the Constitution that "penalties shall be proportioned to the character and degree of the offense?" Certainly on habeas corpus we cannot so hold. A different case might be presented on writ of error, with all the evidence before us; but in the absence of the whole record, how can we say the punishment inflicted is obnoxious to this constitutional limitation? As the statute is not void, we cannot see that the punishment is disproportioned to the offense. In State v. Woodard, supra, Judge Brannon does say, influenced by this clause of the Constitution and the recent case of Weems v. United States, 217 U. S. 349, 54 L. ed. 793, 30 Sup. Ct. Rep. 544, 19 Ann. Cas. 705: "Surely, under our Constitution fines so ex-

v. United States, 217 U. S. 349, 54 L. ed. 793, 30 Sup. Ct. Rep. 544, 19 Ann. Cas. 705.

g. House of correction; training school.

See also note in 35 L.R.A. 567.

Chap. 153, Minnesota Statutes 1895, which provides for the sentencing of the juvenile delinquents to the state training school, does not provide cruel, unusual, or unequal punishment. State ex rel. Schulman v. Phillips, 73 Minn. 77, 75 N. W. 1029.

Nor is an ordinance which provides, as a penalty for its violation, confinement in a house of correction, void for unreasonableness because of the fact that felons are also sentenced to the same institution. Re Cox, 129 Mich. 635, 89 N. W. 440.

h. Imprisonment for costs.

Supplementing note in 35 L.R.A. 567.

Imprisonment for costs taxed in a prosecution brought by the attorney general under the prohibitory liquor law is not cruel and unusual punishment. Re Ellis, 76 Kan. 368, 91 Pac. 81.

Nor will the punishment be made cruel or unusual by the refusal of the board of county commissioners to discharge such person, although they are satisfied that he is unable to pay the costs. Ibid.

Sentence of confinement to county jail until fine and costs are paid is not unusual and cruel punishment because of the fact that one so sentenced is infirm and unable to work and has no money with which to pay costs, and so there is presented a liability to perpetual imprisonment, where, by virtue of another statute, "no convict shall be held in custody for a fine and imprisonment longer than two years," and so his release can be obtained at the end of that time. Ex parte McInnis, 98 Miss. 773, 54 So. 260.

i. Fines.

Supplementing note in 35 L.R.A. 567.

See also infra, III. g, III. j.

A statute which provides a maximum punishment of imprisonment for two years L.R.A.1915C.

and a fine of \$500, upon the conviction of a civilian of purchasing or receiving in pledge public property from any soldier, is not unconstitutional as providing for an excessive fine or cruel and unusual punishment, prohibited by the 8th Amendment of the United States Constitution. Ontai v. United States, 110 C. C. A. 288, 188 Fed. 310.

So, also, as to a statute imposing a penalty of not less than \$100 nor more than \$500, or imprisonment in the county jail for not longer than six months, or both, on one working longer than eight days in an underground mine, smelter, or institution for the reduction or refining of ores or metals. Ex parte Kair, 28 Nev. 127, 113 Am. St. Rep. 817, 80 Pac. 463, 6 Ann. Cas. 893.

Nor is an act imposing a penalty of not less than \$100 nor more than \$500, for the failure of a railway to give crossing signals, violative of a similar provision in the state Constitution. Louisville, H. & St. L. R. Co. v. Com. 104 Ky. 35, 46 S. W. 207.

Nor does an act imposing a fine of from \$25 to \$100 for each day that an electric car is operated in the winter months without a screen to protect the motorman impose cruel and unusual punishment, the court stating that every statute imposing a fine might by the same token be held cruel and unusual punishment, and that the way to avoid the cruelty is to obey the law and avoid accumulated fines. State v. Whitaker, 160 Mo. 59, 60 S. W. 1068. But see Central of Georgia R. Co. v. Railroad Commission, infra.

Imposing a fine of from \$100 to \$250 and imprisonment from ten to thirty days, for violating a statute regulating temporary or transient dealers, does not constitute an excessive fine or cruel punishment in a constitutional sense. State v. Foster, 22 R. I. 163, 50 L.R.A. 339, 46 Atl. 833.

Acts of 31st Legislature, chap. 20, § 2 (Texas), in assessing a fine in double the amount of the license fee for failure to pay the license fee required by that act for conducting a cold storage, do not violate

cessive, imprisonment so long, looking to the offense, as to shock our feelings of humanity, conscience, justice, and mercy would be branded by this clause." But how can we look to the offense without the record? And if we had the record, the statute being valid, could we discharge the prisoners on habeas corpus, when properly convicted of crime? If we had the case on writ of error, and the whole record before us so as to be able to judge of the character of the crime, and whether the punishment inflicted was disproportioned to the offense, we might reverse the judgment and remand the case with direction to enter a proper judgment on the verdict.

Nor do we think our statute providing for the punishment of robbery in conflict with the 14th Amendment or other provisions in the Federal Constitution, as represented in the eighth and ninth paragraphs of plaintiffs' petition.

If there is merit in the claim of petitioners that they have been unjustly punished, they may have a case for executive clemency, but we cannot discharge them on habeas corpus.

We therefore deny the writ.

Petition for leave to appeal to Supreme Court of the United States denied June 24, 1914.

the constitutional provision against the imposition of excessive fines and penalties and cruel and unusual punishment. *Ex parte Flake*, — Tex. Crim. Rep. —, 149 S. W. 146.

And the penalty of a fine of not less than \$1,000 nor more than \$5,000 and imprisonment in state's prison for not less than one year nor more than five years, on conviction of keeping a gambling resort, was upheld as constitutional, in *State v. Griffin*, 84 N. J. L. 429, 87 Atl. 138, affirmed in 85 N. J. L. 613, 90 Atl. 259.

A judgment that he pay a fine of \$500 and be remanded to the custody of the marshal until such fine is paid, pronounced against an attorney for contemptuous language to the jury, is not excessive, unusual, and cruel in the absence of evidence that it was out of proportion to the offense, or that it was beyond the ability of the offender to pay the fine, or to secure discharge from imprisonment by taking "the poor debtor's oath," and that the imprisonment as an alternative would therefore be indefinite. *Re Maury*, 123 C. C. A. 642, 205 Fed. 626.

Nor is punishment of a fine of \$500 and sentence to be confined in the state penitentiary at hard labor for one year, for intentional misappropriation of \$62.50 by a register of deeds, cruel and unusual punishment. *State v. Borgstrom*, 69 Minn. 508, 72 N. W. 799, 975.

Nor a fine of \$500 and imprisonment in a city prison at hard labor on the streets, for violation of a municipal ordinance against fighting. *Kinkaid v. Jackson*, 66 Fla. 378, 63 So. 706.

Nor the imposition of a fine in addition to the death penalty on conviction of homicide. *Jenkins v. State*, — Wyo. —, 135 Pac. 749.

The Texas anti-trust law of 1899 (act of the 26th Legislature, chap. 146), which provides a forfeiture of not less than \$200 nor more than \$5,000 for every offense, stating that each day of continuance of the violation shall be a separate offense, and also provides a forfeiture of all corporate rights and franchises of corporations, is not unconstitutional and void as imposing upon persons who may violate its provisions ex-L.R.A.1915C.

cessive and unreasonable penalties. *State v. Laredo Ice Co.* 96 Tex. 461, 73 S. W. 951.

And a penalty imposed as special damages on a railroad company for delay of shipment, of 5 per cent per month on the value of the property at the time of the shipment, as provided by Texas Revised Statutes 1895, art. 4496, is not violative of constitutional provisions against the imposition of excessive fines or the infliction of cruel and unusual punishments. *Texas C. R. Co. v. Hannay-Ferichs & Co.* 104 Tex. 603, 142 S. W. 1163, 2 N. C. C. A. 71.

The imposition of the maximum penalty of \$1,000 for violation of a statute prohibiting usurious contracts was held in *State v. Griffith*, 83 Conn. 1, 74 Atl. 1068, not to be so disproportionate to the offense as to justify the court in declaring the statute void as in conflict with the constitutional provision of the state prohibiting imposition of excessive fines.

But the subjection of a railroad company to a fine of several hundred dollars for each violation of the statute fixing railroad rates is in violation of the provision of a state Constitution that "excessive fines shall not be imposed." *Central of Georgia R. Co. v. Railroad Commission*, 161 Fed. 925, reversed on another ground in 95 C. C. A. 117, 170 Fed. 225.

And a fine of \$550 and costs on conviction of malicious mischief for castrating a bull is in violation of a provision of a Bill of Rights that "all penalties shall be proportioned to the nature of the offense," where the proof shows that the bull was worth only \$40, that it was castrated without cruelty or unnecessary pain, and in such a way that it became an ordinarily healthy and valuable steer. *People v. Jones*, 241 Ill. 482, 89 N. E. 752, 16 Ann. Cas. 332.

So, also, requiring one who has embezzled over \$500,000 of state funds to pay a fine equal to the amount of the embezzlement, or suffer life imprisonment, while within the terms of, and in compliance with, the direct command of statute affixing the penalty for such offense, is cruel and unusual punishment within the prohibition of the Constitution, both as to the term of

imprisonment and as to the fine, where accused has not the power to pay it presently or secure the necessary funds by a lifetime of effort. *State v. Ross*, 55 Or. 450, 42 L.R.A.(N.S.) 601, 104 Pac. 596, 106 Pac. 1022.

j. Statute fixing no maximum punishment.

See also *State v. Kight*, 106 Minn. 371, 119 N. W. 58, and *State v. Constantino*, 76 Vt. 192, 56 Atl. 1101, *infra*, III. j.

An act which fixes no maximum punishment is not by that fact in conflict with the constitutional provision as to excessive fines because of a possibility of excessive fines being imposed, the act itself not providing for the imposition of excessive fines, and it not being presumed that the court will do violence to the constitutional provision. *Re Hallawell*, 8 Cal. App. 563, 97 Pac. 320.

Texas Penal Code 1911, art. 1259, which provides for the punishment of one injuring a railroad or railroad property, is not unconstitutional because it prescribes no maximum fine. *Hamilton v. State*, — Tex. Crim. Rep. —, 153 S. W. 134.

And the act of 1895, Indiana, relative to fraudulent marriages, is not for the reason that it does not limit the maximum recovery, antagonistic to § 16 of the Bill of Rights, which forbids excessive fines and cruel and unusual punishment. *Latshaw v. State*, 156 Ind. 194, 59 N. E. 471.

k. Bread and water.

Supplementing note in 35 L.R.A. 569.

In *Spencer v. State*, 132 Wis. 509, 122 Am. St. Rep. 989, 112 N. W. 462, 13 Ann. Cas. 969, a statute providing that upon conviction of a husband of abandoning his wife and neglecting to support her, he shall be punished by not exceeding one year's imprisonment in the state's prison, or in the county jail not more than six months or less than fifteen days, ten days of which imprisonment in the county jail may, in the discretion of the court, be upon a diet of bread and water only, was attacked as unconstitutional on the ground that the bread and water clause of the punishment was cruel and unusual. It was held that, as the defendant was sentenced to imprisonment in the state's prison, it could not be well claimed that, because the statute authorizes the infliction of either of two punishments, one of which is objectionable, the whole statute was thereby made void; but the court stated that in its opinion the clause in question might well be justified as providing an appropriate punishment for an aggravated case of abandonment or failure to support.

l. Imprisonment of insane person on acquittal.

Generally, as to confinement of one acquitted of crime by reason of insanity, see notes to *Ex parte Brown*, 1 L.R.A.(N.S.) L.R.A.1915C.

540, and *People ex rel Peabody v. Chanler*, 25 L.R.A.(N.S.) 946.

No cruel punishment is inflicted by committing one who has been acquitted of the crime of murder on the grounds of insanity to prison, where it appears to the court that his discharge from custody will be manifestly dangerous to the peace and safety of the community. *Re Brown*, 39 Wash. 160, 1 L.R.A.(N.S.) 540, 109 Am. St. Rep. 568, 81 Pac. 552, 4 Ann. Cas. 488.

m. Disbarment of attorney.

A statute authorizing the disbarment of an attorney for and on account of his conviction of a felony or misdemeanor involving moral turpitude does not violate any of the constitutional rights prohibiting the infliction of cruel and unusual punishment. *Re Henry*, 15 Idaho, 755, 21 L.R.A.(N.S.) 207, 99 Pac. 1054. The conviction in this case was for larceny.

n. Forfeiture.

See *Krueger v. Colville*, 49 Wash. 295, 95 Pac. 81, and *Dinuzzo v. State*, 85 Neb. 351, 29 L.R.A.(N.S.) 417, 123 N. W. 309, *infra*, III. j. See also *State v. Laredo Ice Co.* 96 Tex. 461, 73 S. W. 951, *supra*, II. i.

III. Punishment for particular crimes.

a. Abortion.

Sentence to imprisonment in state prison for three years and to pay a fine of \$1,000, for procuring a pregnant woman to take a drug with intent to produce a miscarriage, is not cruel and unusual punishment, where the statute prescribes the punishment to be not less than one year nor more than ten years and a fine in the discretion of the court. *State v. Shaft*, 166 N. C. 407, 81 S. E. 932.

b. Assault and battery.

Supplementing note in 35 L.R.A. 569.

See also *supra*, II. d, 2; *State v. Apple*, 121 N. C. 584, 28 S. E. 469, *supra*, II. e.

A sentence of imprisonment in the penitentiary for the period of ten years, and to stand committed until such sentence is performed, upon conviction of an assault with a dangerous weapon, although the maximum sentence, is not cruel or unusual punishment within the provision of Amendment 8 of the Constitution of the United States. *Jackson v. United States*, 42 C. C. A. 452, 102 Fed. 473.

So, the following sentences were held not to be cruel or unusual punishment in a constitutional sense:

—two years in the penitentiary for an assault with intent to kill, the assault being wanton and malicious in a marked degree, *State v. Spaugh*, 199 Mo. 147, 97 S. W. 901;

—two years in the penitentiary, the minimum punishment, for an outrageous assault with intent to kill, *State v. Lortz*, 186 Mo. 122, 84 S. W. 906;

—ninety days in jail and \$50 fine for taking a woman from her bed at night, blindfolding her, and stripping her, and carrying her to a field and administering a severe whipping, *Robinson v. State*, — Tex. Crim. Rep. —, 145 S. W. 345;

—fine of 1 cent and imprisonment for three years for assault with a cane, stick, and cowhide, *Cornelison v. Com.* 84 Ky. 583, 2 S. W. 235.

And, there being no statutory limitation to a fine that may be imposed for a misdemeanor, a fine of \$1,000 for an indecent assault on a young woman is not excessive in a constitutional sense, and this although the amount is double that fixed by a statute for certain felonies. *Doyle v. Com.* 100 Va. 808, 40 S. E. 925.

c. Bribery.

A sentence of six years and six months in the state prison, for the crime of asking for a bribe to influence one's vote and action as an alderman, is not cruel or unusual nor excessive. The court stated that, while the sentence is severe, yet the crime is grave and one which tends probably more than any other to sap the very foundation of all civil government. *State v. Durnam*, 73 Minn. 150, 75 N. W. 1127, 11 Am. Crim. Rep. 179.

So, also, a sentence of six month's imprisonment in the county jail and to pay a fine of \$500 for contempt in attempting to bribe a witness, and to stand committed until the fine is paid and the sentence served, was held in *Fisher v. McDaniel*, 9 Wyo. 457, 87 Am. St. Rep. 971, 64 Pac. 1056, not to be altogether disproportionate to the offense, and so cruel or excessive as to meet or merit the condemnation of a reasonable public sentiment, though perhaps, as the court said, severe and doubtless intended to be so. The court added that the corrupt attempt to influence the testimony of witnesses in a pending trial, in the building where the court is in session and the witnesses are assembled, certainly calls for a punishment such as may be properly inflicted in the case of a flagrant misdemeanor.

d. Burglary.

Supplementing note in 35 L.R.A. 570.

A sentence of not less than fifteen nor more than thirty years, for the crime of burglary accompanied with the use of high explosives, is not so unusual and cruel, and so disproportionate to the offense, as to shock the moral sense of the public. *People v. Mire*, 173 Mich. 357, 138 N. W. 1066.

So, also, where the punishment for burglary at night is not less than five years nor more than twenty years, a sentence of ten years imposed upon one who entered a house in the nighttime, stole therefrom a trunk, and breaking it open stole the money which it contained, is not cruel, excessive, or unusual punishment. *Mallory v. State*, 56 Ga. 545. L.R.A.1915C.

And in *Handy v. State*, 46 Tex. Crim. Rep. 406, 80 S. W. 526, it was held that a sentence of thirty years for burglary of a private residence at night was not excessive or cruel where by statute the punishment for such offense was for any term of years not less than five years.

e. Conspiracy; blackmail.

Supplementing note in 35 L.R.A. 571.

A sentence of the state court of ten years' imprisonment, for the offense of conspiracy to defraud, is not so cruel or unusual as requires the interference by the Supreme Court of the United States on habeas corpus. *Howard v. Fleming*, 191 U. S. 126, 48 L. ed. 121, 24 Sup. Ct. Rep. 49. See also *supra*, II. a.

A sentence of ten years is not cruel or unusual punishment for placing a dynamite bomb in the rear of a dwelling house, which exploded causing damage to the property, on refusal of one to comply with threatening letters demanding money sent by an organization known as the "Black Hand." *Lanasa v. State*, 109 Md. 602, 21 Atl. 1058.

And a sentence of ten years (a maximum punishment) imposed upon one convicted of sending a letter threatening to burn the buildings of another unless paid a certain amount of money was held in *Toomer v. State*, 112 Md. 285, 76 Atl. 118, not to be cruel and unusual punishment.

f. Disorderly houses and persons.

Supplementing note in 35 L.R.A. 571.

Penalty of a fine not exceeding \$1,000 or imprisonment for not more than five years, or both, imposed upon one keeping a disorderly house, is not so severe as to come within the inhibition of the Federal Constitution. *Palmer v. Lenovitz*, 35 App. D. C. 303.

So, a statute making the offense of the husband's allowing and permitting his wife to remain in house of prostitution a felony with a possibility of a punishment of ten years in state prison, is not in conflict with the constitutional provision against inflicting cruel and unusual punishment, although other offenses in houses of prostitution are made misdemeanors only. *People v. Conness*, 150 Cal. 114, 88 Pac. 821.

Minnesota Statutes 1913, chap. 562 (Gen. Stat. 1913, §§ 8717, 8726), for abatement of bawdyhouses as a nuisance, were held in *State ex rel. Wilcox v. Gilbert*, 126 Minn. 95, 147 N. W. 953, not to be penal, and so not to be within the inhibition of the constitutional provisions relating to excessive fines and unusual punishments.

g. Fishery and game law offenses.

Supplementing note in 35 L.R.A. 572.

A statute providing for a penalty of not more than \$1,000 or imprisonment not exceeding five years, or both, for the violation of any statute or ordinance regulating the cultivation of oysters, is not within the inhibition of the constitutional provision

against excessive fines or cruel and unusual punishment, as the statute fixes the maximum punishment only, leaving the matter of the severity of the punishment entirely in the hands of the trial court. *State v. Corson*, 67 N. J. L. 178, 50 Atl. 780.

North Carolina Public Local Laws 1911, chap. 184, in prescribing punishment for permitting a setter or pointer dog to run at large during the closed season for quail, are not obnoxious to the provision of the state Constitution which forbids cruel and unusual punishment. *State v. Blake*, 157 N. C. 608, 72 S. E. 1080.

A statute for the preservation of non-game birds is not violative of the Federal Constitution as imposing excessive fines, by reason of the fact that it specifies that a fine shall be imposed for each bird killed. *Re Schwartz*, 119 La. 290, 121 Am. St. Rep. 516, 44 So. 20. The court distinguished *State ex rel. Garvey v. Whitaker*, 35 L.R.A. 561, as being a case where the penalty fixed for the violation of an ordinance against vandalism in the public parks was not cumulative, and so separate fines for each act of vandalism committed during one visit to a park could not be imposed.

So, also, § 45, chap. 336, p. 606, of Minnesota Laws 1903, providing that "no person shall . . . have in possession with intent to sell . . . at any time any . . . wild duck of any variety. . . . Whoever shall offend against any of the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof, shall be punished by a fine of not less than ten (10) dollars, or more than twenty-five (25) dollars, and costs of prosecution, or by imprisonment in the county jail for not less than ten (10) days nor more than thirty (30) days for each and every bird so . . . had in possession with intent to sell," was held not to be unconstitutional as providing for the imposition of excessive fines and the infliction of cruel and unusual punishment, in *State v. Poole*, 93 Minn. 148, 100 N. W. 647, 3 Ann. Cas. 12. In this case the defendant was convicted of having in his possession 2,000 wild ducks, and the minimum fine of \$10 for each bird so possessed was assessed, amounting in the aggregate to \$20,000, which judgment was affirmed on appeal. The court stated that, although each of the defendants was fined \$20,000, the trial court imposed the mildest punishment that the statute would permit for the offense for which they were convicted. And while it must be admitted that the penalties fixed by statute are drastic when imposed in cases where there has been a wholesale violation of the law, it is, however, clear that the purpose of the statute is to protect the wild game of the state, and that, if the punishment were not graduated according to the number of birds unlawfully possessed, this purpose would be defeated, and the statute would invite its own defeat; and that it would be absurd to punish the unlawful possession of 2,000 or more birds on the basis of one.

A penalty of \$20 for each partridge un-

lawfully possessed is not within the inhibition of the Constitution against excessive fines and cruel punishment. *Stone's Petition*, 21 R. I. 14, 41 Atl. 658.

Nor is the penalty of a fine of \$5 for each prairie chicken found in the possession or under the control of one during the closed season, excessive. *McMahon v. State*, 70 Neb. 722, 97 N. W. 1035.

And an act which provides that it is unlawful to possess for any purpose any lobster less than 10½ inches in length, under a penalty of \$5 for each lobster so possessed, is not unconstitutional and void as imposing an excessive fine. *State v. Lubeck*, 93 Me. 418, 45 Atl. 520.

h. Larceny.

Supplementing note in 35 L.R.A. 573.

See also *Re Henry*, 15 Idaho, 755, 21 L.R.A.(N.S.) 207, 99 Pac. 1054, supra, II. m.

A sentence of two years in the penitentiary at hard labor for larceny of cattle is not cruel and unusual punishment, where the penalty affixed by statute for such offense is from one to five years' imprisonment in the penitentiary at hard labor. *Hendrix v. United States*, 2 Okla. Crim. Rep. 240, 101 Pac. 125.

And where the penalty for larceny of any kind of cattle is imprisonment and hard labor in a penitentiary for not less than one nor more than five years, a sentence of two years at hard labor for the larceny of a calf is not cruel and unusual punishment. *Clampitt v. United States*, 6 Ind. Terr. 92, 89 S. W. 666, 10 Ann. Cas. 1087.

i. Lottery.

Punishment fixed at a fine of \$500 and confinement in the state penitentiary for two years, for violation of a lottery statute, is not cruel punishment or excessive fine. *Schroufe v. Com.* 141 Ky. 554, 133 S. W. 205.

j. Liquor law offenses.

Supplementing note in 35 L.R.A. 574.

See also *Loeb v. Jennings*, 133 Ga. 796, 67 S. E. 101, 18 Ann. Cas. 376, supra, II. e; *Re Ellis*, 76 Kan. 368, 91 Pac. 81, supra, II. h; *Ex parte Flake*, — Tex. Crim. Rep. —, 149 S. W. 146, supra, II. i.

A statute regulating the sale of intoxicating liquors and fixing the punishment of illegal sales at \$150, and permitting the imposition of such fines for every offense committed on the same day, is not unconstitutional as providing for an excessive penalty. *Russell v. State*, 19 Wyo. 272, 116 Pac. 451. The court stated that a fine of \$150 for a misdemeanor is neither unusual nor excessive, and the fact one has violated the statute several times on the same day, and that the aggregate of the fines amount to a considerable sum, does not make the punishment excessive.

Also, a statute fixing the punishment for opening on Sunday any room except a drug store where intoxicating liquors are sold

or kept for sale, at a fine of from \$50 to \$250, imprisonment for six months, vacation of license, and the closing of the business for one year, does not violate the constitutional injunction against cruel or unusual punishment, or the infliction of penalties disproportionate to the offense. *State v. Woodward*, 68 W. Va. 66, 30 L.R.A. (N.S.) 1004, 69 S. E. 385; *State v. Wamsley*, 68 W. Va. 103, 69 S. E. 475; *State v. Wamsley*, 68 W. Va. 104, 69 S. E. 476.

And the penalty for violation of a statute prohibiting the opening of saloons during certain hours, of a fine of not less than \$100 nor more than \$500, or imprisonment of not less than six or more than eighteen months, or both such fine and imprisonment, is not violative of the constitutional provision against the imposition of excessive fines or the infliction of cruel and unusual punishment. *Cardillo v. People*, 26 Colo. 355, 58 Pac. 678.

And a fine of not more than \$500 for selling liquor on Sunday, imposed by the liquor tax law (Laws of 1896, chap. 112, § 34), was held in *People v. Crotty*, 22 App. Div. 77, 12 N. Y. Crim. Rep. 473, 47 N. Y. Supp. 845, not to be excessive, but whether upon constitutional or other grounds is not shown.

A municipal ordinance regulating the sale of intoxicating liquors does not prescribe a penalty for its violation so severe as to constitute cruel and unusual punishment, by reason of the fact that it provides a minimum punishment far in excess of the minimum punishment for a similar offense against the state law, where, by charter, large powers are conferred upon the municipality in enforcing its police powers. *Thomas v. Yazzo City*, 95 Miss. 395, 42 So. 821, 1041.

The penalty of a fine of not less than \$25 nor more than \$100, or imprisonment in the county jail for not less than thirty days nor more than one hundred days, or both such fine and imprisonment, for violating an act to prevent the use of intoxicating liquor upon railroad trains and at railroad stations, is not so manifestly unreasonable and disproportionate to the nature of the offense as to be subject to a constitutional objection. *Tarantina v. Louisville & N. R. Co.* 254 Ill. 624, 98 N. E. 999, Ann. Cas. 1913B, 1058.

In *Ex parte Brady*, 70 Ark. 376, 68 S. W. 34, where the aggregate of fines and costs for twenty violations of a liquor act amounted to \$4,000, it was held that cruel and unusual punishment was not established, although if compelled to serve out the fine it would be about twelve years before the defendant would be released. The court said: "In determining whether these fines were excessive within the meaning of our constitutional prohibition against excessive fines, we must consider the offense for which they were imposed and the nature of the illegal business in which the defendant was engaged. It is a matter of common knowledge that the retailing of liquors in large towns is a profitable business. In L.R.A.1915C.

many of the large towns and county seats of the state, local option or prohibition laws are in force which forbid the granting of license to sell liquors in such towns. Now, unless a considerable fine can be assessed against those who violate such laws and sell without license, it is evident that those laws will not stop the illegal sale of liquor, for those who violate the law can afford to pay the fines out of the profits of the business. The only effect of the law will be to compel the payment of fines in the place of a license, and to force the business into the hands of a more lawless and irresponsible set of men. It would be equally futile to impose a large fine unless there were adequate means of enforcing its payment, for men who engage in such illegal traffic are generally either destitute of much property, or they have it concealed so that an ordinary execution, without the right to take the body of the defendant, would generally be of no avail. The amount of the fines imposed in this case, and the imprisonment which must follow unless the fines are paid, are no doubt unusual in a certain sense, but the reason therefor is not found in the undue severity and cruelty of the statute under which the punishment was imposed, but in the number of offenses committed by the defendant."

A fine of \$200 prescribed by Pub. Stat. § 5141 of Vermont, for violation of a provision that no sale of intoxicating liquors shall be made without first furnishing a sample to the secretary of state for inspection, is not violative of the constitutional provisions prohibiting cruel and unusual punishment and requiring all fines to be proportioned to the offense. *State v. Burlington Drug Co.* 84 Vt. 243, 78 Atl. 882.

A statute making Federal licenses *prima facie* evidence of the sale of intoxicating liquors is not in conflict with the constitutional provision prohibiting excessive fines and cruel and unusual punishment. *Brinkley v. State*, 125 Tenn. 371, 143 S. W. 1120.

Section 1519, Minn. Rev. Laws, 1905, relative to violations of liquor traffic, is not unconstitutional and void for the reason that it fixes no maximum penalty for its violation, and leaves the matter to the discretion of the court, in the exercise of which an excessive or cruel and unusual punishment might be imposed, as § 4763, Rev. Laws 1905, which fixes the maximum penalty for misdemeanors when not expressly fixed by a statute declaring certain acts to constitute that offense, controls. *State v. Knight*, 106 Minn. 371, 119 N. W. 56.

So, also, § 68, No. 90, Acts of 1902 (Vermont), which affixed a minimum fine of \$300 for illegal liquor sales, was held in *State v. Constantino*, 76 Vt. 192, 56 Atl. 1101, not to be unconstitutional, as affixing an excessive minimum fine, or because no maximum fine was fixed, the court stating that, considering the character of the business and the ease with which the unlawful traffic in intoxicating liquor can be carried on, it thought that the minimum fine of

\$300 objected to was not so disproportionate to the offense as to justify it in questioning the action of the legislature in prescribing it.

That a licensee, upon conviction of a violation of a statute making it unlawful for a licensed saloon keeper to traffic in intoxicating liquors after and before certain hours, is subjected thereby to a fine and forfeiture of the license, does not invalidate the statute as inflicting cruel and unusual punishment. *Dinuzzo v. State*, 85 Neb. 351, 29 L.R.A.(N.S.) 417, 123 N. W. 309.

And the penalty imposed by a statute for illegal sale of intoxicating liquor to minors, of a forfeiture of a license in addition to fine, was held not excessive in a constitutional sense, in *Krueger v. Colville*, 49 Wash. 295, 95 Pac. 81, the court refusing to discuss the contention that the penalty was in conflict with the Constitution further than to say that a license to sell intoxicating liquors is merely a temporary permit, and not a contract giving vested or property rights.

But see *Robison v. Miner*, 68 Mich. 549, 37 N. W. 21, and *Luton v. Circuit Judge*, 69 Mich. 610, 37 N. W. 571, under IV. p, in the former note, where the penalty of forfeiture of business for violation of local option law was held unconstitutional.

k. Murder and manslaughter.

Supplementing note in 35 L.R.A. 575.

See also *supra*, II. d, 1; *Jenkins v. State*, — Wyo. —, 135 Pac. 749, *supra*, II. i; *Re Brown*, 39 Wash. 160, 1 L.R.A.(N.S.) 540, 109 Am. St. Rep. 868, 81 Pac. 552, 4 Ann. Cas. 488, *supra*, II. l.

A sentence of twelve years in state's prison on conviction of involuntary manslaughter is not, where the maximum punishment provided is twenty-one years, cruel and excessive punishment. *Siberry v. State*, 149 Ind. 684, 39 N. E. 936, 47 N. E. 458.

And the punishment of nine years in the penitentiary on conviction of manslaughter for recklessly firing a fatal shot at another is not excessive, cruel, or unusual. *State v. Lance*, 149 N. C. 551, 63 S. E. 198.

l. Rape.

Supplementing note in 35 L.R.A. 576.

See also *Dutton v. State*, 123 Md. 373, 91 Atl. 417, *supra*, II. d, 1.

A sentence of fifteen years in jail imposed on a negro convicted of assault with intent to rape a female child four years old was held in *Mitchell v. State*, 82 Md. 527, 34 Atl. 246, not to be cruel and unusual punishment, the evidence showing that the child was badly bruised and somewhat lacerated and contracted a disease from which she suffered permanent injuries.

m. Robbery.

Supplementing note in 35 L.R.A. 577.

See also *Territory v. Ketchum*, 10 N. M. 718, 55 L.R.A. 90, 65 Pac. 169, and *State v. L.R.A.1215C*.

Stubblefield, 157 Mo. 360, 58 S. W. 337, *supra*, II. d, 1; *State v. Lee*, 166 N. C. 250, 80 S. E. 977, *supra*, II. e.

A sentence of eight years of *presidio mayor* for robbery, the penalty fixed by the Penal Code, is not cruel or unusual punishment. *United States v. Manolo*, 17 Philippine, 604.

n. Unlawful publications.

Supplementing note in 35 L.R.A. 578.

A sentence of two years to the penitentiary is not an unusual and cruel punishment for publishing and selling a paper devoted mainly to the publication of scandals, immoral conduct, etc. *State v. Van Wye*, 136 Mo. 227, 58 Am. St. Rep. 627, 37 S. W. 938. The court stated that it considered such offense more dangerous to society than the stealing of \$30 worth of goods, to which a similar punishment is affixed.

o. Unlawful use of mails.

A fine of \$5,000 or imprisonment at hard labor for not more than five years on conviction of depositing obscene, lewd, or lascivious matter in the mails, is not cruel or unusual within the provision of the 8th Amendment of the United States Constitution, in view of the corrupting nature of the offense and of the necessity for effectually checking the temptation to use the mails for improper purposes. *Rinker v. United States*, 81 C. C. A. 379, 151 Fed. 755. The court stated that the dissemination of that which makes against decency, purity, and chastity in private life is infinitely more dangerous to society than are many offenses, the authorized and commonly approved punishment for which is more severe. And no other agency is so well adapted to the inexpensive, extensive, and effective dissemination of such indecent matter as the mails; that, while it is true that the statute lodges a wide discretion in the court in affixing the punishment, this is upon the supposition that the discretion will be judicially exercised according to the circumstances of the particular offense, its malignity, and the occasion for deterring others from offending in a like way, and that no doubt there are many cases in which the imposition of the maximum punishment would be consistent with the constitutional guaranty.

p. Violation of ordinances.

Supplementing note in 35 L.R.A. 578.

See also *Re Cox*, 129 Mich. 635, 89 N. W. 440, *supra*, II. g; *Kinkaid v. Jackson*, 66 Fla. 378, 63 So. 706, *supra*, II. i; *Thomas v. Yazoo City*, 95 Miss. 395, 42 So. 821, 1041, *supra*, III. j.

A fine of \$100 for violation of an ordinance prohibiting the transportation of nitroglycerin through the streets of a city is not excessive and unreasonable. *Walter v. Bowling Green*, 26 Ohio, C. C. 756.

g. Contempt.

See *Re Maury*, 123 C. C. A. 642, 205 Fed. 626, supra, II. i; *Fisher v. McDaniel*, 9 Wyo. 457, 87 Am. St. Rep. 971, 64 Pac. 1056, supra, III. c.

r. Carrying concealed weapon.

Supplementing note in 35 L.R.A. 571.
See *State v. Hamby*, 126 N. C. 1066, 35 S. E. 614, supra, II. e.

s. Desertion and nonsupport.

See *State v. Gillmore*, 88 Kan. 835, 47 L.R.A. (N.S.) 217, 129 Pac. 1123, supra, II. f; *Spencer v. State*, 132 Wis. 509, 122 Am. St. Rep. 989, 112 N. W. 462, 13 Ann. Cas. 969, supra, II. k.

t. Gambling.

Supplementing note in 35 L.R.A. 572.
See *State v. Griffin*, 84 N. J. L. 429, 87 Atl. 138, supra, II. i.

u. Libel.

Supplementing note in 35 L.R.A. 573.
See *Raymond v. United States*, 25 App. D. C. 555, supra, II. f.

v. Disturbing religious meeting.

See *State v. Sheppard*, 54 S. C. 178, 32 S. E. 146.

w. Embezzlement.

See *State v. Ross*, 55 Or. 450, 42 L.R.A. (N.S.) 601, 104 Pac. 596, 106 Pac. 1022, and *State v. Borgstrom*, 69 Minn. 508, 72 N. W. 799, 975, supra, II. i.

x. Malicious Mischief.

See *People v. Jones*, 241 Ill. 489, 89 N. E. 752, 16 Ann. Cas. 332 (castrating bull), supra, II. i; *Hamilton v. State*, — Tex. Crim. Rep. —, 153 S. W. 134 (injuring railroad or railroad property), supra, II. j.

y. Usury.

See *State v. Griffith*, 83 Conn. 1, 74 Atl. 1068, supra, II. i.

z. Miscellaneous.

Imprisonment in the county jail or state prison for a period of not less than thirty days and not exceeding one year, upon conviction of pool selling or bookmaking is not a cruel and unusual punishment. *Re O'Shea*, 11 Cal. App. 568, 105 Pac. 776.

The maximum punishment of imprisonment for two years and a fine of \$500, imposed upon a civilian who knowingly purchases or accepts in pledge from a soldier any public property, is not an excessive fine or cruel and unusual punishment, within the provision of the 8th Amendment to the United States Constitution. *Ontai v. United States*, 110 C. C. A. 288, 188 Fed. 310.

For violation of tramp act, see *State v. L.R.A.1915C*.

Hogan, 63 Ohio St. 202, 52 L.R.A. 863, 81 Am. St. Rep. 626, 58 N. E. 572, supra, II. f; falsification of public and official document by public official, see *Weems v. United States*, 217 U. S. 349, 54 L. ed. 793, 30 Sup. Ct. Rep. 544, 19 Ann. Cas. 705, supra, II. f; violation eight-hour law, see *Ex parte Kair*, 28 Nev. 127, 113 Am. St. Rep. 817, 80 Pac. 463, 6 Ann. Cas. 893, supra, II. i; violation of statute regulating temporary or transient dealers, see *State v. Foster*, 22 R. I. 153, 50 L.R.A. 339, 46 Atl. 833, supra, II. i; violation of anti-trust law, see *State v. Laredo Ice Co.* 96 Tex. 461, 73 S. W. 951, supra, II. i; violation of statutes regulating railroads, see *Louisville, H. & St. L. R. Co. v. Com.* 104 Ky. 35, 46 S. W. 207; *State v. Whitaker*, 160 Mo. 59, 60 S. W. 1068; *Texas C. R. Co. v. Hannay-Frerichs & Co.* 104 Tex. 603, 142 S. W. 1163, 2 N. C. C. A. 71; *Central of Georgia R. Co. v. Railroad Commission*, 161 Fed. 925, supra, II. i.

IV. Extent of United States Constitution.

Supplementing note in 35 L.R.A. 578.

The 8th Amendment to the Federal Constitution is a restriction upon the Federal government only, and does not apply to state statutes. *Com. v. Whitney*, 108 Mass. 5; *State v. Blake*, 157 N. C. 608, 72 S. E. 1080; *Hamilton v. State* — Tex. Crim. Rep. —, 153 S. W. 134. J. H. B.

GEORGIA SUPREME COURT.

COLUMBUS RAILROAD COMPANY, Plff.
in Err.,
v.

MRS. A. E. KITCHENS.

(142 Ga. 677, 83 S. E. 529.)

Electricity — lightning arrester on wires.

Where an electric light company maintains overhead wires from its plant to a residence of one of its patrons, for the purpose of supplying light to the house, the company is under duty to employ such approved apparatus in general use as will be reasonably necessary to prevent injury to the house, or persons or property therein, arising from electricity which may be generated by a thunderstorm and strike the wires, and be conducted thereby into the residence. A petition which alleged a negligent failure in respect of such matters, and damage arising therefrom, was not

Headnote by ATKINSON, J.

Note. — *Duty of electric company with respect to wiring or fixtures installed in private property.*

This note is supplementary to notes on the same subject appended to *Fish v. Waverly Electric Light & P. Co.* 13 L.R.A. (N.S.)

subject to demurrer on the ground that it failed to set out a cause of action. The petition was not subject to any of the grounds set out in the demurrer.

(November 13, 1914.)

ERROR to the Superior Court for Muskege County to review a judgment overruling a demurrer to a petition filed to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

Statement by Atkinson, J.:

Mrs. A. E. Kitchens instituted an action for damages against the Columbus Railroad Company. A demurrer to the petition was filed, which was overruled, and the defend-

ant excepted. The petition alleged the following in substance: That defendant, a corporation, on the day of the injury, and for some time prior thereto, was engaged in furnishing and supplying electricity to its customers for the purpose of lighting residences, for a consideration to be paid. The plaintiff was a customer to whom the defendant supplied electricity for the purpose of lighting her residence. The media or vehicle used by the defendant to transmit the electricity to residences were wires strung overhead on poles or posts, at intervals along the streets and vicinage, and from the poles into the residences to be lighted. At the end of the wires were attached incandescent lamps. The wires so used are among the best-known conductors

226, and Minneapolis General Electric Co. v. Cronon, 20 L.R.A.(N.S.) 816.

For the applicability of the rule *res ipsa loquitur* to accidents on private property, due to escape of electricity from disordered electrical appliances, see notes to Western Coal & Min. Co. v. Garner, 22 L.R.A.(N.S.) 1183, and Turner v. Southern P. Co. 32 L.R.A.(N.S.) 848.

Care required generally.

A company furnishing electricity to private property is not an insurer against danger, but is obliged to use care commensurate with the danger involved, and a patron has a right to assume that such a current as is consistent with the proper rendering of the service contracted for will be used. Alabama City, G. & A. R. Co. v. Appleton, 171 Ala. 324, 54 So. 638, Ann. Cas. 1913A, 1181.

A power company, in furnishing electricity to patrons, with respect to employees of the latter rightfully on the premises of the patrons, and likely to come into contact with wires carrying the current supplied, is bound to use ordinary care, which demands that the power company shall use such diligence in preventing injuries to such employees as is commensurate with the danger involved in the use and control of such a subtle and deadly agency as electricity. Denson v. Georgia R. & Electric Co. 135 Ga. 132, 68 S. E. 1113.

"Electricity is recognized as one of the most destructive agencies we have, and the highest degree of diligence is required by those who are operating electrical plants in order to avoid injury to person or property." Younie v. Blackfoot Light & Water Co. 15 Idaho, 56, 96 Pac. 193.

"Where a corporation, for its profit, assumes to control the distribution of a substance as dangerous to human life as electricity when the current is maintained at a high voltage, it is its duty to exercise at least reasonable care to prevent its escape in a death-dealing manner." Webster v. Richmond Light & R. Co. 158 App. Div. 210, 143 N. Y. Supp. 57.

In Turner v. Southern Power Co. 154 N. L.R.A.1915C.

C. 131, 32 L.R.A.(N.S.) 848, 69 S. E. 767, which was an action for injuries received by plaintiff as he attempted to turn on an incandescent light in his store, the court approved an instruction given by the trial court as follows: "That while the law does not regard an electric light company an insurer against injury, such a company owes to its patrons the duty to protect them from injury, by exercising the highest skill, most consummate care and caution, and the utmost diligence and foresight in the construction, maintenance, and inspection of its plant and appliances obtainable, consistent with the practical operation of its plant. So it is something more, under the law, as the court understands it, than ordinary care; it is the highest care."

In Escambia County Electric Light & P. Co. v. Sutherland, 61 Fla. 167, 55 So. 83, which was an action for the death of plaintiff's husband, caused by coming into contact with an electric light wire in a mill in which he was employed, the theory of plaintiff was that defendant permitted an excessive current to enter the mill, and it was alleged in various counts that defendant was negligent in not having the wire properly insulated, in not keeping its transformer in good condition so as to reduce the current to a safe voltage, and in not installing and keeping in good condition a cut-out fuse to prevent a too powerful current from passing over the wire. The court, in view of the confusion in instructions given in the case and in other cases as to the duty of an electric company to its patrons, adopted the following formula as a proper statement of the law: "An electric company furnishing light to its patrons, while not an insurer against all possible accidents to those whose right or duty [it] is to use its electricity, yet is under obligation to do all that human care, vigilance, and foresight can reasonably do, consistent with the practical operation of its plant, to protect such persons."

In Norfolk & P. Traction Co. v. Daily, 111 Va. 665, 69 S. E. 963, the court approves an instruction that defendant was not required to guarantee the safety of the

of electricity, and during thunderstorms are exceedingly dangerous and liable to cause death or great bodily harm to persons at or near them, unless properly insulated and safeguarded by ground wires, lightning arresters, or other safe appliances. The defendant furnished electricity to light petitioner's residence by wires in the manner just described. The wires to her residence extended from a pole or post directly north of and about 90 feet from the residence. The length of the pole or post is about 30 or 40 feet, and stands on a hill or mound which adds to its height, thereby increasing its liability to be struck by lightning. On the day first above mentioned a slight electric storm occurred, of such severity as usually occurs in that locality at that sea-

son of the year. At the time of the storm the plaintiff was engaged in her usual household duties, and was standing in one of the rooms so lighted by the defendant, about 2 or 3 feet in a vertical line from one of the electric lights, when lightning struck the pole or post just referred to, and the electric current was conveyed along the wires to petitioner, throwing her violently to the floor and causing injury. The defendant was negligent in all of the particulars aforesaid, and especially in not properly grounding and safeguarding the wires so used, and in not constructing and maintaining them with due diligence and care.

After the demurrer was filed an amendment was allowed, alleging that the de-

wire run to plaintiff's house, but "was required to exercise that due and ordinary care which the present state of scientific knowledge, as well as the common observation of the nature of electricity and the enormous power of lightning would suggest as reasonably necessary for the protection of life along its line and wires," as being a proper statement of the "ordinary care" required of defendant.

In *Younie v. Blackfoot L. & Water Co.* supra, it was held that evidence that, after wires became crossed outside of plaintiff's premises, he tried to get defendant's office by telephone to inform the company of the trouble, but could not, and then went to its substation and found no one there, was properly admitted to show that defendant was negligent in the operation of its plant, in that it turned loose so dangerous an agency as electricity without having a proper person in charge.

In *White v. Reservation Electric Co.* 75 Wash. 139, 134 Pac. 807, the court said that while a company supplying electricity may not be an insurer of the safety of persons who must come into contact with the appliances through which it is conveyed, "the patrons of the company have the right to assume that everything that is open to touch concerning the appliances by which the electricity is conveyed can be touched with safety, and that the company has done all that human care, vigilance, and foresight can reasonably do, consistent with the practical operation of its plant, to render such appliances safe."

Where one was killed by taking hold of a movable incandescent lamp in the basement of premises in which he was working, the lamp having been installed by defendant for the employer of deceased with a view to its being moved about to enable defendant's employees to see in their work of repairing the building, evidence that directly after the accident the lamp socket was in a defective condition, and an excessive current was passing over the wires, was held to be, in the absence of evidence tending to show any other cause of death, sufficient to require submission of the case L.R.A.1915C.

to the jury. *Houston v. Durham Traction Co.* 155 N. C. 4, 71 S. E. 21.

—duty to inspect.

It is the duty of a company furnishing electricity to private property to make reasonable and proper inspection of its appliances. This duty does not contemplate such inspection as would absolutely forestall injuries, and whether, in a given case, the duty to inspect as reasonable care, prudence, and foresight would suggest, has been performed, is a question for the jury. *Alabama City, G. & A. R. Co. v. Appleton*, 171 Ala. 324, 54 So. 638, Ann. Cas. 1913A, 1181.

In *Alabama City, G. & A. R. Co. v. Appleton*, supra, which was a suit for injuries received by plaintiff's wife as she attempted to turn on an incandescent light upon plaintiff's premises, due to the circuit becoming overcharged from arc-light wires on account of the breaking of a pin holding an insulator, it was held that a request to charge "that it was not negligence to fail to discover the broken pin supporting the wire, if the rotten portion of it was down in the hole of the cross-arm, so that this condition could not have been seen, except by removing the pin from the hole and taking off the glass insulator thereon," was properly refused, as the jury might have concluded that such acts were essential to an inspection conforming to the exercise of reasonable care, prudence, and foresight in the premises, and to approve the charge would, for practical purposes, affirm that a most remote general survey of the place in which the pin was would meet the requirements for inspection.

In *Union Light Heat & P. Co. v. Lakeman*, 156 Ky. 33, 160 S. W. 723, the court affirmed a verdict for plaintiff for injuries received when he took hold of an electric light in his blacksmith shop, because of an excessive current in the wire, due to the fact that one of defendant's poles gradually leaned, causing its high voltage wires to sag and come in contact with the low voltage wires which supplied plaintiff's shop,—a condition which could have been discover-

endant failed to properly insulate, ground, and safeguard said wires and said post or pole by the use of proper and necessary appliances for arresting, diverting, diffusing, or conducting to the earth the excessive and dangerous current of electricity when struck by lightning, which their condition and position would naturally attract under such conditions. The amendment also added to the averments, descriptive of the manner in which she received the electric shock, the following: "When lightning struck the post or pole referred to . . . the electric current caused thereby, or a dangerous portion thereof, was conveyed on and along said wires to petitioner's residence and to the electric light near which she was standing, leaping from the end of said light wire to

petitioner's body, severely shocking her," etc.

The amendment also added a paragraph, charging that defendant was negligent in not "properly safeguarding the wires and post or pole referred to in the foregoing paragraphs, so that when struck by lightning, or for any other cause they became overcharged with electricity, the excess would be controlled, diverted, diffused, or conducted into the earth, and not be transmitted on and over the wires to petitioner's residence in the way and manner aforesaid, thereby causing the injury for which this suit is filed."

The demurrer complained that no cause of action was set forth, in that the petitioner did not allege: (a) Any breach of

ed by casual inspection for some weeks before the accident.

In *Hill v. Pacific Gas & Electric Co.* 22 Cal. App. 788, 136 Pac. 492, it is held that an electric company supplying current to a customer who has installed his own appliances for using the current on his premises is not bound to see that those appliances are sufficient for its safe use, or to inspect them to see that they are kept safe.

—precautions against excessive voltage.

In *Webster v. Richmond Light & R. Co.* 158 App. Div. 210, 143 N. Y. Supp. 57, where deceased, for whose death recovery was sought, was an assistant engineer on premises supplied with electricity by defendant, and was killed by an overcharge of electricity received when he attempted, during or shortly after a storm, to turn off the switch so as to stop the blaze which was coming from lighting fixtures, the rejection of evidence by a qualified witness, offered on behalf of plaintiff, that it was customary for illuminating companies to use a device, not used by defendant, which would prevent high voltage from flowing from primary to secondary wires, and thence into buildings, was held to be erroneous, and would of itself require reversal of a judgment of nonsuit.

In *Hanton v. New Orleans & C. R. Light & P. Co.* 124 La. 562, 50 So. 544, where the defendant contended that the fire which destroyed plaintiff's house would not have occurred had the fixtures in the house been in proper condition, the court said: "Those fixtures had been in use for years before the fire, without injury or loss. They were accepted by defendant as sufficient. Had anything been wrong about them, defendant should have ascertained the fact by inspection and examination. Householders know nothing whatever of electricity, nor what the requirements called for to insure safety. Defendant is engaged in that particular business and supposed to be informed fully as to what is needed in the premises. If the fixtures have been used for years without any accident, and on a particular

day a fire develops in the dwelling by reason of the electricity conveyed into it by wires, some exceptional condition must have arisen on that day. The evidence in the case satisfied the jury and the trial judge that the fire was due to an increased current having been passed through the wires on that day,—an unusual increase, which the arrangements in the house were not prepared to meet, through the fault of the defendant company."

In *White v. Reservation Electric Co.* 75 Wash. 139, 134 Pac. 807, where plaintiff was severely burned when he attempted to turn on a switch to operate a pump on his premises, due to the fact that defendants' transformers were out of order, so that a high voltage was carried over plaintiff's wires, which ordinarily carried a safe current, it was held that the question of plaintiff's negligence was properly left to the jury.

In *Ohrstrom v. Tacoma*, 57 Wash. 121, 106 Pac. 629, where there was evidence that deceased was killed by coming in contact with an electric light in the store in which he was employed, which had become charged with an excessive voltage from defendant's primary circuit, and it appeared that, though defendant's employees had discovered that there was a ground on the circuit supplying the store, they continued it in full operation, and made no attempt to render it harmless by cutting off the current while they were attempting to locate the trouble, and it further appeared that five years previously the board of fire underwriters had called the defendant's attention to its dangerous system of wiring, and recommended certain changes, it was held that there was sufficient evidence to submit to the jury on the question of negligence in both respects.

In *Hanton v. New Orleans & C. R. Light & P. Co.* supra, where the court found that the evidence warranted the jury in finding that plaintiff's house was destroyed by fire caused by defendant's high voltage wire coming in contact with the wires supplying the house, due to the negligence of defendant's employees in handling the wires while

duty to petitioner; (b) or that the defendant was not in exercise of all ordinary care and diligence due the plaintiff; (c) or any facts showing that the wires were not in a safe condition; (d) or specifically any acts of negligence, or definitely how or in what manner the defendant was negligent. Other grounds of demurrer are that it appears from the allegations of the petition that the injury was a result of an unavoidable accident, and that it was the result of a stroke of lightning; that there are no allegations that the injury would have been averted by any kind of insulation, ground wires, or lightning arresters; and that it is not alleged that the wires running into

the plaintiff's residence were not properly insulated, nor is it alleged "what it takes to constitute proper insulation."

Messrs. F. U. Garrard and A. S. Bradley for plaintiff in error.

Mr. Henry C. Cameron for defendant in error.

Atkinson, J., delivered the opinion of the court:

In *Heidt v. Southern Teleph. Co.* 122 Ga. 474, 478, 50 S. E. 361, it was said by Evans, J.: "Persons or companies operating telephone and electric light systems for the transmission of electricity upon and over

changing a pole in the street, a verdict for plaintiff for damages resulting from the fire was sustained.

In *Younie v. Blackfoot Light & Water Co.* 15 Idaho, 56, 96 Pac. 193, which was an action for damages for the killing of horses belonging to plaintiff by their coming in contact with wires installed in plaintiff's barn by defendant, which burned off and dropped when an excessive current entered the barn because of the crossing of wires outside, it was held to be an act of negligence on the part of defendant to permit the heavy voltage current to go into the barn, as the installation of a proper fuse would have prevented it.

In *Augusta R. & Electric Co. v. Beagles*, 12 Ga. App. 849, 78 S. E. 949, where plaintiff was injured when about to turn on an incandescent light which he had been directed to fix in the mill in which he was employed, and there was evidence that his injury was due to defects in wiring or other appliances outside the mill by which a high voltage wire in defendant's primary circuit was allowed to come in contact with the secondary wires supplying the mill, it was held that the question of defendant's negligence was properly left to the jury.

In *Denson v. Georgia R. & Electric Co.* 135 Ga. 132, 68 S. E. 1113, which was an action for the death of plaintiff's husband, caused by contact with a light bulb or extension cord in the plant in which he was employed, and negligence was alleged on the part of defendant in not establishing or maintaining proper safeguards to prevent a dangerous current from going over the cord, which was supposed to carry 110 volts only, from its primary wires which carried 2,300 volts, an instruction that defendant was only required to use such appliances as were in general use was held to be erroneous, as it was for the jury to determine whether defendant had used ordinary care if it did not use the latest devices instead of those in general use.

In *Berstein v. Philadelphia Electric Co.* 235 Pa. 53, 83 Atl. 612, it was held, where an electric company, upon the use of its electricity in plaintiff's premises being discontinued, disconnected the circuit in the fuse box instead of outside of the building, L.R.A.1915C.

which would have been as practicable, that wires strung along the wall, leading from the place where they entered the building to the fuse box, were as much a part of defendant's system as any other, and, having elected to maintain live wires within the cellar, it was charged with the same duty of proper inspection and maintenance with respect to them as with those outside; and where it appeared that one of the wires had in some way been broken, and that it had probably been in that condition for a month, it was held to be error to nonsuit plaintiff, who was injured while shoveling coal in which the broken wire had become imbedded.

In *Norfolk & P. Traction Co. v. Daily*, 111 Va. 665, 69 S. E. 963, which was an action for the death of plaintiff's daughter, caused by a discharge of lightning which struck defendant's trolley wire at some distance and passed along it to a wire which had formerly been connected with a cluster of lights over plaintiff's door, but which connection had been discontinued at a point below the lights, it was held that allegations that the light wire was connected with the trolley wire were sufficient, under proof that the end of the light wire was left hanging a few inches from the trolley wire, so that lightning could jump from one to the other.

In *Phenix Light & Fuel Co. v. Bennett*, 8 Ariz. 314, 63 L.R.A. 219, 74 Pac. 48, 15 Am. Neg. Rep. 1, where it was probable from the evidence that the fire which destroyed plaintiff's house originated at a point where defendant's light wires entered through the casement of a window, it was held that it was not the duty of defendant to insulate the wires in a manner to protect the building from the consequences of a lightning stroke or any induced current having its origin in the clouds or atmosphere. This case, it will be noted, is directly in conflict with *COLUMBUS R. Co. v. KITCHENS*, and is the only case found which holds that a company supplying electricity to private consumers is under no obligation to adopt measures to protect them from atmospheric electricity which may be conducted over their wires in excessive quantities.

R. L. S.

public highways owe to the public the duty of properly constructing and maintaining their respective wires and poles; they are bound to provide such safeguards against danger as are best known and most extensively used, and all necessary protection must be afforded to avoid casualties which may be reasonably expected. *Higgins v. Cherokee R. Co.* 73 Ga. 149; *Davis v. Augusta Factory*, 92 Ga. 712, 18 S. E. 974. They are not insurers against accidents, but are bound to use reasonable care proportioned to the danger of injury. In determining whether the proper care and diligence in construction or maintenance has been observed, not only the physical structure of wires and poles must be considered, but also the use to which it is to be put, its remoteness or proximity to travelers on the highway, the nature of the electrical current which is to be transmitted over the line, the relative position of other lines, and all other circumstances affecting the case."

See also *Denson v. Georgia R. & Electric Co.* 135 Ga. 132, 68 S. E. 1113; *Sedlmeyr v. Fitzgerald*, 140 Ga. 614, 79 S. E. 409, and citations. In the cases cited the dangerous instrumentality which caused the injury was the electricity which was being supplied by artificial means, which was known and intended to be transmitted over the wires. In that respect the cited cases differ from the one now under consideration, where the electricity emanated from independent or natural cause, and got upon the wires, and was conducted by them to the plaintiff and injured her. Dealing with matters of this character was the case of *Phoenix Light & Fuel Co. v. Bennett*, 8 Ariz. 314, 63 L.R.A. 219, 74 Pac. 48, 15 Am. Neg. Rep. 1, in which it was held: "Providing insulation sufficient to withstand lightning which may strike the wires is not within the obligation of an electric lighting company in carrying its wires into a building for the lighting of which it has contracted to furnish electricity."

But no other court seems to have adopted that view. In other cases it has been said: "A telephone company having reasonable grounds to apprehend that lightning will be conducted over its wires into a house where it maintains an instrument under contract with a subscriber, and there do injury to persons or property, must exercise due care in selecting, placing, and maintaining, in connection with its wires and instruments, such known and approved appliances as are reasonably necessary to guard against such accidents." *Griffith v. New England Teleph. & Teleg. Co.* 72 Vt. 441, 52 L.R.A. 919, 48 Atl. 643.

It was further said, in the course of the opinion; "Having undertaken to place and L.R.A.1915C.

maintain the instrument in the house and connect it with its telephone line for the use of the deceased, in so doing, it was under a duty to exercise the care of a prudent man in like circumstances. If, while in the exercise of such care, it had reasonable grounds to apprehend that lightning would be conducted over its wires to and into the house, and there do injury to persons or property, and there were known and approved devices for arresting or diverting such lightning so as to prevent injury therefrom to the house or persons therein, then it was the defendant's duty to exercise due care in selecting, placing, and maintaining, in connection with its wires and instruments, such known and approved appliances as were reasonably necessary to guard against accidents that might fairly be expected to occur from lightning, when conducted to and into the house over its telephone wires."

In *Southwestern Teleg. & Teleph. Co. v. Robinson*, 16 L.R.A. 545, 1 C. C. A. 684, 2 U. S. App. 205, 50 Fed. 810, it was held: "Injury caused by electricity generated by a thunderstorm in a telephone wire which was negligently allowed to hang across a highway so low that a traveler came in contact with it in the dark renders the telephone company liable as the wire furnished the means by which the dangerous force was communicated and the injury caused."

In the opinion it was said: "The contention of the plaintiff in error seems to be that the petition states the cause of action to have been the injuries which resulted from the fact that the wire, at the time of contact with it by the defendant, was charged with electric fluid, for the creation and existence of which the telephone company was in no sense responsible. Persons, however, must be held to know the ordinary operation of the forces of nature, and to use proper means to avert danger. If the electric fluid with which the wire of the telephone company was charged at the time was an element or the main element in the production of the injuries to the defendant in error, still it is clear that the displaced wire furnished the means of the communication of the dangerous force which resulted in the injury to the defendant in error. Science and common experience show that wires suspended in the atmosphere attract electricity in the time of storms, and, when so suspended and insulated, are dangerous to persons who may at such times be brought in contact with them; and the petition charges that, during electric or thunderstorms, such wires ordinarily become heavily charged with electricity, of power sufficient to cause death or great injury to those coming in contact with them; and

whether this is so or not is a question of fact. To say that the agency of the telephone wire in the production of the injury was inferior to that of the electric current, which was the main cause, is not satisfactory. It is, in fact, to admit that the company's displaced wire furnished the means by which the dangerous force was communicated to and injured the defendant in error. True, it was a new force which intervened, with the production of which the telephone company had nothing to do; but upon this point, in *Louisville Mut. Ins. Co. v. Tweed*, 7 Wall. 52, 19 L. ed. 67, the court says: 'If a new force or power has intervened, of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote.' The new force or power here would have been harmless but for the displaced wire and the fact that the wire took on a new force, with the creation of which the company was not responsible; yet it contributed no less directly to the injury on that account."

The doctrine of this case was also cited and applied in *Jackson v. Wisconsin Teleph. Co.* 88 Wis. 243, 26 L.R.A. 101, 60 N. W. 430; *Peninsular Teleph. Co. v. McCaskill*, 64 Fla. 420, 60 So. 338, Ann. Cas. 1914B, 1029. The reasoning above set forth demonstrates that the petition as amended in this case sets out a cause of action, and was not subject to any of the grounds of demurrer.

Judgment affirmed.

All the Justices concur, except Fish, Ch. J., absent.

ILLINOIS SUPREME COURT.

BENJAMIN F. SCHLAU, Appt.,
v.

ELIZABETHA ENZENBACHER.

(265 Ill. 626, 107 N. E. 107.)

Broker — partnership — dissolution — termination of authority.

The dissolution of a firm of real estate brokers terminates all authority to sell prop-

Note. — Dissolution of partnership authorized to act as agent as terminating agency.

The above question is covered in the note to *Larson v. Newman*, 23 L.R.A. (N.S.) 849. There appears to be but one other case in addition to *SCHLAU v. ENZENBACHER* which has passed upon the point since the writing of that note.

The case referred to, *Holbert v. Keller*, 161 Iowa, 723, 142 N. W. 962, is in accord with the general rule that a dissolution of L.R.A.1915C.

erty which has been placed in their hands for that purpose.

(December 16, 1914.)

A PPEAL by complainant from a decree of the Superior Court for Cook County dismissing a bill filed to compel specific performance of a contract for the sale of real estate, alleged to have been entered into between complainant and defendant's agents. Affirmed.

The facts are stated in the opinion.

Messrs. Caswell & Healy, for appellant: Having held Foerster out as her agent, defendant will not now be heard to deny the agency after complainant relied on it.

Union Stock Yards & Transit Co. v. Mal-lory Sons & Z. Co. 157 Ill. 554, 48 Am. St. Rep. 341, 41 N. E. 888.

And specific performance of a part of a contract which is capable of being performed will not be denied because the contract, as a whole, is not capable of performance.

Work v. Welsh, 160 Ill. 468, 43 N. E. 719; *Moore v. Gariglietti*, 228 Ill. 147, 81 N. E. 826, 10 Ann. Cas. 560; *Kuhn v. Eppstein*, 219 Ill. 154, 2 L.R.A. (N.S.) 884, 76 N. E. 145; *Lancaster v. Roberts*, 144 Ill. 213, 33 N. E. 27.

The right to specific performance must be determined in accordance with the condition of things existing when the bill is filed.

Street v. French, 147 Ill. 342, 35 N. E. 814.

Complainant is entitled to specific performance.

Glover v. Layton, 145 Ill. 92, 34 N. E. 53; *Watson v. Doyle*, 130 Ill. 420, 22 N. E. 613.

It is as much a matter of course for courts of equity to decree a specific performance of a contract for the conveyance of real estate as it is for courts of law to give damages for its breach.

Cumberledge v. Brooks, 235 Ill. 249, 85 N. E. 197; *McClure v. Otrich*, 118 Ill. 320, 8 N. E. 784.

And it should be granted as a matter of

a partnership authorized to act as an agent revokes the agency, it being held that a contract giving a partnership consisting of two members the agency for the sale of certain houses for no specified period was terminated by a dissolution of the partnership. The court said: "That the dissolution of the partnership did work a discontinuance of the agency is clear. The general rule of the common law is that no authority by a principal to two persons to do an act is joint, and the act must be concurred in by both."

J. T. W.

right where all the necessary elements which justify such relief are present.

Baltimore & O. S. R. Co. v. Brubaker, 217 Ill. 462, 75 N. E. 523.

Messrs. Vincent D. Wyman, Charles E. Carpenter, and Otto W. Jurgens, for appellee:

Dissolution of a partnership terminates the partnership agency.

31 Cyc. 1318; Angle v. Mississippi & M. R. Co. 9 Iowa, 487; Wheaton v. Cadillac Automobile Co. 143 Mich. 21, 106 N. W. 399; Meysenburg v. Littlefield, 135 Fed. 184; Larson v. Neuman, 19 N. D. 153, 23 L.R.A.(N.S.) 849, 121 N. W. 202.

Cooke, J., delivered the opinion of the court:

This is an appeal from a decree of the superior court of Cook county dismissing for want of equity the appellant's bill for specific performance. On September 9, 1909, Elizabeth Enzenbacher, the appellee, entered into a written contract with John P. Foerster and Bernard F. Clettenberg, doing business under the firm name of John P. Foerster & Company, whereby said Foerster & Company were given the agency, for a period of three years from that date, to sell 146 lots therein described and of which appellee was the owner, in Robert S. Disney's Irving Park subdivision in the northwest quarter of section 14, township 40, north, range 13, east of the third principal meridian, in Cook county. By this agency contract it was provided that if Foerster & Company succeeded in disposing of 73 or more of the said lots during the term of that contract, the contract should be extended for a further period of three years in which to dispose of the remaining lots upon the same terms and conditions as stipulated in the contract. Under this contract Foerster & Company were authorized to sell the lots specified, either for cash or on instalments, to collect the purchase price as it became due and pay appellee her portion of the same as it was collected, and to have control, generally, of each sale until the full amount of the purchase price had been paid. Appellee agreed to execute, simultaneously with each contract of sale, a warranty deed conveying to the purchaser the lot so contracted to be sold, which deed was to be held in escrow by Foerster & Company until the entire amount of the purchase money should be paid, whereupon Foerster & Company were authorized to deliver the same to the purchaser. Between the date of the contract and the month of September, 1912, Foerster & Company contracted for the sale of 21½ of said lots. On September 7, 1912, John P. Foerster, under and by the name of L.R.A.1915C.

Foerster & Company, entered into a contract with Benjamin F. Schlau, the appellant, for the sale of 51½ lots, which would bring the total number of lots sold to 73, and would thus extend the contract of agency between appellee and Foerster & Company for a further period of three years. When requested to make deeds of conveyance of these lots to appellant and to ratify the sale to him, appellee declined to do so and denied the authority of John P. Foerster, who was then doing business under the style of John P. Foerster & Company, to bind her by his contract with appellant.

Numerous questions are raised on this record and each of them is argued exhaustively. It will be necessary for us to consider but one of the points presented.

On April 1, 1911, the partnership theretofore existing between John P. Foerster and Bernard F. Clettenberg was dissolved, and that firm and partnership thereupon ceased to exist. John P. Foerster continued in the real estate business and continued to use the old firm name of John P. Foerster & Company. Appellee was eighty-three years of age at the time of the hearing on the bill herein, and at the time of the execution of the contract of September 9, 1909, she was in feeble health, and continued in that condition thereafter until this controversy arose. She very seldom left her home and was never in the office of Foerster & Company but once after the execution of the contract of September 9, 1909. While some contracts for the sale of lots were made by Foerster in the name of John P. Foerster & Company after the dissolution of the partnership, it does not appear from the record that appellee was ever informed of the dissolution of the partnership, or that she knew, until the contract was entered into between John P. Foerster and appellant, that the partnership had been dissolved, and that the interest of Clettenberg in the agency contract had ceased.

The dissolution of a partnership which has been authorized to act as agent is generally held to revoke the agency. In *Martine v. International L. Ins. Soc.* 53 N. Y. 339, 13 Am. Rep. 529, in dealing with a similar question, the court of appeals said: "The death of one member of a firm operates immediately and inevitably as a dissolution. *Story, Partn.* § 317; *Parsons, Partn.* 438. During the existence of a partnership, each member is deemed to be authorized to transact any business for the firm; but upon dissolution this authority ceases, and the only authority of the survivor is to close up the business. He has no right to create new obligations, nor in-

deed to do anything in the name of the firm, except such as is necessary in adjusting and closing its concerns. *Van Keuren v. Parmelee*, 2 N. Y. 523, 51 Am. Dec. 322. It is a general rule of the common law that an authority by a principal to two persons to do an act is joint, and the act must be concurred in by both. *Dunlap's Paley, Agency*, 177; *Green v. Miller*, 6 Johns. 39, 5 Am. Dec. 184; *Brown v. Andrew*, 13 Jur. 938, 18 L. J. Q. B. N. S. 153; *Story, Agency*, § 42. When a firm is appointed to an agency, this rule would necessarily be modified to the extent that either member of a firm could do any act within the scope of the agency, the same as he could perform any other partnership act. By appointing a partnership firm it would be implied that the authority was joint and several; but upon dissolution of the firm such an agency would cease. This is the necessary result of the principles alluded to. The principal would not be bound by the act of a surviving member of a firm, because he had never appointed him to act, nor agreed to be responsible for his acts, and the latter could incur no obligation against the deceased member or his representatives."

The case of *Larson v. Newman*, 19 N. D. 153, 23 L.R.A.(N.S.) 849, 121 N. W. 202, presents a state of facts almost identical with that of the case at bar. In that case Newman entered into a written contract with a firm consisting of three copartners, who were engaged in the business of land agents, to sell for him a tract of land which he owned in North Dakota. Thereafter the partnership was dissolved, one of the partners continuing in the same line of business. The partner who thus continued in the business entered into a contract with Larson for the sale of Newman's land, relying upon the agency contract theretofore entered into between Newman and the partnership. Newman refused to ratify the sale and execute a deed, and Larson brought suit for specific performance. The North Dakota court held that whatever authority was conferred upon the partnership by the agency contract was terminated upon its dissolution, and that the former member of the firm who contracted for the sale of the land had no further power under the agency contract. We concur in the reasoning in that case. The authority given John P. Foerster & Company to contract for the sale of the lots of appellee ceased immediately upon the dissolution of that firm, and John P. Foerster had no further authority, either in his own name or in the firm name, to act under the agency contract of September 9, 1909, and his contract with appellant for the sale of 51½ lots was not binding upon appellee.
L.R.A.1915C.

The contract of September 9, 1909, contained the following provision: "The conditions of this contract shall be binding on the heirs, executors, administrators, assigns and successors of the respective parties hereto."

It is not necessary for us to determine the effect of this provision of the contract. No attempt was made during the existence of the partnership to make an assignment of the contract, and, as we have seen, the dissolution of the partnership operated immediately to revoke the agency. Upon the dissolution of a partnership it immediately ceases to exist, except for the purpose of winding up the business of the firm. There can be no successor to a partnership, and there is no question of survivorship involved, either under the terms of the contract itself or by reason of the manner in which the dissolution was effected.

The decree of the Superior Court is affirmed.

KANSAS SUPREME COURT.

GEORGE BLAKEMAN

v.

CITY OF WICHITA, Appt.

(93 Kan. 444, 144 Pac. 816.)

Mob — liability of city — prisoners.

1. A large number of persons confined together in a city jail, who joined together to whip another prisoner, and who did severely whip and injure him, are held to be a "mob" or "riotous assemblage," within the meaning of the statute making cities liable for damages resulting from mob violence.

Same — compulsory attendance.

2. The fact that these persons did not voluntarily come into the jail does not prevent their action from being that of a mob, nor is the primary purpose for which they assembled material, if they in fact formed and executed the unlawful purpose after they were brought together.

Same — co-operation of officers.

3. A city is not relieved from liability for mob violence because its officers were cognizant of the purpose of the mob before illegal action was taken, nor even where they co-operated with the mob.

(December 12, 1914.)

Headnotes by JOHNSTON, Ch. J.

Note. — As to what constitutes a mob for the acts of which a municipality is liable under statute, see notes to *Adamson v. New York*, 10 L.R.A.(N.S.) 925, and *Pittsburg, C. C. & St. L. R. Co. v. Chicago*, 44 L.R.A.(N.S.) 359.

APPEAL by defendant from a judgment of the District Court for Sedgwick County in plaintiff's favor in an action brought to recover damages for injuries sustained by him while a prisoner in the city jail. Affirmed.

The facts are stated in the opinion.

Messrs. Earl Blake, John W. Blood, and R. C. Foulston, for appellant:

The city is not responsible for injuries sustained by reason of the defective, unsanitary, or insufficient nature of the place of detention, nor the negligence or carelessness of the officers in charge or other police officials.

4 Dill. Mun. Corp. 5th ed. §§ 1656-1661; *Peters v. Lindsborg*, 40 Kan. 654, 20 Pac. 490; *Caldwell v. Prunelle*, 57 Kan. 511, 46 Pac. 949; *New Kiowa v. Craven*, 46 Kan. 114, 26 Pac. 426; *Pfefferle v. Lyon County*, 39 Kan. 432, 18 Pac. 506; *La Clef v. Concordia*, 41 Kan. 323, 13 Am. St. Rep. 285, 21 Pac. 272; *Harper v. Topeka*, 92 Kan. 11, 51 L.R.A.(N.S.) 1032, 139 Pac. 1018; *Dickinson v. Boston*, 188 Mass. 595, 1 L.R.A.(N.S.) 664, 75 N. E. 68; *Cahill v. Stone*, 19 L.R.A.(N.S.) 1094, 1136, note; *Louisville v. Bridwell*, 150 Ky. 589, 150 S. W. 672; *Bowling Green v. Rogers*, 142 Ky. 558, 34 L.R.A.(N.S.) 461, 134 S. W. 921; *Terrell v. Louisville Water Co.* 127 Ky. 77, 105 S. W. 100; *Park Comrs. v. Prinz*, 127 Ky. 460, 105 S. W. 948; *Goodwin v. Reidsville*, 160 N. C. 411, 42 L.R.A.(N.S.) 802, 76 S. E. 232, Ann. Cas. 1914C, 217; *Harrington v. Greenville*, 159 N. C. 632, 75 S. E. 849; *Sehy v. Salt Lake City*, 41 Utah, 535, 42 L.R.A.(N.S.) 915, 126 Pac. 691; *Brown v. Guyandotte*, 34 W. Va. 299, 11 L.R.A. 121, 12 S. E. 707; *Shaw v. Charleston*, 57 W. Va. 433, 50 S. E. 527, 4 Ann. Cas. 515; *Lawton v. Harkins*, 34 Okla. 545, 42 L.R.A.(N.S.) 60, 126 Pac. 727; *Kelley v. Cook*, 21 R. I. 29, 41 Atl. 571, 5 Am. Neg. Rep. 94; *Claussen v. Luverne*, 103 Minn. 491, 15 L.R.A.(N.S.) 698, 115 N. W. 643, 14 Ann. Cas. 673; *Craig v. Charleston*, 180 Ill. 154, 54 N. E. 184; *Gaetjens v. New York*, 132 App. Div. 394, 116 N. Y. Supp. 759.

The acts of prisoners in the city jail, even though encouraged by police officers, were not the acts of a "mob" within the meaning of the statute.

Wells, F. & Co. v. Jersey City, 207 Fed. 871; *Atchison v. Twine*, 9 Kan. 350; *Adams v. Salina*, 58 Kan. 246, 48 Pac. 918; *Iola v. Birnbaum*, 71 Kan. 600, 81 Pac. 198, 6 Ann. Cas. 267; *Stevens v. Anthony*, 82 Kan. 179, 107 Pac. 557; *Cherryvale v. Hawman*, 80 Kan. 170, 23 L.R.A.(N.S.) 645, 133 Am. St. Rep. 195, 101 Pac. 994, 18 Ann. Cas. 149, 21 Am. Neg. Rep. 99; *Gianfortone v. New Orleans*, 24 L.R.A. 592, 61 Fed. 64; *Swift v. Philadelphia & R. R. Co.* 5 Inters. L.R.A.1915C.

Com. Rep. 116, 64 Fed. 64; *Brown v. Orangeburg County*, 55 S. C. 45, 44 L.R.A. 734, 32 S. E. 764; *Gillmor v. Salt Lake City*, 32 Utah, 180, 12 L.R.A.(N.S.) 538, 89 Pac. 714, 13 Ann. Cas. 1016; *Taylor v. State*, 8 Ga. App. 241, 68 S. E. 945; *Proctor v. State*, 5 Okla. Crim. Rep. 553, 115 Pac. 630; *Adamson v. New York*, 188 N. Y. 255, 10 L.R.A.(N.S.) 925, 117 Am. St. Rep. 863, 80 N. E. 937, 11 Ann. Cas. 183; *Van Cleef v. Chicago*, 240 Ill. 318, 23 L.R.A.(N.S.) 636, 130 Am. St. Rep. 275, 88 N. E. 815.

Messrs. John W. Adams, George W. Adams, and M. C. Freerks for appellee.

Johnston, Ch. J., delivered the opinion of the court:

This was an action by George Blakeman to recover damages from the city of Wichita for injuries sustained by him while a prisoner in the city jail. It appears that Blakeman became involved in a street fight with a number of boys, with the result that he and a number of the others were arrested and placed in the city jail. Shortly afterwards, the prisoners already in the jail, about thirty in number, organized what is called a "kangaroo court" and proceeded to try Blakeman on the charge of "breaking into their home." He was found guilty of the charge, and a fine of 50 cents was imposed upon him. Refusing to pay the fine, he was whipped by the crowd with a strap about 3 feet long, 2½ inches wide, and about an eighth of an inch thick. In his petition he alleged that the mob assembled in the jail struck him about sixty heavy blows on the back and legs so that large welts were raised thereon, and that aside from these injuries his back was severely wrenched, with the result that he was incapacitated to perform labor for six months thereafter. It was also alleged that a number of others who were brought into the jail on that day were likewise whipped, and that all was done with the consent and connivance of the chief of police and other officers of the city. It is in evidence that the strap was furnished to the crowd by one of the police officers, and that some of those in charge of the prisoners knew that persons were being whipped with it. Within a few hours after the whipping, plaintiff was released from the city prison without prosecution on the charge for which he had been arrested, and it appears that he was confined to his home for four weeks after the whipping, and was under the care of a physician for about six weeks after the injury.

While it was alleged that the assault upon the plaintiff was made with the consent of the city officers, the plaintiff states that he is not seeking to establish a common-law liability against the city for the de-

linquency or misconduct of its officers, but rather that he seeks to recover solely on the liability imposed by the statute which makes cities liable for injuries to persons and property caused by a mob within the corporate limits. Gen. Stat. 1909, § 2933. That the plaintiff was severely whipped while in the prison by the concerted action of quite a number of persons, by which he was seriously injured, is not open to dispute. There was a riotous assembly of persons acting together, bent upon an unlawful purpose which was executed with force and violence to the physical injury of the plaintiff. It is contended, however, that the crowd which committed the assault cannot be regarded as a mob, and that no recovery can be had under the statute because the persons who inflicted the injury did not originally assemble for an unlawful purpose, but were brought together in the jail by the officers in a manner provided for by law, and because these persons had been guilty of violations of the city ordinances and other laws. Was the crowd which united in an attack on the plaintiff within the walls of the jail a mob within the meaning of the statute? A statute which has been in force since 1868 defines "riotous assembly," a term practically synonymous with "mob," as follows: "If three or more persons shall assemble together with intent to do any unlawful act with force and violence against the person or property of another, or to do any unlawful act against the peace, or being lawfully assembled, shall agree with each other to do any unlawful act aforesaid, shall make any movement or preparation therefor, the person so offending on conviction thereof shall be fined in the sum not exceeding \$200." Gen. Stat. 1909, § 2771.

A later statute, which was enacted in 1903 to suppress and punish mob violence and lynching, provides: "That any collection of individuals assembled for an unlawful purpose, intending to injure any person by violence, and without authority of law, shall for the purpose of this act be regarded as a 'mob.' . . ." Gen. Stat. 1909, § 2896.

In proceedings to recover under the mob statute, the term has been properly defined as "an unorganized assemblage of many persons intent on unlawful violence either to persons or property." *Atchison v. Twine*, 9 Kan. 350; *Cherryvale v. Hawman*, 80 Kan. 170, 23 L.R.A. (N.S.) 645, 133 Am. St. Rep. 195, 101 Pac. 994, 18 Ann. Cas. 149, 21 Am. Neg. Rep. 99.

It appears that the assemblage which inflicted the injury upon the plaintiff has all the elements of a mob, unless the fact that the riotous crowd was within the prison when the unlawful purpose was formed and L.R.A.1915C.

executed is material. No reason is seen why a mob may not be organized and carry out its unlawful purpose inside as well as outside a building or inclosure. The circumstances that the persons did not voluntarily come into the jail, and did not originally assemble there to whip the plaintiff, do not put them outside the definition of a mob. The manner of their coming together or the primary purpose for which they assembled is not material, if they in fact formed the unlawful purpose and became riotous after they were brought together. In *Solomon v. Kingston*, 24 Hun, 562, where a crowd legally assembled to look at a fire, and later became riotous and unitedly entered upon the destruction of property, it was held that "the fact that the original purpose for which the crowd had assembled, viz., to see the fire, was a lawful one, did not constitute a defense, as they had subsequently united in unlawful conduct and wrongfully broken into the plaintiff's store." Syl. ¶ 3.

It has been said that "if, in an assembly of persons met together on any lawful occasion whatsoever, a sudden proposal should be started, . . . or to do any other act of violence, . . . and such motion be agreed to and executed accordingly, the persons concerned cannot but be rioters, because their associating themselves together for such a new purpose is no way extenuated by their having met at first upon another." 1 Haw. P. C. chap. 28, div. 4, § 3, p. 514.

Madisonville v. Bishop, 113 Ky. 106, 57 L.R.A. 130, 67 S. W. 269, 270, is a case where a crowd had gathered to celebrate Christmas, and afterwards united in destroying property by throwing fireworks and missiles loaded with powerful explosives, and the court, in holding the city liable under a Kentucky statute, remarked that "the purpose of the assembly, or the aim that it had primarily in view, is not material, if it was in fact riotous or tumultuous, and the city authorities had notice of it and ability to prevent the damage it did." p. 109.

In *Champaign County v. Church*, 62 Ohio St. 318, 48 L.R.A. 738, 78 Am. St. Rep. 718, 57 N. E. 50, the trial court instructed the jury to the effect that, if an assembly of persons who inflicted an injury came together without an unlawful purpose, and afterwards united in acts of violence and injury, no recovery could be had against the municipality. This was held to be erroneous, the court saying: "It is an ancient doctrine in the criminal law, as old as Hale's Pleas of the Crown, at least, that, although the assembly was lawful, the persons assembled might unite in unlawful conduct, and thus become rioters." p. 348.

Custody of prisoners within jail limits is hardly consistent with a lack of power and ability to control them, but the fact that the riotous persons were confined within prison bounds does not prevent their action from being that of a mob where all of the other elements are present. The city is vested with the power and charged with the duty of preventing mob violence and preserving the peace everywhere within its corporate limits, and it should be easier to discharge that duty where those who are engaged in the riot are in custody and could be controlled by the officers without much difficulty. It is not a defense to an action brought under this statute to show that the city was unable to prevent the injury (*Iola v. Birnbaum*, 71 Kan. 600, 81 Pac. 198, 6 Ann. Cas. 267), and certainly it cannot hope to escape responsibility where it appears that the city could easily have prevented the injury. It is not relieved from liability because its officers were cognizant of the purpose of the mob before action was taken, nor even because they became a part of it. One of the purposes of the statute was to quicken the public conscience and stimulate a sentiment in favor of law and order by making each citizen and taxpayer responsible for a proportionate share of the loss resulting from mob violence, and thus making each a champion of peace and good order. In *Allegheny County v. Gibson*, 90 Pa. 397, 35 Am. Rep. 670, the law making the municipality liable for mob violence was likened to the ancient English law which made the inhabitants of the respective hundreds responsible for robberies committed therein. It was said that "the principle upon which this legislation rested was that every political subdivision of the state should be responsible for the public peace and the preservation of private property; and that this end could be best subserved by making each individual member of the community surety for the good behavior of his neighbor and for that of each stranger temporarily sojourning among them." p. 418.

In view of the purpose of the statute and the obligations resting upon municipalities, it must be held that neither the delinquencies of the officers nor their misconduct can absolve the city from the obligation to preserve the peace and to prevent mob violence.

There are some criticisms of the rulings of the court on instructions, but those given appear to be in line with the views already expressed, and in none of the rulings do we find any error nor any occasion for extended comment.

The judgment is affirmed.

All the Justices concur.

Petition for rehearing denied.
L.R.A.1915C.

KENTUCKY COURT OF APPEALS.

JOHN G. WINN, as Committee for Lewis Anderson, Appt.,
v.

GEORGE W. ANDERSON, Admr., etc., of David L. Anderson.

SAME, Appt.,
v.

GEORGE W. ANDERSON, as Committee for Lewis Anderson.

(161 Ky. 18, 170 S. W. 213.)

Judgment — absence of judge's signature — correction.

1. The failure of the judge before whom a person was found to be an idiot, to sign the judgment after it is entered in the proper book, may be corrected by his successor in office, to whose attention the omission is called, under a statute providing that upon the death of the circuit judge, or when from any cause the office is vacant, or when the judge is absent, his successor, no matter how chosen, may sign any order of court left unsigned by the predecessor.

Appeal — ruling not appealed from — root of cause.

2. The question of the validity of a judgment upon which the litigation depends may be passed upon on appeal, although no appeal was taken from the ruling of the trial judge upon the attack made upon it.

Judgment — collateral attack — failure to show service of summons.

3. Failure of the record of a court of general jurisdiction to recite a service of summons on one adjudged insane does not subject the judgment to collateral attack.

Incompetent person — successive inquisitions — paupers.

4. A statute providing for a new inquisition every five years, before any order may be granted by the court for the maintenance of an idiot out of his own estate or out of the state treasury, does not apply alone to pauper idiots.

Same — appointment of new committee — existing incumbent.

5. There is no jurisdiction to appoint a new committee for an idiot before the removal of the old one, under statutes author-

Note. — Right of committee of lunatic or guardian of an infant to appointment as administrator or executor.

As to right of one first entitled to administration to nominate a third person, to exclusion of those next entitled thereto, see note to *Weaver v. Lamb*, 22 L.R.A. (N.S.) 1161.

Generally, a guardian or committee is considered as having a superior interest in the welfare of the person whom he represents and in the economical administration of his estate. For this reason, when a person, because of infancy or other disability, is

izing the court to appoint, suspend, and remove committees, and authorizing removal when the committee shall move out of the state, become incapable of discharging his duties, or evidently unsuited therefor, or when he fails to make proper settlement of his accounts.

Executor and administrator — committee of insane distributee.

6. The committee of a lunatic, sole distributee of a decedent's estate, is entitled to administer upon the estate in right of his ward in preference to a relative of the deceased who is not a distributee, under a statute providing that, after a surviving husband or wife, administration shall be granted to such others as are next entitled to distribution.

(November 13, 1914.)

not entitled to exercise the duties of an administrator, but would be otherwise were he competent, it is generally held, even in the absence of a statute to that effect, that his guardian or committee should represent him, and in so doing stands upon the same plane as the competent person would were he competent. See WINN v. ANDERSON.

The rule at common law, as stated in Kinnick v. Coy, 40 Ind. App. 139, 81 N. E. 107, is that the trustee or guardian of an infant or *non compos* would otherwise be entitled to administer upon an estate is entitled to administer in the right of his ward or *cestui que trust*. There was in Indiana no statute expressly declaring that a guardian shall be entitled to administer upon the estate of a decedent in the right of his ward. The question in Kinnick v. Coy, *supra*, was whether the guardian of the infant son of an intestate's deceased daughter was entitled to the administration of the estate as between himself and those having no interest in the property to be administered. The court, in deciding this question in favor of the guardian, held that, as between himself and those who were not heirs or creditors of the estate, and who represented no one who had an interest in the estate, he was entitled to a preference in the right of his ward, and that he was entitled to the preference as a matter of right, and, such being the case, the court would have no power or authority to set aside his appointment because he was a nonresident of the county. The court laid down the rule that the guardian of an infant who, if of age, would be entitled to administer, was in right of his ward entitled to letters of administration in preference to strangers; and that he stood, so far as the question of his right to administer upon the estate was concerned, in the shoes of his ward, and to that extent represented his ward.

In Woodruff v. Snoover, — N. J. —, 45 Atl. 980, guardians of an intestate's infant children were preferred to others who were kin, but not next of kin, of intestate, since they would have as such guardians a superior interest in the economical administration of the estate.
L.R.A.1915C.

A PPEAL by John G. Winn, as committee for an incompetent person, from a judgment of the Circuit Court for Montgomery County refusing to appoint him as administrator of the estate of David L. Anderson, deceased. Reversed.

A PPEAL by John G. Winn, as committee for an incompetent person, from an order of the Circuit Court for Montgomery County appointing appellee as such committee. Reversed.

The facts are stated in the opinion.

Mr. Robert H. Winn, for appellant:

It is too late for the defendant to question the plaintiff's legal capacity to sue when once the case has gone to trial upon the merits.

Johnson v. Johnson, 12 Bush, 485; War-

So, for the same reason, in Mowry v. Latham, 17 R. I. 480, 23 Atl. 13, the committee of an incompetent person was preferred to one who, but for the incompetent, would have been next of kin and entitled to administer; and *a fortiori* in preference to a stranger nominated by such person.

So, it is held in Boyd v. Cloud, 5 Penn. (Del.) 479, 62 Atl. 294, that where a lunatic is entitled to a residuary estate, and therefore under the statute would be entitled to administer if competent, his trustee is entitled to letters of administration the same as the insane person would be if competent.

Where one died intestate without child or parents, leaving a widow and several next of kin, and it was discretionary with the court to grant letters of administration to the committee of the widow, who was a lunatic, or to the next of kin, the court in Alford v. Alford, 3 Jur. N. S. 990, held that the committee was entitled to appointment in preference to the next of kin, as the widow would have been if competent, unless good cause was shown by the next of kin.

The guardian of an infant, sole next of kin of an intestate, was, in John v. Bradbury, L. R. 1 Prob. & Div. 245, 15 L. T. N. S. 414, 36 L. J. Prob. N. S. 33, 15 Week. Rep. 285, held entitled to letters of administration in preference to creditors of the deceased, there being nothing to show that the guardian was not perfectly fitted to have the administration.

As between guardian of different distributees.

According to Langan v. Bowman, 12 Smedes & M. 715, the party entitled to the estate is entitled to the administration, and when there are several distributees, the one entitled to the largest share in the estate is entitled to the administration. The same rule prevails where the parties claim the right to administer in a representative capacity. Thus, in the above case, where children were the distributees, the guardian of all the children of one of the brothers of

field v. Gardner, 79 Ky. 583; Gillen v. Illinois C. R. Co. 137 Ky. 375, 125 S. W. 1047; Louisville & N. R. Co. v. Herndon, 126 Ky. 589, 104 S. W. 732.

A judgment of a court can be signed by any other qualified judge as well as by the judge who renders it. Proof that a judgment is not signed "by the then presiding judge" is not proof that it has not been duly signed.

Ewell v. Jackson, 129 Ky. 214, 110 S. W. 860.

Section 3896, Kentucky Statutes, determining the priorities in the right of administration, does not embrace relatives by blood without distributable right. The statute includes only those who have a right in the distribution of the decedent's estate.

decedent was held entitled to the administration as against a husband and wife, guardians of only three out of five children of another brother, the former guardian representing the larger interest. The court said: "The fact that Langan [husband] was a relation of the decedent makes no difference, because the relationship was so remote that it gave him no interest in the distribution. A party is entitled to preference in the grant of administration only in proportion to his interest in the distribution. Neither does the circumstance that they are creditors add any strength to their claim. According to some authorities, it is rather adverse to than in favor of their pretension. 1 Lomax, Exrs. 139."

Under statute.

Usually the right of a guardian or committee to represent an incompetent person as administrator is statutory.

Thus, a California statute provides that "if any person entitled to administration is a minor or an incompetent person, letters must be granted to his or her guardian, or any other person entitled to letters of administration, in the discretion of the court." So, in Clough v. Borello, 5 Cal. Unrep. 657, 48 Pac. 330, guardians of minor children and heirs of an intestate father were held entitled to administration in preference to the public administrator. The court said in this case: "It is not contended on the part of appellant [public administrator] that said guardians were not entitled to administration if said children were legitimate, and, as appellant alleged their legitimacy by alleging that they were the children and 'heirs at law of the deceased,' the appeal is frivolous."

So, where intestate's brother of the half blood had been appointed administrator *de bonis non* of the estate with the consent of a brother of the whole blood, the widow having died, the guardian of intestate's only surviving minor child was, in Wooten's Estate, 56 Cal. 322, held entitled, under the statute above set out, to have letters revoked and herself appointed administratrix. L.R.A.1915C.

Hilton v. Hilton, 33 Ky. L. Rep. 276, 109 S. W. 905; Re Weaver, 140 Iowa, 615, 22 L.R.A.(N.S.) 1161, 119 N. W. 69, 17 Ann. Cas. 947.

The committee of an idiot, sole distributee of his deceased father's estate, is entitled to administer for the idiot, by right of his committee relationship, upon the deceased father's estate.

Kinnick v. Coy, 40 Ind. App. 139, 81 N. E. 107; Mowry v. Latham, 17 R. I. 480, 23 Atl. 13; 20 R. I. 786, 40 Atl. 236; Woodruff v. Snoover, — N. J. —, 45 Atl. 980; Boyd v. Cloud, 5 Penn. (Del.) 478, 62 Atl. 294; Re McLaughlin, 103 Cal. 429, 37 Pac. 410; Clough v. Borello, 5 Cal. Unrep. 657, 48 Pac. 330; Re Turner, 143 Cal. 438, 77 Pac. 144; Re Stewart, 18 Mont. 595, 46 Pac. 806;

In 1893 the statute providing for the appointment of a guardian as administrator was amended by inserting the words, "or an incompetent person," the statute as amended reading as follows: "If any person entitled to administration is a minor or an incompetent person, letters must be granted to his or her guardian, or any other person entitled to letters of administration, in the discretion of the court." The guardian of an intestate's incompetent son, sole heir at law, was, in Re McLaughlin, 103 Cal. 429, 37 Pac. 410, held entitled to administration in preference to the public administrator, as against the latter's contention that the amendment above mentioned was not retroactive, and was not applicable, because the right of the public administrator had accrued and was vested at the date of the death of deceased, and no subsequent act of the legislature could serve to divest the public administrator of his right to letters of administration, and to invest the petitioning guardian with that right. The court stated that this claim was not supported by authorities or reason. A public administrator does not, by virtue of his office or by filing a petition for letters of administration upon decedent's estate, acquire any interest in the estate or in the commission to be earned by administering upon it. His status at the time of the grant of administration determined his competency.

A New York statute provides that where any person who would otherwise be entitled to letters of administration as next of kin, or to letters of administration with the will annexed, as residuary or specific legatee, shall be a minor, such letters shall be granted to his guardian, being in all respects competent, in preference to creditors or other persons. Consequently, it was held in Re Tyler, 6 Dem. 48, 19 N. Y. S. R. 897, that the guardian of an infant, sole residuary legatee, was entitled to letters of administration with the will annexed, the executors named in the will having died.

Where minor legatees under their grandfather's will would, but for their minority, have been entitled under the statute to let-

Myers v. Cann, 95 Ga. 383, 22 S. E. 611; Mattox v. Embry, 131 Ga. 283, 62 S. E. 202; Williams, Exrs. 6th Am. ed. ** 418, 482, 518.

On collateral attack it will be conclusively presumed that a judgment of a court of general jurisdiction is supported by proper process, unless the record affirmatively shows the want of such process.

McNew v. Martin, 22 Ky. L. Rep. 1275, 60 S. W. 412; Jones v. Edwards, 78 Ky. 6; Maysville & B. S. R. Co. v. Ball, 108 Ky. 241, 56 S. W. 188; Miller v. Farmers' Bank, 25 Ky. L. Rep. 373, 75 S. W. 218; Northington v. Reed, 25 Ky. L. Rep. 354, 75 S. W. 206; Segal v. Reisert, 128 Ky. 117, 107 S. W. 747; Dennis v. Alves, 132 Ky. 345, 113 S. W. 483; Bamberger v. Green, 146 Ky.

258, 142 S. W. 384; Freeman, Judgm. § 132; Crown Real Estate Co. v. Rogers, 132 Ky. 790, 136 Am. St. Rep. 202, 117 S. W. 275; 1 Black, Judgm. § 271; Ferguson v. Crawford, 70 N. Y. 253, 26 Am. Rep. 589.

To constitute a direct attack upon a judgment, it is necessary that the proceeding be instituted for that very purpose; but if the action has an independent purpose, even though it is necessary to its success that a judgment be overturned, it is a collateral proceeding as to such judgment.

1 Black, Judgm. § 252; Jones v. Blun, 145 N. Y. 333, 39 N. E. 954; 23 Cyc. 1063; Alford v. Guffy, — Ky. —, 115 S. W. 216; Dennis v. Alves, 132 Ky. 345, 113 S. W. 483, on rehearing in 117 S. W. 287; Bamberger v. Green, 146 Ky. 258, 142 S. W. 384;

ters of administration with the will annexed, it was held in *Blanch v. Morrison*, 4 Dem. 297, that the surrogate was required to appoint the mother administratrix, under a statute providing that "if any person who would otherwise be entitled to letters of administration with the will annexed, as residuary or specific legatee, shall be a minor, such letters shall be granted to his guardian, being in all respects competent, in preference to creditors or other persons." "The testator's widow," said the court, "has herself renounced any claim to letters, but she opposes [the] application upon grounds which would strongly appeal to my discretion if I were at liberty to exercise it. It has been repeatedly held, however, by our courts, that letters of administration must be granted to an applicant who is preferentially entitled under the statute, unless he is disqualified for some cause that the statute specifies."

In *Re Milhau*, 28 Misc. 366, 59 N. Y. Supp. 910, however, where a trust company applied for letters of administration with the will annexed, first, by reason of its being the guardian of the sole residuary legatee and only next of kin of decedent, and secondly, by virtue of the provision of Laws 1873, chap. 781, the surrogate disposed of the first contention by stating that, as the law then stood (evidently referring to Code of Civil Procedure, § 2643, subdiv. 1, providing for issuance of letters of administration with the will annexed to one or more of the residuary legatees, and declaring that if one of such legatees who would otherwise be entitled is a minor, administration shall be granted to his guardian, if competent; and further providing that "a corporation which is a residuary legatee shall be qualified to act as such administrator, although not specifically authorized by its charter or any provision of law"), the trust company in its character of guardian was incapable of claiming or receiving letters of administration with the will annexed (citing *Re Davis*, Surr. Dec. 1896, p. 589). The second contention was disposed of by declaring that the effect of the act of 1873 is to substitute the trust company for the next

of kin, and to treat it as if it were in the same order of priority in which the next of kin are included, and that according to that order the next of kin are postponed to the general legatee, who is also claiming letters in this case.

But in *Re Lasak*, 30 N. Y. S. R. 356, 8 N. Y. Supp. 740, an order appointing as administrator with the will annexed a trust company which had been appointed guardian of a residuary legatee was upheld without any suggestion that in its capacity as guardian it was incapable of receiving letters.

In *Speckles v. Public Administrator*, 1 Dem. 475, Surrogate Bergen held that the public administrator was entitled to administration upon the estate of an intestate as against the general guardian of a minor next of kin, on the ground that the general act with respect to administration in case of intestacy, providing that "if any of the persons so entitled be minors, administration shall be granted to their guardians," was superseded, so far as it was in conflict, by the special act providing that the public administrator shall have prior right and authority to administer where there shall be no widow, husband, or next of kin entitled to have distributive share in the estate of an intestate, resident in the state, "entitled, competent, or willing to take out letters of administration on such estate." It will be noticed, observed the court, by reference to the act appointing the public administrator and the amendments thereto, that it gives the prior right to the public administrator, if none of the next of kin entitled, competent, or willing to take out letters, etc., avail themselves of their rights. It certainly cannot be said that the guardian of minors comes within the meaning of next of kin. In the case at bar, Mary E. Speckles (guardian) is not of the next of kin, and is not entitled to a distributive share in the estate of the decedent; the infants whom she represents are of next of kin, but are not competent by reason of their minority.

But in *Re Hudson*, 37 Misc. 539, 75 N. Y. Supp. 1053, Surrogate Church refused to follow the ruling of the *Speckles Case*, supra,

Crown Real Estate Co. v. Rogers, 132 Ky. 790, 136 Am. St. Rep. 202, 117 S. W. 275.

A court's power to appoint, suspend, and remove the committee of an idiot is the same as that over a guardian of an infant. And when once an appointment is made, the court is without power to discontinue such committee save for cause and on notice. Without the resignation or removal of such committee, the appointment of one in his stead is void.

Ky. Stat. § 2149; Leavel v. Bettis, 3 Bush, 74; Cotton v. Wolf, 14 Bush, 238; Estridge v. Estridge, 25 Ky. L. Rep. 1076, 76 S. W. 1101; Dunlap v. Kennedy, 10 Bush, 539; Gill v. Riley, 28 Ky. L. Rep. 639, 90 S. W. 2; Phillips v. Williams, 118 Ky. 757, 82 S.

deeming it wrong, and held the general guardian of the incompetent minor son of a decedent entitled to letters in preference to the public administrator. This court, in construing connectedly the language of the statutes referred to in the Speckles Case, stated that all the statute relating to the public administrator meant to do was to give the public administrator a priority over creditors and other persons, and that there was no intention to differentiate between a person who was entitled to administer himself and one who could do so only through his guardian.

A South Carolina statute regulating the appointment of administrators provides that "if there be no husband or wife of the deceased, or if they do not apply, then to the child or children, or their legal representatives." Consequently, where the widow and minor children were the sole heirs and distributees of the estate of an intestate, and the sole beneficiaries, and the widow did not apply for letters, but requested that the children's guardian be appointed, it was held in *Re Frierson*, 96 S. C. 34, 79 S. E. 791, that the guardian, as legal representative of the children, was entitled to letters of administration in preference to brothers of the deceased, who belonged to a class designated in the statute as inferior to the class to which the children or their legal representative belonged.

Where the sole next of kin of a deceased intestate was a person not lawfully detained as a lunatic, and not found a lunatic by inquisition, but, through mental infirmity arising from age, incapable of managing her affairs within the meaning of the lunacy act, the court in *Leese's Goods*, L. R. [1894] P. 160, 70 L. T. N. S. 810, 63 L. J. Prob. N. S. 124, made a general grant of administration under the probate act to the person appointed to act with the powers of a committee.

The following Louisiana cases turn on questions not within the scope of this note, but the cases indirectly show that a tutor may be appointed administrator, and that when the beneficiary heirs are minors he is entitled by preference to the appointment. L.R.A.1915C.

W. 379; Frazer v. Frazer, 25 Ky. L. Rep. 882, 76 S. W. 546.

Mr. J. A. Judy, for appellee:

It is essential to the validity of a judgment that it shall be entered upon the order book and shall be signed by the presiding judge.

Raymond v. Smith, 1 Met. (Ky.) 65, 71 Am. Dec. 458; Fristoe v. Gillen, 26 Ky. L. Rep. 149, 80 S. W. 824; Ewell v. Jackson, 129 Ky. 214, 110 S. W. 860.

A purported judgment will not be signed *nunc pro tunc* thirteen years after its alleged rendition, unless every fact essential to establish jurisdiction appears of record.

Graham v. Lynn, 4 B. Mon. 17, 39 Am. Dec. 493.

Before a person can be adjudged to be of

McKinney's Succession, 4 La. Ann. 25; Erwin v. Orillion, 6 La. 205; Jacobs v. Tricou, 17 La. 104; Vincent v. D'Aubigne, 19 La. Ann. 528; Self v. Morris, 7 Rob. (La.) 24; Hall v. Parks, 9 Rob. (La.) 138; Arthur v. Cochran, 12 Rob. (La.) 41.

And where two tutors of different beneficiary heirs apply, the judge is vested with a large discretion in deciding between them, and unless manifestly wrong his conclusion will not be disturbed. Boudreaux's Succession, 42 La. Ann. 296, 7 So. 453.

In *Sutton's Succession*, 20 La. Ann. 150, a person died leaving a widow with one minor child, issue of the marriage, and one minor child issue of a former marriage. The maternal grandfather of the minor of the first marriage applied for the administration of the estate, alleging that he was a creditor of said minor. The surviving widow opposed his appointment on the ground that he was not a creditor, that there were no debts against the estate, that she was qualified as the natural tutrix of her minor child, and as such had the right to administer the estate. It was held that, there being no evidence in the record showing that the maternal grandfather was a creditor of the estate, he could not be appointed administrator, and the widow having qualified as natural tutrix to her minor child, and the grandfather having failed to qualify as natural tutor to his grandson, the widow had shown the best right to the administration.

—where there are adults in the same class as the minor.

Under a statute providing that "if any person entitled to administration is a minor, letters must be granted to his or her guardian, or any other person entitled to letters of administration, in the discretion of the court;" that when there are several persons equally entitled, "the court may grant letters to one or more of them;" and that "no person under age of majority is competent or entitled to serve as administrator or administratrix,"—it was held in *Re Turner*, 143 Cal. 438, 77 Pac. 144, that a guardian of a minor is placed upon the same plane

unsound mind, it is absolutely necessary that he should be either present in court or have been served with process.

McAfee v. Com. 3 B. Mon. 305; Stewart v. Taylor, 111 Ky. 247, 63 S. W. 783; Taylor v. Moore, 112 Ky. 330, 65 S. W. 612; Porter v. Eastern Kentucky Asylum, 121 Ky. 816, 90 S. W. 263.

A committee regularly appointed has no right under the Kentucky statutes to qualify as personal representative when the incompetent would have otherwise had such right.

Ky. Stat. § 3896.

Messrs. Hazelrigg & Hazelrigg and Lewis Apperson, also for appellee:

The application for the *nunc pro tunc* signing was not made in a reasonable time, and especially so as the statutory right of appellee to qualify as administrator of his brother was exercised by him, and that right secured by a judgment, prior to any motion to have the old memorandum judgment signed.

17 Enc. Pl. & Pr. 933; McCormick v. Wheeler, 36 Ill. 114, 85 Am. Dec. 388; Church v. English, 81 Ill. 442.

Winn had "neither a legal nor a beneficial interest in the controversy, either in his own right or as the representative of another."

Louisville & N. R. Co. v. Brantley, 96 Ky. 297, 49 Am. St. Rep. 291, 28 S. W. 477.

Each day's proceedings are not required to be read and signed.

Fish v. Genett, 22 Ky. L. Rep. 179, 56 S. W. 813; Com. use of Clay County v. Howard, 99 Ky. 542, 36 S. W. 556.

of equality as adults of the class to which the minor belongs, and that therefore the court may in its discretion grant letters of administration to the guardian of a minor brother, although there are other adult brothers in the same class. Two of the judges dissented, holding that the more reasonable meaning of the statute was that where there is but one person of the class entitled, and that person is a minor, the court has the discretion to appoint his guardian or any other person entitled; but where there are two or more in that class and one is a minor, the court has no discretion, but must appoint one of the class who is of the age of majority, otherwise competent.

Where the issuing of letters of administration was opposed on the ground that persons having a prior right to administer were not cited, the court in Wickwire v. Chapman, 15 Barb. 302, in denying this contention, and holding that an intestate's male relatives under the age of twenty-one years residing out of the state have not a prior right to letters of administration over J.R.A.1915C.

Miller, J., delivered the opinion of the court:

As these two appeals present, in a measure, the same state of facts, and have been heard together, they will be disposed of in one opinion.

In 1901, Lewis Anderson, the twenty-six-year-old son of David L. Anderson, was adjudged to be an idiot by the Montgomery circuit court, and with the consent of David L. Anderson, John G. Winn was appointed and qualified as the committee of Lewis Anderson. The necessity for the inquest and the appointment of the committee arose out of the fact that Lewis Anderson, at that time, received about \$1,500 in the distribution of his mother's estate, in the case of McCue v. Gibson. Lewis continued, however, to live with his father, David L. Anderson, who was a farmer with a handsome estate. On August 16, 1913, David L. Anderson, the father, died intestate, leaving Lewis, the idiot son, as his only child and heir at law, his wife having died many years before. Lewis inherited from his father a farm of 450 acres of land, worth about \$50,000, and about \$25,000 in money, the estate thus aggregating about \$75,000. The September term, 1913, of the Montgomery circuit court, was held by Judge A. J. Kirk, as special judge, the regular judge, Hon. Allie W. Young, being absent, or unable to hold court. On August 18, 1913, George W. Anderson, the half-brother of David L. Anderson, deceased, appeared in the Montgomery county court and asked to be appointed administrator of the estate of his half-brother, David L. Anderson. John G. Winn, who, as above stated, had been appointed committee of Lewis Ander-

adult females of the same degree of kindred residing within the state, construed a statute (2 Rev. Stat. 74, § 27) providing that if any of the persons entitled are minors, administration shall be granted to their guardians; but if none of the relatives entitled, or the guardians of such as are minors, will accept, creditors may apply and be appointed; and if no creditors apply, then any other person or persons may be appointed who are legally competent. Section 32 excludes persons under the age of twenty-one years from the right to letters absolutely. But § 33 provides that if one of the persons who would be otherwise entitled shall be a minor, such letters shall be granted to his guardian, being in all respects competent, in preference to creditors or other persons. The result of these various provisions, observed the court, is to give the guardians of infants a prior right over creditors of the estate and other persons having no right to share in the estate, and not over any of the relatives mentioned in § 27, whatever may be the sex or degree of kindred of the minor.

J. D. C.

son in 1901, claimed the right, by virtue of his appointment as the committee of Lewis Anderson, to qualify as administrator of the estate of David L. Anderson, deceased, and moved the county court to so appoint him. Winn filed with his said motion a copy of the order of 1901 appointing him committee of Lewis Anderson; and, after hearing the argument of counsel upon the motions, the judge of the county court overruled Winn's motion for appointment, and sustained Anderson's motion, whereupon said George W. Anderson duly qualified as administrator of his half-brother. Winn appealed to the circuit court, where the question was again tried. Objection was there made that the judgment entered in the original inquest of 1901, which found Lewis Anderson was an idiot, was invalid because the record of the inquest failed to show that process had been served upon Lewis Anderson, or that he was present in court. The circuit judge overruled this objection, and held the inquest of 1901 valid, in so far as the proceeding was concerned. It developed, however, upon the trial, that the judgment of 1901, finding Lewis Anderson to be an idiot, had been entered in a separate book called the "Mental Inquest Book," which contained a printed form of judgment, with blanks which, when filled in, would give the history of the idiot, as required by § 2158 of the Kentucky Statutes, and that said judgment had never been signed by Judge Cooper, the presiding judge of the court in 1901, or by any subsequent circuit judge. It had, however, been signed by the clerk of the court; and the orders of that date, and of a subsequent date approving Winn's bond as committee, which he filed in the case of McCue v. Gibson, had been entered upon the regular order book of the court and signed by Judge Cooper.

The further proceedings are shown by the judgment of the circuit court judge, which, in part, reads as follows: "Thereupon the cause came on to be heard upon its merits, whereupon the presiding judge announced from the bench his judgment that the appeal should be sustained, that George W. Anderson had no right to qualify as the administrator of David L. Anderson, and that John G. Winn, the committee of Lewis Anderson, had the right to so qualify, and that such was the judgment of the court. Thereupon came the said George W. Anderson before the entering of the said judgment, and entered his motion of record herein to dismiss the appeal, because the judgment appointing the said Winn as committee for the said Lewis Anderson was never signed by the then presiding judge of the Montgomery circuit court, to which motion the appellant objected, because the court had L.R.A.1915C.

already announced its judgment, and because the action was then submitted upon its merits; and in support thereof filed the affidavit of John A. Judy and the amended affidavit of R. J. Hunt. Thereupon came the appellant and moved the court and the Hon. A. J. Kirk, as the presiding judge thereof, without waiving their objection to said motion, to dismiss the appeal and sign said judgment *nunc pro tunc*, and in support of that motion filed the affidavit of H. R. French and Robert H. Winn and an exhibit with the affidavit of Robert H. Winn, to which motion George W. Anderson objects. Thereupon the court, being advised (it being agreed of record by the parties that Henry Jones, who was sheriff of Montgomery county in April, 1901, is now dead), sustained said motion, and its appeal is now dismissed, to all of which the appellants and each of them object, and pray an appeal to the court of appeals, which is granted."

It appears from the affidavit of Hunt, the clerk of the court, filed upon the motion for a new trial, that after Judge Kirk had dismissed Winn's appeal on September 13, 1913, and after the entry of said judgment of dismissal, and its signing by the judge, Judge Kirk then signed the book wherein are recorded the judgments of that court rendered in proceedings to inquire into the minds of idiots, which book is of the same series as, and immediately follows, the book in which is recorded the judgment of 1901 appointing Winn committee of Lewis Anderson, and that immediately after signing said record, Judge Kirk left Mt. Sterling, having, by order, adjourned said court until Monday, September 15, 1913. Judge Kirk did not return to hold the court; but a court was held on September 26, 1913, by Judge Young, the regular presiding judge, and on that day Winn made a motion to set aside Judge Kirk's judgment dismissing his appeal, but Judge Young overruled the motion. The appeal by Winn as committee of Lewis Anderson, from Judge Kirk's judgment of September 13, 1913, refusing to appoint Winn as administrator of David L. Anderson, deceased, and appointing George W. Anderson as such administrator, and the refusal of Judge Kirk to sign the judgment of 1901 *nunc pro tunc*, appointing Winn committee for Lewis Anderson, constitute the questions presented by the first appeal now before us. Under the statute, the term of the Montgomery circuit court began on Monday, the 1st day of September. At the adjourned session on the Friday of the court on September 26th as above recited, Judge Young impaneled a jury and again held an inquest upon Lewis Anderson, who was again found to be an idiot, whereupon Judge

Young appointed the appellee, George W. Anderson, the half-brother of David L. Anderson, as the committee for Lewis Anderson. George W. Anderson qualified by taking the oath and giving the bond required by law, and from Judge Young's judgment of September 26, 1913, appointing George W. Anderson committee of Lewis Anderson, Winn, the original committee, prosecutes the second appeal now before us.

The two appeals present the following principal and controlling questions: (1) Was the original judgment of 1901, appointing Winn committee of Lewis Anderson, a valid judgment? (2) If it was valid, was the second inquest upon Lewis Anderson held by Judge Young on September 26, 1913, authorized by law? And (3) if the judgment of 1901 and the inquest of 1913 were valid, was Winn entitled to be appointed administrator of the estate of David L. Anderson, deceased?

1. It is well settled that it is indispensable to the validity of a judgment that it shall be entered in a book provided for that purpose, and signed after being so entered by the presiding judge or justice of the court. *Com. v. Chambers*, 1 J. J. Marsh. 108; *Ewell v. Jackson*, 129 Ky. 214, 110 S. W. 860; *Robertson v. Donelan*, 138 Ky. 152, 127 S. W. 754, Ann. Cas. 1912A, 1280; *Farris v. Matthews*, 149 Ky. 457, 149 S. W. 896; *Interstate Petroleum Co. v. Farris*, 159 Ky. 823, 169 S. W. 535. But in case the judge should, for any reason, fail to sign his judgment, § 977 of the Kentucky Statutes provides a remedy. That section reads as follows: "Upon the death of a circuit judge, or when from any cause the office is vacant, or when the judge is absent, his successor, no matter how chosen, may sign any orders of court left unsigned by his predecessor, the same as his predecessor might have done."

In speaking of this statute in *Ewell v. Jackson*, 129 Ky. 217, 110 S. W. 861, we said: "It sometimes happens that after a judge has directed the entry of an order or judgment, he is prevented by absence or death or other cause creating a vacancy in the office, from signing the orders or judgments so entered. And when such a condition arises the orders made and entered by his direction may be signed by his successor. This section applies to special as well as regular judges. If a special judge, on account of death or absence from the court or retirement from the case, should fail to sign the orders in the case in which he presided, they may be signed by the special judge who succeeds him in the case, or by the regular judge of the court, unless he was disqualified from presiding in the case. And so, if the regular judge is prevented by

death or absence from the court or by a vacancy in the office, from signing the orders or judgments made and directed to be entered by him, his successor may sign them."

And in *Farris v. Matthews*, 149 Ky. 458, 149 S. W. 898, we further referred to the statute, saying: "This statute was enacted for the purpose of enabling a judge's successor, no matter how chosen, to sign orders which the presiding judge may, for any reason, have failed to sign. The statute should be liberally construed to carry out the purpose of the legislature. There can be no doubt that it applies to a case like this. Whether Judge Faulkner, the presiding judge, failed to sign the orders because he was absent, or merely forgot to do so, his successor in office may now sign the orders, and it is his duty to do so."

In view of the statute and these explicit rulings thereunder by this court, Judge Kirk should have signed the judgment of 1901, when requested to do so, as above stated; and his failure to sustain appellant's motion to that end, and to sign the judgment, was error. Upon the return of the case the presiding judge of the court will sign the judgment of 1901.

But it is said the judgment, if signed, was void, because the record of the mental inquest of 1901 does not show that Lewis Anderson was summoned; and it was upon that ground that appellee moved the circuit court to dismiss the appeal. The court, however, overruled that motion; but since the judgment, if invalid for any reason, would go to the root of the case, it is proper to pass upon that question, although the judgment of the trial court, in this respect, has not been appealed from. The record of the inquest proceeding shows that the court ordered a writ of lunacy to issue; the appointment of counsel to represent Lewis Anderson; the selection of a jury composed of twelve persons, and their names; the filing of the affidavits of W. T. Simrall and Charles Duerson; and the verdict and judgment of the court appointing Winn the committee, and the fact that he gave bond which was accepted by the court.

The rule concerning a collateral attack upon a judgment is stated in 1 Black on Judgments, § 271, as follows: "When a party seeks, in any collateral action, to impeach the judgment or decree of a court of superior jurisdiction, on the ground that he had no legal notice of the pendency of the action, it is necessary that his pleading should set forth what, if anything, is shown by the record in relation to the issue and service of process, because, unless the record itself shows that the court never acquired jurisdiction of him, it will be con-

clusively presumed that the jurisdiction did attach."

The foregoing rule has obtained in this jurisdiction to its fullest extent.

In *McNew v. Martin*, 22 Ky. L. Rep. 1275, 60 S. W. 412, this court said: "Every presumption is in favor of the regularity of the proceedings of courts of general jurisdiction, even though the record is silent. Therefore, where the record in question is silent, or where parts of it are lost and not supplied by competent and satisfactory proof, the court, upon precedent and principle, must conclusively presume that all antecedent necessary steps to acquire jurisdiction were regularly and properly taken by the court. Otherwise judgments would lose sanctity with age, and the natural infirmities of paper and records, yielding to the corrosion of time, would yearly grow of less protecting value."

In *Jones v. Edwards*, 78 Ky. 6, Judge Cofer, speaking for the court, said: "Under our system, it never has been required that evidence of the service of process should be preserved in any permanent form. Process is returned and placed among the loose papers of the case, and is very liable to be lost; and if every judgment is to be held void unless the summons can be produced, no matter how long the period during which it has stood unquestioned, the consequences would be of the most serious character. When a judgment has been rendered by a court of general jurisdiction, some consideration should be given to the fidelity and circumspection of the judge, and it ought, at any rate after a great lapse of time, to be presumed that the process has been lost, rather than that the court rendered judgment without process. Is it not much more probable, in such a case, that the process has been lost than that the court rendered a judgment against parties not properly before it?"

In *Maysville & B. S. R. Co. v. Ball*, 108 Ky. 261, 56 S. W. 193, the court further said: "It is claimed the Nelson judgment is void upon the ground that the defendant had not been served with process in the action in which the judgment was rendered. The attack on the judgment is not direct, but collateral. It is a well-settled rule that domestic judgments rendered in a court of general jurisdiction cannot be collaterally attacked unless the want of jurisdiction appears upon the record. Therefore no evidence is admissible except that which is furnished by the record of the action wherein the judgment was rendered. Of course, the rule is otherwise when a direct attack is made upon a judgment. The answer that the defendant was not served with process, and did not appear in the action, etc., is L.R.A.1915C.

insufficient, because it also should have alleged that the record shows such to be the case."

To the same effect see *Miller v. Farmers' Bank*, 25 Ky. L. Rep. 373, 75 S. W. 218; *Northington v. Reed*, 25 Ky. L. Rep. 354, 75 S. W. 206; *Segal v. Reisert*, 128 Ky. 117, 107 S. W. 747; *Dennis v. Alves*, 132 Ky. 345, 113 S. W. 483; *Bamberger v. Green*, 146 Ky. 258, 142 S. W. 384; *Long v. Huffman*, 149 Ky. 31, 147 S. W. 946.

In *Porter v. Eastern Kentucky Asylum*, 121 Ky. 816, 90 S. W. 263, where the asylum sought to recover for keeping a lunatic, and the lunatic defended on the ground that the inquest was void, the court said: "While the inquest is void if held without notice to the lunatic, and without his presence at the trial, this fact is not shown by the inquest held here. The reasonable construction of the record is that the lunatic was in the custody of the court. The law requires his presence at the inquest, and the presumption is that the officer did his duty. If he was not present at the inquest, this fact may be set up by plea."

Eversole v. Eastern Kentucky Asylum, 30 Ky. L. Rep. 989, 100 S. W. 300, follows the *Porter Case*, supra.

The concrete question relating to the cases of idiots and the presumption as to process upon them came up for consideration in the recent case of *Louisville Title Co. v. Darnell*, 149 Ky. 312, 148 S. W. 369, where some apparent inconsistencies in preceding opinions were explained. In that case Darnell had been found to be of unsound mind, and his committee had been appointed by a judgment of the county court. Subsequently, in a suit by the committee, the real estate of the lunatic was sold, and the regularity of the proceedings in that case was attacked upon the alleged failure of the county court record to show certain jurisdictional facts.

The cases of *Crown Real Estate Co. v. Rogers*, 132 Ky. 790, 136 Am. St. Rep. 202, 117 S. W. 275, and *Stewart v. Taylor*, 111 Ky. 247, 63 S. W. 783, relied upon by the appellee, were carefully examined, whereupon the court announced its purpose to adhere to its ruling in *Porter v. Eastern Kentucky Asylum*, supra, as the better and safer rule. In the *Porter Case*, supra, the court went so far as to hold in favor of the presumption that the officers of the county court did their duty, and issued and served the process.

The judgment attacked in the *Darnell Case* was by a county court, a court inferior in jurisdiction to a circuit court; and it was there held that affirmative proof might be introduced *aliunde* to show service of process. In the case at bar, however, the

judgment attacked is the judgment of a circuit court, a court of general jurisdiction, with nothing upon the record to show affirmatively the want of jurisdiction; and in cases of that character, the presumption of regularity and presumption of jurisdiction are conclusive. The judgment in such cases cannot be attacked by evidence *aliunde*.

There is a well-recognized distinction between the presumption to be given the judgment of a court of limited or special jurisdiction and the judgment of a court of general jurisdiction. The rule is elementary that in courts of limited or special jurisdiction, the jurisdictional facts must appear upon the record, or the judgment is a nullity; while in the case of courts of general jurisdiction, unless the invalidity of the judgment affirmatively appears from the record, the judgment will be conclusively presumed to be valid. *Taylor v. Moore*, 112 Ky. 330, 65 S. W. 612.

In *Stewart v. Taylor*, *supra*, and in similar cases, wherein it was said that an inquest held without the presence of the person charged and without notice to him was void, the court was referring to the condition of the record of a county court, or where it was affirmatively shown that the record disclosed the fact that the person on trial on the insanity charge was not present in court, or his personal presence dispensed with by the affidavits required by statute.

We are therefore of opinion that the presumption as to the validity of the judgment of 1901 in the mental inquest case must prevail, and that the circuit court correctly so ruled.

2. The second inquisition held by Judge Young in 1913 may have been based upon the idea that the first inquisition of 1901 was void, either, because the judgment had not been signed, or for irregularity in the proceedings. In either event, the second inquisition held in 1913 would have been justified as an original inquisition. We are not advised by anything in the record as to the ground upon which the ruling was rested.

Section 2149 of the Kentucky Statutes, relating to the appointment of committees for lunatics, reads as follows: "The several circuit and county courts have power and jurisdiction within their respective counties of the care and custody of the persons and estates of all idiots, lunatics, those who, from confirmed bodily infirmity, are unable to make known to others by speech, sign, or otherwise their thoughts or desires, and, by reason thereof, incompetent to manage their estates, and those whose minds, on account of any infirmity or weight of age, have become so imbecile or unsound as to render L.R.A.1915C.

them incompetent to manage their estates; and also over their committees, with power to appoint, suspend and remove their committees, and to require the committee to make settlements upon the same terms and in the same manner as is given over the persons, estates, and guardians of infants; and a committee shall give bond, with good surety, in the same manner as a guardian upon which bond actions may be maintained by any person aggrieved by a breach thereof."

Section 2167 of the Kentucky Statutes further provides: "Every fifth year after the first inquest, before any order shall be granted by the court for the maintenance of an idiot out of his own estate, or out of the state treasury, the idiot, in like manner, shall be brought into court, or his presence dispensed with, for the reasons herein allowed; and the court shall cause the jury to be impaneled, who shall be sworn as provided in this article; and also to inquire, and true report to make from the evidence, whether the person whom they have in charge has before been found, by the verdict of a jury and judgment of a court, an idiot, and whether and what change, if any, has taken place in his mind, physical condition, and estate, since the original inquest."

We have hereinbefore decided that the mental inquest of 1901 was valid, and that the judgment therein is to be signed by the presiding judge of the court. We have therefore left for decision under this head of the case the further question: Was the second inquest of 1913 authorized by § 2167 of the Kentucky Statutes, *supra*; and if it was so authorized what was the effect of that inquest?

It will be noticed that the statute is peremptory in its terms and requires a new inquest every fifth year after the first inquest, before any order shall be granted by the court for the maintenance of an idiot out of his own estate, or out of the state treasury. Until the time of the death of Lewis Anderson's father, who had supported him, there was no necessity for an allowance to be made out of Lewis's estate for his maintenance, and consequently there was no necessity for a new inquest. But upon the death of his father, Lewis Anderson having become dependent upon his own estate for his maintenance, the statute became operative.

It has been argued that § 2167, *supra*, applies only to pauper idiots, and has no application to a case of the kind before us, where no maintenance is asked or expected out of the state treasury. The language of the statute, however, is plain and broad; it applies to all idiots, and must be complied with before any order be granted for the maintenance of the idiot either out of his

own estate or out of the state treasury. The inquest of 1913 was therefore authorized under § 2167, *supra*, as a quinquennial inquest, the inquest of 1901 being treated as the first and valid inquest.

But this further question arises: Was the court authorized, after having held the inquest of 1913, to appoint George W. Anderson the committee of Lewis Anderson, the idiot? No attempt was made to remove Winn from his position as committee of Lewis Anderson, and no order was made in that connection. No ground of removal or suspension was suggested.

Referring to § 2149 of the statute above quoted, it will be observed that the court is given "power to appoint, suspend, and remove their committees, and to require the committee to make settlements upon the same terms and in the same manner as is given over the persons, estates, and guardians of infants."

Section 2015 of the Kentucky Statutes, relating to the appointment of guardians, reads, in part, as follows: "The several county courts shall have jurisdiction for the appointment and removal of guardians to minors, and the settlement of their accounts."

Sections 2024, 2026, and 2039 of the Kentucky Statutes, relating to the removal of guardians, provide as follows:

"Section 2024. When a guardian shall become insane, move out of the state, become incapable of discharging the duties of his trust, or evidently unsuited therefor, the court, being satisfied that either of the causes aforementioned exists, shall remove him; or when it appears proper, the court may permit him to resign his trust, if he first settles his accounts and delivers over the estate as by the court directed; and in either case, or when from any cause there is a vacancy in the office of guardian, may appoint a guardian."

"Section 2026. The court may also remove a guardian for failing to make a settlement of his accounts as required by law, or as may be required by the court, or for failing to give additional surety when required."

"Section 2039. The several courts of chancery shall have power to hear and determine all matters between guardian and ward, require settlements of guardianship accounts, remove a guardian for neglect or breach of trust, control the custody and tuition of the ward and the management and preservation of his estate, and direct the sale of any of his real estate, if necessary to the proper maintenance and education of the ward, or for the payment of his debts."

Section 2167, *supra*, does not provide for the appointment of a new committee; that L.R.A.1915C.

matter is controlled by § 2149 of the statutes above quoted.

The question as to the right of the court to remove a guardian under the preceding statutes has often been before the court; and, since the statute applies the law of guardians to committees, it becomes necessary to consider under what circumstances the court will remove a guardian.

In *Leavel v. Bettis*, 3 Bush, 74, the county court, without any order removing a prior guardian, appointed a new guardian for a child, upon the assumption that the marriage of the prior guardian had incapacitated her from further acting. The old guardian obtained an order canceling the appointment of the new guardian, and the latter appealed. In the course of the opinion, this court said: "The court appointing the appellant had no jurisdiction in the *ex parte* movement he made without notice; and, if there had been notice, his appointment was void, because there was no vacancy for him to fill."

Substantially the same ruling was made in *Cotton v. Wolf*, 14 Bush, 238.

In *Estridge v. Estridge*, 25 Ky. L. Rep. 1076, 76 S. W. 1101, it was again held that a court was without power to appoint a guardian without having first removed the former guardian.

And in *Dunlap v. Kennedy*, 10 Bush, 539, the court said: "Neither a guardian nor an administrator is the agent, officer, or assistant of the county court. They are trustees, and have such interests in the execution of their trusts as entitle them to the protection of the law. The county courts have supervisory power over them, but their duties are prescribed by law, and not by the county courts, and so long as they observe the requisitions of the law and faithfully execute their trusts, they cannot be compelled to surrender them."

In *Phillips v. Williams*, 118 Ky. 757, 82 S. W. 379, there was litigation over certain rentals in which an infant had an interest, and the court, upon the filing of affidavits stating that Phillips was not a proper person to act as guardian for the infant, summarily removed him. Upon Phillips's appeal, the court said: "Section 2039 of the Kentucky Statutes of 1903, which authorizes courts of chancery to remove guardians for neglect or breach of trust, does not give authority to the court to make the removal on *ex parte* affidavits, nor without proceedings instituted against the guardian for that purpose. He is entitled to his day in court. He should be advised of the charge against him, and be given an opportunity to defend himself. That part of the order removing him is without any effect."

To the same effect see *Gill v. Riley*, 28

Ky. L. Rep. 639, 90 S. W. 2, and Clay v. Clay, 28 Ky. L. Rep. 398, 89 S. W. 500.

The law, being thus well settled that when a guardian has been appointed and has executed bond he cannot be removed except for cause, the same rule must, under the statute, be applied to committees. It results, therefore, that, as Winn was regularly appointed committee and has not been removed, and there cannot be two committees for the same service, the appointment of George W. Anderson as committee did not have the effect to remove Winn, or to supersede him in his office of committee. While Judge Young had authority to hold the inquest, his appointment of George W. Anderson as committee was, under the circumstances of this case, unauthorized and of no effect. *Cotton v. Wolf*, 14 Bush, 238.

3. Did Winn have the right to administer upon the estate of David L. Anderson, deceased?

Section 3896 of the Kentucky Statutes establishes the precedence in right of distribution, as follows: "The court having jurisdiction shall grant administration to the relations of the deceased who apply for the same, preferring the surviving husband or wife, and then such others as are next entitled to distribution, or one or more of them who the court shall judge will best manage the estate."

While the statute gives the right of distribution to "the relations of the deceased," it qualifies the kinship, when it passes the surviving husband or wife, by confining it to such other relations as are next entitled to distribution. If the party applying be not a distributee, he does not come within the terms of the statute, although he may be closely related to the deceased. This construction was given to the statute in *Hilton v. Hilton*, 33 Ky. L. Rep. 276, 109 S. W. 905. In that case, the court, at the instance of the decedent's father and mother, who were his sole distributees, appointed Hamm, the district constable, who was related in no way to the decedent, as administrator. Decedent's sister, Hattie Turner, who had no distributable right, applied to the court to remove Hamm and appoint her in his place. In denying her the appointment, the court said: "The proof shows without question that the father and mother are not qualified to act as administrators; but, as they were the sole distributees of the estate, it was proper for the county court, on their motion, to appoint a suitable person as administrator. It is not controverted that Hamm is a suitable person. While Hattie Turner was a sister of the deceased, she had no interest in his estate, and the county court was not required to wait until the next term before making an

appointment when both of the sole distributees requested the appointment of Hamm. The purpose of the statute is that the surviving husband or wife shall be preferred, and then such other relations as are next entitled to distribution. Here there was no wife, and Hattie Turner, who was not entitled to distribution in any part of the estate, had no control of the matter. . . . The statute does not contemplate that persons who are related by blood, but have no interest in the estate, shall determine who shall be appointed as administrator. We therefore conclude that the court properly appointed Hamm upon the showing made at the time."

A similar ruling was made in *Re Weaver*, 140 Iowa, 615, 22 L.R.A. (N.S.) 1161, 119 N. W. 69, 17 Ann. Cas. 947.

The Iowa Code (Code 1897, § 3297) provided that administration should be granted: (1) To the husband or wife of the deceased; (2) to his next of kin; (3) to his creditors; (4) to any other person the court may select. The decedent left surviving him as his sole distributee a son who was a citizen of Oklahoma, and therefore incompetent to qualify in Iowa. But at the son's instance a citizen of Iowa, a stranger in blood to the decedent, was appointed and qualified as the decedent's administrator. Within due time, a brother of the decedent, a resident of Iowa, applied for letters of administration, and the trial court sustained his application. Upon appeal, however, the Iowa supreme court reversed that ruling, saying: "The fallacy which has entered into the argument supporting this proceeding is the assumption that a brother of a decedent is necessarily a 'next of kin.' In the primary meaning of this term, the next of kin of a decedent are the persons nearest in degree of blood surviving him. 16 Am. & Eng. Enc. Law, 703. No relative can be said to be 'nearest' in degree of blood if someone else be 'nearer.' If a decedent leave neither parent nor lineal descendant surviving him, then surviving brothers and sisters would be nearest in blood, and 'next of kin.' In its practical use in public statutes the term 'next of kin' has come to mean ordinarily those persons who take the personal estate of the deceased under the statutes of distribution. Inasmuch as the statutes of distribution vary in different states, the meaning of this term is subject to the same variation. Whether we adopt the primary meaning of the term or its more practical meaning, as derived from its use in the statute, there can be no question, under the law of this state, but that J. W. Weaver was the decedent's only heir at law, and his only next of kin. The brother, appellee herein,

was therefore not a next of kin. The statute quoted confers upon him no right nor privilege whatever with reference to the estate of the decedent. The fair inference from the record is that there were no known creditors. The son was therefore the only person interested in the estate to any extent. The first action of the court in appointing Lamb upon the application of the son was eminently proper. In the absence of some showing that the appointment was improper, or that a change was required by the interests of the estate as a whole, or by the interest or right of some beneficiary of the estate, such appointment should not have been set aside. In view of the fact that J. W. Weaver was the only person who had any interest in the estate, and that Frank Weaver was, in legal effect, a stranger to the estate, without interest therein, and without statutory right to administer, his petition should have been dismissed at his cost."

Lewis Anderson being entitled under the statute to qualify as the administrator of his father's estate, but being incompetent to do so, did the appellant Winn, by right of his committee relationship, have that right? While we have no direct authority upon the question in this state, the decisions of the courts of other states seem to be reasonably uniform, and to the effect that Winn has the right to administer.

In *Mowry v. Latham* (1891) 17 R. I. 480, 23 Atl. 13, the Rhode Island statute gave the right to administer to the next of kin entitled to distribution. Van Buren Mowry died intestate, leaving as his sole heir at law a brother, Edwin H. Mowry, who had been adjudged *non compos*, and M. L. D. Mowry had been appointed his guardian, or committee as he would have been called under our statute. The probate court appointed Latham administrator of the decedent, whereupon the guardian of the incompetent brother appealed. In sustaining the appeal, the court said: "We do not think, however, that the appellee was entitled to the appointment. In *Johnson v. Johnson*, 15 R. I. 109, 23 Atl. 106, it is shown that the law commits the administration of the estate of an intestate to the persons who are entitled to the residue of the estate, judging that such persons, because of their interest, will be likely to administer the estate most advantageously for all concerned. Under our statute the next of kin is entitled to the residue of the estate after payment of debts, funeral expenses, and expenses of administration. The next of kin of the deceased is Edwin H. Mowry, his brother. If competent, he would be entitled to the administration. He is, however, *non compos mentis*, and incapable of performing its duties. The

appellant has been appointed guardian of his person and estate. As such, it is his duty to manage and care for the property of his ward for the benefit of the ward. We are therefore of the opinion that, as Edwin H. Mowry, if competent, would be entitled to the administration, his representative appointed by law to guard his interests is entitled to the administration in preference to a person who would have been of the next of kin had Edwin H. Mowry died before his brother, and *a fortiori* in preference to a stranger nominated by such person."

A similar ruling was made in the case of *Re Stewart* (1896) 18 Mont. 595, 46 Pac. 806, where Stewart died intestate, leaving a wife sixteen years of age and one minor child surviving him. The widow asked the court to appoint Keith administrator, but the court overruled Keith's application and appointed Brooks, the public administrator. In reversing the judgment upon Keith's appeal, the supreme court of Montana said: "The respondent's contention must be that, where the widow is a minor, she is necessarily incompetent to serve herself, and that inasmuch as she is incompetent to serve herself, she is also incompetent to name some competent person whom she may request to have appointed. But we do not think this contention can be sustained. The first right to administer is granted to the surviving husband or wife, yet it might often happen that such survivor would be, by nonresidence or other disqualification, incompetent to serve. But the statute, as if made especially to cover such a contingency, gives to the surviving husband or wife the right to name some competent person who can serve. This right of the surviving husband or wife to nominate is not made dependent upon the competency to serve of the person occupying such relationship. It is a right of nomination given by virtue of the fact that the person who exercises it stands in the relationship of surviving husband or wife; it is independent of the competency of such husband or wife himself or herself to serve."

In *Woodruff v. Snoover* (1900, N. J. Prerog.) 45 Atl. 980, Snoover, the guardian of the infant children of an intestate, was appointed administrator of their father, and Woodruff, a kinsman of the deceased father, appealed. In support of Woodruff's claim to qualify as administrator, it was argued that he was of kin to the decedent, while Snoover was not. The vice chancellor of the prerogative court denied Woodruff's claim to qualify, saying: "The appellants, however, are not the next of kin of the intestate, who died a widower. His two infant children are his next of kin. They were entitled to administer, had not their infancy prevented their appointment. Now, when the next of

kin are incapable of administering, upon the theory upon which letters of administration are granted, such letters would go to someone interested for the next of kin. It was upon the theory that the next of kin would take the residue that the statute confers the right upon him or them. For that reason, when there is a will and no executor, administration is granted, not to the next of kin, but to the residuary legatee. If the residuary legatee died, administration went to his personal representative, because such personal representative then had a superior interest in having an economical administration, so as to preserve as much as possible of the estate of the intestate for the estate of the residuary legatee. *Donahay v. Hall*, 45 N. J. Eq. 720, 18 Atl. 163; *Re Booraem*, 55 N. J. Eq. 759-762, 37 Atl. 727. For this reason, where the next of kin is an infant, and an administrator is appointed during his minority, it is proper to appoint the person who has charge of the estate of the infant, viz., his guardian. Such has been the practice. 1 Williams, Exrs. *417; 1 Woerner, Admsrs. 404. Nor did it matter that the present respondents were appointed administrators during the minority of the next of kin for, had they been appointed general administrators, the same rule would have controlled. They, as guardians of the estate of the next of kin, would have had a superior interest, as such guardians, in the residuary estate of the intestate."

In *Re Turner* (1904) 143 Cal. 438, 77 Pac. 144, the California statute provided that if any person entitled to administration be a minor, or an incompetent person, letters must be granted to his or her guardian, or any other person entitled to letters of administration, in the discretion of the court. In that case the court upheld the appointment of a guardian as administrator to the exclusion of certain brothers of a minor having the same distributable right, notwithstanding the court had the right, under the statute, to exercise a discretion in granting administration to some other person. See also *Re McLaughlin*, 103 Cal. 429, 37 Pac. 410, and *Clough v. Borello*, 5 Cal. Unrep. 657, 48 Pac. 330.

In *Boyd v. Cloud* (1905) 5 Penn. (Del.) 479, 62 Atl. 294, Joshua Boyd, the decedent, left surviving him as his only heir at law a brother, John L. Boyd, who had been adjudged a lunatic. His son William Boyd, had been appointed his trustee, and by virtue of that office, William Boyd was appointed the administrator of the decedent. A contest having arisen over the appointment, the court summarily formulated its decision as follows: "The matter is decided on L.R.A.1915C.

the one point, viz., whether the trustee of an insane person is entitled to administer on an estate to which such insane person is entitled to the residue, and therefore entitled under the statute to administer; the court held that such trustee is entitled the same as the insane person would be if capable."

One of the best reasoned opinions we have found upon this subject is *Kinnick v. Coy* (1906) 40 Ind. App. 139, 81 N. E. 107. In that case, Weeks, the decedent, left surviving him two daughters, who were nonresidents of Indiana, and an infant son, who was a resident of Indiana. A contest arose over the right of the guardian of the infant resident son on the one hand, and that of the nonresident daughters on the other, to administer upon their father's estate. The Indiana statute provides that administration must be granted to the widow, to the next of kin, to the largest creditor, if he be a resident of the state, in the order named as to precedence. In disposing of the case the court said: "The only question we feel it necessary to determine in this case is whether the appellant is entitled to administer upon this estate as a matter of right, on account of his relationship as guardian of the minor heir. If he is so entitled, then the fact that he is a nonresident of the county would not deprive him of that right. If he is entitled, as the representative of his ward, to administer, he would stand in precisely the same position as his ward with reference to the right to administer, and this would not require that he should be a resident of the county. The statute of this state does not expressly declare that a guardian shall be entitled to administer upon the estate of a decedent in right of his ward. He is, however, recognized as the representative of his ward. It is his duty to care for the ward's estate, and to look after the ward's interest in every matter pertaining to his financial interest. The statute fixing the order of right to administer upon the estate of a decedent is founded upon the proposition that the heirs and the creditors are interested in the estate, and that it is in one sense their property that is to be administered upon. Their heirs, after the debts are paid, own the property of the intestate; it is theirs. The creditors own the property of the estate to the extent that it shall be used to pay the debts, and this is the reason of the statute's giving to those persons a preference in the administration. It is the rule at common law that the trustee or guardian of an infant or *non compos* who would otherwise be entitled to administer upon an estate was entitled to administer in

the right of his ward or *cestui que trust*, and in every case in which the question has arisen it is uniformly held that the guardian of an infant who, if of age, would be entitled to administer upon an estate, is entitled as of right to such administration. The question has never heretofore arisen in this state, but we feel impelled to hold, in unison with the current of authorities upon the question, that in this state the guardian of an infant who, if of age, would be entitled to administer, is in right of his ward entitled to letters of administration in preference to strangers, and that he stands, so far as the question of his right to administer upon the estate is concerned, in the shoes of his ward, and to that extent represents his ward. This holding is in line with the following authorities: *Mowry v. Latham* (1891) 17 R. I. 480, 23 Atl. 13; *Boyd v. Cloud* (1905) 5 Penn. (Del.) 479, 62 Atl. 294; *Woodruff v. Snoover* (1900; N. J. Prerog.) 45 Atl. 980; *Langan v. Bowman* (1849) 12 Smedes & M. 715."

Mattox v. Embry (1908) 131 Ga. 283, 62 S. E. 202, followed *Myers v. Cann*, 95 Ga. 383, 22 S. E. 611, in upholding the appointment of an administrator selected by some of the adult children and the guardian of a minor child of a decedent as against a kinsman not entitled to distribution, who was selected by the other heirs.

That Lewis Anderson, if competent, had the right to qualify as administrator of his father's estate, cannot be doubted. *Buckner v. Buckner*, 120 Ky. 596, 87 S. W. 776; *Watkins v. Watkins*, 136 Ky. 266, 124 S. W. 301. But as Lewis Anderson was mentally incompetent to act as administrator, we are of opinion, in view of the abundant authority above cited, which seems to us to be based upon sound reasoning, his committee, upon whom was imposed the duty of preserving the estate, was entitled to qualify in the place of his incompetent principal. Lewis Anderson is the next of kin, and is the only person interested in the distribution of his father's estate; his uncle, George W. Anderson, not being entitled to participate in the distribution, is not the next of kin within the meaning of the statute. In the contemplation of the statute he is a stranger, and the possibility or probability that, as the uncle of the idiot, Lewis Anderson, he may inherit a part, or even all, of his estate, does not make him a distributee of the estate of David L. Anderson, or affect the case in any way.

The judgment in each appeal is reversed for further proceedings consistent with this opinion.
L.R.A.1915C.

MICHIGAN SUPREME COURT.

CHARLES M. MILLER, Plff. in Err.,
v.
LOUIS W. TOLES.

(— Mich. —, 150 N. W. 118.)

Physician — malpractice — experimental remedy.

1. A surgeon is not liable for the loss of a patient's foot where, at the time he was called to the case, amputation was indicated, because he tried a remedy known and approved by the profession, though not generally, which had in some instances achieved remarkable results in similar cases, but failed in the case to which he was called, so that amputation was finally resorted to.

Evidence — malpractice — loss of foot.

2. The mere loss of a foot under the care of a surgeon is not sufficient to show malpractice, in the absence of evidence tending to indicate it.

(December 18, 1914.)

ERROR to the Circuit Court for Ingham County to review a judgment in defendant's favor in an action brought to recover damages for alleged malpractice of defendant in treating plaintiff's ankle. Affirmed.

The facts are stated in the opinion.

Messrs. W. H. Howard and W. A. Fraser, for plaintiff in error:

Any deviation from the established mode of practice is sufficient to charge the physician or surgeon with liability in case any injury shall arise to the patient.

30 Cyc. 1576; *Patten v. Wiggin*, 51 Me. 594, 81 Am. Dec. 593; *Pike v. Honsinger*, 155 N. Y. 201, 63 Am. St. Rep. 655, 49 N. E. 760.

When a particular mode of treatment is upheld by the consensus of opinion, it should be followed by the ordinary practitioner, and if he sees fit to experiment

Note. — Liability of physician or surgeon for failure to follow established practice as to method of treatment.

The earlier cases on this question will be found in a note in 37 L.R.A. 836.

Generally as to duty and liability of physician or surgeon to patient, see Index to L.R.A. Notes, "Physicians and Surgeons," §§ 12, 13.

Cases dealing with the liability of a physician for injuries resulting from electrical or X-ray treatment are not included herein, this question being considered in notes to *Frisk v. Cannon*, 28 L.R.A. (N.S.) 262, and *Sweeney v. Erving*, 43 L.R.A. (N.S.) 734.

Liability in general.

In the earlier note on this question it is said that the rule is very strict against

with some other mode, he does so at his peril.

Jackson v. Burnham, 20 Colo. 532, 39 Pac. 577; 30 Cyc. 1576.

In an action for negligent injury, it need not be shown by direct or conclusive evidence, but may be inferred from facts and circumstances.

Billings v. Breinig, 45 Mich. 65, 7 N. W. 722.

If the jury is satisfied that the defendant was wanting in care, the plaintiff is entitled to their general verdict.

Peer v. Ryan, 54 Mich. 225, 19 N. W. 961; *People v. Vanderhoof*, 71 Mich. 173, 39 N. W. 28.

Messrs. Cummins, Nichols, & Rhoads for defendant in error.

trying experiments, and that it would seem that any advancement in the art must be at the personal risk of the physician rather than of the patient. *MILLER v. TOLES* does not conflict with this rule, as the treatment in that case could not properly be classed as experimental, and was, it appears, warranted by the circumstances.

In an action for damages against a physician, resulting from an attempted cure of hernia by the injection of paraffin, the defendant in *McClarín v. Grenzfelder*, 147 Mo. App. 478, 126 S. W. 817, testified that the method of treatment he adopted had been used in Chicago, Cincinnati, and in Vienna, Austria, where it had been developed nine years previously, and other witnesses testified for the defendant that they had been cured of hernia by this method. There was evidence, however, that the usual method of treating hernia was by surgical operation. The rule was laid down that "if expert practitioners of defendant's school concurred in opinion about the right method of treating hernia, and defendant adopted a method not recognized as sound, then, according to the courts which have passed on the question, his conduct should be regarded as an experiment which renders him liable, if it injured plaintiff in the way alleged; . . . But if defendant's system of treatment was recognized as proper, then, though there were other systems recognized as proper, he cannot be convicted of negligence if he made use of the one he deemed most suitable for plaintiff's case. . . . In such a condition of medical science the question of defendant's responsibility would turn on whether he administered the remedy preferred by him with the degree of care and skill required of a person holding himself out as an expert. What we are dubious about is whether the evidence for defendant conducted to prove the treatment he used was recognized by the experts of his school as proper for the relief of hernia. That it was of comparatively recent origin ought not, *ipso facto*, to put it in the class of innovating experiments, so as to lay the defendant liable for a bad result, even though he displayed reasonable skill and care in the L.R.A.1915C.

Brooke, J., delivered the opinion of the court:

This is an action for malpractice against defendant, who is a surgeon in active practice in the city of Lansing. The record discloses the following material facts: The plaintiff was injured as the result of a fall from a scaffold on the 24th day of August, 1909. His ankle was badly sprained, and perhaps otherwise injured. He immediately called a physician, Dr. Tooker, who prescribed a liniment which plaintiff applied for some three or four weeks. He later went to Dr. Tooker's office where the ankle was examined, and the injury pronounced to be a bad sprain. The plaintiff continued to use a liniment upon the limb during the fall of 1909 and the winter of 1909-10. He

manner of applying it. This is true because some of the most approved systems of treatment, like antitoxin for diphtheria, met with general acceptance by the medical profession a few years after their discovery." In this case an instruction was held erroneous that the verdict should be for the plaintiff if the manner of treatment used by the defendant was "not used by physicians and surgeons of ordinary skill and care, and as a direct result of the use of such methods the plaintiff suffered the injury of which he complains," and that ordinary skill and care as so used meant such skill and care as were used by physicians and surgeons of ordinary ability in the same locality or similar locality under the same or similar circumstances. The defendant having represented himself as a specialist in the treatment of hernia, it was said that he was bound to exercise the care of a specialist, and that the propriety of his treatment was to be determined with reference to the practice and approval of specialists; that it might be the system was recognized, approved, and used by physicians who had kept pace with scientific progress in relieving hernia, but "was a method or manner of treatment not used by physicians and surgeons of ordinary care and skill," as stated in the instruction.

And in *Sawdey v. Spokane Falls & N. R. Co.* 30 Wash. 349, 94 Am. St. Rep. 880, 70 Pac. 972, the rule was laid down that a surgeon must not experiment in his treatment of the injury; but that, "on the contrary, if he desires to avoid liability for his mistakes, he must treat it in some method recognized and approved by his profession as most likely to produce favorable results. If there be more than one of these applicable to the particular case in hand, he is not, of course, liable for an honest mistake of judgment in his selection of the method; but if bad results follow, and liability therefor is to be avoided, it must appear that the treatment applied was approved and recognized, as well as that it was pursued with ordinary diligence and skill." In this case it was held that the question of the surgeon's negligence should

did some work during this period, but found that when he worked the swelling in his ankle would become greater, and when he stopped work it would subside, in some measure. In the spring of 1910 plaintiff consulted Dr. Hagadorn, a physician of Lansing, who made an X-ray photograph of the ankle. Dr. Hagadorn prescribed different medicines, among them iodine, which was applied externally. Dr. Hagadorn's treatment was continued a week or two, but the ankle did not respond to the treatment or grow better. In June, 1910, plaintiff consulted Dr. Nottingham, also of the city of Lansing. This physician also took an X-ray photograph of the ankle, and later put the injured member in a plaster cast. This was worn two weeks, taken off, and a sec-

ond one applied. The second one was worn about three weeks, when it was removed. The ankle was no better. Plaintiff then consulted Dr. Gordon, who treated the injured limb with a hot solution and bandaged it. The swelling became somewhat reduced under this treatment, and during the summer of 1910 plaintiff was able to do some little work. During September of 1910 he undertook to perform ordinary labor, but found that the ankle became extremely painful and very badly swollen, so that he was forced to desist. By November 19, 1910, the ankle had assumed such a condition that Dr. Gordon, the attending physician, advised plaintiff his case was one which demanded surgical rather than medicinal treatment. Dr. Toles, the defendant, was thereupon

have been submitted to the jury, where there was evidence that the method employed in treating an oblique fracture of the femur was approved by some authorities but was not the usual method of treatment.

It has been said that a surgeon "is bound to keep abreast of the times, and a departure from approved methods in general use, if it injures the patient, will render him liable, however good his intentions may have been." Pike v. Honsinger, 155 N. Y. 201, 63 Am. St. Rep. 655, 49 N. E. 760. The above was quoted with approval in Bigney v. Fisher, 26 R. I. 402, 59 Atl. 72.

And in Allen v. Voje, 114 Wis. 1, 89 N. W. 924, an action against a physician for negligent treatment of the plaintiff, an instruction was approved that "a departure from approved methods in general use, if it injures the patient, will render him (the physician) liable, however good his intentions may have been," the court saying that the instruction, viewed in the light of the rest of the charge, excluded the idea of liability for variations from customary practice merely in the way of increased precaution, recognized as such. It was said: "We think the rule laid down by the court is supported by the weight of authority in cases where there can be said to be a thoroughly established and usual method of treating a situation. We have little doubt that, if the first case of vaccination had proved disastrous and injured the patient, the physician should have been held liable. Nor do we believe that a physician of standing and loyalty to his patients will subject them to mere experiment, the safety or virtue of which has not been established by experience of the profession, save possibly where the patient is *in extremis*, and fatal results substantially certain unless the experiment may succeed."

In regard to the contention that the rule adopted made the physician liable in case he adopted new methods, although improved ones, and that no progress in medicine was possible if physicians must adhere to ancient methods, the court in Allen v. Voje, supra, quoted from the opinion in Carpenter v. Blake, 60 Barb. 488 (cited in the earlier L.R.A.1915C.

note on this question), as follows: "Some standard by which to determine the propriety of treatment must be adopted; otherwise experiments will take the place of skill, and the reckless experimentalist the place of the educated, experienced practitioner. . . . But when the case is one as to which a system of treatment has been followed for a long time, there should be no departure from it, unless the surgeon who does it is prepared to take the risk of establishing by his success the propriety and safety of his experiment. The rule protects the community against reckless experiments, while it admits the adoption of new remedies and modes of treatment only when their benefits have been demonstrated, or when, from the necessity of the case, the surgeon or physician must be left to the exercise of his own skill and experience."

It was also held in Allen v. Voje, supra, that an instruction, in regard to the failure of a physician to remove an abscess, that failure to follow the established practice in the care and treatment of the case for the detection and removal of the abscess, "recognized, adopted, and followed by all physicians and surgeons of good standing," would be negligence, was not erroneous because of the use of the word "all," as tending to convey the impression that it required the defendant to have and exercise the skill of all the physicians residing in his neighborhood.

Testimony by physicians residing in another city 30 miles distant from that in which the defendant practised as to whether certain treatment was proper and sanctioned by physicians and surgeons in the latter place possessing and exercising ordinary skill and intelligence was held in Allen v. Voje, supra, not objectionable on the ground that it was calling upon third persons to testify as to the opinion of others, or because the witnesses practised in a different vicinity, where they testified they were familiar with the practice of medicine and the custom of the profession in the vicinity in question.

In an action for damages for alleged negligent treatment of a dislocation of the

called in consultation. What occurred at this consultation is set out in the testimony of Dr. Gordon, who was sworn as a witness for plaintiff. In part, he testified as follows: "I thought the condition at that time justified, and called for, amputation. That is why I called in a surgeon. I told Mr. Miller that I considered the case surgical. I called the surgeon for the purpose of consultation about the patient and advised what to do, but had in view an amputation. It was my judgment that the joint had become useless, and there was no use treating it any longer. Dr. Toles and I made a very careful examination of the joint, and the doctor said to the patient that he could not promise him anything, but that there was some chance of saving it. I think he made a remark like that. I knew in a general way of this Murphy treatment. I knew that it was reported in the journals that it had

in some instances accomplished remarkable results. I knew that it was a treatment that was being used by Dr. Murphy, of Chicago, for chronic inflammatory condition of joints. Dr. Murphy is very famous as a surgeon of the joints. After the treatment the temperature came down. Along in the early part of February the limb resumed a condition similar to that in which the limb was at the time I called Dr. Toles. There was no time when the limb became anything like normal. Even at the time when the temperature came down and there was some subsiding of the enlargement, it was still greatly enlarged all the time. Even after the exploratory examination I still thought that amputation was advisable. While he was still under the anæsthetic I remarked that it should be taken off. I don't know just why I said that because the case was really Dr. Toles's case, and yet I had been

clavicle, it was held in *Tomer v. Aiken*, 126 Iowa, 114, 101 N. W. 769, that the question whether the defendant should have adopted the "Stimson method" of dressing was for the jury, one physician having testified that the method used had been standard until Stimson's treatment came in vogue, but that it was not at the present time regarded as efficient, while other physicians testified that the method adopted was generally approved.

Where a carbolic acid solution was applied for the purpose of removing smallpox pittings, resulting in a scar, it was held that the defendants, who had applied the treatment, were liable for damages. *Graham v. Dr. Pratt Institute*, 163 Ill. App. 91. The court said that the evidence tended to show that there was no treatment known to medical science for the cure or removal of smallpox pits; and that if the defendants, by applying a solution of acid to the plaintiff's face mutilated his face, when they knew, or were bound, in the eyes of the law, to know, that such treatment was not sanctioned by medical science, and that they had therefore no legal right to perform the operation or to apply such treatment, the treatment would not be relieved from the imputation of malice in its legal sense, although there was no malicious intent present.

In an action against a physician and surgeon for malpractice, an instruction was given for the plaintiff in *Prichard v. Moore*, 75 Ill. App. 553, that the defendant was required to "use the appliances and instrumentalities ordinarily used by surgeons of good standing and reasonable and ordinary skill." This, the court said, was urged as error on the ground that the defendant had a right to employ any appliances, whether ordinarily used or not, if he exercised reasonable and ordinary skill, and that the instruction would exclude new and better appliances than those in ordinary use; but that there was no claim that unusual ap-

pliances had been employed, and the instruction therefore was not erroneous in the condition of the proof, though it might have been if the proof had shown that the defendant employed unusual appliances.

In *Craghead v. McCullough*, — Colo. —, 146 Pac. 235, it was said that "employing the method to reduce a fracture generally recognized by surgeons as proper is not negligence," and that in this case "all the surgeons called as witnesses who testified on the subject stated that the method defendant employed was the usual and proper one to treat an oblique fracture of the clavicle."

And in *De Long v. Delaney*, 206 Pa. 226, 55 Atl. 965, it was held that a physician was not liable for failure to use a tourniquet to stop the flow of blood from the crushed limb of a patient, where there was no evidence from any witness competent to express an opinion that it should have been used in this instance, or that the tight bandage applied by the defendant was not fully its equivalent.

Practice of his own school.

"The skilfulness of a physician in diagnosis and treatment should be tested by the recognized rule of his own school." *McGraw v. Kerr*, 23 Colo. App. 163, 128 Pac. 870. To a similar effect are *Martin v. Courtney*, 75 Minn. 255, 77 N. W. 813, subsequent appeal in 87 Minn. 197, 91 N. W. 487, and *Wilkins v. Brock*, 81 Vt. 332, 70 Atl. 572 (action against osteopath).

And in *Booth v. Andrus*, 91 Neb. 810, 137 N. W. 884, an action against a physician and surgeon of the eclectic school for malpractice in the treatment of the plaintiff, the rule was laid down that physicians are only bound to exercise such reasonable care and skill as are usually exercised by physicians or surgeons in good standing in the same school of practice.

"It seems to be a sound and reasonable

interested in the case. I examined the tissues and looked at the leg, and I remarked in a kind of aside—I remembered saying it was better off than on. I did not consider that the ankle would ever become useful. I did not pose as an expert surgeon or anything of that kind. It was just simply my own notion of it."

As a result of the consultation, it was determined by the defendant to attempt to save plaintiff's foot and ankle by the use of what is known as the "Murphy Treatment." This consists in the injection, by means of a hypodermic syringe, of a solution, the nature of which is not disclosed by the record. The first of these injections was administered November 20, 1910; the second December 3, 1910; and the third December 30, 1910. At the time the first injection was administered, the plaintiff's temperature was about 102°, indicating,

probably, that the diseased condition of the ankle was causing a serious constitutional disturbance. It was doubtless this fact which induced the belief expressed by Dr. Gordon that the plaintiff's life could be saved only by amputation of the diseased limb. As a result of the injections, plaintiff's high temperature subsided. After each injection, however, plaintiff suffered severe pain, which lasted from one to three days, requiring the administration of opiates for its relief. No marked improvement followed the use of the injection and on February 14, 1911, it was determined to undertake an exploratory operation. This was performed, and the bones on the inside of the ankle were laid bare for examination. The condition in which they were found is not disclosed by any expert testimony, although plaintiff testifies that he was assured by the defendant that the bones were

rule and well established by the authorities that the treatment of a physician of one particular school is to be tested by the general principles and practices of his school, and not by those of other schools, and that a physician or surgeon is bound to exercise such reasonable care and skill as is possessed and exercised by physicians and surgeons generally in good standing of the same system or school of practice or treatment in the locality and community of his practice, having due regard to the advanced state of the school or science of treatment at the time of such treatment. . . . When a patient selects any one of the many schools of treatment and healing to serve him, he thereby accepts and adopts the kind of treatment common to that school or class, and the care, skill, and diligence with which he is treated, when questioned in a court of justice, should be tested by the evidence of those who are trained or skilled in that school or class." *State v. Smith*, 25 Idaho, 541, 138 Pac. 1107, where an osteopath was tried for manslaughter on the ground of having starved a patient to death in the course of a medical treatment.

But that a physician of one school may testify as to the correctness of the diagnosis of a case which one of another school treated as dislocation of the hip joint, where the diagnosis of dislocation and of disease of the joint is the same in all schools of medicine, see *Grainger v. Still*, 187 Mo. 197, 70 L.R.A. 49, 85 S. W. 1114.

In an action for damages for alleged negligence in administering osteopathic treatment, an instruction has been held error that the treatment was negligent if it was improper and not such as an ordinarily skilful and prudent man would have given under the circumstances since it ignored the fact "that the plaintiff submitted to the treatment furnished by the defendant school knowing that it was to be applied according to the system known as osteop-

athy, and that treatment according to this system was contemplated in her contract, and gave the jury the right to find that osteopathic treatment was not proper treatment, and that persons administering it were not ordinarily skilful and careful; while the law is that her treatment must be judged by this method." *Atkinson v. American School of Osteopathy*, 240 Mo. 338, 144 S. W. 816. A statute expressly recognized osteopathy as a system of treating diseases.

In *Longan v. Weltmer*, 180 Mo. 322, 64 L.R.A. 969, 103 Am. St. Rep. 573, 79 S. W. 655, it was held that to entitle one to recover damages for injuries negligently inflicted upon him by a magnetic healer in treating a disease, he is not bound to show that the treatment received was not proper or usual in magnetic healing, but that it is sufficient to show that it was not proper to be given in any case to one in the plaintiff's condition at the time of receiving it. The court said, however, that if the action were being prosecuted upon the theory that the defendants were physicians, or that magnetic healing was one of the recognized professions, there would be more force in the contention that it devolved upon the plaintiff to show that the kind of treatment adopted was not proper or usual in magnetic healing.

That one who employs a Christian Scientist to treat a disease from which he is suffering cannot, after receiving the treatment ordinarily administered by such healers, without benefit, hold him liable in damages because the method of treatment is improper, and that a person who offers to treat diseases as a Christian Scientist is bound only to exercise the care, skill, and knowledge of one who undertakes to treat diseases according to the methods of such healers, and not of the ordinary physicians, see *Spred v. Tomlinson*, 73 N. H. 46, 68 L.R.A. 432, 59 Atl. 376.

R. E. H.

all right and that a complete cure would follow. However, the ankle did not improve, but continued to grow markedly worse, until on August 7, 1912, about eighteen months after the exploratory operation, plaintiff's condition became so alarming (his temperature having arisen to about 104°) that it was obvious an amputation must be resorted to or he would certainly die. The foot was therefore, upon that date, cut off.

It appears from the record that four doctors were sworn on behalf of plaintiff, although the testimony of but two of them, Dr. Gordon and Dr. Holm, is set out therein.

Briefly stated, it was the claim of the plaintiff that the defendant was guilty of malpractice: (1) In administering the injections which he describes as an experimental remedy; (2) in failing to relieve plaintiff's pain after the administration of the several injections; (3) in carelessly and negligently conducting the exploratory operation in such a manner as to cut the muscles and tendons on the inside of the injured ankle, and in failing to support the same properly after the operation, so that plaintiff's foot gradually turned outwards, and when his weight was imposed upon it, the foot turned completely over.

Upon the conclusion of the plaintiff's case a verdict was directed for the defendant, upon the ground that the record contained no evidence tending to show that the treatment administered by the defendant in any of the particulars charged in the declaration was improper or conduced in any way to the loss of the plaintiff's foot. It is obvious from an examination of this record that at the time Dr. Toles was called plaintiff's ankle was in an extremely serious condition. It was in such a condition as, in the opinion of his attending physician, demanded amputation. Under these circumstances defendant tried a remedy which appears to have been known and approved by the profession, though perhaps not generally, and which in some instances of diseased joints had achieved remarkable results. It is apparent from the testimony of Dr. Gordon, the plaintiff's own witness, that a favorable result from such treatment was scarcely to be expected; at most, it could only be hoped for. Inasmuch as the only alternative at that time was immediate amputation, it would, in our opinion, be a strange application of the law which would hold defendant responsible for its failure. In treating a broken or diseased limb, the implied contract between the surgeon and patient is not to restore it to its natural condition, but to use that degree of diligence and skill which is ordinarily possessed by the average L.R.A.1915C.

of the members of the profession in similar localities, giving due consideration to the state of the art at the time. 30 Cyc. p. 1573, note 35; 39 Century Dig. title, "Physicians and Surgeons," § 23.

While the facts touching plaintiff's injury and his subsequent treatment, step by step, are set out in the record by witnesses both lay and expert, there is absolutely no testimony from any witness in the record that the course pursued by the defendant was improper or contributed in any degree to the loss which the plaintiff suffered. No witness, lay or expert, testified that, under the circumstances of the case, the administration of the so-called Murphy treatment was not warranted. No witness, lay or expert, testified that, in making the exploratory operation, the muscles or tendons holding the foot in place were severed by the defendant. There is no testimony tending to show that the gradual turning of the foot, during the months succeeding the exploratory operation, was the result of that operation, rather than the result of the antecedent injury. It appears to be the contention of the plaintiff that, having laid before the jury the facts surrounding the injury, the subsequent treatment, and the ultimate loss of the limb, the jury, in the absence of all testimony of an expert character tending to show malpractice, should be permitted to draw inferences of negligent conduct on the part of defendant. We have had occasion, very recently, to pass upon this identical question. In the case of *Farrell v. Haze*, 157 Mich. 374, 122 N. W. 197, the following request to charge was submitted on behalf of the defendant:

"The question whether the loss of the plaintiff's foot was attributable to anything that the plaintiff claims the defendant did or omitted to do is a scientific question, which the jury cannot determine for itself, and can only be answered by an expert; and, inasmuch as no expert or medical man or surgeon has stated that the loss of the foot, in his opinion, came from anything the defendant did or omitted to do, therefore I charge you that you cannot take the loss of the foot into consideration in this case or hold the defendant liable therefor."

We held, at page 392 of 157 Mich. that the proffered request should have been given. Upon the same point see also *Wood v. Barker*, 49 Mich. 295, 13 N. W. 597; *Mayo v. Wright*, 63 Mich. 32, 29 N. W. 832; *Spaulding v. Bliss*, 83 Mich. 311, 47 N. W. 210; and *Neifert v. Hasley*, 149 Mich. 232, 112 N. W. 705.

We are of the opinion that the circuit judge properly directed a verdict for defendant, and the judgment will stand affirmed.

NEBRASKA SUPREME COURT.

WILLIAM R. HOMAN, Appt.,

v.

OAK C. REDICK et al., Exrs., etc., of
John I. Redick, Deceased.

(— Neb. —, 149 N. W. 782.)

Principal and agent — occupancy of office — power with interest.

1. Where an office is furnished to an agent employed to manage property and collect rents, rent free, as a part of the compensation for his services, the relation of landlord and tenant does not exist, the occupancy is merely ancillary to the service, and the agent does not take his power coupled with an interest.

Contract — services — death — effect.

2. As a general rule, a contract for personal services is dissolved by the death of either party.

Same — mutual termination.

3. If the contract is so far personal that the representatives of one of the parties to it are not responsible in damages for refusing to complete its performance, the representative of the other party is not responsible for a like failure.

Same — care of real estate — survival.

4. A contract was made that A should manage and control a number of parcels of improved real estate belonging to B for the term of five years, should collect the rents and make repairs, and pay the money remaining in his hands on the 15th of each month to B. It contained the provision: "That the covenants in this contract shall succeed to and be binding upon the respective heirs, executors, administrators, and assigns of the parties hereto." After A had entered upon the performance of his duties, B died, having by will devised the property to his executors and trustees. Held that, since such a contract could not be enforced as against the heirs, executors, and assigns of A, it was equally unenforceable against the personal representatives of B. Held further, that the fact that the executors permitted A for some time after the death of B to manage the property and collect the rents did not constitute a ratification and adoption of the contract.

(December 4, 1914.)

A PPEAL by plaintiff from a judgment of the District Court for Douglas County dismissing an action brought to recover

Headnotes by LETTON, J.

Note. — For termination of contract of employment by death of one of the parties, see notes to Mendenhall v. Davis, 21 L.R.A. (N.S.) 914, and Dumont v. Heighton, 39 L.R.A. (N.S.) 1187.

For occupation of premises as a servant and as tenant, see note to Bourland v. McKnight & Bro. 4 L.R.A. (N.S.) 698. L.R.A. 1915C.

damages for breach of a contract for personal services. Affirmed.

The facts are stated in the opinion.

Messrs. Morsman, Maxwell, & Thompson and Will E. S. Thompson, for appellant:

Under the terms of the contract the plaintiff was vested with an agency or authority coupled with an interest in the subject-matter.

Volk v. Stowell, 98 Wis. 386, 74 N. W. 118.

If the contract did not create an agency coupled with an interest, yet the contract was binding upon the executors and trustees of the deceased to the extent that, if they refused to be bound by the terms of the contract, and discharged the plaintiff, they were liable in damages.

Mills v. Smith, 193 Mass. 11, 6 L.R.A. (N.S.) 865, 78 N. E. 765; Volk v. Stowell, 98 Wis. 386, 74 N. W. 118; Wylie v. Coxe, 15 How. 415, 14 L. ed. 753; Hawley v. Smith, 45 Ind. 183; Grapel v. Hodges, 112 N. Y. 419, 20 N. E. 542; Price v. Haeblerle, 25 Mo. App. 201; Mecartney v. Carbine, 108 Ill. App. 282; Barrett v. Towne, 196 Mass. 487, 13 L.R.A. (N.S.) 643, 82 N. E. 698; Cloe v. Rogers, 31 Okla. 255, 38 L.R.A. (N.S.) 366, 121 Pac. 201.

If the decedent's part of the contract could be performed by his representatives, the contract was not so personal as to terminate by his death.

Billings's Appeal, 106 Pa. 559; Babcock v. Goodrich, 3 How. Pr. N. S. 52; Toland v. Stevenson, 59 Ind. 485; Tolland v. Wells, 59 Ind. 529; Barrett v. Towne, 196 Mass. 487, 13 L.R.A. (N.S.) 643, 82 N. E. 698; Kernochan v. Murray, 111 N. Y. 306, 2 L.R.A. 183, 7 Am. St. Rep. 744, 18 N. E. 868; Mecartney v. Carbine, 108 Ill. App. 282; Lockart v. Forsythe, 49 Mo. App. 654; Chamberlain v. Dunlop, 126 N. Y. 45, 22 Am. St. Rep. 807, 26 N. E. 966; Drummond v. Crane, 159 Mass. 577, 23 L.R.A. 707, 38 Am. St. Rep. 460, 35 N. E. 90; Schouler, Exrs. p. 459.

Defendants had an election whether they would employ the agent according to their testator's contract, or dismiss him and pay damages. They could refuse to employ him, and keep him from binding them by contracts with third persons, but they could not terminate his right to compensation under the contract.

Cloe v. Rogers, 31 Okla. 255, 38 L.R.A. (N.S.) 366, 121 Pac. 201; Star F. Ins. Co. v. Ring, 118 App. Div. 107, 103 N. Y. Supp. 137; McMahan v. Burns, 216 Pa. 448, 65 Atl. 806; Gleason v. McKay, 37 Ill. App. 464; Harrison v. Augerson, 115 Ill. App. 226; Shevalier v. Doyle, 88 Neb. 560, 130

N. W. 417; *Durkee v. Gunn*, 41 Kan. 496, 13 Am. St. Rep. 300, 21 Pac. 637.

Defendants ratified and adopted the contract.

Home F. Ins. Co. v. Barber, 67 Neb. 644, 60 L.R.A. 927, 108 Am. St. Rep. 716, 93 N. W. 1024; 9 Cyc. 387; *Harlow v. Oregonian Pub. Co.* 53 Or. 272, 100 Pac. 7; *Drakely v. Gregg*, 8 Wall. 242, 19 L. ed. 409; *Billings's Appeal*, 106 Pa. 559.

Mr. Francis A. Brogan, for appellees:

The contract in question created simply an agency, involving the personal services of the agent, upon a compensation payable from month to month, and it terminated wholly on the death of the principal.

31 Cyc. 1299, 1316; *Lewis v. Kerr*, 17 Iowa, 73; *Jones v. Beall*, 19 Ga. 171; *Fisher v. Southern Loan & T. Co.* 138 N. C. 90, 50 S. E. 592; *Kimmell v. Powers*, 19 Okla. 339, 91 Pac. 687; *Smith v. Dare*, 89 Md. 47, 42 Atl. 909; *Simpson v. Carson*, 11 Or. 361, 8 Pac. 325; *Frink v. Roe*, 70 Cal. 296, 11 Pac. 820; *Lacy v. Getman*, 119 N. Y. 109, 6 L.R.A. 728, 16 Am. St. Rep. 806, 23 N. E. 452; *Farmers' Loan & T. Co. v. Wilson*, 139 N. Y. 284, 36 Am. St. Rep. 696, 34 N. E. 784; *Brown v. Cushman*, 173 Mass. 368, 53 N. E. 860; *Weaver v. Richards*, 144 Mich. 395, 6 L.R.A. (N.S.) 855, 108 N. W. 382; *Hallstead v. Perrigo*, 87 Neb. 128, 126 N. W. 1078; *Hunt v. Rousmanier*, 8 Wheat. 174, 5 L. ed. 589; *Hall v. Gambrell*, 34 C. C. A. 190, 63 U. S. App. 740, 92 Fed. 32; *Taylor v. Burns*, 203 U. S. 120, 51 L. ed. 116, 27 Sup. Ct. Rep. 40.

The occupancy by an agent of any part of his principal's premises does not create the relation of landlord and tenant between the principal and the agent, and the right of the agent to occupy the premises for the purposes of the agency ceases with the termination of the agency.

24 Cyc. 880; *School Dist. v. Batsche*, 106 Mich. 330, 29 L.R.A. 576, 64 N. W. 196; *Tucker v. Burt*, 152 Mich. 68, 17 L.R.A. (N.S.) 510, 115 N. W. 722; *Bowman v. Bradley*, 151 Pa. 351, 17 L.R.A. 213, 24 Atl. 1062; *Davis v. Williams*, 130 Ala. 530, 54 L.R.A. 749, 89 Am. St. Rep. 55, 30 So. 488; *McQuade v. Emmons*, 38 N. J. L. 397; *Lodhunter v. Armstrong*, 6 Cal. Unrep. 27, 53 Pac. 446; *Presby v. Benjamin*, 169 N. Y. 377, 57 L.R.A. 317, 62 N. E. 430.

The contract having terminated at the testator's death, as to all future collection of rents and compensation for the same, the act of the executors, in the first instance, and the trustees, thereafter, in making the plaintiff their agent for the collection of the rents, could not operate to revive decedent's contract, nor impose its terms upon the defendants.

Harris v. Johnson, 98 Ga. 434, 25 S. E. L.R.A. 1915C.

525; *Krumdick v. White*, 107 Cal. 37, 39 Pac. 1066; *Zinnell v. Bergdoll*, 19 Pa. Super. Ct. 508; *Louis v. Elfelt*, 89 Cal. 547, 26 Pac. 1035; *Lewis v. Kerr*, 17 Iowa, 73; *Hawkins v. McGroarty*, 110 Mo. 546, 19 S. W. 830; *Long v. Poth*, 16 Misc. 85, 37 N. Y. Supp. 670; *Borderre v. Den*, 106 Cal. 594, 39 Pac. 946; *Judd v. Arnold*, 51 Minn. 430, 18 N. W. 151; *Morris v. Ewing*, 8 N. D. 99, 76 N. W. 1047.

Letton, J., delivered the opinion of the court:

Action to recover for breach of a contract for personal services. A demurrer to the petition was sustained, and the cause dismissed. Plaintiff appeals.

In substance the petition alleges that the plaintiff is engaged in the real estate and rental business at Omaha; that John I. Redick in his lifetime was the owner of a large amount of real estate in the city, which was rented to various tenants; that on December 8, 1904, an agreement was made between plaintiff and Redick, whereby plaintiff was employed for five years from January 1, 1905, to look after this real estate, collect the rents, make repairs, pay bills, and have the general supervision of the property, and as compensation for his services he was to receive 3 per cent of the rents collected, and in addition office rent free at 1517 Farnam street, Omaha; that plaintiff, under the contract, proceeded to take charge of the property and carry out its terms; that the total rentals received during 1904 amount to \$29,000 per year. It is further alleged that Redick died on April 2, 1906, leaving a will by which the defendants were constituted trustees and executors of his estate, and the entire title, control, and management of the real estate passed to them for the purpose of the trust; that after Redick's death plaintiff continued in charge, control, and supervision of the property, and collected rents as before, making monthly reports to the trustees until August 1, 1908, when they attempted to cancel the contract, and took the charge, control, and supervision of the property away from him, and refused to allow him to collect the rents, and compelled him to vacate his office. The amount of money then collectible for rents is alleged; that plaintiff was fully able and willing to continue and carry out the obligations of the contract on his part; that 3 per cent is below the general and customary fee for such services; that he accepted the contract at that price on account of the length of time it would run and the volume of business; that at the time the property was taken from his control the rent amounted to \$5,800 per month; that if the contract had not been

broken he would have collected that sum, and his compensation would have been \$174 per month; and that his office rent was reasonably worth the sum of \$60 per month. He prays judgment for \$4,000 as damages. A copy of the written contract is attached. This contains the further agreement: "That the covenants in this contract shall succeed to and be binding upon the respective heirs, executors, administrators, and assigns of the parties hereto."

Appellant bases his right to a reversal upon three propositions: (1) Under the terms of the contract, the plaintiff was vested with an interest in the subject-matter. (2) If the contract did not create an agency coupled with an interest, yet it was binding upon the defendants to the extent that, if they refused to be bound by it and discharged the plaintiff, they were liable in damages. (3) Defendants ratified and adopted the contract.

1. It is a general principle of the law of agency that upon the death of the principal the contract of agency comes to an end, since the agent, who is merely acting for another, cannot act for the principal when he has ceased to exist. This rule, however, is subject to various exceptions and modifications growing out of the facts in each case. It is claimed that the facts alleged with reference to the occupancy of an office, rent free, bring the case within one of these exceptions, for the reason that the agent took the power to act coupled with an interest in the premises by reason of his right to the possession of real estate. The contract recites that the right to occupy the office, rent free, is merely compensation for the agent's services in addition to the 3 per cent specified. It seems clear that upon the termination of the service the right to occupancy ceased, that the contract did not create the relation of landlord and tenant, and that no interest in real estate passed to plaintiff by reason of the agreement. The relation between the parties was principal and agent, and not landlord and tenant. Contracts for services allowing the occupancy rent free of premises to the person employed are very common, and courts generally take the view stated. *School Dist. v. Batsche*, 106 Mich. 330, 29 L.R.A. 576, 64 N. W. 196; *Davis v. Williams*, 130 Ala. 530, 54 L.R.A. 749, 89 Am. St. Rep. 55, 30 So. 488; *McQuade v. Emmons*, 38 N. J. L. 397. An exhaustive discussion of this point may be found in note to *Bourland v. McKnight & Bro.* 4 L.R.A.(N.S.) 698 et seq. The real test seems to be whether the occupation of the premises is connected with the purposes of the service and was obtained by reason of the contract, for the L.R.A.1915C.

purpose of facilitating the business of the principal. *Morris Canal & Bkg. Co. v. Mitchell*, 31 N. J. L. 99. There is a clear distinction between the facts alleged and the facts in *Volk v. Stowell*, 98 Wis. 385, 74 N. W. 118, cited by plaintiff. The defendant in that case was to receive a certain sum per month besides 15 per cent of all increase of stock born on the farm, and also 15 per cent of the farm products, and the court was of the opinion that the contract was somewhat of the nature of a lease, and conferred upon the plaintiff many of the rights of a tenant.

2. Is the contract binding upon the executors and trustees to the extent that, if they failed to carry it out, they are liable in damages? The compensation of plaintiff was fixed at 3 per cent of the amount collected. The contract required him to render a monthly statement to Mr. Redick, "showing in detail rents collected, bills paid, and turn over to said first party on the 15th of each month all moneys remaining in his hands at that time belonging to said first party." The compensation for services performed was evidently deducted each month, so that, both at the time of Mr. Redick's death and at the time the trustees refused to allow the plaintiff to continue further to manage the property and collect rents, he had been fully paid for services to that time rendered. The claim in the petition is for compensation which he might have earned under the contract, if he had been permitted to carry it on until the expiration of the five-year period. The principle which applies is laid down in *Babcock v. Goodrich*, 3 How. Pr. N. S. 52: "As a general rule, if a contract is so far personal that the representative of one of the parties to it is not responsible in damages for refusing to complete its performance, the representative of the other party is not so responsible for a like failure, in the absence of evidence of intention to bind the representative. Evidence of such intention may be furnished by the terms of the contract, or implied from its nature."

In the present case, would the death of plaintiff have bound his "heirs, executors, administrators, or assigns" to carry on the stewardship, or could they insist upon such right against the wishes of the other party? Would a court compel a specific performance of the contract upon their part? If these queries must be answered in the negative, and the personal representatives of the plaintiff would not be bound to perform in case of his death, how can it be said that in case of the death of the other contracting party his representatives are bound? Could it have been the intention of Mr. Redick to intrust the care of his valuable property

and the collection of a large sum of money each month to unknown persons, who might, perhaps, be of doubtful business ability or integrity? Are not the relations so purely personal that the death of either party puts an end to them? Must not the contract be mutual? These questions are discussed in *Lacy v. Getman*, 119 N. Y. 109, 6 L.R.A. 728, 16 Am. St. Rep. 806, 23 N. E. 452, and it was held that the death of the servant dissolved the contract, and that the death of the master had the same effect. See also note to *Mendenhall v. Davis*, 21 L.R.A. (N.S.) 914.

Considered without relation to the agreement in the contract that its terms should be binding upon the representatives of the parties, the death of Redick terminated and dissolved the relation of principal and agent, and no recovery could be had against his executors and trustees for failure to permit the plaintiff to carry on the contract until its expiration. 2 *Woerner*, Am. Law of Administration, 2d ed. *688, § 328; *Kimmell v. Powers*, 19 Okla. 339, 91 Pac. 687; *Campbell v. Faxon*, 73 Kan. 675, 5 L.R.A. (N.S.) 1002, 85 Pac. 760. Does the fact of this express stipulation change the situation of the parties? Suppose that Mr. Redick had died intestate, and his property had been distributed to a number of heirs; would each of the heirs take it subject to the provisions of the contract? Could they involuntarily be made principals, and the plaintiff their agent? Is such a contract in the nature of a charge against an estate, so that whoever takes it by descent, or by purchase, takes it burdened with the obligation to employ the plaintiff? Or, in case of plaintiff's death, must the then owners employ his heirs, executors, administrators, or assigns to manage the property and collect its revenues? These queries suggest the impracticability of applying such a provision to a contract for services. The very nature of the contract does not permit of the enforcement of such an agreement. No doubt it may be carried out voluntarily by the consent of the parties; but in such case it is virtually the making of a new contract. If the agent dies, the owner of the property may accept as a new agent one of the classes of persons named in this clause; or if the principal dies, his heirs, executors, or assigns may be willing to accept the services of the agent, upon the same terms and conditions as specified in the contract. In such case the person so accepted is vested with authority by virtue of a new relation entered into, and not by reason of the survival of the contract. We have examined the cases cited by the plaintiff upon this point, but we find features in each one which clearly distinguishes it from the facts in this case. L.R.A.1915C.

Where such recovery is allowed, the contract has usually been partly performed without compensation, and has been of such a nature that the peculiar knowledge or skill of the agent has been exerted for the benefit of the estate to such an extent as to increase its corpus or enhance its value, and loss would occur if he had ceased to act. *Wylie v. Coxe*, 15 How. 415, 14 L. ed. 753, and *Hawley v. Smith*, 45 Ind. 183, are typical cases.

3. What has just been said in the discussion of the second point answers the contention that the defendants, by allowing the plaintiff to continue to collect the rents and manage the property for them for a portion of the time after the death of Mr. Redick, have ratified and adopted the contract. The trustees, by accepting the services of plaintiff, did so, not because they were bound to do so by any provision in the contract, but voluntarily. They allowed him to retain payment for his work to the same extent and in the same manner as specified in the contract. If they had accepted the service and refused to pay, they would have been liable upon an implied contract for the reasonable value thereof. Both parties tacitly seemed willing to consider the terms named in the contract as a proper remuneration. We cannot take the view that the fact that the trustees continued to allow plaintiff to act had the effect to cause them to ratify or adopt the contract, so as to bind the trustees to accept plaintiff's services until the time of its expiration.

The judgment of the District Court is affirmed.

Reese, Ch. J., and Hamer and Sedgwick, JJ., not sitting.

NEW JERSEY COURT OF ERRORS AND APPEALS.

SARAH MILLER et al., Appts.,

v.

PUBLIC SERVICE RAILWAY COMPANY.

(86 N. J. L. 631, 92 Atl. 343.)

Street railway — curve — overhanging — duty to pedestrian.

In view of the well-known fact that in rounding a curve, the rear end of a street

Headnote by BERGEN, J.

Note. — Liability of street railway company to one hit by swing of car at curve.

The present note is supplementary to the notes to *South Covington & C. Street R. Co.*

car will swing beyond the track and overlap the street to a greater extent than the front, the motorman is justified in presuming that an adult person standing in the street near the track, who is apparently able to see, hear, and move, having notice of the approach of the car and of the existence of the curve in the track, will draw back far enough from it to avoid being struck by the rear of the car as it swings around the curve in the usual and expected manner, and under such circumstances, it is not negligent operation on the part of the motorman to continue the progress of the car without warning such person of the possible danger of collision with the rear of the car, because of the swing, if he remains in the same position.

(Garrison, Kalisch, Black, and Heppenheimer, JJ., dissent.

(November 16, 1914.)

v. Busse, 16 L.R.A.(N.S.) 890, and Bryant v. Boston Elev. R. Co. 40 L.R.A.(N.S.) 133.

As to liability for discharging street car passenger on curve, see note to White v. Connecticut Co. post, 609.

The operation of a street car around a curve at a street crossing at the rate of 6 miles an hour is not an act of negligence. Gribbins v. Kentucky Terminal & Traction Co. 150 Ky. 276, 150 S. W. 338. In this case it appeared that the car which caused the injury had an overhang of 5 feet beyond the line of the car track.

It cannot be said as a matter of law that a street car was negligently constructed where it appeared that the wheels were so adjusted as to permit the rear end of the car to extend 5 feet beyond the line of the car track when passing around a short, sharp curve. Ibid.

It is not a duty of street railway companies to warn pedestrians on the streets that there is an overhang to an ordinary street car when it rounds a curve, as ordinary prudence requires persons to take notice of that fact. Gannaway v. Puget Sound Traction, Light & P. Co. 77 Wash. 655, 138 Pac. 267.

Persons operating street cars are under no duty to anticipate and guard against the approach of pedestrians toward the side or rear of the car, who may be struck by the overhang of the car as it rounds a curve. Gribbins v. Kentucky Terminal & Traction Co. supra; Brightman v. Union Street R. Co. 216 Mass. 152, 103 N. E. 379.

Accordingly, it has been held that persons in charge of a street car were not guilty of actionable negligence in failing to warn a pedestrian of the danger of being struck by the rear end of the car upon seeing him approaching the car at a crossing where there is a curve in the track, unless they had actual knowledge of his perilous position in time to avoid injuring him. Gribbins v. Kentucky Terminal & Traction Co. supra. L.R.A.1915C.

APPEAL by plaintiffs from a judgment of the Hudson County Circuit, directing a nonsuit in an action brought to recover damages for personal injuries alleged to have been caused by the negligence of defendant's servant. Affirmed.

Statement by Bergen, J.:

The material facts proven by the plaintiff were as follows: The defendant operated a street railway along Bergen and Fairmount avenues in Jersey City; that Fairmount avenue intersects and crosses Bergen avenue at an obtuse angle, and at the intersection the railway leaves one avenue and continues along the other, the change making necessary a curve; that about 15 minutes after 10 in the evening of the day of the accident, which is the foundation of plaintiff's claim, she and her mother, Elvina Greenleaf,

A pedestrian who misjudges what would be a safe distance to avoid injury from a passing street car, and approaches so near the car that he is struck by the overhang of the car as it rounds a curve at a place where there is ample space to avoid injury, is guilty of such contributory negligence as will defeat a recovery for the injury sustained. Ibid. But see infra, Kuhn v. Milwaukee Electric R. & Light Co. 158 Wis. 525, 149 N. W. 220.

One intending to take passage on a street car, who, while waiting for a certain car, stood so close to the track at a curve that he was struck by the rear end overhang of an approaching car, which he saw, and upon which he did not intend to take passage, was guilty of such contributory negligence as to bar a recovery for the injuries sustained. Beeck v. Coney Island & B. R. Co. 135 N. Y. Supp. 600. The plaintiff testified in the above case that she stood about 3 feet from the track. The court said the facts did not show negligence on the part of the street car company, and did show contributory negligence on the part of the plaintiff.

One intending to take passage on a street car on a dark night at a place where there is a curve in the track, who approaches the track in such close proximity as to be struck by the forward end of the car or the fender as the car rounds the curve, is guilty of contributory negligence, as a matter of law, so as to bar a recovery on the ground that the railroad company was negligent in operating the car at a high rate of speed; or that the motorman was negligent in failing to keep a proper lookout. Townsend v. Houston Electric Co. — Tex. Civ. App. —, 154 S. W. 629.

The close proximity to the track, and not the high rate of speed at which the street car was operated, was the proximate cause of an injury to one who, after signaling the car to stop, was struck by the forward end of the car or the fender as it rounded the curve at that place. Ibid.

walked into Bergen avenue on a line with the southerly side of Fairmount avenue to a point about the middle of the curve, and signaled the motorman on an approaching car that she wished him to stop it; that the motorman slackened the speed of the car as it struck the curve, and then increased it as the car rounded the curve; that the front of the car passed plaintiff and her mother, but, owing to the curve, the rear of the car was given a swing so that it overlapped a portion of the street to a greater extent than the front, and struck the plaintiff, causing the injuries complained of; that the plaintiff had on two previous occasions boarded the car at about the point of the accident; that she knew there was a curve at that point; that she supposed the rear

end of a car running on fixed rails around a curve had a swing; that when the front of the car passed her, she did not move from her position until she was struck, and although the motorman saw them standing near the front of the car, he did not stop it or give any warning. There was no proof of the distance plaintiff was standing from the car. On these facts, the trial court ordered a nonsuit, from which plaintiff appeals.

Messrs. DeGraw & Murray and Willson E. Tipple, for appellants:

There was sufficient evidence offered by the plaintiffs to warrant the submission of the case to the jury on the question of defendant's negligence.

Negligent operation of a street car is not shown by the fact that one who intended to take passage was injured by being struck in the back by the rear end of the car as it rounded the curve, after he had signaled the motorman to stop the car, and while going to the opposite corner, as directed by the motorman, in compliance with the city ordinance requiring cars to stop at the far corner, it appearing that the car was proceeding at about 3 miles an hour as it came up the grade, and that the speed increased to about 6 miles an hour as it rounded the curve, which curve was also slightly up grade, and that the car, which was 51 feet in length, had an overhang of nearly 6 feet when rounding the curve in question. *Kuhn v. Milwaukee Electric R. & Light Co.* 158 Wis. 525, 149 N. W. 220. The trial judge granted a nonsuit on the express ground of contributory negligence, but the supreme court said: "We are not to be understood as expressing approval of this reason for the ruling. The outward swing of the end of a long car like the one in question when rounding the sharp curve at a street corner is quite surprising in extent to one who has not given the matter serious attention, and we should not wish to say that every person who knows there is some outward swing must be held guilty of contributory negligence because he underestimated its extent, and thus found himself struck when he thought himself safe. We are, however, of opinion that the judgment was right, because no negligence was shown on the part of the defendant. The business of the motorman is to operate the car with reasonable celerity for the accommodation of the traveling public, obeying city ordinances and exercising due care to protect from injury not only those who are passengers on his car, but those who are in the street. He cannot move his car from the tracks, and he must certainly be entitled to assume that people on the street in apparent possession of their faculties, who see his car approaching, and are then out of harm's way, will not allow themselves to come within reach of the car. The situation here was clearly not one L.R.A.1915C.

which would lead the motorman to suppose there was any danger of injury to the plaintiff. He knew that she was waiting for the car and that she saw it approach. He knew also that he had signaled to her to go to the far corner, and that she had seen and comprehended the signal and had started for that corner. Under these circumstances, and in the absence of any ordinance prescribing any different rule of action, we are unable to say that there was any fact from which a jury could find negligence in the handling of the car. It is true that it appears that the speed of the car was increased from about 3 to about 6 miles per hour, but we see no evidence of negligence here. We suppose it to be a well-known fact that in rounding a sharp curve on an up grade with a long and heavy car there is much friction by the grinding of the wheels on the inside of the rails, and consequent necessity for greater power and speed in order to make the curve successfully. *South Covington & C. Street R. Co. v. Besse*, 33 Ky. L. Rep. 52, 16 L.R.A.(N.S.) 890, 108 S. W. 848; *Widmer v. West End Street R. Co.* 158 Mass. 49, 32 N. E. 899."

But in *Fritch v. Pittsburgh R. Co.* 239 Pa. 6, 86 Atl. 526, it is held that a street railway company that has placed tracks in a narrow thoroughfare about 22 feet wide, with a single sidewalk less than 3 feet in width, must exercise a high decree of care in the operation of its cars while swinging around a curve, especially where the fender of the car covered the entire cartway of the thoroughfare and extended several inches over the sidewalk, and that a pedestrian unfamiliar with the operation of cars at that place, who was injured by the overhang of the car as it approached him from behind when he stepped aside with one foot off the sidewalk, to permit another to pass, was entitled to have his action to recover damages submitted to the jury. A verdict and judgment in favor of the plaintiff was sustained. The court said: "Pedestrians have the unquestioned right to make use of the pavement without fear of being injured by the operation of the cars of a street railway company upon the cartway of the

Consolidated Traction Co. v. Lambertson, 59 N. J. L. 297, 36 Atl. 100; Peterpolo v. Public Service R. Co. 81 N. J. L. 390, 79 Atl. 307; Consolidated Traction Co. v. Haight, 59 N. J. L. 577, 37 Atl. 135, 2 Am. Neg. Rep. 192; Glasco v. Jersey City, H. & P. Street R. Co. 81 N. J. L. 469, 79 Atl. 368; Camden, G. & W. R. Co. v. Preston, 59 N. J. L. 264, 35 Atl. 1119; Buttelli v. Jersey City, H. & R. Electric R. Co. 59 N. J. L. 302, 36 Atl. 700; Copeland v. Metropolitan Street R. Co. 67 App. Div. 483, 73 N. Y. Supp. 856, 177 N. Y. 570, 69 N. E. 1121.

Plaintiffs were not guilty of negligence.

Glasco v. Jersey City, H. & P. Street R. Co. 81 N. J. L. 469, 79 Atl. 368; Loder v. Metropolitan Street R. Co. 84 App. Div. 591, 82 N. Y. Supp. 957.

street or alley. Appellee was not familiar with the operation of cars at the place of accident, and had no reason to anticipate the danger to which he was subjected. He was not bound to foresee that the fender of the car would sweep the entire alley and extend out over the curb. On the other hand, appellant knew the situation, and either did anticipate the danger to pedestrians, or should have done so, and thus a very high degree of care was required under the circumstances. The learned trial judge could not, as a matter of law, declare that appellant was not negligent, or that appellee was guilty of contributory negligence, without invading the province of the jury. Under the facts, both questions were for the jury, and they were so submitted."

And in *Brentlinger v. Louisville, R. Co.* 156 Ky. 685, 161 S. W. 1107, it was held that the question of negligence was for the jury where it appeared that a pedestrian, while walking upon a temporary sidewalk which had been erected in the street near the car tracks, was struck by the overhang of a car as it rounded a curve in passing down an intersecting street, and that ordinarily the cars did not turn out the intersecting street, and that persons who did not know that cars sometimes turned out at that point would be under no apprehension of danger until the car began to turn, and then there would be no adequate way of escape from the danger, as the space left was so narrow. The court said: "Here the plaintiff was walking on a sidewalk built for the use of the public and held out to the public for its use. The plaintiff had a right to assume under such circumstances that the sidewalk was safe; for he was using it upon an implied invitation. . . . In view of the character of the thoroughfare, the unusual condition of this corner, and the fact that any car turning out Fifth street would endanger a person on this sidewalk, it was a question for the jury whether those in charge of the street car, in the exercise of ordinary care, should have anticipated the presence of persons on the sidewalk when a car was making this turn, and should have maintained a lookout L.R.A.1915C.

If the plaintiffs were guilty of negligence, such negligence was not the proximate cause of the injury complained of.

Shcarm. & Redf. Neg. 6th ed. § 99; Consolidated Traction Co. v. Haight, 59 N. J. L. 577, 37 Atl. 135, 2 Am. Neg. Rep. 192; Ball v. Camden & T. R. Co. 76 N. J. L. 539, 72 Atl. 76; Hayward v. North Jersey Street R. Co. 74 N. J. L. 678, 8 L.R.A.(N.S.) 1062, 65 Atl. 737; Camden, G. & W. R. Co. v. Preston, 59 N. J. L. 264, 35 Atl. 1119.

Messrs. Edwards & Smith, for appellee:

Defendant was not liable, as it was under no duty, in operating its cars over this curve, to watch out for and warn persons upon the highway who might be or come within the range of the outward swing of

for them or taken other precautions for their safety. For the rule is that where the presence of persons near a railroad track and danger to them may be reasonably anticipated by those in charge of the cars, it is their duty to maintain a lookout for such persons and to exercise such care for their safety as may be usually expected of a person of ordinary prudence under the circumstances."

In *Frank Bird Transfer Co. v. Krug*, 30 Ind. App. 602, 65 N. E. 309, it was held that one who took passage in a closed cab or coupé, and directed the driver to stop at a certain station, was not, as a matter of law, negligent in failing to observe that the cab was stopped at a point where the street car tracks rounded a curve, so as to preclude recovery for injuries sustained when the cab was overturned by being struck by the rear end of a street car as it rounded the curve at that point. The court said: "The coupé was not on the track when struck, and if, by listening, she could have heard the noise of an approaching car, her failure to listen would not, under the circumstances, have been necessarily negligence, as a matter of law, but a circumstance to be considered by the jury in determining whether or not appellee contributed to her own injury, the burden of which was upon appellants. The passing of cars along the track was to be expected, and the vehicle, not being on the track, was presumably, from the standpoint of the passenger, not in danger. . . . Whether appellee's failure to see and avoid the dangerous position in which she had been placed for the second or two of time after the cab was stopped until struck by the car was negligence on her part was a question to be submitted to the jury."

The question of alleged negligent operation of a long and heavy street car and the contributory negligence on the part of the driver of a wagon loaded with sand was for the jury in an action for injuries caused when the wagon was struck by the rear end of the car, which projected beyond the rail about 4 feet as it rounded a curve in the track, it appearing that the car,

its rear platform, and plaintiffs were guilty of contributory negligence.

Jelly v. North Jersey Street R. Co. 76 N. J. L. 191, 68 Atl. 1091; *Widmer v. West End Street R. Co.* 158 Mass. 49, 32 N. E. 899; *Riddle v. 42nd Street, M. & St. N. Ave.* R. Co. 173 N. Y. 327, 66 N. E. 22, 13 Am. Neg. Rep. 382; *Hayden v. Fair Haven & W. R. Co.* 76 Conn. 355, 56 Atl. 613; *Garvey v. Rhode Island Co.* 26 R. I. 80, 58 Atl. 450, 16 Am. Neg. Rep. 581; *Kaufman v. Interurban Street R. Co.* 43 Misc. 634, 88 N. Y. Supp. 382; *Matulewicz v. Metropolitan Street R. Co.* 107 App. Div. 230, 95 N. Y. Supp. 7; *Hoffman v. Philadelphia Rapid Transit Co.* 214 Pa. 87, 63 Atl. 409; *South Covington & C. Street R. Co. v. Bease*, 33 Ky. L. Rep. 52, 16 L.R.A.(N.S.) 890, 108 S. W. 848; *Louisville R. Co. v. Ray*, — Ky. —, 124 S. W. 313; *Gribbins v. Kentucky Terminal & Traction Co.* 150 Ky. 276, 150 S. W. 338.

Intending passengers are no less bound to observe and avoid the swinging overhang than are other persons or vehicles.

Baltimore & O. R. Co. v. Schwindling, 101 Pa. 258, 47 Am. Rep. 706; *Pennsylvania R. Co. v. Bell*, 122 Pa. 58, 15 Atl. 561; *Matthews v. Pennsylvania R. Co.* 148 Pa. 491, 24 Atl. 67; *Nellis, Street Railways*, 2d ed.

which was moving rapidly, overtook the wagon as it was traveling along the side of the track in the same direction the car had been going before it started to round the curve; and that the car had a superior, but not an exclusive, right of way. *Metropolitan R. Co. v. Blick*, 22 App. D. C. 194. Upon the allegation as to contributory negligence the court said: "Plainly there was no proof of contributory negligence on the part of the plaintiff, such as would justify a peremptory verdict against him. At the most only a question of fact was raised for the jury. He was passing up along the side of the defendant's track. The defendant's car had almost passed him in safety. There was ample room for both car and wagon to proceed onwards in safety, had it not been for the curve which the car was here required to make. There might have been mistake, or miscalculation, or inattention on the part of the plaintiff; but certainly there was no such clear case of negligence as that all sensible men could take but one view of it. We think it would have been error to take the case from the jury upon any such ground as this." As to the alleged negligence on the part of the motorman, the court said: "Nor was there such failure of proof that the defendant was negligent as would justify the withdrawal of the case from the jury. Both the plaintiff and the defendant were entitled to be on the street. The defendant had a superior right of way so far as to require that the plaintiff should put no obstacle in its way; but it had no exclusive

§§ 252, 361; *Cox v. South Shore & B. Street R. Co.* 182 Mass. 497, 65 N. E. 823, 13 Am. Neg. Rep. 317; *Neale v. Springfield Street R. Co.* 189 Mass. 351, 75 N. E. 702, 19 Am. Neg. Rep. 274; *Donovan v. Hartford Street R. Co.* 65 Conn. 201, 29 L.R.A. 297, 32 Atl. 350; *Holohan v. Washington & G. R. Co.* 8 Mackey, 316, 2 Am. Neg. Cas. 313; *Oddy v. West End Street R. Co.* 178 Mass. 341, 86 Am. St. Rep. 481, 59 N. E. 1026; *Brown v. Seattle City R. Co.* 16 Wash. 465, 47 Pac. 890, 1 Am. Neg. Rep. 389; *Monroe v. Metropolitan Street R. Co.* 79 App. Div. 587, 80 N. Y. Supp. 177; *Savage v. Third Ave. R. Co.* 29 App. Div. 556, 51 N. Y. Supp. 1066.

Bergen, J., delivered the opinion of the court:

The first point urged in the support of this appeal is that there was sufficient proof of negligence on the part of the defendant's servant to require its submission to the jury. The only basis upon which defendant's negligence can be rested in this case is that the motorman was charged with knowledge that the position of the plaintiff was within the range of the swing of the rear of the car, and therefore he should have stopped the car, or warned plaintiff as he passed that she was liable to be struck by

right. If the plaintiff was too dangerously near the track, the motorman of the car must have been aware of the fact. There was testimony that he was propelling his car at very great speed; the injury to the wagon and the distance which it was thrown is ample proof of this, apart from the testimony of any witness as to the rate of speed. In fact, it would seem that considerable speed was necessary in order to surmount the elevation and go round the curve. Then the motorman knew, or should have known, that the rear end of his car projected several feet beyond the track in going round the curve, and that therefore there was danger from it to passing vehicles. Intelligent men might well be divided in opinion as to the duty of the motorman in the premises; and if this be admitted, as we think it must be, it is plain that a case arises for the jury, and not for the court."

An issue of discovered peril was raised by the evidence in an action for injury to one who, after signaling a street car to stop, was struck by the forward end of the car or the fender as the car rounded a curve at that place, where, although the motorman testified that he immediately shut off the power and applied the emergency brake, the uncontradicted evidence disclosed that the car should have been stopped in considerably less distance than it was from where plaintiff was first discovered in peril to the front of the car which inflicted the injury. *Townsend v. Houston Electric Co.* — Tex. Civ. App. —, 154 S. W. 629.

A. L. R.

the rear of the car if she remained where she was. This implies that every motorman, when passing a person standing in the street, must determine the question whether such person is in danger of being struck by the rear part of the car while passing around a curve, although he is far enough away to allow the front of it to pass. We do not conceive that any such legal duty is imposed upon the motorman.

Cases may arise where the circumstances justify a presumption of negligent operation of a car where the contractual relation continues, as in *Walger v. Jersey City, H. & P. Street R. Co.* 71 N. J. L. 356, 59 Atl. 14, 17 Am. Neg. Rep. 322, where a passenger was being transferred from one car to another in order to continue his journey, but such cases are entirely different from this, where no contractual relation existed. Nor are the cases cited by appellant, where the defendant had knowledge, or was chargeable therewith, that if the car proceeded, it would run down a person on, or near, the track, or about to cross it, applicable. The reasonable presumption is that a person standing in the street and indicating a desire to board such a car will keep beyond the range of the car until it stops; and to charge a motorman with the duty of deciding in every case whether an applicant for passage is within the zone of danger from the swing of the rear of the car when going around a curve would charge him with an obligation the law does not impose.

The rule approved by the weight of authority is that, in view of the well-known fact that in rounding a curve the rear end of a street car will swing beyond the track, and overlap the street to a greater extent than the front, the motorman may rightfully assume that an adult person, standing near the track, who is apparently able to see, hear, and move, and having notice of the approach of a street car, and of the existence of the curve, will draw back far enough to avoid being struck by the rear of the car as it swings around the curve in the usual and expected manner, and therefore no legal duty is imposed upon the motorman to warn such a person against the possible danger of a collision with the rear, because of the swing, if he remains in the same position. *Jelly v. North Jersey Street R. Co.* 76 N. J. L. 191, 68 Atl. 1091; *Widmer v. West End Street R. Co.* 158 Mass. 49, 32 N. E. 899; *Garvey v. Rhode Island Co.* 26 R. I. 80, 58 Atl. 456, 16 Am. Neg. Rep. 581; *Hayden v. Fair Haven & W. R. Co.* 76 Conn. 355, 56 Atl. 613.

In the case under consideration, the plaintiff approached the track at a point where she knew there was a curve, and she testi-

fied that she supposed the rear of a car would swing out over the street as it came around the curve, and yet she did not move. The distance she was standing from the front of the car as it passed around the curve was not shown, and we think the motorman had a right to presume, either that she was beyond the swing, or that if not, she would move out of its range. We must take the case as it is presented to us; and, without proof of the exact position taken by the plaintiff with reference to the approaching car, beyond the fact that the front passed her without injury, we are asked to say that the motorman must assume, under such circumstances, that she would not act as a reasonably prudent person, and withdraw from a danger of which she was aware, or which she supposed did not exist because of the distance she was from the car, but about which, it subsequently appeared, she was mistaken. To accede to this request would impose a duty upon those operating street railways which, in our opinion, has no legal basis.

In order to make a defendant liable for negligent operation of its car, the plaintiff must prove facts from which it may be legally inferred; and as there is no basis for such inference from the facts in this case, there was nothing to submit to the jury, and the court properly directed a judgment of nonsuit, and it will be affirmed.

Garrison, Kalisch, Black, and Heppenheimer, JJ., dissenting.

CONNECTICUT SUPREME COURT OF ERRORS.

HARRIET H. WHITE, Exrx., etc., of Harriet E. White, Deceased,

v.

CONNECTICUT COMPANY, Appt.

(88 Conn. 614, 92 Atl. 411.)

Carrier — discharging passenger on curve — precautions.

1. A street car company which discharges a passenger from the forward part of a car on a curve is bound to adopt some precautions to avoid injuring him by the overhang of the car as it proceeds around the curve, either by delaying the starting of

Note. — Carriers: discharging street car passenger on curve.

As to liability of street railway company to one hit by swing of car at curve, including some cases involving persons who had signaled the car to stop, see notes to *South Covington & C. Street*

the car until he is out of danger, or by warning him of the danger.

Same — contributory negligence.

2. A passenger alighting from a street car on a curve, with the intention of crossing the track to reach his destination, is not negligent merely in failing to move more than a couple of steps from the car to let it pass, so that he is struck by the overhang as it rounds the curve, if he was not notified of the danger of the situation.

(December 2, 1914.)

APPEAL by defendant from a judgment of the Superior Court for Hartford County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

R. Co. v. Bease, 16 L.R.A.(N.S.) 890; Bryant v. Boston Elev. R. Co. 40 L.R.A.(N.S.) 133, and Miller v. Public Service Corp. ante, 604. Those notes, however, do not cover the question of liability as to persons having the status of passengers.

Generally as to liability of street railway company for stopping car at improper place for passenger to alight, see notes to Melton v. Birmingham R. Light & P. Co. 16 L.R.A.(N.S.) 467, and Messenger v. Valley City Street & Interurban R. Co. 32 L.R.A.(N.S.) 881.

As to duty of interurban road with respect to accommodations for boarding or leaving car at country crossing, see note to McGovern v. Interurban R. Co. 13 L.R.A.(N.S.) 476.

A search has disclosed but few cases in addition to WHITE v. CONNECTICUT Co. involving injury to passenger because of the stopping of a street car at a point where the track is curved.

In Walger v. Jersey City, H. & P. Street R. Co. 71 N. J. L. 356, 59 Atl. 14, 17 Am. Neg. Rep. 322, it was held that the question of the carrier's negligent operation was for the jury where it appeared that a passenger was injured while transferring to another car, by the overhang of the car which he had just left, as it rounded a curve at that point. The court said: "If he was taking the most direct course from the car which he had just left to the car upon which he was about to embark, it was for the jury to say whether he was not entitled to believe that he was safe in doing this; or, at least, that he would not be put in jeopardy by anything done by the company while taking this most direct route."

But in Creenan v. International R. Co. 139 App. Div. 863, 124 N. Y. Supp. 360, it was held that the carrier was not liable to a passenger injured while walking along the side of the car for the purpose of transferring to another car, by being struck by the overhang of the car he had just left as it rounded a curve, if there was sufficient space to walk without danger from the

Mr. J. F. Berry, for appellant:

The motorman has a right to assume that the person ahead will take some precaution to remove himself to a position of safety.

Riley v. Consolidated R. Co. 82 Conn. 105, 21 L.R.A.(N.S.) 880, 72 Atl. 562; Hayden v. Fair Haven & W. R. Co. 76 Conn. 364, 56 Atl. 613; Morrissey v. Bridgeport Traction Co. 68 Conn. 215, 35 Atl. 1126.

The failure of Mrs. White to step a few inches farther away than she was when the extreme rear end of the car reached her was negligence on her part.

Kruck v. Connecticut Co. 84 Conn. 401, 80 Atl. 162; Popke v. New York, N. H. & H. R. Co. 81 Conn. 724, 71 Atl. 1098.

It is not negligence as a matter of law for a conductor to give a signal to start a car when a traveler on the highway must

overhang of the car. In this case it appeared that the ordinary overhang of the car was 2½ feet, and as the car proceeded around the curve the projection increased until, at its maximum, it was 5 feet, and that there was a space between the outermost overhang of the car and the ridge of snow in the street of 3 to 3½ feet, and it was held that the trial court erred in denying defendant's request to instruct the jury "that if there was reasonable space for the plaintiff in the exercise of care to walk between the pile of snow and the car as it passed around the curve, the defendant was not guilty of negligence in starting the car after the plaintiff had alighted from the car," and a new trial was granted.

In Gannaway v. Puget Sound Traction Light & P. Co. 77 Wash. 655, 138 Pac. 267, it was held that one who alighted from the rear exit of a street car onto the planked roadway, and immediately passed to the rear of the car, crossed the car tracks, and proceeded to walk along the opposite side of the car on the platform, ceased to be a passenger, and the carrier owed no greater duty to look out for his safety than it owed to travelers upon the street; and was not negligent in starting the car forward around the curve at that place, causing the rear end to swing over the platform some 3 feet, striking him, as it was not its duty to warn pedestrians that there is an overhang to an ordinary street car when it rounds a curve, it being a matter of common knowledge, of which ordinary prudence requires persons to take notice.

It was also held in the above case that a street car conductor who has discharged his passengers at a place of safety is not negligent in ordering the car started without observing that the former passengers have crossed to the opposite side of the car, and are liable to be struck by the overhang as the car rounds the curve at that place, especially when it is dark, and the lights inside the car would prevent him from seeing anything on the other side. It was said that the conductor was under

have had an opportunity to have placed herself in a position of safety.

Jelly v. North Jersey Street R. Co. 76 N. J. L. 191, 68 Atl. 1091; *Widmer v. West End Street R. Co.* 158 Mass. 49, 32 N. E. 899; *Garvey v. Rhode Island Co.* 26 R. I. 80, 58 Atl. 456, 16 Am. Neg. Rep. 581; *Louisville R. Co. v. Ray*, — Ky. —, 124 S. W. 313; *South Covington & C. Street R. Co. v. Besse*, 33 Ky. L. Rep. 52, 16 L.R.A. (N.S.) 890, 108 S. W. 848; *Matulewicz v. Metropolitan Street R. Co.* 107 App. Div. 230, 95 N. Y. Supp. 7; *Waters v. United Traction Co.* 114 App. Div. 275, 99 N. Y. Supp. 763.

Mr. Herbert O. Bowers for appellee.

Roraback, J., delivered the opinion of the court:

This action was commenced by Harriet

E. White, who alleged in her complaint that she had sustained injuries by reason of the defendant's negligence in the operation of its trolley car. Prior to the trial of the case in the superior court Harriet E. White died, and her executrix, Harriet H. White, entered to prosecute.

The evidence justified the trial court in finding the following facts: Mrs. White, now deceased, at the time mentioned in the complaint, was a woman eighty-two years of age, active, sound in bodily and mental health. She was a particularly active woman for her years, and was accustomed to travel unassisted on trolley cars. Her eyesight was good. She boarded a car at Depot square in Manchester, intending to ride to Adams street in the village of Buckland. While a passenger on this car she gave notice to the conductor of the

no duty to warn the passengers of the danger of being struck by the overhang of the car on the opposite side.

In *Hilborn v. Boston & N. Street R. Co.* 191 Mass. 14, 77 N. E. 646, it was held not negligence to stop a street car on a curve at a platform, and to fail to give notice of the existence of a space of 15 inches between the step of the car and the platform.

The location of a station on an elevated railroad, and the stopping of cars for receiving and discharging passengers at a point where the track curves, is not negligence. *Ryan v. Manhattan R. Co.* 121 N. Y. 126, 23 N. E. 1131, 5 Am. Neg. Cas. 329. But it was said in this case that if the necessary space between the cars and the station platform is so wide as to exceed the ordinary and natural step of a passenger, it may become a source of danger and require further precaution on the part of the company. It was also said that the locality should be well lighted so that passengers could see the extent of the space.

It was also held in the above case, an action to recover for injuries sustained by a passenger by stepping into the opening between the platform and the car while attempting to get on a car at a station located on a curve, that the railroad company was entitled to have the jury instructed to the effect "that if the jury find that the space between the car and station platform at the time and place when and where plaintiff stepped between them was not more than 8 inches, it was not negligence on the part of the defendant to have such space, and the plaintiff cannot recover," it appearing that the testimony of a number of defendant's witnesses who measured the space between the platform and a large number of cars was that the space was less than 8 inches, though the plaintiff testified that she estimated by the eye that the space between the step and the platform was 14 or 15 inches wide.

And in *Fox v. New York*, 70 Hun, 181, 24 N. Y. Supp. 43, 5 Am. Neg. Cas. 683, which followed *Ryan v. Manhattan R. Co.* L.R.A.1915C.

supra, it was held that the maintenance of a platform for passengers to board and leave the cars at a point where the track curves, in the condition which for a number of years had been found to be a sufficient provision for the safety of the thousands of passengers who had alighted at that place without accident, was not, of itself negligence.

In the above case the evidence was conflicting in reference to the condition of the lights and as to the distance from the ends of the car to the platform, the testimony on the part of the plaintiff, who was injured by stepping into the space between the end of the car and the platform upon alighting from the car, being that the ends of the car were from 18 to 20 inches from the platform, and the middle of the car from 4 to 7 inches, whereas, upon the part of the defendant, the evidence was to the effect that the ends were within 11½ inches of the platform, and the center within 1 inch thereof; and it was held that the carrier was entitled to have the jury instructed to the effect that there was no evidence that the space between the platform of the car and the station was unnecessarily wide, and that the only question which the jury might consider was whether it was properly lighted; and if the jury believed that the platform was lighted on the night of the accident with electric lights, as testified to by defendant's witnesses, the verdict must be for the defendant.

Negligent operation of a train in a subway is not shown by the fact that the train was standing at a station where a curve of the track increased the space between the platforms of the cars, and a woman, while passing from one car to another, was injured by stepping into the space between the cars without being warned of the danger. *Welch v. Boston Elev. R. Co.* 187 Mass. 118, 72 N. E. 500. There was no testimony in this case as to the width of the space between the cars except that it was wider than when the cars were on a straight part of the track.

A. L. R.

car that she desired to alight at Adams street. She had alighted at this place on former occasions. The car in question was a large, open car about 40 feet in length. It was equipped with a double-step running board, extending the entire length of the car on each side. The plaintiff's testatrix sat in a seat between the front and the middle point of the car. When the tracks of the defendant reach the east line of Adams street, they cross that street by a very sharp curve, and continue on the right-hand side of the street, going toward Hartford. The regular stopping place of the car at Adams street is on this curve, and the ends of cars in rounding the curve overhang on the outer side of the curve to a much greater extent than if the cars were running upon a straight rail. It had been the rule and custom of the defendant for several years to require passengers to alight at this point upon the right-hand side of the car, or the long side of the curve. The motorman of the car had run cars over this line of the defendant for two years or more prior to the day in question. The conductor had been in charge of this car for fully two months prior to September 5, 1912. Both motorman and conductor were familiar with the curvature of the tracks at this point, and both knew well that in passing over the curve the rear of the car swung to the right to the extent of at least 2 or 3 feet, and rendered the place dangerous to passengers alighting from cars at this point. On the day in question, when Mrs. White alighted from the right-hand side of the car in the highway, it was necessary to step away from the car a sufficient distance in order that the rear end of it would not strike her as the car started up and continued around the curve. Mrs. White was intending to make a visit at a house upon the opposite side of the tracks from the place where she alighted, and it was necessary for her to cross the tracks for that purpose. When she alighted she took a couple of steps away from the car. The conductor, at the time Mrs. White alighted from the car, was standing on the rear platform. He saw her take a couple of steps away from the car, and assumed that she would be able to get to a point of safety, signaled the motorman to start the car, and then stepped to the left side of the car in order to raise the guard rail on that side. No assistance was proffered or given to Mrs. White in alighting from the car by the conductor or by the motorman, and no warning of danger was given her by either the conductor or motorman, though they both well knew that Mrs. White was in danger of being struck by the car when it rounded the curve. The car L.R.A.1915C.

started suddenly, rounded the curve, and the rear part of the car struck her as it swung out over the highway. She was struck in the back, thrown to the ground, and sustained injuries by reason of the fall. Her leg was broken at the hip. She received immediate surgical attention, was removed to the Hartford Hospital, where she remained about two months, and was brought to her home in Manchester on December 5, 1912. She suffered much physical and mental pain, and worried much over her condition. About three weeks after she returned home, while in a weakened condition, she contracted pneumonia, and died from the effects of pneumonia on January 2, 1913.

The superior court from all the evidence was justified in reaching the conclusion that Mrs. White did not have a reasonable opportunity to get away from the car after the conductor signaled the motorman to start it. This place was on the sharpest point of an abrupt curve. It was a dangerous place for persons to alight from the defendant's cars.

It is unnecessary to inquire whether the railway company was directly responsible for the dangerous character of the place as a point to receive and unload passengers. The company had adopted and was using it as a regular stopping place for its cars. It has also been found that the defendant's servants well knew of its danger and that Mrs. White was in a perilous situation when they started the car. Under such circumstances it is manifest that some precaution adapted to the situation should have been used, such as waiting until it could be seen that she was out of danger, or by warning her of the perilous situation that she was in. This was not done.

A passenger alighting from a car after it has stopped at a regular stopping place is entitled to have a reasonable opportunity after leaving the car to get beyond danger from its movements and operation. 6 Cyc. 612, and cases cited in note 53.

The statement of facts already made is sufficient answer to the claim of the defendant that Mrs. White was guilty of contributory negligence as a matter of law. While the actual situation was dangerous, the apparent situation was free from danger to one in Mrs. White's position. Under the circumstances disclosed by the finding, what should she, a woman of eighty-two years of age, have done that she did not do? Unconscious of danger, she did what any other person would have done under the same or similar circumstances. She had the right to assume, unless notice was given to the contrary, that the place was a safe one. *Powers v. Connecticut Co.*

82 Conn. 665, 669, 26 L.R.A. (N.S.) 405, 74 Atl. 931.

The evidence and rulings of the court are before us under the provisions of § 797 of the General Statutes.

The defendant, by its reasons of appeal, contends that several of the facts set forth in the finding are not warranted in the evidence, and we are asked to amend the finding in its material and controlling questions. The law which governs motions of this character is well settled in this state. It is that they will not be granted unless such facts have been found without evidence. This does not appear.

There is no error.

In this opinion the other Judges concur.

NEW JERSEY COURT OF ERRORS AND APPEALS.

INDUSTRIAL SAVINGS & LOAN COM-
PANY et al., Respts.,

v.

GRACE FRANCES PLUMMER et al.,
Appts.

(— N. J. —, 92 Atl. 583.)

**Fraud — overvaluation of property —
discovery — diligence.**

The defendants, desiring to purchase a plot of ground with a building thereon, at Grantwood, negotiated for over three months with the agent of the vendor, and at the end of that period accepted title subject to first and second mortgages. They resided on the premises without complaint for some years, paying interest upon both mortgages, and reducing the principal of the second, until the bill in this case was filed to foreclose the latter mortgage, when they alleged fraud as a defense, by reason of the fact that the agent had excessively valued the property at the time of sale. Ample opportunity to examine the property and verify the representations of value had been given prior to the purchase. Held, that the opportunity of examining the property and its value, and of verifying the representations made, cast a duty upon the defendants of exercising reasonable diligence in their own behalf upon estimates of value which were open to their observation, judgment, and investigation, and, in the absence of actual fraud, relief upon that ground alone will not be

Headnote by MINTURN, J.

Note. — See note to Faulkner v. Wassmer, 30 L.R.A. (N.S.) 872, as to waiver of purchaser's right to rescind contract for purchase of real property; note to Kohl v. Taylor, 35 L.R.A. (N.S.) 175, on the question of fraud in falsely stating cost, selling or market price, or as to offers made therefor. L.R.A.1915C.

afforded in equity. In such a situation the doctrine of *caveat emptor* applies.

(December 1, 1914.)

APPEAL by defendants from a decree of the Chancery Court in complainants' favor in a suit to foreclose a second mortgage. Affirmed.

The facts are stated in the opinion.

Mr. Frank G. Turner for appellants.

Mr. J. Boyce Smith, Jr., with Mr. Frederick P. Schenck, for respondents:

The claim of fraud in connection with the sale of the premises to defendants is without merit.

Peterson v. Reid, 76 N. J. Eq. 378, 74 Atl. 662; Haberman v. Kaufner, 60 N. J. Eq. 271, 47 Atl. 48; McMichael v. Webster, 57 N. J. Eq. 295, 73 Am. St. Rep. 630, 41 Atl. 714; Kuhnen v. Parker, 56 N. J. Eq. 286, 38 Atl. 641; Wooster v. Cooper, 56 N. J. Eq. 759, 36 Atl. 281; Green v. Stone, 54 N. J. Eq. 387, 55 Am. St. Rep. 577, 34 Atl. 1099; Richman v. Donnell, 53 N. J. Eq. 32, 30 Atl. 533; Skinner v. Christie, 52 N. J. Eq. 720, 29 Atl. 772; Melick v. Dayton, 34 N. J. Eq. 245, 27 N. J. Eq. 362, 32 N. J. Eq. 570; Parker v. Jameson, 32 N. J. Eq. 222; Parker v. Hartt, 32 N. J. Eq. 225; O'Brien v. Hul-fish, 22 N. J. Eq. 471; Coursen v. Canfield, 21 N. J. Eq. 92; Graham v. Berryman, 19 N. J. Eq. 29, 21 N. J. Eq. 370; Miller v. Gregory, 16 N. J. Eq. 274.

The value of real property is a matter of opinion, and cannot be a subject of fraudulent misrepresentations in the absence of relations of trust and confidence.

Hallinger v. Zimmerman, 59 N. J. Eq. 644, 44 Atl. 1100; Conlan v. Roemer, 52 N. J. L. 53, 18 Atl. 858; Wise v. Fuller, 29 N. J. Eq. 257; Miller v. Gregory, 16 N. J. Eq. 274; 20 Cyc. 92.

Minturn, J., delivered the opinion of the court:

The bill was filed to foreclose a second mortgage executed and delivered under the following circumstances: The Columbia Investment & Real Estate Company developed a tract of land on the Palisades, known as Grantwood, in the county of Bergen. It expended a large sum of money in building streets, erecting houses, and constructing the ordinary municipal improvements, preparatory to advertising and exploiting the location as a desirable site for homes. The houses and lots were sold according to a schedule of prices, depending upon the site and the character of the building. The defendants purchased three lots, upon which was located an eight-room cottage. The intermediary was an agent of the company, whose efforts to bring about a sale to de-

defendants were instituted about a month prior to its consummation.

Upon more than one occasion during the interval, the defendant Grace F. Plummer visited the place, with her husband and friends, and familiarized herself with the location and its inherent merits and disadvantages, as well as its financial value in the real estate market. She declined to purchase the building and two of the lots for \$14,500, but, after discussing the subject with her husband, offered to purchase the plot in question for \$13,000. The offer being accepted, she paid \$1,000 in cash and agreed to take the property subject to a first mortgage of \$7,500, held by the New York Mortgage Company, and to execute a second mortgage for the difference of \$4,500. The second mortgage was made to one Mathews, who is conceded to have been an employee and dummy of the complainant. He subsequently assigned the mortgage to the complainant company, which paid the face thereof to the Columbia company. Thereafter defendants continued to make the payments on account of principal and interest, provided for in the second mortgage, for a period of nearly four years. These payments were divided so as to cover interest on the first and second mortgages and a reduction of principal upon the second mortgage, and continued until March 29, 1912, when they ceased. At the trial there was found to be due upon the second mortgage, for interest and principal, \$4,908.59.

The answer of the defendants alleges that at the time of the sale the value of the property was misrepresented to the defendants by the agents of the Columbia company, who conspired with the New York Mortgage Company, and the complainant, the Industrial company to misrepresent the value of the property, and practically to cheat and defraud the defendants into purchasing for \$13,000 property which in reality was of no greater value than \$6,000. Upon the truth of this allegation the defendants insist upon an abatement of the mortgage in suit to accord with the true value of the property.

The learned vice chancellor, after consideration of the testimony, advised a decree in favor of the complainants. Our examination of the case has led us to concur in that view. The fundamental inquiry is whether the testimony presents a case of fraud and imposition upon these defendants clear enough to warrant the court in practically annulling *pro tanto* their sealed written instruments solemnly executed. Without discussing the subsidiary questions, whether, upon a mere allegation of fraud in an answer, without any attempt to compel the appearance of the alleged principal fraud L.R.A.1915C.

doer, the Columbia company, by cross bill, such a judicial inquiry may be had, we are satisfied that the conduct which is alleged in this answer to be fraudulent upon the part of the agents of the Columbia company was not of the questionable quality which the law characterizes as fraudulent, for the purpose of annulling a legal instrument. A glance at the situation of the parties will evince this.

For months the defendants had been negotiating with the agents of the Columbia company. No relation of confidence existed between them, so that, during the interval between their negotiations and the execution and delivery of the deed, the defendants were free to verify any representations or statements as to value which the agent had made. They examined the property and its entire environment, and no effort, artifice, or subterfuge seems to have been employed to pervert their judgment or becloud their sense of observation and discernment. In this situation they were dealing at arm's length. Speaking of the relative duties of parties in such a posture, Chancellor Kent says: "The common law affords to everyone reasonable protection against fraud in dealing; but it does not go to the romantic length of giving indemnity against the consequences of indolence and folly, or a careless indifference to the ordinary and accessible means of information. . . . Every person reposes at his peril in the opinion of others, when he has equal opportunity to form and exercise his own judgment. *Simplex commendatio non obligat.*" 2 Kent, Com. 485; *Davis v. Meeker*, 5 Johns. 354.

"Courts of equity, like courts of law, do not aid parties who will not use their sense and discretion upon matters of this sort." Willard, Eq. Jur. 152.

Under such circumstances the doctrine of *caveat emptor* is equally applicable at law and in equity. Willard, Eq. Jur. 152; *Lord Campbell in Beaufort v. Neeld*, 12 Clark & F. 248, 9 Jur. 813. The application of these fundamental principles is illustrated by the following cases in our own jurisdiction: *Miller v. Gregory*, 16 N. J. Eq. 275; *Wise v. Fuller*, 29 N. J. Eq. 258; *Conlan v. Roemer*, 52 N. J. L. 53, 18 Atl. 858; *Hallinger v. Zimmerman*, 59 N. J. Eq. 644, 44 Atl. 1100.

But the equitable status of these defendants is further complicated by the fact that for three years and over they occupied the mortgaged premises, and continued so to do at the time of the trial, and until this bill was filed, and during that period made no claim and uttered no protest to fortify themselves in the attitude they now take as the alleged victims of fraud doers. Such a

complacent attitude is inconsistent with their present claim, and does not enlist the favorable consideration of a court of conscience.

The court of chancery will refuse its aid, not merely to a party who fraudulently misrepresents his title, but also to one who remains silent when duty, candor, and fair dealing require him to speak out. *Ross v. Elizabeth-Town & S. R. Co.* 2 N. J. Eq. 422.

"Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence; when these are wanting, the court is passive and does nothing." Lord Camden in *Smith v. Clay*, 3 Bro. Ch. 639, note, quoted by Vice Chancellor Green in *De Grauw v. Mechan*, 48 N. J. Eq. 224, 21 Atl. 194.

The legal status of the banking commissioner of the state of New York as a party complainant was not challenged by any appropriate pleading in the case, as was done in *Hurd v. Elizabeth*, 40 N. J. L. 218, and the attack at this time, therefore, may properly be subject to the criticism that it is urged too late. *Hoagland v. Supreme Council*, R. A. 70 N. J. Eq. 607, 61 Atl. 982; *Ex parte* —, 2 Madd. Ch. 281. But, conceding the correctness of defendants' contention, it cannot avail, since under the circumstances presented here the complainant corporation is entitled to a decree of foreclosure, regardless of the status possessed by the New York banking commissioner as a party to the suit.

Our examination of the remaining objections leads us to conclude that they are without merit.

Finding no error in the record, the decree of the Court of Chancery will be affirmed.

NEW YORK COURT OF APPEALS.

RE APPLICATION OF NICHOLAS MEYER, Exr., etc., of Mary R. Meyer, Deceased, Appt., to Vacate an Order Fixing an Inheritance Tax.

(209 N. Y. 386, 103 N. E. 713.)

Succession tax — setting aside — inaccurate appraisement.

1. A transfer tax cannot be set aside on the sole ground that the appraisement of

the estate was inaccurate, and that there was in fact no transferable property.

Same — shrinkage of estate — payment by executor — necessity.

2. If, after appraisement of a transfer tax, the estate, without fault or delinquency on the part of the executor, shrinks, so that no money comes into his hands with which to pay the tax, he is not required to pay it out of his own funds, although the statute provides that he shall not be entitled to a final accounting of the estate unless he shall produce a receipt for the tax, and that he shall be personally liable for the tax until its payment.

(November 18, 1913.)

APPEAL by the executor from an order of the Appellate Division of the Supreme Court, First Department, affirming an order of the Surrogate's Court for New York County denying a petition to vacate or modify a transfer tax upon the estate of Mary R. Meyer, deceased. Affirmed.

The facts are stated in the opinion.

Messrs. William G. Cooke and Howard O. Wood, for appellant:

The tax is upon the "transfer" or right of "succession," not upon the estate itself.

Brown v. Lawrence Park Realty Co. 133 App. Div. 753, 118 N. Y. Supp. 132; *Re Dows*, 167 N. Y. 227, 52 L.R.A. 433, 88 Am. St. Rep. 508, 60 N. E. 439; *Re Gihon*, 169 N. Y. 443, 62 N. E. 561; *Re Wolfe*, 89 App. Div. 349, 85 N. Y. Supp. 949.

If there has been no transfer, no right of succession exists or can exist; and there is nothing to tax.

Re Wolfe, 89 App. Div. 349, 85 N. Y. Supp. 949, affirmed in 179 N. Y. 599, 72 N. E. 1152; *Re Cook*, 187 N. Y. 253, 79 N. E. 991, reversing 114 App. Div. 718, 99 N. Y. Supp. 1049; *Re Tracy*, 179 N. Y. 501, 72 N. E. 519, reversing 87 App. Div. 215, 83 N. Y. Supp. 1049.

The surrogate had ample power to grant the executor's application.

Morgan v. Cowie, 49 App. Div. 612, 63 N. Y. Supp. 608; *Re Lowry*, 89 App. Div. 226, 85 N. Y. Supp. 924; *Roderigas v. East River Sav. Inst.* 63 N. Y. 464, 20 Am. Rep. 555; *Miller v. Brinkerhoff*, 4 Denio, 119, 47 Am. Dec. 242; *Staples v. Fairchild*, 3 N. Y. 41; *Freeman*, Judgm. § 98.

The surrogate erred in refusing to exer-

Note. — Succession tax: personal liability of executor or administrator.

Most statutes, it will be observed, impose upon the executor or administrator the duty of collecting from the distributees, and of paying to the public authorities, the inheritance or succession taxes.

Re Meyer appears to be the only case passing upon the personal liability of the L.R.A.1915C.

personal representative for inheritance tax, where, because of a shrinkage of the estate after appraisement of the tax, there were insufficient funds to pay.

Under a statute imposing upon the executor or administrator the duty of paying the inheritance tax, it is held in *Re Sammon*, 3 Mees. & W. 381, that it is the duty of an executor to deduct the amount of the tax from the legacy on payment, and that

cise his power to set the appraisal aside for newly discovered evidence.

Re Lowry, 89 App. Div. 227, 85 N. Y. Supp. 924; Wilcox Silver Plate Co. v. Barclay, 48 Hun, 54; Vollkommer v. Nassau Electric R. Co. 23 App. Div. 88, 48 N. Y. Supp. 372; Keister v. Rankin, 34 App. Div. 288, 54 N. Y. Supp. 274; Kring v. New York C. & H. R. R. Co. 45 Div. 373, 60 N. Y. Supp. 1114; Barrett v. Third Ave. R. Co. 45 N. Y. 632.

Mr. Effingham N. Dodge, with Mr. Thomas E. Rush, for respondent:

The court has no power to modify a decree of appraisal of real property merely on the ground that it subsequently sells for a less amount at auction.

Re Lowry, 89 App. Div. 226, 85 N. Y. Supp. 924.

A transfer tax order based upon a valuation in an executor's affidavit is a solemn decree of a court of record, and should not be set aside on the ground that his valuation was largely excessive.

Re Barnum, 129 App. Div. 418, 114 N. Y. Supp. 33.

neglect to do so renders him personally responsible therefor.

So, where the statute directs the personal representative having in charge a legacy or property subject to the tax, to deduct the tax from the legacy, or to collect the amount thereof from the person entitled to the property, before turning it over, a failure to do so renders him personally liable for the tax. Re Weed, 10 Misc. 628, 32 N. Y. Supp. 777; Re Hackett, 14 Misc. 282, 35 N. Y. Supp. 1051; Hunter v. Husted, 45 N. C. (Busbee, Eq.) 141. See to the same effect McMahon v. Brown, 14 Abb. N. C. 406, note.

In State v. Dalrymple, 70 Md. 294, 3 L.R.A. 372, 17 Atl. 82, there is *dictum* to the effect that when the property passes into the hands of the executor or administrator, his obligation to pay the tax is fixed, and his bond at once becomes liable therefor by virtue of the statute declaring it the duty of an executor or administrator, before paying any legacy or distributing the shares of an estate liable to the tax, to pay the tax to the register of wills of the proper county, and providing that his letters should be forfeited where he fails to pay the tax within thirteen months from the date of the administration.

In Hopkins's Appeal, 77 Conn. 644, 60 Atl. 657, it is held that a statute directing the administrator to pay the tax, and empowering him to sell so much of the estate as may be necessary to pay the same, renders him personally liable for failure to pay, when it is due to his own misconduct.

In State v. Brevard, 62 N. C. (Phill. Eq.) 141, it is held that an executor is liable as such for the collateral inheritance tax on a bequest to himself, but not liable for the tax upon a devise of land to himself, L.R.A.1915C.

The time to appeal having expired, the order fixing tax could not be vacated or modified.

Re Wallace, 28 Misc. 603, 59 N. Y. Supp. 1084; Re Schermerhorn, 38 App. Div. 350, 57 N. Y. Supp. 26.

Collin, J., delivered the opinion of the court:

The estate of the testatrix consisted of personal property of an inventoried value less than the expenses of administration, namely, \$153.25, and a one-half interest in the equity of redemption in certain mortgaged real estate, which interest, in the transfer tax proceeding, was on December 31, 1909, appraised at about \$8,000. On July 13, 1911, the surrogate's court fixed the transfer tax on certain legacies at \$297.08. The real estate was sold September 25, 1912, under the judgment in the action to foreclose the mortgage upon it, for the sum due and unpaid upon the mortgage. The executor has not at any time, therefore, had any money or property with or from which he could pay any of the lega-

though he is liable as an individual for the tax upon the latter. The decision was probably based upon the theory that a personal representative charged with the collection of an inheritance tax is liable only for the tax upon the property that comes into his possession; the personal representative generally having nothing to do with the real estate.

But an executor or administrator is not personally liable for legacy and succession taxes imposed by a statute (act of Congress June 30, 1864) which declared the taxes to be a lien on all the property of the decedent, and directed the executor or administrator to pay the same, but contained no provision authorizing suit against the executor or administrator, and provided that in case of failure to pay, the lien should be enforced by suit against the individual in possession, and the property sold under the judgment. United States v. Truck, 27 Fed. 541. The court said that where a statute provides a method for enforcing compliance with its provisions, ordinarily no other remedy can be resorted to; that the remedy provided for by the statute was an ample one, and there was nothing to support an implication that any other was contemplated.

Even under a statute expressly providing that executors, administrators, and trustees shall be personally liable for the payment of inheritance taxes, and that they may retain from the legacy or property for distribution the inheritance tax due on such legacy or distributive share, executors, administrators, and trustees are not liable for inheritance taxes on legacies which were never in their possession, but which were paid out directly by the ancillary administrator. People v. Union Trust Co. 255 Ill.

cies or the transfer tax. The tax law (Consol. Laws 1909, chap. 60, § 236) provides: "No executor, administrator or trustee shall be entitled to a final accounting of an estate in settlement of which a tax is due under the provisions of this article unless he shall produce a receipt" duly issued for the payment of the tax.

The petition alleges as the sole ground for vacating the tax that the appraisal in the transfer tax proceeding was grossly inaccurate; that in fact there was at that time, within the statutory provisions relating to the transfer tax, no transferable property, and consequently no transfer to be taxed. The petition was justly and properly denied under the principles stated in *Re Lowry*, 89 App. Div. 226, 85 N. Y. Supp. 924, and *Re White*, 208 N. Y. 64, 46 L.R.A. (N.S.) 714, 101 N. E. 793, Ann. Cas. 1914D, 75, and the order appealed from should be affirmed.

The provision of § 236 of the tax law, above quoted, is not applicable, however, to the final accounting of the estate in question under the facts presented in the present

record. The situation under our consideration is: The appraisal of the estate honestly and legally made and the nature of the bequests required that the transfer tax be fixed at \$297.08. It came to pass, within the administration of the estate, without fault or delinquency upon the part of the executor, that the estate yielded a value less than the expenses of its administration. Therefore the executor did not receive or acquire any money or property usable for the payment of the transfer tax. If he is not entitled to a final accounting and discharge from his office unless he shall produce a receipt for the payment of the transfer tax, he must pay it from his individual moneys or property, although he has completely and honestly fulfilled the duties of his executorship. We think the legislature did not intend or enact such result. It is true that the language of the statute thus declares, and seems too plain to call for judicial construction, if we look to that alone. It is a familiar rule that it is not the province of the courts to supervise or revise legislation, and a law plain and certain in

168, L.R.A.—, 99 N. E. 377, Ann. Cas. 1913D, 514.

Under a Federal statute (act June 13, 1898, 30 Stat. at L. 464, chap. 448) providing that "persons having in charge or trust as administrators, executors or trustees any legacies or distributive shares arising from personal property . . . passing . . . from any person possessed of such property either by will or by the intestate laws of any state or territory . . . shall be, and hereby are made subject to a duty or tax," executors are not liable for taxes upon legacies and distributive shares which never came into their hands because of a settlement or compromise in a proceeding contesting the will. *McCoy v. Gill*, 156 Fed. 985.

In *Re Wood*, 40 Misc. 155, 81 N. Y. Supp. 511, it was held that a direction in a will that the executor should withdraw one half of the claims presented by the testator against the estate of his deceased brother, and a statement that he forgave one half of said claims, amounted to a bequest of such half, which passed to the executrix of the deceased brother's estate, and that therefore the inheritance tax should be assessed against the executrix as such, and not to her individually, notwithstanding the fact that she was, by the brother's will, entitled to the possession and income of his whole estate for life, with the right to resort to the principal, if necessary, for her support.

Under a statute giving the Crown, in case of failure in the payment of the legacy duty, a right to resort to either or both the executor or legatee, it was held in *Horn v. Coleman*, 2 Jur. N. S. 1127, 26 L. J. Ch. N. S. 213, 5 Week. Rep. 32, that the executor was liable for the loss of a legacy L.R.A.1915C.

duty where the agent of the executor, who was authorized to pay the legacy, having paid the same without deducting the duty, and having subsequently received back from the legatee the amount of the duty upon a request therefor, in order that he might prepare the receipt to be taken from the Crown, absconded with the money. The court said that the agent received the money in the capacity of agent of the executor, and that the transaction did not render the absconding agent the agent of the legatee; that it was the duty of the executor, in the first instance, while he was sole debtor to the Crown in respect to the duty, to discharge the debt due out of the money which was remitted to the legatee; and that the application by the executor's agent to the legatee was not an application to the legatee to enable him to discharge the legatee's debt, but in order to enable him to prepare a proper receipt on behalf of the executor.

As affected by decree of probate court.

A decree of the probate court allowing the accounts of an administrator, and ordering distribution of the estate, affords the administrator no protection from liability for failure to pay an inheritance tax upon the property distributed that was subject to the tax, in a proceeding on behalf of the state to collect the tax, where it appears no reference was made to the inheritance tax in any of the proceedings of the probate court, and that the state was not a party thereto. *Atty. Gen. v. Rafferty*, 209 Mass. 321, 93 N. E. 747, following *Atty. Gen. v. Stone*, 209 Mass. 186, 95 N. E. 395.

But under the New York statute which authorizes the surrogate to determine the

its meaning declares itself, and is insusceptible of interpretation. It is as binding upon a court as upon every citizen. There must be some uncertainty of sense, else the natural and ordinary meaning of its words must prevail. Uncertainty of sense, however, does not spring alone from uncertainty of expression. The legislative intention, if expressed, is the law itself. It is always presumed in regard to a statute, that no unjust or unreasonable result was intended by the legislature. Hence if, viewing a statute from the standpoint of the literal sense of its language, it works such a result, an obscurity of meaning exists, calling for judicial construction.

Where a particular application of a statute in accordance with its apparent intention will occasion great inconvenience or produce inequality or injustice, another and more reasonable interpretation is to be sought. *Church of the Holy Trinity v. United States*, 143 U. S. 457, 36 L. ed. 226,

12 Sup. Ct. Rep. 511; *Murray v. New York C. R. Co.* 4 Keyes, 274; *People ex rel. Wood v. Lacombe*, 99 N. Y. 43, 1 N. E. 599; *Murray v. Gibson*, 15 How. 421, 14 L. ed. 755; *State ex rel. Heiden v. Ryan*, 99 Wis. 123, 74 N. W. 544. The courts must in that event look to the act as a whole, to the subject with which it deals, to the reason and spirit of the enactment, and thereby determine the true legislative intention and purpose; and if such purpose is reasonably within the scope of the language used, it must be taken to be a part of the statute the same as if it were plainly expressed. To effect the intention of the legislature the words of a single provision may be enlarged or restrained in their meaning and operation, and language general in expression may be subjected to exceptions through implication.

There is neither reason nor justice in a requirement that the executor here should pay with his individual moneys the transfer

question of liability of property to the tax, it is held that a decree unappealed from which declared certain legacies exempt from taxation was conclusive upon the comptroller and district attorney, and precluded the institution of proceedings by such officers where the statute authorizes proceedings by them only in the case of a refusal or a neglect to pay the tax which has been declared due, and that therefore executors who paid the legacies without retaining the tax in reliance upon the decree of the surrogate could not be held personally liable therefor. *Re Wolf*, 137 N. Y. 205, 33 N. E. 156, reversing 66 Hun, 399, 29 Abb. N. C. 356, 21 N. Y. Supp. 522, which reversed 2 Connolly, 600, 15 N. Y. Supp. 539.

Right to recover amount of tax paid out.

In *Bate v. Payne*, 13 Q. B. 900, 13 Jur. 609, 18 L. J. Q. B. N. S. 273, it was held that an executor who permitted the legatee to enter into possession of a leasehold estate without paying the legacy duty thereon, and who after fifteen years paid the duty upon demand by the public authorities, was entitled to recover from the legatee the amount so paid as money paid for the latter's use, which included not only the duty on the principal, but also the duty paid on the profits accruing for the fifteen years, under the rule which required the duty to be paid on the accruing profits and income of the deceased from the time of his death to that of accounting and offering to pay the duty.

In *Hales v. Freeman*, 1 Brod. & B. 391, 4 J. B. Moore, 21, 21 Revised Rep. 663, it is held that a trustee under a will, who pays the legacy duty upon an annuity after the expiration of four years from the death of the testator, may recover the amount of the duty from the legatee, notwithstanding a previous assignment of the annuity by such legatee.

L.R.A.1915C.

In *Foster v. Ley*, 2 Bing. N. C. 269, 1 Hodges, 326, 5 L. J. C. P. N. S. 17, 2 Scott, 438, it was held that the creditors should pay the legacy duty upon a bequest made by a wife for the payment of her husband's debts, under a statute which imposed upon the legatee a liability to pay the duty, and which made the executor responsible for enforcing payment by the legatee, and that where her executor paid the debts in full and afterward paid the legacy duty, he was entitled to recover the amount so paid from the creditors as money paid for their use.

But in *Farwell v. Seale*, 18 L. J. Ch. N. S. 189, 13 Jur. 483, 3 De G. & S. 359, where an executor joined with a legatee in the assignment of the legatee's contingent interest in the estate, and permitted the purchase money to be paid to the legatee, it was held that the executor could not recover from the purchaser of such interest the legacy duty which he was obliged to pay on the full value of the legacy after the happening of the contingency.

An executor who has paid the collateral inheritance taxes upon legacies given by the will is entitled to an allowance therefor in his final account, together with interest collected thereon for a period not exceeding one year, notwithstanding the statute imposing the tax makes it his duty to deduct the tax from the legacy in settlement with the legatee. *Wyckoff v. O'Neil*, 72 N. J. Eq. 880, 67 Atl. 32. The court said that the executor was not bound to pay the tax until the expiration of the year allowed him by law within which to settle the estate. It appeared that the statute imposed a penalty for not paying the tax within nine months from the death of the decedent. The court ruled that the executor was chargeable with the whole penalty and for interest due on the tax in excess of one year.

A. L. R.

tax. We cannot impute to the legislature an intent so harsh and unjustifiable. The study of those provisions of the tax law relating to the transfer tax convinces us that the legislative intent was to secure the payment of the tax, which is in the nature of an excise on the right to and the method of transfer, from the transferred estate, through the hands of the executor or administrator who is made, in a sense, the collector for the state. Under them the tax is, speaking generally, due and payable at the time of the transfer, and is to be paid by the executor, administrator, or trustee. § 222. Elaborate and comprehensive means and methods are provided through which the executor or other payer shall secure and actually get from the estate subject to succession and the tax, the moneys with which to pay it, and it remains a lien upon the property transferred until paid, and the person to whom the property is so transferred, and the executors, administrators, and trustees of every estate so transferred, are personally liable for such tax until its payment. § 224. Every executor, administrator, or trustee is required to take from the state comptroller or a county treasurer, as the case may be, duplicate receipts for the payment of the tax (§ 222), and is not entitled to a final accounting of an estate in settlement of which a tax is due unless he shall produce the receipt (§ 236). An obvious contemplation and intention expressed by the provisions is that the money to be used by the executor, administrator, or trustee in the payment of the tax, and which through the payment is to produce and give him possession of the receipt, should be collected by him from the transferred property. When its collection has been impossible, the taking and production of the receipt is impossible, within the intent of the provisions, and the provision barring him from a final accounting is inapplicable. A case in which, after a hearing upon proper notice to all parties interested, it is adjudged that an executor, administrator, or trustee has been unable to get or collect the moneys for the payment of the tax from the transferred property, through the destruction of the property or obliteration of its value during the process of administration, without fault or delinquency upon his part, is excepted from the general provision through implication.

It is clear, we think, under the reasoning of this opinion, that the executor is not personally liable for the tax. Apprehension that he is so liable is based upon the provision: "Every such tax shall be and remain a lien upon the property transferred until paid, and the person to whom the property is so transferred, and the executors, admin-

istrators, and trustees of every estate so transferred, shall be personally liable for such tax until its payment." § 224. It is true that the test by which the tax is to be measured is the value of the interest or property transferred at the time of the death of the testatrix. *Re White*, 208 N. Y. 64, 46 L.R.A.(N.S.) 718, 101 N. E. 793, Ann. Cas. 1914D, 75. The property disposed of through or under the contracts of the deceased, or to enable the executor or administrator to pay the transfer tax or the decedent's debts, is not a part of the interest or property transferred within the meaning of such provision, and is free of the tax and its lien. In this case, under the facts as presented, the value of the interest or property, the transfer of which was taxed, has vanished during the administration, and the executor has been unable to get from the estate moneys for the payment of the tax. The legislature did not impose a personal liability under such conditions. The order should be affirmed, without costs.

Cullen, Ch. J., and Gray, Cuddeback, Hogan, and Miller, JJ., concur. Werner, J., absent.

WEST VIRGINIA SUPREME COURT OF APPEALS.

CHARLES S. FISHER

v.

SUN INSURANCE OFFICE OF LONDON, ENGLAND, Plff. in Err.

(— W. Va. —, 83 S. E. 729.)

Insurance — account books — sales.

1. A clause in a fire insurance policy requiring the insured to "keep a set of books which shall clearly and plainly present a complete record of business transacted, including all purchases, sales, and shipments, both for cash and credit," is not complied with by keeping books which do not show the items sold, but only the gross amounts of weekly sales.

Same — classes of property — severable policy.

2. Where an insurance policy is issued covering different classes of property, each insured for a stated amount, and there is a breach of a condition or warranty respecting one class not affecting the risk as to others, the contract should not be considered as entire, but as severable, and a

Headnotes by WILLIAMS, J.

Note. — As to divisibility of insurance, see note to *Joffe v. Niagara F. Ins. Co.* 51 L.R.A.(N.S.) 1047.

recovery allowed on account of the property not affected by the breach, notwithstanding the policy stipulates that it shall be void, and no action brought on it, when any one of its conditions or warranties is broken, provided the insured has committed no fraud, and no act prohibited by public policy is involved.

Same — iron safe clause — breach — effect.

3. A breach of the iron safe clause in a policy of fire insurance covering a stock of merchandise, fixtures, household furniture, and the building containing them, each insured for a specified sum, avoids the policy only in respect to the stock of merchandise.

Evidence — insurance — location of property.

4. Parol evidence is admissible to contradict the terms of a fire insurance policy, respecting the location of the property and the insured's estate therein, when oral application for insurance was made to the insurer's agent, and the insured, several days thereafter, received his policy by mail, and failed to read it until after the loss.

(September 15, 1914.)

ERROR to the Circuit Court for Kanawha County to review a judgment in plaintiff's favor in an action brought to recover the amount alleged to be due on a fire insurance policy. Reversed.

The facts are stated in the opinion.

Mr. W. T. Porter, for plaintiff in error:

The plaintiff failed to prove compliance with his obligations assumed by the acceptance of the policy.

Teter v. Franklin F. Ins. Co. — W. Va. —, 82 S. E. 41; *Tucker v. Colonial F. Ins. Co.* 58 W. Va. 30, 51 S. E. 86; *L. Rosenthal Clothing & Dry Goods Co. v. Scottish Ins. Co.* 55 W. Va. 238, 46 S. E. 1021; *Flanagan v. Phenix Ins. Co.* 42 W. Va. 426, 26 S. E. 513; *Adkins v. Globe F. Ins. Co.* 45 W. Va. 384, 32 S. E. 194; *Prudential F. Ins. Co. v. Ally*, 104 Va. 356, 51 S. E. 812; *Maupin v. Scottish Union & Nat. Ins. Co.* 53 W. Va. 557, 45 S. E. 1003; *North British & M. Ins. Co. v. Robinett*, 112 Va. 754, 72 S. E. 668.

A clause in a fire insurance policy that the insured make an inventory of his stock of goods and keep books correctly detailing purchases and cash and credit sales, and keep them in an iron safe or away from the store building when closed for business, is reasonable and valid.

Maupin v. Scottish Union & Nat. Ins. Co. 53 W. Va. 557, 45 S. E. 1003; *Scottish Union & Nat. Ins. Co. v. Virginia Shirt Co.* 113 Va. 353, 74 S. E. 228; *Houff v. German American Ins. Co.* 110 Va. 585, 66 S. E. 831; *Phœnix Ins. Co. v. Sherman*, 110 Va. L.R.A.1915C.

435, 66 S. E. 81; *German Ins. Co. v. Bates*, 67 Ill. App. 370; *Everett-Ridley-Ragan Co. v. Traders' Ins. Co.* 121 Ga. 228, 104 Am. St. Rep. 99, 48 S. E. 918.

Leaving the daily sales book, from which the weekly account of sales was posted, in the store, where it was destroyed in the fire, was a noncompliance with the iron safe clause in an essential.

Penix v. American Cent. Ins. Co. — Miss. —, 63 So. 346; *Chamberlain v. Shawnee F. Ins. Co.* 177 Ala. 516, 58 So. 267; *Scottish Union & Nat. Ins. Co. v. Virginia Shirt Co.* 113 Va. 361, 74 S. E. 228.

Invoices of goods purchased do not comply with the condition requiring an inventory.

Invoices could not be understood to state the actual value of the merchandise involved, which is a necessary feature of an inventory.

Royal Ins. Co. v. Kline Bros. & Co. 117 C. C. A. 228, 198 Fed. 468; *Southern F. Ins. Co. v. Knight*, 111 Ga. 622, 52 L.R.A. 70, 78 Am. St. Rep. 216, 36 S. E. 821; *Home Ins. Co. v. Delta Bank*, 71 Miss. 608, 15 So. 932; *Fire Asso. of Philadelphia v. Masterson*, 25 Tex. Civ. App. 518, 61 S. W. 962; *Hartford F. Ins. Co. v. Adams*, — Tex. Civ. App. —, 158 S. W. 231; *Shawnee F. Ins. Co. v. Thompson*, 30 Okla. 466, 119 Pac. 985; *Day v. Home Ins. Co.* 177 Ala. 600, 40 L.R.A.(N.S.) 652, 58 So. 549.

The true location of the property was not given, and was not stated in the policy.

Cleason v. Prudential F. Ins. Co. 127 Tenn. 8, 151 S. W. 1030; *L'Anse v. Fire Asso. of Philadelphia*, 119 Mich. 427, 43 L.R.A. 838, 75 Am. St. Rep. 410, 78 N. W. 465.

Plaintiff, by accepting the policy, became bound by its terms. His failure to read the policy is no excuse.

Tyree v. Virginia Ins. Co. 55 W. Va. 63, 66 L.R.A. 657, 104 Am. St. Rep. 983, 46 S. E. 706, 2 Ann. Cas. 30; *Oliker v. Williamsburgh City F. Ins. Co.* 72 W. Va. 436, 78 S. E. 746; *Parsons v. Lane (Re Millers' & Mfrs. Ins. Co.)* 97 Minn. 98, 4 L.R.A.(N.S.) 231, 106 N. W. 485, 7 Ann. Cas. 1144; *Mutual Assur. Co. v. Mahon*, 5 Cal (Va.) 517; *Oatman v. Bankers' Fire Relief Asso.* 66 Or. 388, 133 Pac. 1183; 134 Pac. 1033; *Eagan v. Etna F. & M. Ins. Co.* 10 W. Va. 583; *Kibbe v. Hamilton Mut. Ins. Co.* 11 Gray, 167; *Westchester F. Ins. Co. v. Ocean View Pleasure Pier Co.* 106 Va. 633, 56 S. E. 584; *Manhattan F. Ins. Co. v. Weill*, 28 Gratt. 389, 26 Am. Rep. 364; *Syndicate Ins. Co. v. Bohn*, 27 L.R.A. 614, 12 C. C. A. 531, 27 U. S. App. 564, 65 Fed. 165; *Virginia F. & M. Ins. Co. v. J. I. Case Threshing Mach. Co.* 107 Va. 588, 122 Am. St. Rep. 875, 59 S. E. 369; *Wyandotte*

Brewing Co. v. Hartford F. Ins. Co. 144 Mich. 440, 6 L.R.A.(N.S.) 852, 115 Am. St. Rep. 458, 108 N. W. 393; Security Ins. Co. v. Mette, 27 Ill. App. 324; Phenix Ins. Co. v. Searles, 100 Ga. 97, 27 S. E. 779.

Oral evidence of a prior or contemporaneous oral agreement or conversation cannot be received to vary or contradict a valid written contract, unless in cases of fraud or mutual mistake.

Maupin v. Scottish Union & Nat. Ins. Co. 53 W. Va. 557, 45 S. E. 1003; Northern Assur Co. v. Grand View Bldg. Assn. 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133; Vanbibber v. Beirne, 6 W. Va. 168; Oliker v. Williamsburgh City F. Ins. Co. 72 W. Va. 436, 78 S. E. 746.

Mr. S. C. Burdett also for plaintiff in error.

Mr. U. S. Albertson for defendant in error.

Williams, J., delivered the opinion of the court:

In an action on a fire insurance policy issued July 3, 1912, plaintiff recovered a judgment for \$2,086.42, and defendant was awarded this writ of error.

The insurance covered real estate and personal property as follows, viz., \$450 on a building occupied by plaintiff both as a store and a dwelling; \$1,300 on his stock of merchandise; \$200 on fixtures; and \$200 on household furniture therein. The building and its contents were totally destroyed by fire on October 19, 1912. The defense is that plaintiff failed to comply with certain conditions and warranties contained in the policy. One is that the policy describes the building as situate "on the Charleston and Ripley turnpike, Sissonville, West Virginia (Kanawha county)," while it is proven to be located on the turnpike a mile and a half from Sissonville. Defendant contends that plaintiff concealed or misrepresented its true location, and that, if it had known that the property was not located at Sissonville, it would not have taken the risk. It is well known that the risk, as well as the rate of premium charged by insurance companies, varies according to the location of the property. 19 Cyc. 664. Sissonville is a small town, and is the name of the postoffice where plaintiff received his mail, and it may be that the actual location of plaintiff's property, being $1\frac{1}{2}$ miles from Sissonville, comes within the description of the location given in the policy. The language does not necessarily mean that the property is in Sissonville, and may, with equal propriety, mean near to Sissonville.

But, assuming that the location is a material matter affecting the risk, and that the actual location is materially variant from that given in the policy, and would vitiate it, yet there is conflict in the testimony respecting the information which plaintiff gave to defendant's agent concerning the location when he applied for insurance. Plaintiff testifies positively that he told the agent it was a mile and a half "this side of Sissonville," meaning on the side next to the city of Charleston, where witness was when he was testifying. He further testifies that he received his policy by mail and only read a few lines of it, and therefore did not know what it contained. The agent testifies, to the best of his recollection, that when plaintiff applied for the insurance he represented the property to be located at Sissonville, and says he wrote down on paper, at the time, what plaintiff told him, and afterwards transcribed it into the policy. But the original writing was not produced, nor does it appear that plaintiff saw it after it was prepared. The question was therefore one of fact for the jury to determine from the conflicting testimony, and if this were the only error relied on it would not justify a reversal. If the agent wrote the description different from what he was told, it was a fraud, and oral evidence was admissible to prove it.

The next point raised is that defendant is not liable, because plaintiff did not comply with the iron safe clause of the policy. That clause bound the assured to "take a complete itemized inventory of stock on hand at least once in each calendar year," and, unless such inventory had been taken within twelve months prior to the date of the policy, he was bound to take such inventory "in detail within thirty days of the issuance of this policy." Plaintiff was also required to keep a set of books which should contain a "complete record of business transacted, including all purchases, sales, and shipments, both for cash and credit, from the date of the inventory," which were to be kept locked in a fireproof safe at night and at all other times when the building was not open for business, or, failing in this, he was to keep such books and inventories in a place not exposed to fire which would destroy the building. The policy also stipulated that noncompliance with these conditions should render it void, and bar any recovery thereon. It is contended there has been a breach of these warranties, and that the entire contract is avoided. The iron safe clause is a promissory warranty, and provided for a complete record of the mercantile business transacted by plaintiff, both purchases and sales of goods, as well for cash as on credit, and for the preservation of the same.

But, assuming that the location is a material matter affecting the risk, and that the actual location is materially variant from that given in the policy, and would vitiate it, yet there is conflict in the testimony respecting the information which plaintiff gave to defendant's agent concerning the location when he applied for insurance. Plaintiff testifies positively that he told the agent it was a mile and a half "this side of Sissonville," meaning on the side next to the city of Charleston, where witness was when he was testifying. He further testifies that he received his policy by mail and only read a few lines of it, and therefore did not know what it contained. The agent testifies, to the best of his recollection, that when plaintiff applied for the insurance he represented the property to be located at Sissonville, and says he wrote down on paper, at the time, what plaintiff told him, and afterwards transcribed it into the policy. But the original writing was not produced, nor does it appear that plaintiff saw it after it was prepared. The question was therefore one of fact for the jury to determine from the conflicting testimony, and if this were the only error relied on it would not justify a reversal. If the agent wrote the description different from what he was told, it was a fraud, and oral evidence was admissible to prove it.

The next point raised is that defendant is not liable, because plaintiff did not comply with the iron safe clause of the policy. That clause bound the assured to "take a complete itemized inventory of stock on hand at least once in each calendar year," and, unless such inventory had been taken within twelve months prior to the date of the policy, he was bound to take such inventory "in detail within thirty days of the issuance of this policy." Plaintiff was also required to keep a set of books which should contain a "complete record of business transacted, including all purchases, sales, and shipments, both for cash and credit, from the date of the inventory," which were to be kept locked in a fireproof safe at night and at all other times when the building was not open for business, or, failing in this, he was to keep such books and inventories in a place not exposed to fire which would destroy the building. The policy also stipulated that noncompliance with these conditions should render it void, and bar any recovery thereon. It is contended there has been a breach of these warranties, and that the entire contract is avoided. The iron safe clause is a promissory warranty, and provided for a complete record of the mercantile business transacted by plaintiff, both purchases and sales of goods, as well for cash as on credit, and for the preservation of the same.

in order that the amount of loss, if any occurred, might be definitely and satisfactorily ascertained. Plaintiff did not keep an iron safe, nor did he at any time take such inventory of his stock of merchandise as is contemplated. He had been conducting a mercantile business in the same building, for about eleven months prior to obtaining insurance; and, in order to prove the amount of his loss on the stock of merchandise, the court permitted him to introduce, over defendant's objection, evidence of invoices made and furnished to him by wholesale merchants from whom he had purchased goods, extending back over the whole time he had been engaged in business. Plaintiff had some of those bills in his possession at the time of the fire and others were supplied to him thereafter by the wholesale merchants. From the gross amount of those invoices he was permitted to deduct the gross amount of his weekly sales, which had been kept in a pencil pad to which, plaintiff says, they had been transcribed from a similar pad containing accounts of daily sales, at the end of each week. The weekly sales did not show the items, but only the gross amounts in figures, as for instance, "1911, Aug. 5, First Week 21.81; Second Week 29.27," and so on, with each consecutive week, up to and including the sixty-fifth week which ended with the date of the fire. The pads containing the itemized accounts of daily sales made after the insurance was written were not produced, and plaintiff says the last one was left in the store on the night of the fire and was destroyed. The foregoing facts show a noncompliance with the warranties contained in the iron safe clause. Plaintiff does not pretend to have taken an inventory of his stock of goods, either within a year before the insurance was written or within thirty days thereafter, such as is contemplated by the policy. The inventory provided for meant a listing of the goods in store according to their kind and value. An invoice supplied after the fire by the wholesale merchants from whom plaintiff had purchased them many months before is not equivalent to taking and preserving an inventory of the goods in store, nor can proof of loss in that manner be substituted for the method provided for by the policy. The invoices do not prove that the goods were actually received and placed in the building by the insured.

"An invoice of goods purchased is not an inventory of stock to be produced under the 'iron safe clause' of a fire policy." *Southern F. Ins. Co. v. Knight*, 111 Ga. 622, 52 L.R.A. 70, 78 Am. St. Rep. 216, 36 S. E. 821; *Day v. Home Ins. Co.* 177 Ala. 600, 40 L.R.A.(N.S.) 652, 58 So. 549; *Shawnee F. L.R.A.* 1915C.

Ins. Co. v. Thompson, 30 Okla. 466, 119 Pac. 985; *Royal F. Ins. Co. v. Kline Bros. & Co.* 117 C. C. A. 228, 198 Fed. 468; *Home Ins. Co. v. Delta Bank*, 71 Miss. 608, 15 So. 932; *Fire Asso. of Philadelphia v. Masterson*, 25 Tex. Civ. App. 518, 61 S. W. 962; *Hartford F. Ins. Co. v. Adams*, — Tex. Civ. App. —, 158 S. W. 231; *Scottish Union & Nat. Ins. Co. v. Virginia Shirt Co.* 113 Va. 361, 74 S. E. 228; *Penix v. American Cent. Ins. Co.* — Miss. —, 63 So. 346; *Everett-Ridley-Ragan Co. v. Traders' Ins. Co.* 121 Ga. 228, 104 Am. St. Rep. 99, 48 S. E. 918; *German Ins. Co. v. Bates*, 67 Ill. App. 370.

The case was not briefed or orally argued in this court by counsel for plaintiff, and it is suggested in brief of counsel for defendant that the trial court was induced by the decision of this court in *Ruffner Bros. v. Dutchess Ins. Co.* 59 W. Va. 432, 115 Am. St. Rep. 924, 53 S. E. 943, 8 Ann. Cas. 866, to let in proof of loss in the manner complained of. That case differs materially from this, in that the stock of goods in that case was entirely new at the date of insurance, having been placed in the building but a few days before, while in the present case plaintiff had been adding to, and selling from, his stock for a period of eleven months before it was insured. Judge Poffenbarger, who wrote the opinion in the *Ruffner Bros. Case*, expressly says that the invoices would not constitute an inventory, within the meaning of the policy, in the case of a store which had been conducted for a considerable time; and Judge Brannon, although concurring in the opinion, expressed a doubt whether such invoices could take the place of an inventory in any case. That the promissory warranty, generally denominated the "iron safe clause," is reasonable, and that a compliance therewith is material, is too well established to require a citation of authorities.

But the iron safe clause relates only to the stock of merchandise, and noncompliance with it does not necessarily affect defendant's liability with respect to the other property insured. It was not intended to apply to the building itself, the household furniture, or the fixtures in the building; and notwithstanding the policy expressly provides that it shall be void and no action shall be maintained upon it if any of the warranties are violated, the rule established by the great weight of decision is that, in the absence of fraud or any act condemned by public policy, the contract is divisible, and recovery may be had for the loss of other property not affected by the particular warranty broken. The risk as to the building, fixtures, and household furni-

ture is in no wise increased by a failure to preserve an account of the mercantile transactions. *Mitchell v. Mississippi Home Ins. Co.* 72 Miss. 53, 48 Am. St. Rep. 635, 18 So. 86; *Miller v. Delaware Ins. Co.* 14 Okla. 81, 65 L.R.A. 173, 75 Pac. 1121, 2 Ann. Cas. 17; *Miller v. Scottish Union & I. F. Ins. Co.* 14 Okla. 91, 75 Pac. 1135; *Roberts, W. & T. Co. v. Sun Mut. Ins. Co.* 13 Tex. Civ. App. 64, 35 S. W. 955; *Georgia Home Ins. Co. v. McKinley*, 14 Tex. Civ. App. 7, 37 S. W. 606; *Sun Mut. Ins. Co. v. Tufts*, 20 Tex. Civ. App. 147, 50 S. W. 180. *Contra: Southern F. Ins. Co. v. Knight*, 111 Ga. 628, 52 L.R.A. 70, 78 Am. St. Rep. 216, 36 S. E. 821.

Defendant further insists that the policy is avoided because plaintiff had only a leasehold estate for years in the building insured, whereas the policy contains the provision that "if the subject of insurance be a building on ground not owned by the insured in fee simple," the policy shall be void. Plaintiff was permitted to testify, over objections, that he informed defendant's agent when he applied for insurance of the character of his estate in the property, and also that he did not read his policy until after the fire and was therefore ignorant of its contents. Plaintiff did not make written application, and he swears positively that he told the agent that he had only a fifteen-year lease, and that he paid a rental of \$5 a year for it. But this is denied by the agent. This question, like the one relating to the location of the property, was for jury determination, and we would have no right to disturb the verdict on this fact, which, in view of the general verdict, the jury evidently found in favor of plaintiff, provided the testimony tending to prove it was admissible. If plaintiff advised the agent correctly respecting his estate, and the agent wrote it in the policy differently, or if the printed policy contained a statement representing the insured to be the fee simple owner and the agent failed to change it to make it accord with the fact, it would be a fraud. In such case parol testimony is admissible to contradict the terms of a written contract. Otherwise the fraud could not be shown. This question was fully discussed and decided in *Medley v. German Alliance Ins. Co.* 55 W. Va. 342, 47 S. E. 101, 2 Ann. Cas. 99. The authorities on the subject are there pretty well collated by Judge Poffenbarger in his opinion, and we deem it unnecessary to enter upon a discussion of it here. If, however, the jury should be of the opinion that plaintiff's testimony on this point is untrue, there would be a breach of a warranty so vital as to render the entire policy void. Because the less valuable plaintiff's

estate in the building is, the greater would be the insurer's risk, and the increase of risk on the building would necessarily increase the risk on the personal property contained in it.

At the conclusion of plaintiff's evidence there was a motion by defendant to exclude it, which was overruled and it excepted. Defendant, however, waived the exception by subsequently introducing evidence on its own behalf. It is unnecessary to cite cases in support of this rule so frequently announced by this court.

It does not appear that the court gave any instructions at the request of plaintiff, but defendant complains of the refusal to give certain ones of its instructions and the modification of others. In view of what we have already said, it was not error to refuse defendant's peremptory instruction to find for the defendant.

It was error to give instruction No. 2, which is as follows: "The jury are instructed that when parties have made a written agreement, such as the policy in this case, said policy is regarded as the exclusive evidence of the contract, and all oral negotiations and stipulations preceding or accompanying the execution of said policy are merged in it, and are not admissible in evidence, and all such oral negotiations and stipulations, if any, should not be considered by you to contradict or vary the policy in this case."

This instruction was prejudicial to plaintiff, because it told the jury, in effect, not to consider any oral testimony that contradicted the terms of the policy. If the jury had regarded this instruction, they would have found for defendant, for plaintiff himself admits that he had but a leasehold estate, while the policy itself stipulates that if he is not the fee simple owner he cannot recover.

Instruction No. 3 is also erroneous. Non-compliance with the promissory warranties respecting the taking of inventories and the preserving of books of accounts in an iron safe does not necessarily call for a verdict for defendant. If not entitled to recover for the stock of merchandise, plaintiff may still be entitled to recover for other property insured. Instruction No. 4 is likewise erroneous for the same reason. Instruction No. 6, we think, correctly defines the term "inventory" as used in the iron safe clause, but it is erroneous in that it tells the jury to find for the defendant in case they find this clause has not been complied with. Their finding, under this instruction, should be limited to the insurance on the stock of merchandise.

In view of the fact that plaintiff had been conducting a mercantile business in the

building for eleven months prior to taking out insurance, and had not at any time taken an inventory of his stock of merchandise, the court should not have modified instructions Nos. 7 and 15, but should have given them as originally prepared. Plaintiff's own testimony shows clearly that there has been no substantial compliance with the iron safe clause.

It was not error to modify, and give to the jury as so modified, instructions Nos. 8, 9, and 18. The modifications were properly made to permit the jury to consider the oral testimony concerning representations made to the agent at the time of plaintiff's application for insurance respecting his estate in, and the location of, the building.

For reasons hereinbefore given it was error to give instruction No. 19, either as originally presented or as modified by the court.

We reverse the judgment, set aside the verdict, and remand the case for a new trial.

Petition for rehearing denied December 22, 1914.

WISCONSIN SUPREME COURT.

W. D. TYRE, Appt.,
v.

H. E. KRUG et al., Respts.

(159 Wis. 39, 149 N. W. 718.)

Action — joinder — causes not affecting all parties.

1. A claim for damages for injuries to the private business of plaintiff cannot be joined with an action by one as citizen and taxpayer on behalf of all others of the class to enjoin the use of a schoolhouse for private business, where the statute provides that to be joined causes of action must affect all the parties to the action.

Schools — power to permit sale of books in school building.

2. Authority to permit the principal to conduct a business of selling school supplies at a profit in a school building is not conferred on the school board by a provision that it may adopt rules and regulations for the management of the public schools, and

adopt such measures as shall promote the public usefulness of the schools.

Parties — taxpayer's action — enjoining business in school building.

3. A citizen and taxpayer of a school district may, as representative of the class of taxpayers to which he belongs, maintain an action to enjoin the use of the school building for the conducting of a private business.

Costs — party successful in part.

4. A plaintiff may recover costs on appeal if he succeeds in reversing a ruling sustaining a demurrer to his complaint on the ground that it fails to state a cause of action, although the order dissolving the preliminary injunction must be affirmed because of improper joinder of different causes of action, which matter was not passed upon by the trial court.

(Winslow, Ch. J., and Vinje, J., dissent.)

(December 8, 1914.)

APPEAL by plaintiff from an order of the Circuit Court for Milwaukee County sustaining a demurrer to a complaint filed to enjoin defendants from conducting stores in their schools for the sale of schoolbooks and supplies at a profit affirmed.

Statement by Siebecker, J.:

The plaintiff brings this suit as a taxpayer against the defendants, who are the principals of five public high schools in the city of Milwaukee. It is alleged that the defendants have been conducting regular stores in the school buildings under their charge and control, wherein they have sold drawing instruments, schoolbooks, stationery, and blanks for a profit above the cost of such articles; that they pay no compensation for the use of the buildings for this purpose; that the school board denied the request of the Milwaukee Stationers & Manufacturers' Club to prohibit the use of the buildings for this purpose, and by an unanimous vote gave its assent that the same should be continued. It is also alleged that the plaintiff is now, and for years has been, engaged as a dealer in schoolbooks and school supplies, and that his income has been diminished by reason of these acts of the defendants. The plain-

Note. — Sale of books or other school supplies upon school property or by persons connected with schools.

Generally, as to the use of public school property for other than school purposes, see notes to State ex rel. Gilbert v. Dilley, 50 L.R.A.(N.S.) 1182, and Herald v. Board of Education, 31 L.R.A.(N.S.) 588.

While TYRE v. KRUG is the only case found passing upon the use of school prop-

erty for the sale of school supplies or the sale of such supplies for a profit by persons connected with the schools, the purchase and sale of text-books by school authorities for cost was passed upon in Kuhn ex rel. Sheehan v. Board of Education, 45 L.R.A.(N.S.) 972, and other similar cases will be found in the note appended thereto, as well as cases passing upon the power of school authorities to furnish text-books to pupils free of charge.

R. L. S.

tiff further alleges that his remedy at law is not adequate. He asks judgment for \$1,000 damages sustained by him because of the acts of the defendants, and that the defendants be enjoined and restrained during the pendency of this action, and until the further order of the court, from making any use of the buildings for the purpose of carrying on this business of offering for sale any schoolbooks or other school supplies, or otherwise attempting to make use of the school buildings under the permission given by the school board, and that he have such other and further relief as may be equitable, together with his costs and disbursements herein.

Injunction was granted during the pendency of this action upon the depositing of a bond for \$250 by the plaintiff. The defendants demurred to the complaint upon the grounds: (1) Several causes of action have been improperly united; and (2) the complaint does not state facts sufficient to constitute a cause of action. The court sustained the demurrer on the second ground, and ordered that the temporary injunction be dissolved. From this order sustaining the demurrer this appeal is taken.

Mr. C. H. Hamilton for appellant.

Messrs. Daniel W. Hoan and Clifton Williams, for respondents:

There was an improper joinder of actions.

Hawarden v. Youghiogheny & L. Coal Co. 111 Wis. 545, 55 L.R.A. 828, 87 N. W. 472; Tyler v. Stitt, 127 Wis. 379, 106 N. W. 114; Pietsch v. Krause, 116 Wis. 344, 93 N. W. 9.

These five defendants cannot be sued in one action.

Lull v. Fox & W. Improv. Co. 19 Wis. 101; Greene v. Nunemacher, 36 Wis. 50; Hoffman v. Wheelock, 62 Wis. 434, 22 N. W. 713, 716; Younkin v. Milwaukee Light, Heat & Traction Co. 112 Wis. 15, 87 N. W. 861; Draper v. Brown, 115 Wis. 361, 91 N. W. 1001.

Schoolhouses may be used for purposes that do not interfere with their use for actual school purposes.

Nichols v. School Directors, 93 Ill. 61, 34 Am. Rep. 160; Townsend v. Hagan, 35 Iowa, 194; Davis v. Boget, 50 Iowa, 11; Harmony Twp. v. Osborne, 9 Ind. 458; Lagow v. Hill, 143 Ill. App. 523, 238 Ill. 428, 87 N. E. 369; Cost v. Shinault, — Ark. —, 166 S. W. 740; Barnes's Appeal, 6 R. I. 591; Chaplin v. Hill, 24 Vt. 528; Russell v. Dodds, 37 Vt. 497; State v. Kessler, 136 Mo. App. 236, 117 S. W. 85; Gottlieb-Knabe & Co. v. Macklin, 109 Md. 429, 31 L.R.A. (N.S.) 580, 71 Atl. 949, 16 Ann. Cas. 1092; Hartwell v. Littleton, 13 Pick. 229; School Dist. v. Arnold, 21 Wis. 657; Dorner v. L.R.A.1915C.

School Dist. 137 Wis. 147, 19 L.R.A. (N.S.) 171, 118 N. W. 353.

Siebecker, J., delivered the opinion of the court:

It is contended that the plaintiff has attempted to join an individual cause of action in his favor for damages, with an action which he prosecutes as taxpayer in favor of himself and all others similarly situated, for an injunction to restrain defendants from using the schoolhouses to conduct the alleged private businesses. The allegations of the complaint are that the plaintiff has been damaged in his private business, for which he seeks to be compensated. Can such a cause of action be joined with the equitable relief sought by the plaintiff as representative of a class, namely, the taxpayers of the city of Milwaukee? Section 2647, Stat., prescribes what causes of action may be united in the complaint. "But the causes of action so united must all belong to one of these classes and must affect all the parties to the action. . . ." The complaint before us seeks to unite an action in equity prosecuted by the plaintiff in his representative capacity of citizen and taxpayer of the city of Milwaukee, in behalf of himself and all others similarly situated, and an action in his individual capacity to recover damages which he personally claims to have suffered through the acts of the defendants. No one except the plaintiff has any interest in his personal action, while the equitable cause of action for an injunction is in favor of a large number of persons whom he represents as a class. As held in Hawarden v. Youghiogheny & L. Coal Co. 111 Wis. 545, 55 L.R.A. 828, 87 N. W. 472: "Potentially all of the class are parties." Such an action cannot be united in the same complaint with an action which is brought to redress the personal wrongs of the plaintiff.

"The two causes of action would not both belong to any one of the classes specified in § 2647, Stat. 1898, nor would they both affect all parties to the action, as required by that section." Luther v. C. J. Luther Co. 118 Wis. 112, 99 Am. St. Rep. 977, 94 N. W. 69, and cases cited.

The trial court held that the complaint does not allege sufficient facts to constitute a cause of action, on the ground that the board of school directors of the city of Milwaukee is authorized to permit defendants such use of the school buildings as is set forth in the complaint. The court based its decision on the provisions of chapter 459, Laws of 1907, and § 453e, Stat. 1913.

The buildings erected for the public schools are to be devoted to the purposes

contemplated by the statutes of maintaining the public schools and providing popular instruction. The legislature has by law made provision to promote the cause of popular education by the organization of local school authorities, and conferred on them the power to raise by general taxation the money required to acquire schoolhouse sites and for building schoolhouses, and imposed upon school boards the duties of maintaining the required schools, and to devote these school properties to school purposes and manage them as prescribed by law. The allegations of the complaint are, in effect, that the school directors of the city of Milwaukee granted the defendants permission to use the school buildings of the city for the purpose of conducting private schoolbook and supply businesses for their personal profit. Do the statutes authorize the use of the public school buildings for conducting such private school businesses for personal profit? We have discovered no provision in the statute that confers any authority on school officers to grant the use of schoolhouses for such a private purpose, unless such authority is granted by the acts on which the trial court based its decision. Chapter 459, Laws of 1907, is "An Act Relating to School Boards and Common and High Schools in Cities of the First Class." Section 18 thereof provides: "The board shall be governed in all things by the school laws of the state, except as they are altered or modified by this act." The trial court considered that § 8 of this act, providing that the board may adopt a uniform system of instruction, and that the board "shall adopt at its discretion, and modify or repeal, by-laws, rules and regulations for its own government, and for the organization, discipline and management of the public schools under its control, and generally adopt such measures as shall promote the good order and public usefulness of said schools; provided that such by-laws, rules and regulations shall not conflict with the Constitution and laws of the state," conferred such authority. The context of this portion of the law clearly indicates that the power of making regulations as therein conferred was intended to include such regulations as were appropriate to promote good order, furnish useful and efficient instruction and such management of the school properties as would accomplish the purposes of providing the contemplated public education. If the complaint alleged a state of facts which showed that the school board in their official capacity were furnishing books and supplies to pupils as an incident to a successful and efficient conduct of the public schools, we would then have presented to us an entirely L.R.A.1916C.

different case from the one presented by the alleged facts in this complaint. The facts alleged in the complaint present a case wherein the defendants are charged with conducting "regular stores in the high school buildings under their charge and control, wherein they have sold drawing instruments, schoolbooks, stationery, and blanks for a profit above the cost of such articles," and that they so use the buildings without paying any compensation therefor. It is not charged that the alleged use of these schoolhouses by defendants in any way interferes with the uses of the buildings for school purposes. We find nothing in the part of the statute heretofore quoted, nor in the provision of § 435e, Stat. 1913, indicating a legislative intent to confer authority on the school boards of this state to permit the schoolhouses within their control to be used for the conduct of private businesses such as the defendants are alleged to be conducting for their personal profit. We think that school boards have not been granted authority to permit school buildings to be devoted to uses other than to school purposes, aside from those uses expressly enumerated in the statutes. The rule which was enforced under the statutes in the case of *School Dist. v. Arnold*, 21 Wis. 657, has not been modified by subsequent enactments by the legislature nor by the decisions in the cases of *Bell v. Platteville*, 71 Wis. 139, 36 N. W. 831; *Stone v. Oconomowoc*, 71 Wis. 155, 36 N. W. 829; and *State v. Eau Claire*, 40 Wis. 533. These decisions in no way referred to the extent or the nature of the authority conferred on school boards, nor did they, in principle, involve the questions here presented under the statutes regulating the government and management of the public schools. The *Arnold Case* was adhered to in *State ex rel. Weiss v. District Board*, 76 Wis. 177, 7 L.R.A. 330, 20 Am. St. Rep. 41, 44 N. W. 967.

The trial court erred in sustaining the demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action. The complaint states a good cause of action for relief to restrain the defendants from using the school buildings to conduct their private businesses for profits as alleged in the complaint. The plaintiff, as a taxpayer and resident of the city, is a proper party to prosecute the action for himself and all others similarly situated.

Since the complaint embraces a cause of action for recovery of plaintiff's personal damages, it follows that the complaint improperly unites this cause of action with a cause of action in equity for injunctive relief, and the demurrer on that ground

should have been sustained, and the demurrer on the ground that the complaint failed to state a cause of action should have been denied; but, since the plaintiff is the successful party on this appeal, he is entitled to recover his costs in this court, although the order appealed from, under the circumstances, must be affirmed on grounds other than those on which the trial court acted.

The order appealed from is affirmed.

Vinje, J., dissents.

Winslow, Ch. J., dissenting (December 16, 1914):

I agree that a cause of action for a wrong to a single individual cannot be joined with an action to redress or prevent a wrong done to a class, but in my judgment there is no actionable wrong of either kind stated in the complaint. Taking the alleged taxpayer's action first, it appears by the complaint that the principals of the public schools, with the assistance of some students, are selling to pupils necessary schoolbooks and utensils for a profit above the cost, and are using space in the school buildings therefor; that the facts have been investigated by the school directors, who have unanimously declared that it is for the best interests of the schools, pupils, and parents, in the way of convenience and economy, that the practice be continued; and that the so-called stores are not run for profit.

Inasmuch as the allegation of the complaint is positive that the so-called stores are operated for a profit, it will undoubtedly be necessary to consider the case on that basis, notwithstanding the statement of the school board that they are not conducted for profit. It may well be, however,—in fact, it seems very probable,—that the so-called profit consists of a margin above cost which goes into a fund used to beautify or provide equipment for the school buildings, as was suggested on the argument. The complaint significantly omits to charge that the profit goes to the personal enrichment of defendants.

However this may be, I think no cause of action is stated. Lawsuits are brought for the redress of substantial wrongs. Especially should this be true of the so-called taxpayer's action. The theory of this action is that the governing body of the municipality, or some administrative board, is either doing or about to do some act by which the interests of the taxpayers generally are, or will be, materially prejudiced. Liabilities are about to be created public moneys spent, or public property wasted in illegal or extra-legal enterprises. L.R.A.1915C.

The foundation of the action is not merely that the public authorities have done or are about to do an unauthorized or extralegal act, but that the act will result in unlawful expenditure of public funds, increased taxation, or waste of public property, to the prejudice of the taxpayers. Not every departure from the technically exact line of legal duty on the part of executive or administrative officers is subject to prevention or correction by the taxpayer's action. As said by this court in *Chippewa Bridge Co. v. Durand*, 122 Wis. 85, at page 107, 106 Am. St. Rep. 931, 99 N. W. 603: "It is the private interest of the taxpayer, after all, that enables him to set judicial machinery in motion in a suit of this sort." It is because the alleged unlawful act injures the taxpayer in his private interest—i. e., wastes or expends the money or property of the municipality, which belongs to the whole body of taxpayers—that the taxpayer may bring and maintain the action.

The complaint is barren of any allegation either that public money or property is injured or wasted by the operation of the so-called stores, nor does it allege that the interests of the educational system are in any way injuriously affected. There is therefore no wrong to the taxpayers alleged. Such being the case, it follows logically that there is no basis for an action for injury to the business of a private individual. *Stone v. Oconomowoc*, 71 Wis. 155, 36 N. W. 829.

ILLINOIS SUPREME COURT.

PEOPLE OF THE STATE OF ILLINOIS

v.

MORRIS MENDELSON et al., Plffs. in Err.

(264 Ill. 453, 106 N. E. 249.)

Evidence — burglary — sufficiency.

1. Conviction for burglary may be based on the fact that accused in the night drove a horse and wagon to the rear door of a store which had been feloniously entered

Note. — Acquittal or conviction upon a charge of burglary or feloniously entering with intent to steal goods of a certain person, as a bar to a subsequent prosecution based on the same entry, but charging intent to steal the property of another person.

While this precise question has but rarely arisen, *PEOPLE v. MENDELSON* is in accord with the few cases in point which have been found, excepting two early English cases which have been expressly disapproved. Thus, in *Kinney v. State*, — Tex. Crim.

and goods piled for removal near such door, which was partly open.

Criminal law — former jeopardy — burglary — taking goods of different persons.

2. A trial and acquittal of a person for feloniously entering a certain building at a certain time with intent to steal the goods of a specified person are not a bar to a subsequent prosecution for entering the same building at the same time with intent to steal goods of a different person.

Trial — instruction — singling out particular witness.

3. An instruction which singles out the testimony of policemen who were witnesses in a criminal case, and attempts to state the rule for determining its weight, is erroneous.

Appeal — erroneous instruction — immaterial error.

4. A judgment will not be reversed because the judge erroneously singles out and comments on the testimony of a particular

witness in his instruction, if it had no material effect upon the verdict.

(June 18, 1914.)

ERROR to the Criminal Court for Cook County to review a judgment convicting defendants of burglary. Affirmed.

The facts are stated in the opinion.

Mr. Louis Greenberg for plaintiffs in error.

Messrs. P. J. Lucey, Attorney General, George P. Ramsey, Assistant Attorney General, and MacLay Hoyne, for the State:

An acquittal, to be a defense or bar to another prosecution, must be an acquittal of the same identical offense,—that is, the identical act and crime.

Campbell v. People, 109 Ill. 565, 50 Am. Rep. 621, 4 Am. Crim. Rep. 338; Durham v. People, 5 Ill. 172, 39 Am. Dec. 407; Free-

Rep. —, 148 S. W. 783, it was held, on the same ground as that on which it has been held in this state that an acquittal of the larceny of property belonging to one person is not a bar to a prosecution for the larceny at the same time of property belonging to another person (see notes in 31 L.R.A.(N.S.) 723, and 42 L.R.A.(N.S.) 969), that a trial and acquittal upon an indictment charging the defendant with having entered a house occupied by a certain named person, with the intent to take property belonging to that person, are not a bar to a subsequent prosecution for burglariously entering (apparently at the same time) the same house, alleged to have been occupied by another person, with the intent to steal certain property belonging to the latter.

And in *Com. v. Hope*, 22 Pick. 1, holding that, upon an indictment charging the breaking and entering of a dwelling house with an intent to steal, and actually stealing therefrom, and a general verdict of guilty, the defendant should be sentenced as for housebreaking, and was not liable to a distinct sentence for larceny,—the court, in the course of its discussion, said: "It has been held on great consideration that an acquittal on an indictment for burglary, in breaking and entering a dwelling house with an intent to steal the goods of one person, is no bar to an indictment for the same breaking and entering with an intent to steal the goods of another person. But this stands upon other and peculiar grounds;" citing *Rex v. Vandercom*, 2 East, P. C. 519, where Mr. East says that "it was formerly considered that a person indicted and acquitted for breaking and entering a dwelling house in the night, and there stealing the goods of one person, could not be afterwards indicted for the same breaking and entering, and stealing the goods of another person, though he might be indicted of the simple larceny; but the cases L.R.A.1915C.

in which that doctrine was established have been since denied to be law in the case of *Vandercom & Abbott*."

In *Turner's Case*, J. Kelyng, 30, cited and discussed in 2 East, P. C. 521, 2 Leach, C. L. 717, it is said that "there was this question, one James Turner and William Turner, at Christmas sessions last, were indicted of burglary for breaking the house of Mr. Tryon in the night, and taking away great sums of money; and thereupon James Turner was found guilty and executed, but William Turner was then acquitted. And now there being great evidence that William Turner was in the same burglary with James Turner, and there being £47 of the money of one Hill, a servant to Mr. Tryon, stolen at the same time, which £47 was not in the former indictment, they would have indicted William Turner again now for burglary, for breaking the house of Mr. Tryon and taking thence £47 of the money of Hill; but we all agreed that William Turner being formerly indicted for burglary in breaking the house of Mr. Tryon and stealing his goods, and acquitted, he cannot now be indicted again for the same burglary for breaking the house; but we all agreed he might be indicted for felony, for stealing the money of Hill. For they are several felonies, and he was not indicted of this felony before; and so he was indicted. And afterwards I told my Lord Chief Justice Bridgeman what we had done, and he agreed the law to be so as we had directed."

And in *Jones's Case*, J. Kelyng, 52, cited and discussed in 2 East, P. C. 522, 2 Leach, C. L. 719, the defendants "were indicted for burglary for breaking the King's house at Whitehall, and stealing from thence the goods of the Lord Cornbury, and were found not guilty, and after were indicted for the same burglary and stealing the goods of Mr. Nunneay; and we agreed that they, being once acquitted for the burglary, could

land v. People, 16 Ill. 380; Guedel v. People, 43 Ill. 226; Spears v. People, 220 Ill. 72, 4 L.R.A.(N.S.) 402, 77 N. E. 112; 17 Am. & Eng. Enc. Law, 2d ed. 596, ¶ 7; United States v. Randenbush, 8 Pet. 288, 289, 8 L. ed. 948, 949; Winn v. State, 82 Wis. 571, 52 N. W. 775; Phillips v. State, 85 Tenn. 551, 3 S. W. 434, 7 Am. Crim. Rep. 318; State v. Cameron, 3 Heisk. 78; Com. v. Fredericks, 155 Mass. 455, 29 N. E. 622; Burns v. People, 1 Park. Crim. Rep. 182; State v. Burlingame, 146 Mo. 207, 48 S. W. 72; State v. Cooper, 13 N. J. L. 361, 25 Am. Dec. 490.

The intent here alleged was to steal goods of Stickler & Korach. In the acquittal indictment, the intent alleged was to steal goods of Goldstein, Harris, & Guthman. The two indictments allege the stealing of a different character of goods, respectively, and the property of different persons, respectively.

not be indicted again for the same burglary, but might be indicted for stealing the goods of Mr. Nunnesy according as it was formerly resolved in *Turner's Case*."

But in *Rex v. Vandercomb*, 2 Leach, C. L. 708, also cited and quite fully stated in 2 East, P. C. 519, holding, after an argument by the senior counsel in the exchequer chamber before all the judges, that an acquittal upon an indictment charging the defendant with having burglariously broken and entered a dwelling house and stolen certain goods therein was not a bar to a subsequent prosecution for the same burglarious entry alleged to have been with the intent to steal the goods,—Mr. Justice Buller, delivering the opinion of the judges, after stating with reference to *Turner's Case* and *Jones's Case*, the two cases quoted on behalf of the defendant, that they did not support the proposition contended for, said that the decision in the former case "was not a solemn judgment, for the prisoner was not indicted a second time for the burglary; it was merely a direction from the judges to the officer of the court how to draw the second indictment for the larceny, and it proceeded upon a mistake;" and that the latter case "proceeded entirely upon the decision in *Turner's Case*, and if the foundation fail, the superstructure cannot stand." And he concludes: "But authorities are not wanting to show the principle and foundation upon which the plea of *autrefois acquit* is built and must be sustained." And: "These cases establish the principle that unless the first indictment were such as the prisoner might have been convicted upon by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second."

And where, on a prosecution for burglary or felonious entry, allegation and proof as to the ownership of the property which it is alleged that the accused intend-

17 Am. & Eng. Enc. Law, 597, ¶ 2; Guedel v. People, 43 Ill. 226; Durham v. People, 5 Ill. 172, 39 Am. Dec. 407; Campbell v. People, 109 Ill. 565, 50 Am. Rep. 621, 4 Am. Crim. Rep. 338; Freeland v. People, 16 Ill. 380; Spears v. People, 220 Ill. 72, 4 L.R.A.(N.S.) 402, 77 N. E. 112; Nagel v. People, 229 Ill. 598, 82 N. E. 315; Ferguson v. People, 90 Ill. 510; Phillips v. State, 85 Tenn. 551, 3 S. W. 434, 7 Am. Crim. Rep. 318.

Separate rooms, stores, or offices having separate entrances in the same general building are the separate buildings or separate stores and offices of the lessees or renters, in contemplation of the burglary statute.

Mason v. People, 26 N. Y. 200; Smith v. People, 115 Ill. 17, 3 N. E. 733, 6 Am. Crim. Rep. 80; People v. Carr, 255 Ill. 203, 41 L.R.A.(N.S.) 1209, 99 N. E. 357, Ann. Cas. 1913D, 864; Flanagan v. People, 214

ed to steal are required, the rule laid down in the majority of the above cases seems clearly to be correct under the general rule as to the identity of offenses (see 12 Cyc. 280), as the evidence necessary to support the second indictment would not have warranted a conviction under the first.

But where an indictment for breaking and entering with intent to steal need not allege the ownership of the property which it is charged that the accused intended to steal, and such ownership need not be proved as charged (see *State v. Riddle*, 245 Mo. 451, 43 L.R.A.(N.S.) 150, 150 S. W. 1044, Ann. Cas. 1914A, 884), it would seem that a conviction or acquittal of a breaking and entry with intent to steal should bar a subsequent prosecution based on the same felonious entry, notwithstanding a difference in the alleged ownership of the property which it is charged that the accused intended to steal.

For the larceny of property from different owners at the same time as distinct offenses, see note to *State v. Sampson*, 42 L.R.A.(N.S.) 967.

As to the right to convict for several offenses growing out of the same facts, see note to *Hughes v. Com.* 31 L.R.A.(N.S.) 693, which note expressly excludes the question whether certain acts constitute but one offense within the law against double jeopardy, and, assuming that the offenses are not identical, discusses only the question whether there can be more than one prosecution when the same act constitutes two or more distinct offenses, or when more than one offense is committed in the prosecution of a single enterprise, or in the course of one transaction.

For the effect of an acquittal of the charge of larceny as a bar to a prosecution for forgery growing out of the same transaction, see *Spears v. People*, 4 L.R.A.(N.S.) 402, and note thereto.

A. C. W.

Ill. 170, 73 N. E. 347; 6 Cyc. 213; Ullman v. State, 1 Tex. App. 220, 28 Am. Rep. 405; Turner's Case, 2 East, P. C. 492, 2 Leach, C. L. 717; Rex v. Bailey, 1 Moody, C. C. 23; People v. St. Clair, 38 Cal. 137.

The question of whether the record offered in evidence proved a prima facie identity of the offense being tried, with the offense of which plaintiffs in error were acquitted, was a question for the court.

2 Whart. Crim. Ev. 10th ed. 1204; Spears v. People, 220 Ill. 72, 4 L.R.A.(N.S.) 402, 77 N. E. 112; Campbell v. People, 109 Ill. 565, 50 Am. Rep. 621, 4 Am. Crim. Rep. 338; Freeland v. People, 16 Ill. 380; Phillips v. People, 55 Ill. 429; Durham v. People, 5 Ill. 172, 39 Am. Dec. 407; Guedel v. People, 43 Ill. 226; State v. Williams, 152 Mo. 115, 75 Am. St. Rep. 441, 53 S. W. 424; State v. Ellsworth, 131 N. C. 773, 92 Am. St. Rep. 790, 42 S. E. 699; Lamphere v. State, 114 Wis. 193, 89 N. W. 128; State v. Blodgett, 143 Iowa, 578, 121 N. W. 685, 21 Ann. Cas. 231; State v. Rosa, 72 N. J. L. 462, 62 Atl. 695.

Instruction No. 3 given for the people, which is the only instruction in which policemen are mentioned, was proper under the conditions existing in this record.

People v. Campbell, 234 Ill. 391, 123 Am. St. Rep. 107, 84 N. E. 1035, 14 Ann. Cas. 186; People v. Gardt, 258 Ill. 469, 101 N. E. 687; Hronek v. People, 134 Ill. 139, 8 L.R.A. 837, 23 Am. St. Rep. 652, 24 N. E. 861; People v. Casey, 231 Ill. 261, 83 N. E. 278; St. Charles v. O'Malley, 18 Ill. 408; Roberts v. People, 226 Ill. 296, 80 N. E. 776; Stevens v. People, 215 Ill. 593, 74 N. E. 786.

An erroneous instruction not affecting the result of the suit is not such prejudicial error as will reverse the judgment of conviction.

People v. Campbell, 234 Ill. 391, 123 Am. St. Rep. 107, 84 N. E. 1035, 14 Ann. Cas. 186; Graff v. People, 208 Ill. 312, 70 N. E. 299; O'Donnell v. People, 224 Ill. 218, 79 N. E. 639, 8 Ann. Cas. 123; Quigg v. People, 211 Ill. 17, 71 N. E. 886; People v. Horschler, 231 Ill. 566, 83 N. E. 428; People v. Deluce, 237 Ill. 541, 86 N. E. 1080; Flanagan v. People, 214 Ill. 170, 73 N. E. 347; Beck v. People, 115 Ill. App. 19.

Craig, J., delivered the opinion of the court:

Plaintiffs in error were indicted in the criminal court of Cook county for the crime of burglary, and on a trial in that court were found guilty by a jury. The court overruled motions for a new trial and in arrest of judgment, and sentenced them to be confined in the penitentiary in accordance with the verdict. They have sued out L.R.A.1915C.

a writ of error and seek to reverse the judgment of the court below on the grounds that the trial court erred in refusing to admit proper evidence offered on their behalf, and gave improper instructions to the jury on behalf of the people.

The first count of the indictment charged, in apt terms, that plaintiffs in error, on the 26th day of January, 1913, did break and enter the building, store, and office of Herman Korach and Milton Stickler, with intent to steal the goods, chattels, money, etc., of said Korach and Stickler, and that they did steal twenty-five dresses and other property, money, current coins of the United States, etc., of the property of said Korach and Stickler. The second count charged the plaintiffs in error with breaking and entering the said building with intent to steal, and the third count charged the burglarious entry of the building without force, the doors and windows being open, with intent to steal, etc.

Korach and Stickler, who were partners and lessees of a part of the first story of No. 1648 Haddon avenue, in Chicago, each testified on the trial that they left their place of business on January 25th, which was Saturday, about 3 o'clock in the afternoon and locked the doors. They came down to their place of business on Sunday morning and found that the front door had been pried open and the rear door unbolted. Some pay envelopes containing small amounts of money for different persons in their employ had been taken from a tin box, torn open, and the money abstracted. Several bundles of dresses and goods which they were engaged in manufacturing had been piled up near the rear door. Two police officers, Barry and Ryan, testified to seeing one Snider, who was indicted jointly with plaintiffs in error, procure a horse and wagon from a livery stable on West Fourteenth street at about 3 o'clock in the morning of January 26, 1913. The two officers followed Snider, who drove the horse and wagon to the corner of Paulina and Haddon streets, where he was joined by the plaintiffs in error, who led the horse over to the building which was occupied by Korach & Stickler and backed the wagon up to the rear door, whereupon the officers arrested plaintiffs in error and Snider near the rear door in question, which had been partly opened. From this evidence the jury were justified in finding the defendants guilty of burglary as charged in the indictment.

The evidence offered by the defendants which the court refused to admit, and which ruling of the court is assigned for error, was the record of the criminal court of Cook county in the case of the people

against Nathan Steinberg, Harry Green, and Morris Mendelson (the plaintiffs in error in this case), and Jake Snider, containing the return of an indictment against said defendants charging them with burglary in breaking and entering a certain building, to wit, the store and office of David Goldstein, Joseph Harris, and Louis B. Guthman, an arraignment of said defendants on said charge, a trial by jury, the verdict of the jury finding the defendants not guilty, and the discharge of said defendants by the court. The defendants further offered to show that the police officers, Barry and Ryan, testified identically in said former trial as to the arrest of the defendants in the rear of the building at No. 1648 Haddon avenue, and that they were tried in that case for breaking into the building No. 1648 Haddon avenue. Defendants further offered to show that the firm of Goldstein, Harris, & Guthman were engaged in business in the building at No. 1648 Haddon avenue; that they occupied the fourth floor; that there were two entrances leading into the building, one at the front and the other in the rear of the building, which entrances led into a common hall going through the building, each floor having a door leading into the premises of different occupants. The above testimony was offered, as stated by counsel for plaintiffs in error, "for the purpose of showing a former acquittal on the identical charge, to wit, for the breaking and entering of the building at No. 1648 Haddon avenue on the 26th day of January, 1913, by the defendants."

While it is true that plaintiffs in error could not be tried again for an offense for which they had been previously tried, the record offered shows that the charge for which they were formerly tried and acquitted was entirely different from the charge in the case at bar on which they were tried and convicted. In the former trial they were tried for burglary and larceny of the goods of Goldstein, Harris, & Guthman. In the case at bar they were tried for the burglary and larceny of the goods of Korach & Stickler. These were two separate and distinct charges of separate and distinct burglaries. The evidence of the police officers, Barry and Ryan, as to following the plaintiffs in error and arresting them in the act of removing goods from the building which had been broken into, may have been the same in each case. The distinction between the two crimes, however, is shown by the additional testimony of Korach and Stickler, who testified in the case at bar that their money which they had put in the pay envelopes was taken, and that their goods were piled up near the rear door of L.R.A.1915C.

the building where plaintiffs in error were arrested, and the circumstances shown by the evidence from which the jury were justified in finding that plaintiffs in error were about to remove these goods in the wagon they had brought there. The crime of burglary, under the statute, consists of wilfully and maliciously breaking and entering a building, or entering a building with intent to commit larceny or felony. Not only must the entry be charged and proven, but also the intent to commit larceny or felony. As held in *Price v. People*, 109 Ill. 109, on an indictment for breaking and entering a dwelling house with intent to rob or steal, the intent with which the defendant enters the house is the gist of the charge. In an indictment for burglary, where it is charged the breaking and entry are with the intent to commit larceny, the indictment must allege the intent to steal the property of some person. Manifestly the indictment for burglary with intent to steal the goods of Korach & Stickler charged a different crime from the burglary with intent to steal the goods of Goldstein, Harris, & Guthman.

Counsel for plaintiffs in error in his brief quotes from vol. 3 of the *Encyclopedia of Pleading & Practice*, p. 785, as follows: "The rule laid down by the authorities to decide the question whether a former acquittal or conviction is a bar to a subsequent prosecution is: If the facts charged in the subsequent indictment would, if found to be true, have warranted a conviction upon the first one, then the former judgment is a bar to the later prosecution, otherwise not."

Following this rule, evidence of the breaking and entry and larceny, or circumstances showing the intent to commit larceny, of the goods of Korach & Stickler, could not have been properly offered to sustain the indictment in the trial for burglary and larceny of the goods of Goldstein, Harris, & Guthman, and, *vice versa*, evidence of the latter burglary was not competent on the trial of the case at bar. The evidence offered, being to the effect that plaintiffs in error had been tried and acquitted of an entirely separate and distinct crime from that of which they were charged and on trial in the case at bar, could not sustain a plea of *autrefois acquit*, and the court committed no error in refusing to admit it. *Spears v. People*, 220 Ill. 72, 4 L.R.A.(N.S.) 402, 77 N. E. 112. No other evidence was offered on behalf of plaintiffs in error.

The instruction complained of informed the jury that the business of a policeman or detective is a lawful one, and, when such persons possess information bearing upon the question of the guilt or innocence of a party on trial charged with crime, it is

their duty to appear and testify, if called, and the jury should not, through mere caprice or prejudice alone, reject their testimony, but, while taking into consideration their business and surroundings, the jury should at the same time consider their statements with candor and fairness, and give the same such weight as, under all the circumstances shown by the evidence, they think such statements fairly and justly entitled to. The instruction is faulty in singling out and calling attention to the testimony of particular witnesses, and should have been refused. *People v. Campbell*, 234 Ill. 391, 123 Am. St. Rep. 107, 84 N. E. 1035, 14 Ann. Cas. 186. It was held in the latter case that the giving of a similar instruction was not so prejudicial to defendants as to cause a reversal of the judgment, and we do not think the giving of the instruction in question in this case had any material effect on the verdict. An examination of all the instructions in the case discloses that other instructions were given in which the jury were correctly advised as to judging the credibility of the witnesses. They were directed to carefully scrutinize the testimony given and to consider all the circumstances under which any witness testified, his demeanor and manner while on the stand, his interest, if any, in the outcome of the case, the relations which he bears to the state or the defendants, the manner in which he might be affected by the verdict, the extent to which he is contradicted or corroborated by any other credible evidence, etc. No exception is taken to the other instructions, and we think the instructions, as a series, were fair.

There being no error sufficient to justify a reversal of this case, the judgment of the Criminal Court of Cook County will be affirmed.

Petition for rehearing denied October 7, 1914.

MAINE SUPREME JUDICIAL COURT.

CARRIE B. GRAFFAM, Admr., etc.,

v.

SACO GRANGE, PATRONS OF HUSBANDRY, NO. 53.

(112 Me. 508, 92 Atl. 649.)

Show — injury to patron — negligence of concessionary — liability.

1. A fair association is liable for the death of a patron by the negligence of a person to whom it has let space for a shooting gallery, in removing a cartridge from

a rifle, where his carelessness was such as to require oversight or precautionary steps to protect patrons, which the association failed to exercise.

Damages — death — pecuniary loss.

2. \$1,000 is the limit of allowance for the death of a boy to the only one pecuniarily interested in his life, whose life expectancy is twenty years after he will reach a productive age, where the statute limits recovery to pecuniary loss.

(December 30, 1914.)

MOTION for new trial and exceptions by defendant to rulings of the Supreme Judicial Court for York County made during the trial of an action brought to recover damages for the alleged wrongful killing of plaintiff's minor son, which resulted in a verdict for plaintiff. Motion overruled on condition of entry of remittitur by plaintiff.

The facts are stated in the opinion.

Messrs. Cleaves, Waterhouse, & Emery for defendant.

Mr. John G. Smith, for plaintiff:

The jury would have been justified in deciding that the corporation was negligent in not itself making an investigation without any notice.

Thornton v. Maine State Agri. Soc. 97 Me. 108, 94 Am. St. Rep. 488, 53 Atl. 979, 13 Am. Neg. Rep. 302; *Higgins v. Franklin County Agri. Soc.* 100 Me. 565, 3 L.R.A. (N.S.) 1132, 62 Atl. 708, 19 Am. Neg. Rep. 257.

The finding of the jury was not so manifestly against the weight of evidence as to show that it was influenced by prejudice, sympathy, or some other improper motive.

Pollard v. Maine C. R. Co. 87 Me. 61, 32 Atl. 735; *McKay v. New England Dredging Co.* 92 Me. 454, 43 Atl. 29; *Oakes v. Maine C. R. Co.* 95 Me. 103, 49 Atl. 418.

Philbrook, J., delivered the opinion of the court:

This is an action brought by an administratrix, under the provisions of Rev. Stat.

Note. — The liability of one conducting a fair or exposition for injury to patron from negligence of concessionary is discussed in the note to *Hollis v. Kansas City, M. Retail Merchants' Assn.* 14 L.R.A. (N.S.) 284, and is supplemented by notes to *Greene v. Seattle Athletic Club*, 32 L.R.A. (N.S.) 715, and *Wodnik v. Luna Park Amusement Co.* 42 L.R.A. (N.S.) 1070, covering the general subject of the responsibility of one maintaining a place of amusement for safety of patrons; and see also on the general question, the later cases *Bole v. Pittsburgh Athletic Club*, 46 L.R.A. (N.S.) 602, and *Wells v. Minneapolis Baseball & Athletic Assn.* 46 L.R.A. (N.S.) 606.

chap. 89, §§ 9, 10, to recover damages resulting from the death of a boy nearly eleven and one half years of age, his heirs being a mother, who is the administratrix, and three sisters. The plaintiff says that the defendant, while conducting an agricultural fair on hired grounds, allowed a person to erect and run a shooting gallery in which a 22-caliber repeating rifle was used; that a cartridge got lodged in the working parts of the rifle, and, while the person in charge of the gallery was trying to remedy the trouble, the rifle was accidentally and carelessly discharged, and the bullet passed through the boy's head, resulting in his death.

The defendant offered no evidence, but at the close of the plaintiff's testimony requested the presiding justice to direct a verdict for the defendant, and upon the refusal of the justice to so rule the defendant seasonably excepted. The jury returned a verdict for plaintiff in the sum of \$1,873.33. Defendant then filed a motion for a new trial on the usual grounds. As the exceptions and the motion raise the same questions, they will be considered together.

The evidence satisfactorily establishes the proposition that the boy met his death from the accidental discharge of the rifle, but the defendant urges that it should not be held liable for the damages resulting from that death. It says that the evidence does not show that the fair grounds were hired or the fair conducted by this defendant. A detailed discussion of the testimony upon this point would not be profitable, for this question was submitted to the jury under instructions which we assume were full and correct, since the charge of the presiding justice is not reported; and we are not disposed to disturb this feature of the verdict. It further says that it is not liable because all ordinary care was taken to protect the public, so far as a safe target was concerned, and that the accident was caused by the unfortunate manner in which the owner of the rifle attempted to remedy a trouble in the working of the rifle, and against this accidental result it says it was not bound to provide. We do not think this contention can prevail. The defendant says that the case at bar differs from *Thornton v. Maine State Agri. Soc.* 97 Me. 108, 94 Am. St. Rep. 488, 53 Atl. 979, 13 Am. Neg. Rep. 302, and, while this is partially true, yet certain principles of law expounded in that case are applicable to this one. In that case our court said: "It is too well settled to need the citation of authorities, that if the owner or occupier of land either directly or by implication induces persons to come upon his premises, he thereby assumes an obligation to see that

such premises are in a reasonably safe condition, so that the persons there by his invitation may not be injured by them or in their use for the purpose for which the invitation was extended. . . . It was its [the defendant] duty to use reasonable care that there should be no traps or pitfalls into which the invited might fall, and that there should be no dangerous plays or sports or exhibitions by which the invited might be injured."

In the case at bar there is no satisfactory evidence that the defendant took sufficient precautionary measures regarding the protection of the public from the careless handling of a dangerous firearm. Apparently it let the ground privilege for the shooting gallery and gave the matter no further attention. It is suggested that on the second day of the fair the target protection was enlarged, but it does not appear that even this was the result of careful supervision by the defendant. In *Conrad v. Clauve*, 93 Ind. 476, 47 Am. Rep. 388, the court said: "The practice in target shooting appears to have been a part of the entertainment carried on at the fair, and as the defendants were the owners of the premises, and the managers and controllers of the fair, the practice in target shooting was a part of their exhibition, and under their supervision and control, as much as any other part of the fair. And those having charge of . . . it, while, perhaps, not strictly agents or servants of the defendants, were acting under the license and permission of the defendants; and such a relation existed between them as will hold the defendants liable for injuries resulting from their negligence in not properly controlling the conduct and management of this part of their exhibition."

Upon this principle of law, our own court in *Thornton v. Maine State Agri. Soc.* supra, said: "By inviting patrons to their fair, they make themselves bound to use reasonable care to see that the fair in all its parts is safe and is conducted safely, whether the various parts of the fair are conducted and managed by the owners themselves, or with their permission by licensees, independent contractors, or lessees."

In the case at bar the manner and means used by the owner of the shooting gallery to remedy the defective condition of the rifle seem to us to be clearly careless and negligent. To allow such negligence, or to let grounds to such a careless person, with no careful supervision, oversight, or precautionary steps having been taken, would seem to clearly fix the liability of the defendant so far as this branch of the case goes.

The only remaining point for discussion is the amount of the damages. In construing

ing the act under which this suit is brought, this court has declared that "no damages can be recovered for any grief, distress of mind, loss of mere companionship or society, or injury to the affections, suffered by the beneficiaries. . . . The injury for which damages can be recovered must be wholly to the beneficiaries themselves, and it is limited to the pecuniary effect of the death upon them." *McKay v. New England Dredging Co.* 92 Me. 454, 43 Atl. 29.

One of the beneficiaries, a sister, is already married and has a husband to support her. The other two sisters, older than the deceased boy, are not likely, in the ordinary course of human probabilities, to be much affected pecuniarily by his death. The pecuniary effect upon the mother is the principal question. According to the testimony, her expectancy of life is a little over twenty-five years. Had the boy lived, he would have been compelled by the laws of this state to attend school nearly five years longer, and in that time at least would hardly be expected to contribute anything to the support of his mother. Assuming that during the next twenty years of his life he had been a dutiful son to his mother, had been industrious and frugal, and had not taken on other domestic burdens by marriage, he would have been of financial aid to his mother. All these elements, however, are more or less speculative. They are in the realm of possibility, not the realm of certainty. During the earlier years following the school age, the financial benefit must necessarily be small.

After a full consideration of all the situation, the court is of opinion that the verdict should not have been in excess of \$1,000. It is therefore ordered that, if the plaintiff remit all the verdict in excess of \$1,000, the motion is to be overruled; otherwise new trial to be directed. This order disposes also of the exceptions.

MISSISSIPPI SUPREME COURT.

J. P. SPINKS, Appt.,

v.

W. M. JORDAN et al.

(— Miss. —, 66 So. 405.)

Usury — right of creditor to question.

1. Judgment creditors of an insolvent debtor may show usury in a prior note of their debtor secured by deed of trust, and have it eliminated from such indebtedness.

Tender — necessity in action to eliminate usury.

2. Judgment creditors of an insolvent L.R.A.1915C.

debtor need not tender the amount due to secure elimination of usury from a prior indebtedness secured by a trust deed on the property, where they are unable to state the true balance owing to the holder because they have not access to the accounts.

(November 23, 1914.)

APPEAL by defendant from a decree of the Chancery Court for Leake County overruling a demurrer to a bill filed to enjoin the foreclosure of deeds of trust. **Affirmed.**

The facts are stated in the opinion.

Mr. J. L. McMillon, for appellant:

The plea of usury is a personal privilege which complainants are not legally entitled to plead.

1 High, Inj. § 234; 39 Cyc. 999.

Complainants, having admitted that there is some amount due defendant by the Tates, are required to tender with their bill an amount which in good faith will cover the sum legally due appellant, and to, moreover, offer in their bill to pay whatever may be found to be legally due him on an accounting.

Rush v. Pearson, 92 Miss. 153, 45 So. 723; *Crittenden v. Ragan*, 89 Miss. 185, 42 So. 281; *Purvis v. Woodward*, 78 Miss. 929, 29 So. 917; *Casserly v. Witherbee*, 119 N. Y. 522, 23 N. E. 1000.

Mr. O. A. Luckett, for appellees:

Complainants may avail themselves of the defense of usury.

Note. — Right of creditors to set up usury in their debtor's contract with others.

I. Introductory, 635.

II. In general.

a. Doctrine that usury is a defense personal to debtor.

1. In general, 636.

2. Exceptions, 636.

b. Doctrine that usury is not a defense personal to debtor, 637.

c. Pennsylvania doctrine, 637.

III. Effect of debtor's insolvency, 638.

IV. Recovery of usury paid, 640.

V. Extent of relief, 641.

VI. Particular classes of creditors.

a. General creditors, 642.

b. Judgment and attachment creditors.

1. Rule that such creditors may take advantage of usury, 643.

2. Rule that they cannot, 645.

c. Junior mortgagees.

1. Rule that junior mortgagees may take advantage of usury, 645.

2. Rule that they cannot, 646.

VII. Effect of judgment on the usurious debt, 647.

Boyd v. Warmack, 62 Miss. 536; Georgia State Bldg. & L. Asso. v. Grant, 82 Miss. 424, 34 So. 84; Brooks v. Todd, 79 Ga. 692, 4 S. E. 156; Pope v. Solomons, 36 Ga. 541; Coleman v. Cole, 158 Mo. 260, 59 S. W. 106; Marx v. Hart, 166 Mo. 503, 89 Am. St. Rep. 715, 66 S. W. 280; Western Storage & Warehouse Co. v. Glasner, 169 Mo. 38, 68 S. W. 917; American Rubber Co. v. Wilson, 55 Mo. App. 656; Voorhis v. Staed, 63 Mo. App. 370; Carow v. Kelly, 59 Barb. 239; Dix v. VanWyck, 2 Hill, 522; Chapuis v. Mathot, 91 Hun, 565, 36 N. Y. Supp. 835; Thompson v. Van Vechten, 27 N. Y. 568; Mason v. Lord, 40 N. Y. 488; Hamilton-Brown Shoe Co. v. Mayo, 8 Tex. Civ. App. 164, 27 S. W. 781; Martin Brown Co. v.

Perrill, 77 Tex. 199, 13 S. W. 975; Stein v. Swensen, 44 Minn. 218, 46 N. W. 360; Re Miller, 118 Fed. 360; Mansfield v. Ogle, 3 Eq. Rep. 907, 24 L. J. Ch. N. S. 450, 1 Jur. N. S. 603, 3 Week. Rep. 557; Cole v. Bansemer, 26 Ind. 94; Banta v. Louisville Sav. Loan & Bldg. Co. 22 Ky. L. Rep. 1045, 59 S. W. 501; Trusdell v. Dowden, 47 N. J. Eq. 396, 20 Atl. 972; Chamberlain v. Dempsey, 14 Abb. Pr. 241; Mutual L. Ins. Co. v. Bowen, 47 Barb. 618; Maloney v. Eaheart, 81 Tex. 281, 16 S. W. 1030; Johnston v. Lasker Real Estate Asso. 2 Tex. Civ. App. 494, 21 S. W. 961; Washington v. Soria, 73 Miss. 665, 55 Am. St. Rep. 555, 19 So. 485; Jones v. Jones, 99 Miss. 600, 55 So. 361.

I. Introductory.

It is assumed in the present note that the debtor might take advantage of the usury in the transaction involved. Some cases involving creditors which turn on the fact that even the borrower could not take advantage of the usury have been included, but the note is not intended to be exhaustive of such cases.

Consequently, cases in which the right of the debtor himself is barred by the statute of limitations, such as Gramling v. Pool, 111 Ga. 93, 36 S. E. 430, have been excluded.

So, cases such as Mason v. Pierce, 142 Ill. 331, 31 N. E. 503, have been excluded where, in a contest over the right of a junior encumbrancer by virtue of a judgment lien to raise the question of usury against a mortgagee to whom the mortgagor had conveyed the property in satisfaction of the debt, the decision was based upon the theory that after making such payment the mortgagor was no longer in a position to invoke the usury laws.

And also cases such as Building & L. Asso. v. Price, 18 Tex. Civ. App. 370, 46 S. W. 92, where it was held that a second mortgagee who had received his mortgage from a subsequent purchaser of the mortgaged property, who had assumed the payment of the first mortgage, could not plead usury in the first mortgage, since his mortgagor could not do so.

Cases generally where usury has been paid, and the creditor is defeated in his attempt to recover it on the theory that the debtor could not recover it, have been excluded.

And also where the debtor has assigned his right to recover usury, such as American Sewing Mach. Co.'s Appeal, 83 Pa. 198.

So, cases in which the right of a corporate creditor to take advantage of usury in his debtor's contract with others is denied on the theory that, the corporation being prevented by some statute from pleading usury, its creditor cannot do so, such as Lembeck v. Jarvis Terminal & Cold Storage Co. 70 N. J. Eq. 757, 64 Atl. 126 and The Vigilancia, 19 C. C. A. 528, 38 U. S. App. 563, 73 Fed. 452, are in general excluded. L.R.A.1915C.

The right of trustees for benefit of creditors, or trustees in insolvency or bankruptcy, to set up usury, is not discussed.

These cases are illustrative, but not exhaustive, of those excluded. All cases have been excluded in which the decision is on the theory that the debtor himself could not take advantage of the usury.

Where creditors, especially lien creditors, have, in the enforcement of their lien or otherwise, obtained title to the property, so that they stand in the relation of purchasers, their rights in such relation are not discussed, but in some such cases such parties are treated as creditors or subsequent encumbrancers and their rights determined from this relation. The questions arising under such a theory are discussed.

As to the right of a vendee of real estate which is subject to a lien, to raise the question of usury, see the note to Stuckey v. Middle States Loan, Bldg. & Constr. Co. 8 L.R.A.(N.S.) 814, and the subsequent note to Burnett v. Young Men's Bldg. & L. Asso. 48 L.R.A.(N.S.) 840.

See subdivision VI. of the note to Hiller v. Ellis, 41 L.R.A. 707, as to who may and who may not urge the usurious character of the debt preferred in an assignment for creditors.

The method followed in treating this subject results in some duplication of citations. In the first five subdivisions of the note, the general rules governing the question are discussed abstractly, without particular reference to the character of the creditor involved. This follows the method of treatment by the courts. To illustrate, the rule that usury is a defense personal to the debtor and those in privity with him has been applied in case of general creditors, judgment creditors, and junior mortgagees. The character of the creditor is only an incident. In other cases the character of the creditor is made the determining factor, and necessarily these must be treated under a subdivision devoted to creditors of that kind. In order that the user of the note may have all cases involving creditors of the particular character being discussed, those cases decided under the general rules above referred to are again cited.

Complainants are not required to tender the amount due before filing their bill.

Parchman v. McKinney, 12 Smedes & M. 631; Norcuum v. Lum, 33 Miss. 299; Chaffe v. Wilson, 59 Miss. 42; Aust v. Rosenbaum, 74 Miss. 893, 21 So. 555; Pom. Eq. § 388.

Reed, J., delivered the opinion of the court:

Appellees, judgment creditors of A. H. Tate, Sr., and A. H. Tate, Jr., filed their bill in chancery to enjoin the foreclosure of deeds of trust given by Tates, senior and junior, in favor of appellant, J. P. Spinks, to secure to him certain indebtedness

owing for merchandise and supplies furnished; the amount of such indebtedness being evidenced by promissory notes and open accounts. Appellees prayed in their bill for an accounting to show the correct balance due appellant, for the appointment of a receiver to take charge of the property, and for the sale of the property so that the true amount due under the deeds of trust could be paid, with the application of the balance as payment on the judgments. It is charged in the bill that there is usurious interest on the notes. It is also alleged therein that appellant charged exorbitant prices for supplies fur-

II. In general.

a. Doctrine that usury is a defense personal to debtor.

1. In general.

While usurious contracts have been declared void, the tendency, even under statutes declaring such contracts void, has been to treat them as voidable. In very few instances within the scope of the present note has such a contract been regarded as void in the strict sense of that word. See Harrold v. Morgan, 66 Ga. 398, *infra*, VI. b, 1.

The majority of courts, while they may speak of such contracts as void, treat them as voidable. If a contract is void, it confers no rights, imposes no liabilities, and cannot be ratified. It leaves the relations of the parties as if no attempt had been made to enter into a contract. The question discussed in the note vanishes in case of a usurious agreement which is void in the strict sense of that word. It is apparent that usurious contracts are generally regarded as voidable merely, to be avoided at the election of someone. For the purpose of this note it is assumed that the debtor has the right to make such an election; and the question discussed is whether the right of the debtor can be exercised by a creditor other than the one with whom the usurious contract is made.

The right of a creditor of the debtor to take advantage of usury in his debtor's contract with other creditors has been denied on the broad ground that the defense is personal to the debtor, that it cannot be set up by a stranger to the contract, but only by the parties or their legal representatives or those in privity.

This was held in case of creditors whose debts were secured by a common mortgage. Adams v. Robertson, 37 Ill. 45.

This rule has been applied in case of judgment creditors. Harbinson v. Harrell, 19 Ala. 753; Baskins v. Calhoun, 45 Ala. 582; Carmichael v. Bodfish, 32 Iowa. 418; Lee v. Feamster, 21 W. Va. 108, 45 Am. Rep. 459; Barbour v. Tompkins, 31 W. Va. 410, 7 S. E. 1.

The rule has also been applied in case of junior mortgagees. Stickney v. Moore, 108 L.R.A.1915C.

Ala. 590, 19 So. 76 (even though the debtor is insolvent); Loomis v. Eaton, 32 Conn. 550 (second mortgagee who has purchased equity of redemption); Darst v. Bates, 95 Ill. 493 (here stated that neither debtor nor his surety set up the defense of usury, "and that ends it"); Union Nat. Bank v. International Bank, 123 Ill. 610, 14 N. E. 859; Powell v. Hunt, 11 Iowa, 430; Pritchett v. Mitchell, 17 Kan. 355, 22 Am. Rep. 287 (debtor was insolvent, but no point made of this); Farmers' & M. Bank v. Kimmel, 1 Mich. 84; Richardson v. Baker, 52 Vt. 617 (mechanics' lien which had ripened into a mortgage under a statute); Lee v. Feamster, 21 W. Va. 108, 45 Am. Rep. 549.

In Mechanics' Bank v. Edwards, 1 Barb. 271, affirmed on rehearing in 2 Barb. 545, a mortgagee whose lien was subsequent to that of a judgment was held not to be a borrower and entitled to take advantage of usury in the superior lien under a statute. But see the subsequent cases in this state, *infra*, V.

The rule was applied to the case of a junior mortgagee who accepted a bill in favor of a senior mortgagee for the amount of his debt, whereupon the senior mortgagee released his lien. Cook v. Dyer, 3 Ala. 646.

The assignee of a mechanics' lien which, by due proceeding under the statute, had ripened into a mortgage, cannot avail himself of usury in a senior mortgagee's contract. Richardson v. Baker, 52 Vt. 617. The usury here had been paid, but the balance of the debt had not. The court, however, treats it as an action to recover back usury, and holds that this right is personal to the party paying the usury. See *infra*, IV., as to effect of payment generally.

Cases that are based upon the fact that the creditors seeking to take advantage of the usury are lien creditors are treated under the proper subdivision *infra*. See VI. b. and VI. c.

2. Exceptions.

Certain creditors are treated as being in privity with the debtor, and therefore entitled to take advantage of usury in the debtor's contract with others.

Within the rule that the defense of usury

nished A. H. Tate, Sr., and A. H. Tate, Jr., and that there are large amounts which he has failed to credit on the notes.

Appellees aver that they are unable to state the amount of the credits which should have been given, for the reason that they have no means of ascertaining the sum, and that such information can only be obtained from inspection of appellant's books. They allege that if the notes were purged of all usurious interest, and the proper reduction made because of overcharges for supplies, and true application made of all credits, that only a small amount would be owing appellant on the indebtedness,—not

near so much as he was claiming to be due when he directed the foreclosure of the deeds of trust. They further charged that both A. H. Tate, Sr., and A. H. Tate, Jr., were insolvent.

To this bill a demurrer was filed by appellant and W. A. Ellis, trustee in the deeds of trust. From the decree by the chancellor overruling the demurrer, this appeal was granted to settle the legal principles of the case.

The following were assigned as grounds in the demurrer and are urged at this hearing, by appellant: (1) The plea of usury is a personal privilege, and could not be

may be set up by anyone who claims under the mortgagor and in privity with him, a judgment creditor whose judgment becomes a lien upon the whole interest of his debtor in land which had been mortgaged under a usurious contract may, when he is made a party to an action by the mortgagee to enforce his mortgage against the land, avail himself of the defense of usury to the full extent of his legal lien upon the premises by virtue of his judgment. *Post v. Dart*, 8 Paige, 639.

That a judgment creditor who has levied upon property covered by a mortgage stands in privity with the debtor is held also in *Dix v. Van Wyck*, 2 Hill, 522, and *Carow v. Kelly*, 59 Barb. 239.

The rule that these cases was applied to a fourth mortgagee, allowing him to plead usury in the contract of a third mortgagee, in a proceeding for the distribution of surplus moneys arising from a sale of the mortgaged premises under a prior mortgage. *Mutual L. Ins. Co. v. Bowen*, 47 Barb. 618.

See further exceptions, *infra*, III.

b. Doctrine that usury is not a defense personal to debtor.

On the contrary, it has been held that the plea of usury is not a personal one, and may be made by a creditor of the debtor.

This has been held in case of judgment creditors who have had execution levied. *Sloss v. Levi*, 5 Ky. L. Rep. 431.

It is stated in *Banta v. Louisville Sav. Loan & Bldg. Co.* 22 Ky. L. Rep. 1045, 59 S. W. 501, that in a contest between parties asserting liens upon the same property owned by a common debtor, either party may make any defense which the common debtor could make, and therefore may set up usury in the other creditor's contract.

This has been held in case of junior mortgagees. *Shanks v. Stephens*, 4 Ky. L. Rep. 838; *Shanks v. Stephens*, 6 Ky. L. Rep. 526.

Nothing is said as to insolvency in the abstract of the case of *Shanks v. Stephens*, 4 Ky. L. Rep. 838, but in *Shanks v. Stephens*, 6 Ky. L. Rep. 526, a condition of the right of the junior mortgagee to plead usury is that the property be not sufficient to pay the liens.

Under a statute making merely the usuri-

ous excess void, it is stated that the hardship and injustice of the defense of usury are in a great measure, if not entirely, removed, and thus a strong reason for the strictness of the old rule that no one but the debtor could make the defense has been swept away; that the just rights of the senior debtor are protected, as he can still recover his debt, and as great a rate of interest as in the judgment of the law he ought to demand; and therefore there can be little, if any, wrong to him in allowing a junior encumbrancer to protect the fund in which he is interested for the payment of his debts, by making the defense of usury. *Cole v. Bansemer*, 26 Ind. 94. The debtor in this case was insolvent.

That the creditor of an insolvent debtor may take advantage of usury in his debtor's contract with other creditors is held also in *Hart v. Hayden*, 79 Ky. 346, where it is stated that the defense of usury is not personal to the debtor.

Cases based upon the fact that the creditor seeking to set up usury is a lien creditor are discussed under the proper subdivision, *infra*. See VI. b and VI. c.

c. Pennsylvania doctrine.

Under a statute making a usurious contract void, it was held by the Pennsylvania courts that a junior mortgagee might take advantage of usury in a contract of the debtor with a prior mortgagee. The question arose after a sale of the premises under a foreclosure decree, but no point is made of the fact that a judgment had been rendered. *Greene v. Tyler*, 39 Pa. 361.

In this case the creditor alleged a fraudulent setting up of the mortgage. The only fraud, however, appears to have been in including usurious interest in the judgment for the debt.

But under a statute which does not make it unlawful for a debtor to pay, and a creditor to receive, more than the legal interest, a second mortgagee cannot take advantage of usury in the contract of a prior mortgagee in the absence of fraud or collusion, the mere fact of the prior creditor receiving usury not being a sufficient showing that fraud was intended. *Lennig's Appeal*, 93 Pa. 301. A judgment had been taken in

availed of by the judgment creditors; (2) appellees, admitting an amount to be due appellant, failed to tender such amount or to offer in their bill to pay whatever amount might be found to be due upon an accounting.

Appellant contends that there was not sufficient privity to enable judgment creditors to exercise the privilege of pleading usury; that this privilege, which is personal to the debtors, could not be extended in this case to such creditors. It appears that in some states it is held that the pleading of usury is a privilege personal to the debtor, and that the judgment creditor cannot take advantage thereof in contracts to which he was not a party without the consent of the debtor.

this case also, and here this fact is emphasized and regarded as conclusive in the absence of fraud or collusion.

But a junior mortgagee may raise the question of usury in a prior judgment lien without showing fraud therein, where the bond and warrant of attorney on which the judgment was rendered were conditioned for the payment of all moneys which had been borrowed from the judgment creditor, or which may from time to time be borrowed from the same, since, the judgment being indefinite as to the extent of the sum covered by the lien, the judgment creditor must prove the amount of his claim, and upon such proof being offered it is the privilege of the junior mortgagee to offer evidence to controvert the truthfulness of his claim. Price's Appeal, 84 Pa. 141.

Relying upon the case of *Greene v. Tyler*, 39 Pa. 361, supra, the auditor in *Bachdell's Appeal*, 56 Pa. 386, held that judgment creditors can question the validity of a prior judgment on the ground of usury, and this holding was approved by the supreme court.

So, a subsequent judgment creditor has a right to show that the debt secured by a prior mortgage was usurious in its inception, and have it reduced by payments which ought to have been deducted from the principal, upon the distribution of a fund arising from the sale of the mortgaged premises. *Building Asso. v. O'Connor*, 3 Phila. 453.

The first of the Pennsylvania cases was decided under a statute making the usurious contract void. No statute is referred to in the *O'Connor Case*, and apparently it was decided after the statute had been changed. Under a subsequent statute which merely rendered the usurious contract unenforceable, it was held that judgment creditors could not take advantage of usury in the contract with a prior judgment lien holder in the absence of fraud and collusion; and that the mere payment or agreement to pay usurious interest did not show such fraud and collusion. *Second Nat. Bank's Appeal*, 85 Pa. 528; *Wheelock v. Wood*, 83 Pa. 298. L.R.A.1915C.

"In other states the lien of a judgment or execution creditor upon the property of the debtor is held to establish sufficient privity to enable such creditor to exercise the debtor's privilege of setting up usury in defense of the claims of other creditors. The view is taken that such creditors are not strangers within the rule prohibiting strangers to the usury from taking advantage of it." 39 Cyc. 1073.

It was held in *Bachdell's Appeal*, 56 Pa. 386, that a mortgage may be impeached before an auditor for usury by subsequent judgment creditors to divert that portion of the fund arising from the sale of the mortgaged premises which exceeds the real debt after the usury is deducted, and to appropriate it to the payment of their own

A judgment creditor has no right to raise any question as to usurious interest which has been paid to a prior judgment creditor, although the payments at the higher rate have been indicated on the judgment record, in the absence of fraud or collusion. *Nicholson's Appeal*, 8 Sadler (Pa.) 396, 20 W. N. C. 339, 11 Atl. 562.

This rule was followed, and an unsecured creditor was held to have no standing to object to a settlement of his debtor with another creditor in which notes including usurious interest were given, unless the agreement to pay a higher rate was part of a scheme to cheat and defraud creditors. *Selser's Estate*, 141 Pa. 529, 21 Atl. 777.

The cases in which the Pennsylvania doctrine was established were cases in which the creditor was seeking to take advantage of usury as against another creditor whose debt had been reduced to judgment. There was thus introduced into the consideration of the question the conclusiveness of judgments. Under such circumstances it is correctly held that the judgment is conclusive in the absence of fraud or collusion. The doctrine as thus established in this state has not been extended to cases in which the creditor was seeking to take advantage of usury as against one other than a judgment creditor, except in *Selser's Estate*, supra, and here the fact of a settlement between the debtor and usurious creditor was held to prevent another creditor taking advantage of the usury.

III. Effect of debtor's insolvency.

The rule that the defense is personal has been adhered to even though the debtor was insolvent. *Stickney v. Moore*, 108 Ala. 590, 19 S. E. 76; *Carmichael v. Bodfish*, 32 Iowa, 418.

Even though the debtor is insolvent, a junior judgment creditor cannot plead usury in the contract of a senior encumbrancer, since the statute protects those who are or may be liable on the usurious contracts, and they alone can interpose the illegality as a defense. *Carmichael v. Bodfish*, supra.

debts. This question was raised in the case of *Boyd v. Warmack*, 62 Miss. 536, and we quote in full the headnote to that case, as follows: "The beneficiary in a deed of trust on land, even after a sale thereunder, he being the purchaser, has the right to show usury in the debt secured by a prior deed of trust upon the same land, and to have the security therefor limited to the satisfaction of the legal amount thereof; and this right exists, notwithstanding a sale under the senior trust deed and a purchase by the *cestui que trust* therein, if the usury in the debt was not then known to the beneficiary in the junior trust deed."

It is our opinion that appellees, judgment creditors, had the right to show usury in the indebtedness secured by the deed of

trust, and to have such indebtedness reduced by the deduction therefrom of the interest illegally charged.

We do not see that it was necessary for appellees to make a tender in this case, as contended for by appellant. There was no effort to cancel a mortgage. Appellees clearly show that they were unable to state what was the true balance owing by the debtors. This could only be ascertained from the books of appellant and perhaps after a full hearing of the case. Their inability to state definitely the amount due was not from their fault, but, according to their averment, was by reason of the fault of appellant. The bill does not seek to remove appellant from his place as a first lienor. The prayer specifically asks that

Especially is this true if the creditor fails to show that his debtor was insolvent at the time the debt on which the judgment was rendered was created, since he then shows no equitable reason why he should be allowed to interpose the defense of usury against another creditor of his debtor. *Ibid*.

See *Pritchett v. Mitchell*, *infra*, VI. c. 2.

But other cases, while admitting the general proposition that the right to take advantage of usury is the personal privilege of the debtor, hold that where the debtor is insolvent the creditor may take advantage of the usury. Thus, it was held in *Pope v. Solomons*, 36 Ga. 541, that where an insolvent debtor, after conveying his property to a purchaser and directing him to pay his debts, had absconded, a creditor could plead usury in his contract with another creditor. It is stated that the creditor seeking to avoid the usurious contract is not a mere stranger having no interest in the result of the usurious transaction. The criticism of this case in *Gatewood v. City Bank*, 49 Ga. 45, is not sustained by subsequent decision in this state.

The view taken in *Pope v. Solomons*, that the creditor of an insolvent debtor is in such privity with his debtor as to enable him to raise the question of usury in the debtor's contract with another creditor, is approved and affirmed in *Stone v. Georgia Loan & T. Co.* 107 Ga. 524, 33 S. E. 861.

While recognizing the abstract rule that a plea of usury is a personal plea, it is held in *Brooks v. Todd*, 79 Ga. 692, 4 S. E. 156, that where the debtor is insolvent and there is a fund in court to be distributed, equity will allow one creditor to suggest usury as to another creditor, and will compel the usurious creditor to write off his usury and receive only his principal and legal interest.

On the theory that a mortgage creditor has no right to collect usurious interest from an insolvent debtor, to the prejudice of other creditors who are objecting thereto, the court in *Burgwyn Bros. Tobacco Co. v. Bentley*, 90 Ga. 508, 16 S. E. 216, ordered the sheriff, in case the mortgaged property brought more than enough to satisfy the amount of the mortgage creditor's debt with L.R.A.1915C.

lawful interest, to turn over to a receiver for the general creditors a specified sum amply sufficient to cover the amount of usury, the disposition of which was to be determined by the final decree. A similar ruling was made in *Weihl v. Atlanta Furniture Mfg. Co.* 89 Ga. 297, 15 S. E. 282.

By subsequent statute in Georgia, it is provided that "the plea of usury is personal; but a creditor has no right to collect usurious interest from an insolvent debtor to the prejudice of other creditors." *Stone v. Georgia Loan & T. Co.* 107 Ga. 524, 33 S. E. 861.

Under this statute, in *Re Miller*, 118 Fed. 360, a creditor of a bankrupt was held entitled to enjoin a sale of the bankrupt's real estate by a mortgagee thereof, without paying the principal and interest due on the debt.

In *Parker v. Barnesville Sav. Bank*, 107 Ga. 650, 34 S. E. 365, it was held that a wife whose husband had invested her property in land, and had given a mortgage on the land which had been foreclosed, could treat herself as a creditor of her husband, and as such call upon the mortgagee for an accounting as to usury, if her husband was insolvent and she could not otherwise realize on her claim.

But if the usury has been paid, it cannot be recovered, even though debtor is insolvent. *Singleton v. Patillo*, 78 Ga. 269, 3 S. E. 253. But see discussion under IV.

Other cases arrive at the same conclusion as the foregoing in the case of insolvent debtors, but do so by disapproving of the entire rule that the right to take advantage of usury is personal, and not merely by grafting an exception upon it in case of insolvency. *Cole v. Bansemer*, 26 Ind. 94.

The court in *Lee v. Fellowes*, 10 B. Mon. 117, recognizes the rule that where the borrower has paid usurious interest, his creditor cannot, without his consent, sue for and recover of the usurer the amount of the usury so paid, but holds that where the usury has not been paid, and the matter in contest between the creditors is what

appellant be decreed a first lien on the property, and that the amount shown to be due him be paid first out of the funds arising from the sale. An accounting in the case will be necessary to ascertain the correct amount owing by the debtors to appellant. Under the facts as shown in this

case, it was unnecessary for appellees to make a tender of any amount in their bill. We consider the bill sufficient in this respect. *Aust v. Rosenbaum*, 74 Miss. 893, 21 So. 555; *Peoples v. Yates*, 88 Miss. 289, 40 So. 996.

Affirmed.

sum each may lawfully and equitably assert against a debtor whose means are insufficient to pay all his debts, usury may be asserted. That usury may be pleaded by a creditor where the debtor is insolvent is held also in *Hart v. Hayden*, 79 Ky. 346.

It is stated in *Lee v. Fellowes*, supra, that the sum legally due to a creditor is all that in good conscience he ought to be permitted to assert to the prejudice of the claims of other bona fide creditors; that, as the taking of usury is expressly discountenanced by law, the usurer and his debtor should not be permitted to increase the demands of the one against the other by the addition of illegal interest, to the prejudice of other creditors.

See *Shanks v. Stephens*, 4 Ky. L. Rep. 838; *Shanks v. Stephens*, 6 Ky. L. Rep. 526, supra, II. b.

In *Hill v. Cornwall*, 95 Ky. 512, 26 S. W. 540, it is stated that in a contest between creditors where the assets are insufficient to pay the debts, the chancellor should take notice, although no plea is entered, of usury sought to be recovered, and reject a claim to that extent.

IV. Recovery of usury paid.

In the absence of statute providing otherwise, the general rule is that usury paid by a debtor cannot be recovered by a creditor.

Thus, it has been held that this right of election of the debtor to recover usury paid by him cannot be exercised by a judgment creditor who has issued an execution upon his judgment which has been returned unsatisfied. *Estill v. Rodes*, 1 B. Mon. 314. It was urged in this case that the right of the judgment creditor to recover the usurious payment was authorized under a statute providing that the court of chancery may subject to the satisfaction of a judgment any "chose in action" belonging to the debtor. It was held, however, that the debtor's right to recover the usurious payment was not such a "chose in action" as was meant by this statute.

In this case the debtor expressly disavowed any willingness to recover the usury or have the judgment creditors do so. The doctrine of this case was approved in *Graham v. Moore*, 7 B. Mon. 53, where it is stated that creditors could not reach the usury in the hands of the creditor who had been paid without a transfer or without the assent of the debtor.

That usury paid cannot be recovered is recognized in *Lee v. Fellowes*, 10 B. Mon. 117.

But in the syllabus of *Sloss v. Levi*, 5 Ky. L.R.A.1915C.

L. Rep. 431, all that appears of this case, it is stated that an execution plaintiff who has had his execution levied upon property of the debtor may apply to the chancellor to have payments of usury made by the mortgagor to the mortgagee applied to the principal of the mortgaged debt. See *Banta v. Louisville Sav. L. & Bldg. Co.* 22 Ky. L. Rep. 1045, 59 S. W. 501, infra.

Where property of the debtor has been transferred to a creditor in satisfaction of his debts, the property cannot be seized by execution at the suit of another creditor, on the mere ground that the debt of the first creditor was infected with usury. *Mills v. Carnly*, 1 Bosw. 159, affirmed in 25 How. Pr. 592.

Where the debtor has waived the usury by discharging the obligation by the conveyance of the property without objection to the usury, another creditor cannot avoid the conveyance on the ground of usury. *Kelley v. Sprague*, 58 Hun, 611, 36 N. Y. S. R. 445, 13 N. Y. Supp. 64, affirmed in 128 N. Y. 582, 28 N. E. 250.

In *Singleton v. Patillo*, 78 Ga. 269, 3 S. E. 253, the debtor had entered into an agreement of sale of his personal property to his creditors under a usurious contract. Under the agreement he still remained in possession of the property, but as the agent of his creditors. Upon a bill by other creditors for an injunction and receiver, asking that this contract be declared void, that an account be taken, and that the claim of the creditors who had thus secured the property be purged of usury, the legal amount due them paid, and the balance applied to the claims of the complainants, it is stated by the court that this differs from a case in which the usury has not been paid, and that where it has been paid, as in this case, another creditor cannot recover it. It is on the theory that this agreement constituted payment of the usury that this case is distinguished from *Pope v. Solomons*, 36 Ga. 541. In *Pope v. Solomons* the debtor had paid usurious interest, which was credited on a balance remaining due on the debt at the instance of another creditor. But the full amount of the debt had not been paid. In an *obiter* statement in *Stone v. Georgia Loan & T. Co.* 107 Ga. 524, 33 S. E. 861, the usury involved in *Pope v. Solomons* is treated as having been paid, and the decision in *Singleton v. Patillo* as not reconcilable with the decision in the *Pope Case*, so that, according to the latest view of *Pope v. Solomons*, that case stands for the principle that usury may be credited on a balance due the usurious creditor although paid, while *Singleton v. Patillo* decided otherwise.

See *Richardson v. Baker*, 52 Vt. 617, *supra*.

A Tennessee statute expressly gave judgment creditors the right to recover from a person who may have received usurious interest from the principal or debtor, the amount so received over and above lawful interest. Under this statute a judgment creditor who had issued an execution on his judgment which had been returned *nul-la bona* was held entitled to recover usurious interest from a creditor who had received the same, in *Esselman v. Wells*, 8 Humph. 482.

A judgment creditor may recover under this statute usury paid to a national bank, notwithstanding the act of Congress prescribing penalties for receipt by a national bank of usurious interest, where it does not appear that the penalty prescribed by Congress has been imposed, or that the bank is now liable for the penalty on account of limitation. *Steadman v. Redfield*, 8 Baxt. 337.

But creditors who have not reduced their claims to judgment are not entitled to recover under this statute. *Battle v. Shute*, 3 Head, 546; *McKinney v. Memphis Overton Hotel Co.* 12 Heisk. 104.

See *Selser's Estate*, 141 Pa. 529, 21 Atl. 777; *Second Nat. Bank's Appeal*, 85 Pa. 528, and *Nicholson's Appeal*, 8 Sadler (Pa.) 396, 20 W. N. C. 339, 11 Atl. 562, *infra*.

See *Maloney v. Eabeart*, 81 Tex. 281, 16 S. W. 1030, *infra*, "Junior mortgagees."

The paying of usurious interest by a debtor is not such a fraudulent disposition of one's property as to authorize an attachment. *David Adler & Sons Clothing Co. v. Corl*, 155 Mo. 149, 55 S. W. 1017.

V. Extent of relief.

In a majority of the cases, the extent of the relief is not involved. It is stated that the creditor may or may not take advantage of, or may or may not plead, usury, as the case may be, in a contract of his debtor with another. It seems evident, however, that it was intended in the cases which allow this right to a creditor, to hold the creditor entitled to the same measure of relief as that to which his debtor would be entitled, were he pleading the usury. In certain cases, especially those in which the creditor is attempting to avoid the lien of another creditor which is prior to his own, his right to set aside the entire lien so as to give preference to his own is challenged, although it may be admitted that the debtor would have this right.

One who has taken a mortgage on property of his debtor, which is stated to be subject to a previous conveyance to secure a usurious debt, cannot avoid the previous deed entirely. *Brooks v. Todd*, 79 Ga. 692, 4 S. E. 156. But he may have usurious interest canceled. See III. *supra*.

Where usurious contracts are null and void, and no recovery can be had thereon, L.R.A.1915C.

it is held in some cases that if the debtor seeks relief from the contract on the ground of usury, he is required to pay the principal and legal interest of the sum due, on the principle that he who seeks equity must do equity. Within this rule junior mortgagees who were brought with the other mortgagees into an insolvency proceeding, and who sought to take advantage of usury in the senior mortgagee's contract, were held bound to return to the senior mortgagee the amount of the sum loaned to the debtor with legal interest thereon. *Carter v. Dennison*, 7 Gill, 157.

The attempt in the foregoing case was to avoid the entire contract of the usurious creditor. In the subsequent Maryland case of *Gaither v. Clarke*, 67 Md. 18, 8 Atl. 740, the subsequent encumbrancer was asking for affirmative relief, and it was there held that it was not necessary for the creditor seeking to take advantage of usury in another creditor's contract, to offer to redeem from the other creditor's lien by making tender of the amount supposed to be due, where it was wholly unknown. In the latter case, an accounting was all that was asked for by the subsequent encumbrancer.

In Missouri a statute provided that, in actions for enforcement of liens upon personal property, proof that the party holding the lien received or exacted usurious interest shall render the mortgage or pledge invalid or illegal.

Under this statute a pledge of personal property to secure a usurious debt will be declared void at the instance of subsequent mortgagees of the personal property, even though the mortgages contained a clause that they were subject to all liens and claims against the personal property. *Western Storage & Warehouse Co. v. Glasner*, 169 Mo. 38, 68 S. W. 917. So, under this statute a pledge of personal property will be avoided at the instance of attaching creditors. *Marx v. Hart*, 166 Mo. 503, 89 Am. St. Rep. 715, 66 S. W. 260; *Coleman v. Cole*, 158 Mo. 253, 59 S. W. 106, affirming 69 Mo. App. 530; *American Rubber Co. v. Wilson*, 55 Mo. App. 656.

A creditor who has attached property of his debtor which has been mortgaged by such debtor to secure a usurious contract may invoke the defense of usury against the enforcement of such mortgage. *Voorhis v. Staed*, 63 Mo. App. 370.

The attaching creditors of the debtor are held to stand in such privity of contract with the debtor as to entitle them, under the rule that only the debtor or those in privity with him can take advantage of usury, to set up the usury in the debtor's contract. *Coleman v. Cole*, 158 Mo. 253, 59 S. W. 106, affirming 69 Mo. App. 530; *American Rubber Co. v. Wilson*, 55 Mo. App. 656.

It seems, however, that a general creditor cannot take advantage of the statute.

In *Griebel v. Imboden*, 158 Mo. 632, 59 S. W. 957, *Robinson, J.*, in delivering the opinion, stated that the privilege conferred

by this statute was one conferred upon the debtor alone, or upon him or his privies in estate or blood, but is unavailing to a general creditor or stranger, and the right to plead usury was denied to a creditor who had garnisheed another creditor of his debtor, and subsequently obtained a judgment in the attachment suit, to invalidate a pledge of collateral to the garnisheed creditor to secure a usurious debt. It is not clear, however, whether this statement is concurred in by all the members of the court; it is stated that two of the members concur in the result of the decision, and in paragraphs other than the one above referred to, while the opinion is silent as to the other members.

The statute does not apply in case of a sale. A creditor cannot set up usury in his debtor's contract by which property of the debtor is sold to another and the debtor retained as selling agent of the purchaser. *Hill v. Taylor*, 125 Mo. 331, 28 S. W. 599.

Under a statute declaring void all contracts and securities affected with usury without any reference to the source from which the objection came, a judgment creditor who had levied execution upon personal property which was covered by a chattel mortgage given to secure a usurious debt was held entitled to defeat an action of replevin brought by the mortgagee, in *Dix v. Van Wyck*, 2 Hill, 522.

A judgment creditor who was made a defendant in an action for the foreclosure of a mortgage given for a usurious consideration was held entitled in *Van Tassell v. Wood* 12 Hun, 388, to have the usurious mortgage avoided so far as affected the lien of his judgment, but not to have it avoided *in toto*. The judgment creditor was held entitled to a priority of lien over the mortgage simply. *Dix v. Van Wyck* is cited as authority for this decision, but it does not appear whether it was decided under the same statute as the earlier case. *Van Tassell v. Wood* was reversed in 76 N. Y. 614, on the technical ground that, the usury not having been conclusively proven in the trial court, a finding in favor of the mortgagee was not an error of law warranting a reversal by the general term in 12 Hun, 388.

In *Post v. Dart*, 8 Paige, 639, a judgment creditor whose judgment was a legal lien upon the mortgaged premises of his debtor, and who was made a defendant to a bill for the foreclosure of the mortgage, was held entitled to have the bill dismissed as to himself, so that a purchaser under the decree would take title subject to the payment of the judgment if it should not be collected out of the other property of the judgment debtor.

In *Thompson v. Van Vechten*, 27 N. Y. 568, it is stated that a chattel mortgage which is founded on a usurious consideration is utterly void against other liens on the property.

It is stated in *The Vigilancia*, 19 C. C. A. 528, 38 U. S. App. 563, 73 Fed. 452, L.R.A.1915C.

that a judgment creditor who has issued execution, and by virtue thereof has acquired a lien upon property, is in a position to challenge the validity of mortgages given upon the property; and even though they are sufficient as between the mortgagor and the mortgagee to transfer title to the property, if they are void by force of a statute against usury his lien must prevail. It was held, however, that the debtor, being a corporation, could not avail itself of the statutes against usury, and therefore the judgment creditor could not do so.

Subsequent mortgagees of certain real estate on which judgments confessed by the mortgagor upon a usurious consideration are a lien are not borrowers within the meaning of a usury statute, and therefore cannot maintain a bill for the purpose of setting aside the judgments and restraining the sale of the land in question on the ground of usury, without paying or offering to pay the amount actually due on the judgment. *Rexford v. Widger*, 2 N. Y. 131.

But the right to avoid a mortgage for usury given by Wisconsin Statutes 1859, chap. 160, cannot be taken advantage of by a junior judgment creditor in a suit by the mortgagee to foreclose the mortgage, which the mortgagor does not defend. *Bensley v. Homier*, 42 Wis. 631. The court expressly states that it decides only the question of avoidance of the security, and does not pass upon the right of the creditor of the borrower to reduce the security to the amount for which it ought to stand in equity, or to cancel the security on payment of such amounts.

And the same was held with reference to a second mortgagee in *Ready v. Huebner*, 46 Wis. 692, 32 Am. Rep. 749, 1 N. W. 344. See *Re Miller*, 118 Fed. 360, *supra*, 111.

VI. Particular classes of creditors.

a. General creditors.

The general creditors of a debtor cannot take advantage of usury in his contracts with other creditors.

The Pennsylvania rule denying this right to a creditor, applied generally to all classes of creditors in the absence of fraud and collusion, was followed in *Selser's Estate*, 141 Pa. 529, 21 Atl. 777, as to general creditors.

See *Griebel v. Imboden*, 158 Mo. 632, 59 S. W. 957, *supra*.

As to the effect of payment, see IV. *supra*, especially the following cases discussed in that subdivision: *Singleton v. Patillo*, 78 Ga. 269, 3 S. E. 253; *Graham v. Moore*, 7 B. Mon. 53; *Lee v. Fellowes*, 10 B. Mon. 117; *Battle v. Shute*, 3 Head, 547; *McKinney v. Memphis Overton Hotel Co.* 12 Heisk. 104.

See *Adams v. Robertson*, 37 Ill. 45, *supra*, II. a.

See *Brooks v. Todd*, 79 Ga. 692, 4 S. E. 156, *infra*, VI. c. 1.

The reason for denying to general cred-

itors the right to take advantage of usurious contracts of their debtor with other creditors is that usury is a defense personal to the debtor and his privies, and the general creditors, not occupying the relation of privy to the debtor, must be denied the right.

On the contrary, it is held that the general creditors of an insolvent debtor may take advantage of his usurious contracts.

In *Pope v. Solomons*, 36 Ga. 541, a general creditor of an insolvent debtor was held entitled to an injunction against a purchaser of the insolvent debtor's stock of goods under an agreement to pay certain debts, including the usurious debt, to restrain him from paying the usurious debt until the transaction could be investigated.

See also *Burgwyn Bros. Tobacco Co. v. Bentley*, 90 Ga. 508, 16 S. E. 216; *Weihs v. Atlanta Furniture Mfg. Co.* 89 Ga. 297, 15 S. E. 282; *Parker v. Barnesville Sav. Bank*, 107 Ga. 650, 34 S. E. 365; and *Re Miller*, 118 Fed. 360, *supra*, III.

Where the debtor is insolvent and the usury has not been paid, the creditor may assert usury against the other creditors of his debtor. *Lee v. Fellowes*, 10 B. Mon. 117.

But if the usury is paid, there can be no recovery, even though the debtor is insolvent. *Singleton v. Patillo*, 78 Ga. 269, 3 S. E. 253. See discussion as to effect of payment, *supra*.

See, generally, on the question of the effect of insolvency, subdivision III. hereof. It will be noticed, as shown in that subdivision, that the rule that the right to plead usury is personal to the debtor has been adhered to in cases not involving general creditors, but no distinction appears in this regard, and it seems evident that these courts would adhere to this holding as to general creditors, and deny the right even in case of insolvency.

b. Judgment and attachment creditors.

1. Rule that such creditors may take advantage of usury.

There is a difference of opinion as to the right of judgment creditors to take advantage of usury in their debtor's contract with other creditors. One line of authorities holds that judgment creditors may take advantage of usury in their debtor's contracts with other creditors. This is the rule adhered to in *SPINKS v. JORDAN*.

This was held in case of an insolvent debtor where a prior mortgagee whose contract was usurious was asking for foreclosure of his mortgage in a proceeding to which he and the judgment creditors had been made parties. *Cole v. Bansemer*, 26 Ind. 94. See discussion, *supra*, II. b.

It is stated in the syllabus of *Sloss v. Levi*, 5 Ky. L. Rep. 431, all that appears of the report of this case, that the plea of usury is not a personal privilege, but may be interposed by a junior lien holder as against the prior lien where the property L.R.A.1915C.

is sought to be subjected to the satisfaction of the lien.

In *Banta v. Louisville Sav. Loan & Bldg. Co.* 22 Ky. L. Rep. 1045, 59 S. W. 501, a judgment creditor who had issued execution on his judgment, which had been returned unsatisfied, was held entitled to plead usury against a senior mortgagee who had collected a large amount of usurious interest. It is stated that the amount of usurious interest should be ascertained and the mortgagee's claim purged of the same.

The creditors who sought to take advantage of usury in the contract of another creditor of their debtor, in *Lee v. Fellowes*, 10 B. Mon. 117, were judgment creditors, and the action was by them to set aside a mortgage made by their debtor after they were unable to coerce their several demands by execution. It was held that they were entitled to set up the usury in their debtor's contract. No point is made of the fact, however, that the creditors were judgment creditors. See discussion of case under "General creditors" above.

The court in *Cummins v. Wire*, 6 N. J. Eq. 73, is of the opinion that judgment creditors who are made parties to a bill for the foreclosure of a mortgage may set up the defense of usury.

Within the rule that the defense of usury may be set up by anyone who claims under the mortgagor and in privity with him, a judgment creditor whose judgment becomes a lien upon the whole interest of his debtor in land which has been mortgaged under a usurious contract may, when he is made a party to an action by the mortgagee to enforce his mortgage against the land, avail himself of the defense of usury to the full extent of his legal lien upon the premises by virtue of his judgment. *Post v. Dart*, 8 Paige, 639.

A judgment creditor who has issued execution upon his judgments, and seized goods covered by a chattel mortgage which was given to secure a usurious loan, stands in such privity with the owner of the goods as will entitle him to defeat the chattel mortgage upon an action of replevin brought by the mortgagee to secure possession of the goods. *Dix v. Van Wyck*, 2 Hill, 522. A statute governing this case declared void all contracts and securities affected with usury without any reference to the source from which the objection came. The court, however, treats the usurious contract as voidable.

Approving of this case, the court in *Carow v. Kelly*, 59 Barb. 239, holds that a judgment creditor who has issued execution upon his judgment and taken the property can avoid a chattel mortgage given upon the property, in an action by the mortgagee against the officer levying the execution for unlawfully taking and retaining the property.

Dix v. Van Wyck is cited with approval in *Mason v. Lord*, 40 N. Y. 476, also a case in which the judgment creditor had become a purchaser at an execution sale.

But where property of the debtor has been transferred to a creditor in satisfaction of his debt, the property cannot be seized by execution at the suit of another creditor on the mere ground that the debt of the first creditor was infected with usury. *Mills v. Carnly*, 1 Bosw. 159, affirmed in 25 How. Pr. 592.

Neither can a judgment creditor who has issued execution on his judgment, which has been returned unsatisfied, avail himself of the right of his debtor at his election to recover money voluntarily paid on a usurious contract. *Estill v. Rodes*, 1 B. Mon. 314.

See, generally, on the effect of payment, subdivision IV. *supra*.

See *Van Tassell v. Wood*, 12 Hun, 388, *supra*, V.

See *Esselman v. Wells*, 8 Humph. 482; *Steadman v. Redfield*, 8 Baxt. 337, *supra*, IV.

And see also *Bachdell's Appeal*, 56 Pa. 386, and *Building Asso. v. O'Connor*, 3 Phila. 453, and subsequent Pennsylvania cases holding a contrary doctrine, *supra*, II. c.

The Virginia Code 1873, chap. 137, § 12, gives the right to a judgment creditor to take advantage of usury under certain conditions. *Keagy v. Trout*, 85 Va. 390, 7 S. E. 329.

Under this statute, which authorizes any judgment creditor who apprehends that he is in danger of loss by reason of usurious dealings on the part of his debtor, to exhibit his bill in equity against the party with whom the dealings were had, and compel him to discover all bargains, contracts, etc., and if it appears that more than legal interest has been received, the excess above that rate, or so much thereof as may be necessary, shall be applied to the satisfaction of the plaintiff's demand, the usurious interest must be applied to the plaintiff's demand, and not to the discharge of the debtor's obligation to the usurious lender. *Ryan v. Krise*, 89 Va. 728, 17 S. E. 128.

It has been held that a judgment creditor of a debtor who has previously given a security deed of his property, which is void because tainted with usury, may levy upon the property as if no such deed had been given. *Harrold v. Morgan*, 66 Ga. 398; *Stone v. Georgia Loan & T. Co.* 107 Ga. 524, 33 S. E. 861. The court in the latter case discusses the rights of the judgment creditor to levy upon the property in this case as dependent upon his being in privity with his debtor, and thus entitled to take advantage of the usury in the contract. After reviewing the Georgia decisions, the court comes to the conclusion that the creditor does stand in such a privity with his debtor as to entitle him to take advantage of the usury. Although the court in the *Stone* case regards the decision in the *Morgan* case as based upon this idea of privity, it does not so clearly appear from the *Morgan* case that this L.R.A.1915C.

was the basis of that decision, nor does it seem that privity is necessary if the deed is void in the strict sense of that term, for if it is void, as stated in the *Morgan* case, "it is just as if no such deed had ever been made so far as concerns the vesting of title in the claimants, and does not require any act on the part of the debtor to make it void. A void deed can never be in the way of the levy of legitimate process, and the plaintiff in *fi. fa.*, in levying his execution, usurps or assumes no personal privilege of anybody, but exercises a clear right which the law gives him of subjecting the property of the defendant to the payment of his debt."

That a junior judgment creditor cannot avoid a whole mortgage for usury is held in *Bensley v. Homier*, 42 Wis. 631.

The holders of a mechanics' lien who had purchased the premises upon a foreclosure of such lien were held entitled to set up the defense of usury in an action by a senior mortgagee to foreclose the mortgage; but this decision is based apparently upon the fact that those who attempted to set up the usury sustained the relation of subsequent purchasers. *Knickerbocker L. Ins. Co. v. Hill*, 6 Thomp. & C. 285.

So, attachment creditors may set up usury in other creditors' contracts.

A pledge of personal property will be declared void at the instance of attaching creditors, where the debt secured thereby is usurious, under a statute providing that in actions for enforcement of liens upon personal property proof that the party holding the lien received or exacted usurious interests shall render the mortgage or pledge invalid or illegal. *Marx v. Hart*, 166 Mo. 503, 89 Am. St. Rep. 715, 66 S. W. 260; *Coleman v. Cole*, 158 Mo. 253, 59 S. W. 106, affirming 69 Mo. App. 530; *American Rubber Co. v. Wilson*, 53 Mo. App. 656.

So, a mortgage of personal property will be declared void at the instance of an attaching creditor. *Voorhis v. Stead*, 63 Mo. App. 370.

But see *Griebel v. Imboden*, *supra*, V.

An officer who has acquired a lien upon property by execution of a writ of attachment may plead the defense of usury against the claim of a mortgagee of the property. *Stein v. Swensen*, 44 Minn. 218, 46 N. W. 360. The legal privity in estate with the mortgagor, the owner of the property, thus acquired, is stated to be sufficient to justify the assertion of the invalidity of the prior encumbrance on the property.

The action in *Dix v. Van Wyck*, 2 Hill, 522, was against the officer levying the execution, but was treated as one against the creditor. See discussion above.

The action against *Carow v. Kelly*, 59 Barb. 239, was against the officer levying the execution, but the question is discussed as to the right of the creditor to avoid the prior mortgage for usury.

2. Rule that they cannot.

The contrary has been held, and the right of judgment creditors to take advantage of their debtor's usurious contracts denied, on the theory that the right to take advantage of usury in the contract is personal to the debtor, that it can be pleaded only by a party to the contract or one in privity thereto.

This has been held in actions by a mortgagee who holds the senior encumbrance to foreclose his mortgage, to which action the judgment creditor has been made a party. *Carmichael v. Bodfish*, 32 Iowa, 418 (even though the debtor is insolvent).

And in a suit in equity to subject land to liens. *Lee v. Feamster*, 21 W. Va. 108, 45 Am. Rep. 549; *Barbour v. Tompkins*, 31 W. Va. 410, 7 S. E. 1.

This has been held also in an action to cancel a mortgage securing a usurious debt, subsequently placed upon the debtor's lands so as to impair their sale under execution on the judgment. *Baskins v. Calhoun*, 45 Ala. 582.

It is stated in *Mason v. Pierce*, 142 Ill. 331, 31 N. E. 503, that a junior encumbrancer by virtue of a judgment lien is not in privity with the mortgagor so as to be able to set up the defense of usury in his own behalf.

Judgment creditors who have taken out execution and levied it upon personal property of their debtor cannot take advantage of usury in a debt of their debtor secured by a mortgage on the property levied upon, in distributing the fund arising from the sale of such property. *Harbinson v. Harrell*, 19 Ala. 753.

See *Gatewood v. City Bank*, 49 Ga. 45, *infra*, VI. c.

That judgment creditors cannot avoid entirely a prior mortgage, see *Bensley v. Homier*, 42 Wis. 631, *supra*, V.

See *Second Nat. Bank's Appeal*, 85 Pa. 528; *Wheelock v. Wood*, 93 Pa. 298; *Nicholson's Appeal*, 8 Sadler (Pa.) 396, 20 W. N. C. 339, 11 Atl. 562, holding that judgment creditors cannot take advantage of usury in their debtor's contract in the absence of fraud and collusion, and earlier Pennsylvania cases holding a contrary doctrine, in the discussion of the doctrine in that state, *supra*, II. c.

c. Junior mortgagees.

1. Rule that junior mortgagees may take advantage of usury.

As in the case of judgment creditors, there is a difference of opinion as to the right of junior mortgagees to take advantage of usury in the senior mortgagee's contract; one line of decision holding that this can be done, the other that it cannot.

A junior mortgagee may, although his debt is not yet due, and therefore unenforceable at the time of a foreclosure action by a senior encumbrancer, plead usury in his debtor's contract with such senior

encumbrancer. *Hart v. Hayden*, 79 Ky. 346. The debtor here was insolvent.

It is stated in *Hart v. Hayden* *supra*, that an insolvent debtor cannot, either by her silence or a refusal to plead, permit property upon which a junior lien exists to be sold for a debt based upon a vicious consideration; that the plea of usury is not a personal privilege, and that where the mortgaged land is insufficient to satisfy all the mortgage debts and the senior lien is based upon a usurious consideration, the junior lien holder may make the defense of usury.

That a junior mortgagee may make the defense of usury and show that the claim of senior mortgagee is tainted with usury is held in *Shanks v. Stephens*, 4 Ky. L. Rep. 838.

In an abstract of *Shanks v. Stephens*, 6 Ky. L. Rep. 526, it is stated that the plea of usury may be relied upon by the holder of a junior lien upon property mortgaged to secure the debt, where the property is insufficient to pay the liens upon it.

It is stated in *Shanks v. Stephens*, 4 Ky. L. Rep. 838, that the plea of usury is not a personal one. The same holding appears in *Shanks v. Stephens*, 6 Ky. L. Rep. 526.

It is stated in *Gaither v. Clarke*, 67 Md. 18, 8 Atl. 740, that a subsequent mortgagee may question the title and claim of a prior encumbrancer, and take advantage of the legal defect or taint of the elder encumbrance. Accordingly, a junior mortgagee was allowed to raise the question of usury in the senior mortgagee's contract. There was no proof in this case that the estate mortgaged to the junior mortgagee would not be sufficient to satisfy her mortgage, allowing the senior mortgagee's contract to stand as written, but it was held that this was immaterial under the circumstances of the case.

Citing from *Thomas v. Mason*, 8 Gill, 11, the court in *Gaither v. Clarke*, *supra*, says that "it is in the constant practice to permit a subsequent mortgagee to question the title and claim of a prior encumbrancer, and to take advantage of the legal defect or taint of the elder encumbrance. It is the right of every party in equity to question the title or the legality of a claim that precedes his own, and, by a successful impeachment, to render it void and defeat it."

The interest at the time the junior mortgagee's mortgage was given had been reduced to a legal rate of interest, but nothing is said of this in the opinion, nor does it appear whether all the usurious interests had been paid. *Gaither v. Clarke*, *supra*.

In the *Title Guarantee & T. Co. v. Wheatfield*, 123 Md. 458, 91 Atl. 757, a third mortgagee was allowed to dispute the amount of the second mortgage indebtedness upon the ground that the loan it secured was usurious, the court stating that the principle is well settled that, in the absence of an agreement on the part of a

subsequent purchaser or encumbrancer to assume the payment of the debt secured by the pre-existing liens, he is at liberty to make such an objection as this.

So, a junior encumbrancer was held to have the right to raise the question of usury although his mortgage contained the clause that the mortgaged premises were, when he took his mortgage, already subject to a prior mortgage, since this clause cannot be made the foundation of an estoppel, nor be held to preclude the junior encumbrancer from showing either that such prior mortgage is usurious or has been paid. *Trusdell v. Dowden*, 47 N. J. Eq. 396, 20 Atl. 972.

A junior mortgagee may set up usury in the prior mortgage in the same manner that the mortgagor might. *Johnston v. Lasker Real Estate Asso.* 2 Tex. Civ. App. 494, 21 S. W. 961. And the fact that his mortgage contained a notice which amounted to nothing more than a mere acknowledgment of the prior lien does not affect him. The action here was by the senior mortgagee to foreclose his mortgage.

Under the Missouri statute it has been held that a pledge of warehouse receipts to secure the payment of a usurious debt should be declared void at the instance of subsequent mortgagees of the property covered by the warehouse receipts, even though it was expressed in the mortgages that they they were subject to all outstanding claims, charges, and liens upon the property. *Western Storage & Warehouse Co. v. Glasner*, 169 Mo. 38, 68 S. W. 917. It is stated that under this statute, even the pledgee or mortgagor could avoid the pledge or mortgage, and what the pledgee or mortgagor could do in this regard, his creditors, being his privies in representation, can do. See *supra* for discussion of Missouri cases.

In a proceeding for the distribution of surplus moneys arising from the sale of mortgaged premises under a decree of foreclosure, and remaining after the payment of the first and second mortgages, a fourth mortgagee may take advantage of usury in the contract of the third mortgagee. *Mutual L. Ins. Co. v. Bowen*, 47 Barb. 618.

See *Mechanics' Bank v. Edwards*, 1 Barb. 271, *supra*, II. a, 1.

That a junior encumbrancer may raise this defense is held also in *Union Dime Sav. Inst. v. Clark*, 59 How. Pr. 342.

That a junior mortgagee may plead usury against a prior judgment creditor is held also in *Greene v. Tyler*, 39 Pa. 361, but the contrary was held in *Lenning's Appeal*, 93 Pa. 301, under a different statute. See discussion of Pennsylvania doctrine, *supra*, II. c.

It has been held that the beneficiary in a deed of trust which had been foreclosed and the land purchased by the beneficiary may take advantage of usury in debt secured by a prior deed of trust which had also been foreclosed and the land purchased by the beneficiary therein. *Boyd v. Warmack*, 62 Miss. 536. See *infra*, VII., as to L.R.A.1915C.

the right to take advantage of usury as against a judgment creditor.

In *Maloney v. Eahart*, 81 Tex. 281, 16 S. W. 1030, it is stated to be the right of the junior mortgagee to remove the lien of a senior mortgage by discharging so much of the debt secured thereby as was lawful, and the parties to the first mortgage could not deprive him of that right by a conveyance subsequently made of the land by the mortgagor to the senior mortgagee. The action was trespass to try title brought by the senior mortgagee, to whom the land had been conveyed, against one who had purchased upon a foreclosure of the junior mortgage.

Junior lien holders who have purchased the equity of redemption and canceled their debt, but who have agreed to reconvey to the debtor upon repayment of the amount of the debt with interest within a limited time, may take advantage of usury in a senior lien holder's contract. *Chaffe v. Wilson*, 59 Miss. 43.

Where, however, the junior mortgagee has become the absolute owner by purchase of the property, he can no longer raise this question. *Fulford v. Keerl*, 71 Md. 397, 18 Atl. 663.

But a usurious contract was held invalid in *Madsen v. Whitman*, 8 Idaho, 762, 71 Pac. 152, as against a subsequent mortgagee of the debtor who had foreclosed his mortgage and purchased the property at the sale.

Under a statute precluding a corporation from pleading or setting up the defense of usury, a junior mortgagee cannot set up this defense where the mortgagor is a corporation, since the right of the junior mortgagee to raise the question of usury rests upon the right of the mortgagor to do so at the time the last mortgage was made. *Lembeck v. Jarvis Terminal Cold Storage Co.* 70 N. J. Eq. 757, 64 Atl. 126. But see I. *supra*, as to such cases, generally.

See *Brooks v. Todd*, 79 Ga. 692, 4 S. E. 156, *supra*, V.

2. Rule that they cannot.

Adhering to the rule that the right to take advantage of usury is personal to the debtor, or can be pleaded only by a party to the usurious transaction, or in privity thereto, some courts deny this right to junior mortgagees.

This has been held in foreclosure actions in which all lien holders are made parties. *Stickney v. Moore*, 108 Ala. 590, 19 So. 76 (even though the debtor is insolvent); *Union Nat. Bank v. International Bank*, 123 Ill. 510, 14 N. E. 859 (under a statute merely declaring the interest contracted to be received, void); *Farmers' & M. Bank v. Kimmel*, 1 Mich. 84.

The rule has also been applied in a suit in equity brought to subject land to payment of liens. *Lee v. Feamster*, 21 W. Va. 108, 45 Am. Rep. 549. And in an action by a junior mortgagee to foreclose his

mortgage, in which action the senior mortgagees, both of whom had previously obtained judgments of foreclosure upon his mortgages, and one had sold the premises, were made parties. *Powell v. Hunt*, 11 Iowa, 430.

In *Pritchett v. Mitchell*, 17 Kan. 355, 22 Am. Rep. 287, the action was by a junior mortgagee to foreclose his mortgage, the senior mortgagee, who had previously obtained a judgment of foreclosure upon his note and mortgage, being made a party by the junior mortgagee. The debtor was insolvent, but no point is made of this fact.

This was held in the case of a junior mortgagee in *Darst v. Bates*, 95 Ill. 493.

This was held also where a second mortgagee who had purchased the equity of redemption intervened in a proceeding on the estate of the mortgagor in probate court, and objected to the allowance of interest on the note. *Loomis v. Eaton*, 32 Conn. 550.

In *Richardson v. Baker*, 52 Vt. 617, *supra*, II. a, 1.

A junior mortgagee cannot avoid a prior mortgage under Wisconsin Statutes, 1859, chap. 180, since the defense of usury is personal to the debtor his privies in blood or estate, or privies to the contract. *Ready v. Huebner*, 46 Wis. 692, 32 Am. Rep. 749, 1 N. W. 344.

See discussion of Pennsylvania cases, *supra*, II. c.

A junior mortgagee who has accepted a bill of exchange in favor of a senior mortgagee, who thereupon released his mortgage, cannot, when sued upon the bill of exchange, raise the question of usury between the senior mortgagee and the debtor, although the statute makes the offense of taking usury indictable. *Cook v. Dyer*, 3 Ala. 643. It is stated that there was no usurious contract between these parties, nor illegal interest reserved on the bill of exchange, and as it was not pretended that the transaction was a shift or device to evade the statute, the question of usury cannot be presented.

Some cases recognize the abstract rule that a creditor cannot set up usury in another creditor's contract, but make an exception where there is a fund in court and the debtor is insolvent. *Brooks v. Todd*, 79 Ga. 692, 4 S. E. 156. See discussion, *supra*, III.

The reasons advanced for denying to junior mortgagees the right to raise the question of usury in a senior mortgagee's contract are various.

On the question of privity by contract, it is stated in *Union Nat. Bank v. International Bank*, 123 Ill. 510, 14 N. E. 859, that a junior mortgagee is neither directly nor indirectly a party to the usurious contract, and he derives and makes claim to no right through or resulting from it; therefore he cannot claim to set up the usury on account of privity of contract.

Some courts will not expressly answering the question whether a privity of estate exists, in effect deny it. Thus, on L.R.A.1915C.

the theory that the mortgagor of property does not part with his right of election to plead or waive the defense at usury in his contract by giving a junior mortgage on the same property, the right of the junior mortgagee to plead usury was denied, since this right could not exist in two persons at the same time. *Ibid*.

It is stated in *Pritchett v. Mitchell*, 17 Kan. 355, 22 Am. Rep. 287, that the second mortgagee could increase the value of his security by diminishing the amount of the first lien, but he does so only by preventing parties who have made a contract and are willing to abide by its terms from complying with that contract; continuing, the court states that when the first mortgage was given, the debtor had a perfect right to give it, and the junior mortgagee, upon the taking of his mortgage, finds the property charged with a mortgage pledged therefor as a security for a specified amount, and finds that the mortgagor intends that it shall be used in discharging that amount of indebtedness, and voluntarily takes the property thus burdened as security for his own debts, and it is with ill grace that he thereafter endeavors to prevent the mortgagor from complying with his first contract.

A junior mortgagee who, with the senior mortgagee, was brought into an insolvency proceeding, was held to be within the rule requiring a debtor who seeks to be relieved from his usurious contract on the ground of usury to offer to pay the principal and legal interest of the sum due, upon the principle that he who seeks equity must do equity, and therefore the junior mortgagee could not, without offering to do this, take advantage of the usury in the senior mortgagee's contract so as to render it void. *Carter v. Dennison*, 7 Gill, 157.

See discussion on this case, *supra*, V., and see also *Gaither v. Clarke*, 67 Md. 18, 8 Atl. 740, *supra*.

VII. *Effect of judgment on the usurious debt.*

Where the usurious creditor has taken judgment upon his debt, and the debtor does not avail himself of the privilege of setting up the usury, but permits judgment to go against him, and there is no fraudulent combination between that creditor and debtor against other creditors, the judgment closes the defense of usury.

This rule has been applied against general creditors. *Phillips v. Walker*, 48 Ga. 55.

A creditor who, when the judgment creditor's debt had been reduced to judgment, and execution had been issued therein, and levied on the debtor's property, sought to assist the debtor in paying a part of the debt and thus postponing final execution, cannot thereafter set aside the judgment on the sole ground of usury in the original debt. *Mahan v. Cavender*, 77 Ga. 118.

The rule has also been applied against

judgment creditors. *Foster v. Thrasher*, 45 Ga. 517 (*dictum*); *Phillips v. Walker*, *supra*.

And against subsequent encumbrancers. *Gatewood v. City Bank*, 49 Ga. 45; *Powell v. Hunt*, 11 Iowa, 430.

The right of a junior mortgagee who had foreclosed his mortgage, to take advantage of usury in a senior mortgagee's contract, where the senior mortgagee had foreclosed his mortgage also, and issued execution thereon upon the property, was denied in *Gatewood v. City Bank*, *supra*, largely because of the conclusiveness of the judgment.

This rule was applied where a senior mortgagee had foreclosed his trust deed and the property had been sold. *Tyler v. Massachusetts Mut. Ins. Co.* 108 Ill. 58.

So, in *Pickett v. Pickett*, 2 Hill, Eq. 470, it is stated that, the judgment being conclusive upon the debtor, the junior creditor has no better rights than his debtor, and that whatever binds the debtor binds the creditor unless the creditor is defrauded.

On the contrary, it has been held that the beneficiary in a junior deed of trust may, after a foreclosure of his deed and his purchase thereunder, assert usury in a debt secured by a prior deed of trust, which had also been foreclosed, and the lands purchased by the beneficiary; but nothing is said as to the effect of the judgment. *Boyd v. Warmack*, 62 Miss. 536.

See discussion of the Pennsylvania cases, *supra*.

The general question of the conclusiveness of judgments is not discussed. So, cases adhering to the theory that a judgment is conclusive upon the debtor himself, so that he is prevented from thereafter taking advantage of the usury, have not been included in the note. W. A. E.

MISSISSIPPI SUPREME COURT.

LUTHER JONES, Appt.,
v.

STATE OF MISSISSIPPI.

(— Miss. —, 66 So. 987.)

Intoxicating Liquors — loan — prohibition.

Lending whisky to be returned in kind and amount is not within a statute prohibiting the selling, bartering, or giving away to induce trade of intoxicating liquors.

(January 11, 1915.)

APPEAL by defendant from a judgment of the Circuit Court for Yalobusha County convicting him of unlawfully selling intoxicating liquors. Reversed.

The facts are stated in the opinion.

Messrs. Creekmore & Stone for appellant.

L.R.A.1915C.

Mr. Ross A. Collins, Attorney General, for the State.

Reed, J., delivered the opinion of the court:

Appellant was tried and convicted on an indictment charging him with the unlawful sale of intoxicating liquors. The testimony of the sole witness for the state showed that he purchased from appellant a pint of whisky and paid money therefor. The evidence for the defense showed that appellant refused to sell the whisky, but loaned to

Note. — Intoxicating liquors: loan as sale.

This note is supplemental to notes to *Tombeaugh v. State*, 8 L.R.A.(N.S.) 937, and *Clark v. State*, 31 L.R.A.(N.S.) 517.

As will be seen by the earlier notes, courts of different jurisdictions have adopted opposite rules as to whether the loan of intoxicating liquors to be repaid by the return of other liquors is a sale within the prohibitory laws.

The later Texas cases follow the rule formerly adopted by the courts of that state, that a loan of intoxicating liquor to be paid in kind constitutes a sale within the prohibitory statute. *Daniel v. State*, 57 Tex. Crim. Rep. 467, 125 S. W. 37; *Morris v. State*, 64 Tex. Crim. Rep. 498, 142 S. W. 876; *Johnson v. State*, — Tex. Crim. Rep. —, 150 S. W. 1175; *Black v. State*, — Tex. Crim. Rep. —, 151 S. W. 1063; *Veach v. State*, — Tex. Crim. Rep. —, 159 S. W. 1069; *Howard v. State*, — Tex. Crim. Rep. —, 163 S. W. 429.

Such a loan constitutes a violation of the statute though it was made in good faith, with no intention of evading the statute. *Daniel v. State*, and *Morris v. State*, *supra*.

But where the indictment charged the gift of the liquor to a minor, proof that the liquor was loaned to him to be paid in kind would not sustain a conviction. *Jenkins v. State*, — Tex. Crim. Rep. —, 155 S. W. 531.

The rule that a loan of intoxicating liquor to be paid in kind constitutes a sale within the prohibitory statute was adopted by the supreme court of North Carolina in *State v. Mitchell*, 156 N. C. 659, 37 L.R.A.(N.S.) 302, 72 S. E. 632, Ann. Cas. 1913A, 469, after a review of the cases decided in other states upon the question, the case being one of first impression upon the point in that state. Although the statute in question made it unlawful to "sell or otherwise dispose of for gain" intoxicating liquors, the court said that in any view of the evidence, the most favorable of which for defendant was that he loaned the whisky upon consideration of a like amount being returned, the transaction constituted a sale, and was a clear violation of the statute.

It will be noted that JONES v. STATE adopts the opposite view, that a loan of intoxicating liquors does not constitute a sale.

R. L. S.

the witness about a half pint of some whisky which he had left over from Christmas, upon the understanding that the same amount of whisky would be returned to him.

Appellant assigns as error the giving of the following instruction for the state: "The court instructs the jury for the state that if they believe from the evidence beyond a reasonable doubt that the defendant either sold whisky to the witness Vaughan and received money therefor upon the occasion testified to by said witness, or that the defendant loaned whisky upon said occasion to said witness with the understanding and agreement then had between them that said witness was to return other whisky to the defendant for or in the place and stead of the whisky then loaned and delivered by the defendant to said witness, the jury should return a verdict of guilty as charged."

The statute (chapter 113 of the Laws of Mississippi of 1908) prohibits the selling, bartering, or giving away to induce trade of intoxicating liquors. It will be noted that the indictment in this case charges only a sale. A sale is a transfer of property upon a consideration of the payment of money. In a barter goods are exchanged for other goods. In a loan, such as is testified to in this case, goods or property is delivered from one party to another to be returned by the latter to the lender in kind. According to the testimony for the defense the lending of the whisky to be returned in kind was done as an accommodation.

In the case of *State v. Austin*, — Miss. —, 23 So. 34, the court held that § 1088 of the Code of 1892, which provides a penalty for selling property which had been before sold, etc., without informing the person to whom the sale is made of the exact state of the property affected, did not apply to a case where such property is exchanged for other personal property and money does not pass. We quote from the opinion of the court in that case, delivered by Judge Terrall, as follows: "Section 1088, Anno. Code, applies only to a sale; and a sale 'means, at all times, a contract between parties to give and pass rights and property for money.' 2 Burrill, Law Dict. Penal statutes are to be construed strictly, and a thing, to be indictable, must come within the letter as well as the spirit of the statute. *State v. Baker*, 47 Miss. 94."

The instruction complained of should not have been given. If the jury believed from the evidence that appellant, as an accommodation to the witness, loaned him the whisky, as testified to by the witnesses for the defense, then they were not authorized to return a verdict of guilty of the offense of

selling the liquor, as charged in the indictment.

Reversed and remanded.

NEW JERSEY COURT OF ERRORS AND APPEALS.

THOMAS J. STEWART

v.

CHILDS COMPANY, Appt.

(86 N. J. L. 648, 92 Atl. 392.)

Landlord and tenant — covenants — dependence.

1. A covenant in a lease to pay rent, by the tenant, and a covenant by the landlord to keep the cellar waterproof, are independent covenants.

Same — breach by landlord — effect on rent.

2. A breach of the latter is not a defense to an action for the nonpayment of rent under the covenant.

(November 16, 1914.)

Headnotes by BLACK, J.

Note. — *Landlord's breach of covenant to repair or make improvements as defense to action for rent, or justification for abandonment.*

The questions raised by this note were covered in two separate notes in 34 L.R.A. (N.S.) 977-984. A few cases have been decided since.

The fact that the rental value of the premises was lessened by the breach of the landlord's covenant to repair is immaterial in an action by him against the tenant for rent. *Leisteko v. Smith*, 160 Ill. App. 170. This was an action for rent in which the tenant pleaded a counterclaim based upon the landlord's breach of covenant, and it was held that under the pleadings the only counterclaim allowable was the amount of damages sustained by reason of the breach. The case is, therefore, not wholly within the scope of this note, which does not include the question of tenant's right to counterclaim, but the reasoning here is applicable to a case where the attempt was made to avoid payment of rent on account of the breach; for if the reduction in value cannot be shown as a counterclaim, *a fortiori*, it could not enable the tenant to wholly avoid payment of rent. This case does not involve the right of the tenant to abandon the premises.

Where, by the terms of the lease, a partial destruction of the building that renders the same "untenantable" works a suspension of rent until the building is fully repaired by the lessor, the fact that the tenant remained in the building should be taken as some evidence, though not conclusive evidence, of the fact that the

A PPEAL by defendant from a judgment of the Hudson County Circuit in plaintiff's favor in an action brought to recover rent alleged to be due and unpaid under a written lease. Affirmed.

The facts are stated in the opinion.

Messrs. William D. Edwards and Ralph E. Lum, with Messrs. Lum, Tam-blyn, & Colyer, for appellant:

Failure of the landlord to do what is lawfully required of him, which renders the demised premises unfit for the purpose for which they were leased, or which seriously interferes with the beneficial enjoyment thereof, in consequence of which the tenant abandons the premises, constitutes an eviction and releases the tenant from the obli-

gation under the lease to pay rent accruing thereafter.

building was not "untenantable." *Reischmann v. L. N. Hartog Candy Co.* 132 N. Y. Supp. 435. The question as to whether or not the premises were untenantaole should be decided by the jury upon the facts disclosed by the evidence.

The decision in *Soucy v. Louis Obert Brewing Co.* 180 Ill. App. 69, is based upon the assumption that where the landlord has covenanted to repair, the tenant, upon the premises becoming untenantaole for lack of repair, may abandon them, and is not liable for rent thereafter; but the lease was construed to mean that the tenant was to make the repairs at the expense of the landlord, so that there was no covenant by the landlord to make the repairs, and the principle was not applied. The lease contained a printed clause wherein the lessee agreed, "to maintain and keep the same in as good condition and repair as same shall be upon taking possession thereof, natural wear, injury by fire, and other inevitable accident excepted," and a written provision that "it is understood and agreed that all inside repairs are to be made at the expense of said lessee, and all outside repairs at the expense of said lessor." It was held that while the written clause would take precedence over the printed one if they were in conflict, they should be construed together if possible, as they could be in this case. Therefore, when the lack of outside repairs made the premises untenantaole, the tenant, instead of abandoning the place, should have made the repairs at the expense of the landlord.

Where a lease provided that if the premises were partly destroyed by fire, so as to render them untenantaole, the payment of rent should be suspended until the lessor had fully repaired or rebuilt them, and that the lessee might terminate the lease by giving notice to that effect within ten days after the fire, it was held in *Spear v. Baker*, 117 Md. 570, 84 Atl. 62, that, in the absence of notice by the tenant terminating the lease within ten days after the buildings had been partially destroyed by fire, the tenant would be liable to the landlord for rent beginning at the time when the

repairs were completed only in case the premises were rebuilt substantially as they were before the fire; and the building of a five-story warehouse without elevators in place of a six-story one with elevators is not a substantial compliance with the requirements. Presumably the tenant had abandoned the premises, since he pleaded a termination of the lease in defense to an action for the payment of rent.

In *Morse v. Tochterman*, 21 Cal. App. 726, 132 Pac. 1055, it was held that "the neglect of the landlord to keep the premises in a condition suitable to the purpose for which it was rented may be treated as an eviction by the tenant, and he may refuse to pay rent;" and the court applied this general rule to the case where the landlord had covenanted to put the premises in a condition to be "ready for occupancy," and had induced the tenant to take possession before the premises were ready by verbal promise that they would be completed in certain respects within a reasonable time, holding that the tenant was liable for rent for only the time during which he actually occupied the premises, but not for the time after he had, because of the landlord's breach of covenant, abandoned them.

But if the landlord has covenanted to put the premises in repair before the tenant takes possession, but the tenant takes possession before the repairs are made, he cannot avoid the payment of rent by abandoning the premises because of the landlord's breach of covenant, since a covenant for quiet enjoyment is the only covenant the breach of which will justify the tenant in abandoning the premises. *Soucy v. Louis Obert Brewing Co.* 180 Ill. App. 69.

And where an oral covenant to repair was alleged to have been made by the lessor, and a breach thereof alleged to have occurred, resulting in damages to the lessee prior to the time when notes for the rent, secured by chattel mortgage, were given by the lessee, it was held in *Reardon v. Averbuck*, 92 S. C. 569, 75 S. E. 959, that, in an action of claim and delivery it was not error to exclude all evidence of the covenant, its breach, and the damages, for the rea-

lars 43 S. W. 705; *Young v. Collett*, 63 Mich. 331, 29 N. W. 850; *Tallman v. Murphy*, 120 N. Y. 345, 24 N. E. 716; *Thalheimer v. Lampert*, 49 Hun, 606, 17 N. Y. S. R. 346, 1 N. Y. Supp. 470; *Bradley v. De Goicouria*, 12 Daly, 393, 67 How. Pr. 76; *Brolaskey v. Loth*, 5 Phila. 81; *Edwards v. Etherington*, *Ryan & M.* 268; *Alger v. Kennedy*, 49 Vt. 109, 24 Am. Rep. 117; *Lawrence v. Mycenian Marble Co.* 1 Misc. 105, 20 N. Y. Supp. 698; *Lawrence v. Burrell*, 17 Abb. N. C. 312; *LaFarge v. Mansfield*, 31 Barb. 345; *West Side Sav. Bank v. Newton*, 76 N. Y. 616, 57 How. Pr. 152; *Tyler v. Disbrow*, 40 Mich. 415; *Hunter v. Porter*, 10 Idaho,

repairs were completed only in case the premises were rebuilt substantially as they were before the fire; and the building of a five-story warehouse without elevators in place of a six-story one with elevators is not a substantial compliance with the requirements. Presumably the tenant had abandoned the premises, since he pleaded a termination of the lease in defense to an action for the payment of rent.

In *Morse v. Tochterman*, 21 Cal. App. 726, 132 Pac. 1055, it was held that "the neglect of the landlord to keep the premises in a condition suitable to the purpose for which it was rented may be treated as an eviction by the tenant, and he may refuse to pay rent;" and the court applied this general rule to the case where the landlord had covenanted to put the premises in a condition to be "ready for occupancy," and had induced the tenant to take possession before the premises were ready by verbal promise that they would be completed in certain respects within a reasonable time, holding that the tenant was liable for rent for only the time during which he actually occupied the premises, but not for the time after he had, because of the landlord's breach of covenant, abandoned them.

But if the landlord has covenanted to put the premises in repair before the tenant takes possession, but the tenant takes possession before the repairs are made, he cannot avoid the payment of rent by abandoning the premises because of the landlord's breach of covenant, since a covenant for quiet enjoyment is the only covenant the breach of which will justify the tenant in abandoning the premises. *Soucy v. Louis Obert Brewing Co.* 180 Ill. App. 69.

And where an oral covenant to repair was alleged to have been made by the lessor, and a breach thereof alleged to have occurred, resulting in damages to the lessee prior to the time when notes for the rent, secured by chattel mortgage, were given by the lessee, it was held in *Reardon v. Averbuck*, 92 S. C. 569, 75 S. E. 959, that, in an action of claim and delivery it was not error to exclude all evidence of the covenant, its breach, and the damages, for the rea-

72, 77 Pac. 434; *Leonard v. Armstrong*, 73 Mich. 577, 41 N. W. 695; *Bass v. Rollins*, 63 Minn. 226, 65 N. W. 348; *Jackson v. Eddy*, 12 Mo. 209; *Weiler v. Pancoast*, 71 N. J. L. 414, 58 Atl. 1084; *McCurdy v. Wyckoff*, 73 N. J. L. 368, 63 Atl. 992; 2 Am. & Eng. Enc. Law, 472; *Taylor, Land. & T.* ¶ 382; *Strohecker v. Barnes*, 21 Ga. 430, 17 Ga. 340; *Baird v. Evans*, 20 Ill. 29; *Pierce v. Joldersma*, 91 Mich. 463, 51 N. W. 1116; *Prior v. Sanborn County*, 12 S. D. 86, 80 N. W. 169; *Bostwick v. Losey*, 67 Mich. 558, 35 N. W. 246; *Wood, Land. & T.* pp. 377, 384; 24 Cyc. 1131, 1156.

Messrs. Vredenburg, Wall, & Carey, for appellee:

If the plaintiff has failed to comply with his guaranty to at all times keep the cellar

son that if the payment of rent could have been made conditional upon the keeping of the covenant, the tenant had waived his right to defend on that ground by giving the rent notes after the breach had occurred and the damage had been sustained.

And, even though a tenant be conceded to have the right to abandon the premises because of their untenable condition, if he stays part of any particular month and then moves out on account of the condition of the premises he is liable for the whole month's rent, it being payable in advance, and the rule is not changed by the fact that he was induced to stay for that part of the month by the agreement of the landlord's superintendent that the condition would be remedied, the authority of the superintendent to make the agreement for the landlord not having been shown. *Brentmore Realty Co. v. Weld*, 148 N. Y. Supp. 79.

Where it is the landlord's duty to repair, the tenant is not released from liability for rent if he abandons the premises upon their becoming untenable by reason of other causes than lack of repairs, for which the landlord is not responsible, such as offensive odors arising from food materials carried to the place by rats. *Lumpkin v. Provident Loan Soc.* — Ga. App. —, 84 S. E. 216. The court humorously discussed the question as follows: "In the instant case the lease contained no express covenant in the lease for the landlord to keep the premises in repair; but it is true that, under § 3699 of the Civil Code, he must, without such covenant, keep them in repair. *Guthman v. Castleberry*, 48 Ga. 172; *Whittle v. Webster*, 55 Ga. 180; *Driver v. Maxwell*, 56 Ga. 12; *Lewis v. Chisholm*, 68 Ga. 40; *Dougherty v. Taylor & N. Co.* 5 Ga. App. 773, 63 S. E. 928. None of these authorities, however, control this case, for here no repairs were needed; the undisputed evidence being that the physical condition of the premises was exactly the same as when they were leased, and there was no evidence whatever that any repairs were required. Our Georgia statute, however, does not render the landlord L.R.A.1915C.

waterproof, at his own expense, this does not constitute an eviction.

Upton v. Townsend, 17 C. B. 30, 25 L. J. C. P. N. S. 44, 1 Jur. N. S. 1089, 4 Week. Rep. 56; *Morris v. Kettle*, 57 N. J. L. 218, 30 Atl. 879; *Meeker v. Spalsbury*, 66 N. J. L. 60, 48 Atl. 1026; *Miller v. Maguire*, 18 R. I. 770, 30 Atl. 966; *Ogilvie v. Hull*, 5 Hill, 52; *Edgerton v. Page*, 20 N. Y. 281; *Huber v. Ryan*, 26 Misc. 428, 56 N. Y. Supp. 135; *Sully v. Schmitt*, 147 N. Y. 248, 49 Am. St. Rep. 659, 41 N. E. 514; *Birckhead v. Cummins*, 33 N. J. L. 56; *Gribbie v. Toms*, 70 N. J. L. 524, 57 Atl. 144; *Koehler v. Scheider*, 11 N. Y. S. R. 676; *Hilliard, Real Prop.* p. 349, § 7; *Hoeveler v. Fleming*, 91 Pa. 322; *DeWitt v. Pierson*, 112 Mass. 8, 17 Am. Rep. 58.

liable for extraordinary and unforeseen occurrences. 1 *Tiffany, Land. & T.* 579. In fact, the whole trouble of the plaintiff in error can be summed up in one word—rats! It is true that the evidence discloses that the office was badly ventilated, and one witness for the defendant in error testified that was the cause of the bad odor; but the plaintiff in error himself makes no such complaint; he puts the bad odors, and the consequent untenability of his office, squarely upon the 'offending heads' of the rats. There is no contention that the rodents disturbed the office force by unseemly squeaking or squealing, or that they otherwise conducted themselves in any ungentelemanly or unladylike manner, or that they gnawed his furniture, or that they themselves had a bad odor; but the sole contention is that they brought in food, presumably from an adjoining restaurant (which was established about a year after the plaintiff in error released his office), and that this food alone caused the offensive odors. The plaintiff in error, not being an object of charity, but a man of considerable means, strongly objected to having food thus brought in to him from his neighbors, and especially the kind that was furnished; he not being especially fond of 'chicken bones,' 'fish heads,' 'scraps of cheese,' 'tripe,' and such like delicacies. He testified that he disinfected the premises, but all in vain. He set traps, and every day caught scores of rats 'as big as squirrels' but their numbers were no more diminished by his captures than were the ranks of the Allies or the Germans by the 'Battles of the Aisne.' No traps, no disinfectants, 'no nothing' could stop the onslaught of these hungry and persistent vermin; they were imbued with the true 'Atlanta spirit,' and continued with undiminished ardor their kindly meant, but misunderstood, attentions. Finally, in despair, the plaintiff in error, having no 'Pied Piper' to entice them by the witchery of his music to their destruction in the 'rolling waters of the River Weser' (or the Chattahoochee), cut the 'Gordian knot' by breaking his lease and moving to another and distant building.

There is no stipulation in the lease that failure of the plaintiff to perform his guaranty shall discharge defendant's liability to pay rent, or work a forfeiture of plaintiff's rights under the lease. Hence, such failure is not a bar to the action for rent.

Surplice v. Farnsworth, 7 Mann. & G. 576, 8 Scott, N. R. 307, 13 L. J. C. P. N. S. 215, 8 Jur. 760; *Hart v. Windsor*, 12 Mees. & W. 68, 13 L. J. Exch. N. S. 129, 8 Jur. 150, 9 Eng. Rul. Cas. 438; *Hunter v. Reiley*, 43 N. J. L. 480; *Meeker v. Spalsbury*, 66 N. J. L. 60, 48 Atl. 1026; *Coles v. Celluloid Mfg. Co.* 39 N. J. L. 327; *Whitcomb v. Brant*, 76 N. J. L. 246, 69 Atl. 1086; *Royce v. Guggenheim*, 106 Mass. 201, 8 Am. Rep. 322; *Huber v. Ryan*, 26 Misc. 428, 56 N. Y. Supp. 135; *Watts v. Coffin*, 11 Johns. 495; *Etheridge v. Osborn*, 12 Wend. 529; *Tibbits v. Percy*, 24 Barb. 39; *Wood, Land. & T.* § 482, p. 814; *Taylor, Land. & T.* p. 286, § 374; *Grigg v. Landis*, 21 N. J. Eq. 512; *Den ex dem. Bockover v. Post*, 25 N. J. L. 285; *Hawley v. Kaftz*, 148 Cal. 393, 3 L.R.A.(N.S.) 741, 113 Am. St. Rep. 282, 83 Pac. 248.

The covenant of the defendant to pay rent, and the guaranty of the plaintiff to keep the cellar waterproof, are independent covenants, and, in the absence of a stipulation to the contrary, a breach of either does not warrant an abrogation of the entire contract by the injured party.

Hunter v. Reiley, 43 N. J. L. 480; *Thomson-Houston Electric Co. v. Durant Land Improv. Co.* 144 N. Y. 34, 39 N. E. 7; *Leavitt v. Fletcher*, 10 Allen, 119; *Taylor v. Finnigan*, 189 Mass. 568, 2 L.R.A.(N.S.)

973, 76 N. E. 203; *Drago v. Mead*, 30 App. Div. 258, 51 N. Y. Supp. 360; *Blackburn v. Reilly*, 47 N. J. L. 290, 54 Am. Rep. 159, 1 Atl. 27; *Gerli v. Poidebard Silk Mfg. Co.* 57 N. J. L. 432, 30 L.R.A. 61, 51 Am. St. Rep. 611, 31 Atl. 401; *Luce v. New Orange Industrial Asso.* 68 N. J. L. 32, 52 Atl. 306; *Coursen v. Canfield*, 21 N. J. Eq. 92; *Vannatta v. Brewer*, 32 N. J. Eq. 268, 6 Mor. Min. Rep. 358; *Lewis v. Chisholm*, 68 Ga. 42; *Rubens v. Hill*, 213 Ill. 523, 72 N. E. 1127.

Black, J., delivered the opinion of the court:

The error complained of by the appellant in this case is the ruling of the trial court directing a verdict for the plaintiff. The suit was instituted in the Hudson circuit court to recover rent, due under a written lease, for the premises No. 53 Newark avenue, Jersey City. The lease was dated the 26th day of December, 1901; the term commencing on the 1st day of February, 1902, ending on the 1st day of May, 1922, at the yearly rental of \$3,000. The lease contained these covenants: By the tenant: "That the tenant shall pay the rent aforesaid as the same shall fall due." By the landlord: "The basement shall be waterproof, and not less than 7 feet high. And he does hereby guarantee that he will at all times during the said lease keep the said cellar waterproof at his own expense." The evidence of the defendant showed that there was a breach of the above covenant on the part of the landlord to keep the cellar waterproof during the term of the lease.

We do not think that, under the law and the evidence, the landlord can be held responsible for the action of the rats. It is clearly established that there was no bad odor in the premises of the plaintiff in error until after the adjoining restaurant was opened (about a year after the plaintiff in error leased his office), and that the odor was caused entirely by food brought in, presumably from that restaurant, by rats. There was no evidence to show that the restaurant was a nuisance, or that it was improperly conducted. The plaintiff in error himself declared in his testimony that he could not swear that it was a nuisance, and that he did not desire it closed up, as it was not responsible for his troubles, and the landlord offered to remove the restaurant if the plaintiff in error would swear that it was a nuisance, and the plaintiff in error declined to do so, saying it was not to blame. If the restaurant which caused the influx of the rats, and was thereby indirectly responsible for the odor, was not to blame, how could the landlord be held responsible for the actions of these pests? There is, however, another plea which the plaintiff in error might have set up by way L.R.A.1915C.

of recoupment, which would have received our careful and sympathetic consideration. The fear of rats, and even of mice, entertained by the fair sex, is proverbial, and this court will take judicial cognizance of the fact that any real estate office overrun by such vermin would lose all patronage of the ladies, and would be entirely deprived of the refining and elevating influence of their presence, to say nothing of the more substantial emoluments derived from business dealings with them. If the plaintiff in error had rested his case on this ground, at once solid and sentimental, this court (though all of its members are staid and settled married men, but like all men of intelligence and discernment, fond of the beautiful) would have diligently sought to find a way to relieve him, if not by the harsh and inflexible rules of law, then by the softer and more pliant ones of equity. But, the plaintiff in error (possibly through fear of his better half) not having made this plea, the only thing we can do, while affirming the judgment against him, is to tender our congratulations upon the fact that at last he has escaped from his too attentive friends (!)—the rats." J. W. M.

The trial court held that the two covenants were independent. The breach of the covenant to keep the cellar waterproof was not a defense to an action for rent. The judge at the trial, therefore, directed a verdict for \$4,350 in favor of the plaintiff. It is this ruling of the trial judge which the defendant alleges is erroneous in law, and seeks to have the judgment reversed. The defendant contends, to use the words of the brief, that the failure of the landlord to do what is lawfully required of him, either by the terms of the lease or otherwise, which renders the demised premises unfit for the purpose for which they are leased, or which seriously interferes with the beneficial enjoyment thereof, in consequence of which the tenant abandons the premises, constitutes an eviction by construction of law, and releases the tenant from the obligation under the lease to pay rent accruing thereafter; while the plaintiff contends that the failure by the landlord to perform his guaranty does not constitute an eviction in fact or constructively.

There are numerous cases in this and other jurisdictions illustrating the principle of eviction, both actual and constructive, applied as a defense to an action for the nonpayment of rent. Chief Justice Jervis, in the case of *Upton v. Townsend*, 17 C. B. 30, 51, after speaking of a physical expulsion or a motion, in reference to a constructive eviction, said: "I think it may be taken to mean this: Not a mere trespass and nothing more, but something of a grave and permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises."

This definition of a constructive eviction was cited with approval by our supreme court in the cases of *Meeker v. Spalsbury*, 66 N. J. L. 63, 48 Atl. 1026; *Metropole Constr. Co. v. Hartigan*, 83 N. J. L. 411, 85 Atl. 313.

The record shows that the premises were fitted for and used as a Childs restaurant. Soon after the place was opened for business, there was water in the basement, which was taken care of, by the tenant, with a hand pump; that at times it got 2 feet deep; that the tenant moved out of the premises in May, 1904, and resumed again in November, 1904. From 1905 to 1909 the premises were sublet. The tenant abandoned the premises in 1909. In October, 1910, there were 3 feet of water in the cellar. The presence of the water in the cellar was wholly due to the fact that the walls and foundations were not waterproof. The cellar was necessary for the conduct of the business of the defendant. The cellar was used in part for storage, but mainly L.R.A.1915C.

for the steam apparatus that perfects the coffee. There is no evidence that the landlord in any way was responsible for the water in the cellar, except that the walls and foundations were not waterproof, according to the guaranty. The facts in the record, on which the judge at the trial was called upon to make a ruling, tested by the rule above cited, fall short of making out either an actual or constructive eviction. We are unable to find in the record any evidence that shows that the landlord, or by his procurement, did anything with the intention of depriving the tenant of the enjoyment of the premises. A breach of his covenant was not a defense to the action. The ruling of the trial court in directing a verdict for the plaintiff was not error.

No error appearing in the record, the judgment is affirmed.

OHIO SUPREME COURT.

A. R. CREAMER, Exrs., etc., of Emma Weaver, Deceased, Plff. in Err.,
v.

SARAH E. HARRIS.

(— Ohio St. —, 106 N. E. 987.)

Will — construction — ejusdem generis.

1. In the construction of wills, a presumption prevails, especially in items not residuary, that, where a more general description is coupled with an enumeration of things, the description shall cover only things *ejusdem generis*.

Same — intention of testator.

2. This, however, is only a rule of presumption, and must yield to the testator's intent as gathered from the whole instrument, but where the presumption is favored and supported by the evident intention of the testator, as developed from a consideration of all the parts of the instrument, then such rule of presumption should be applied to the matter in question.

(March 17, 1914.)

Headnotes by the Court.

Note. — Wills: what passes under bequest of contents of, or property, effects, etc., contained in, a place or receptacle.

It is the purpose of the present note to treat the cases which determine what passes under a bequest in general terms, such as contents of, or personal property, effects, etc., in, a certain place or receptacle, such, for example, as a house or barn, or desk, bureau, box, safe, etc.

This question can be answered only by applying the general rules of construction of wills, the cardinal one of which is that the general intent of the testator, if not

ERROR to the Circuit Court for Fayette County to review a judgment affirming a judgment of the Court of Common Pleas in defendant's favor in a suit for the construction of the will of Emma Weaver, deceased. Reversed.

Statement by Nichols, Ch. J.:

The controversy in this action centers around the clause "one bureau and contents," mentioned in the second item of the last will and testament of Emma Weaver, late a resident of Fayette county, Ohio, and demands an interpretation thereof in order that the true intention of the testatrix may be ascertained. The will in its entirety reads thus:

"I, Emma Weaver of the county of Fay-

ette and state of Ohio do make and publish this my last will and testament.

"Item 1. It is my will that all my just debts be first paid.

"Item 2. I give to my husband Silas Weaver the sum of \$10 in money and he is to have the right to occupy the house in which we now live for six months after my death. The above I give to him in lieu of all claims against my estate as widower and given also on the condition that he survives me.

"Item 3. I give and bequeath to Sadie Harris widow of John Harris all my carpets, window blinds and curtains, 1 clock, 1 stand, 1 bureau and contents, 6 kitchen chairs, 1 small rocking chair, 1 safe, all my dishes, all crocks, jars, washtub and board,

inconsistent with some established rule of law or public policy, must govern. Generally speaking, this intention is to be gathered from consideration of the will as a whole, construed in the light of the circumstances surrounding its execution, the nature and amount of the property devised, the relation of the parties, etc., together with various minor or subordinate and ancillary rules of construction which have been established by the courts. Among the latter may be mentioned the rule which requires that, when possible, the will must be given effect as a whole; the rule that the will should be so construed as to dispose of the whole estate; the rule that particular words or terms inconsistent with the general context will be rejected; and the rule, doctrine, or maxim *ejusdem generis*, itself a rule of intention, by which the natural import of words of general description or broad meaning is confined or restricted to matters or things of the same class as is comprehended by accompanying words of specific or limited meaning.

Beyond the establishment of the above and similar rules of construction, the individual cases are of little value except for purposes of illustration. This is necessarily true because the facts and circumstances vary in practically all cases, the effect of which is that but little aid in determining the intent of the testator in a particular case is afforded by the determination of the intent of the testator in a preceding case. The impracticability of basing decisions on precedents is aptly illustrated by many of the following cases, wherein contrary conclusions are reached upon facts which in the main are, to say the least, similar.

Cases illustrating general rule of intent.

In *Gaff v. Cornwallis*, 219 Mass. 226, 106 N. E. 860, the court, adhering to the rule that whether all the things contained in a receptacle will pass under a bequest of its contents depends upon the intention of the testator, held that a bequest of the contents of a safe deposit box passed a mort-
L.R.A.1915C.

gage, some corporate stock, and two bank books found therein, saying: "It seems clear that by the bequest of the 'contents' of this safe deposit drawer or box the testatrix intended to give to the plaintiff the property in question. This place of security was under the sole control of the testatrix. She alone knew what valuable papers she had deposited or intended to deposit therein. Her language, by its plain meaning, embraced whatever securities and property she might have in the box at the time of her death, except such as were otherwise disposed of by the will, or from their nature would not be the subject of a devise or bequest. . . . Whether all the things contained in the receptacle, or only specially designated articles therein, will pass by such a bequest, will depend upon the intention of the testator as manifested by the words he uses."

In *Foxall v. McKenney*, 3 Cranch, C. C. 206, Fed. Cas. No. 5,016, it was held that a bequest of testator's two residences, together with all the "furniture and household effects in both residences," did not pass coffee in a bag, wine in bottles, and brandy in a cask, which had been laid in by the testator for current use and consumption by himself and family, the court saying that where the words used are sufficiently broad and extensive to either cover or be interpreted to exclude the things in question, the testator's intention, gathered by a comprehensive view of the whole will and the circumstances in which the testator was at the time of making it, must govern, and that in the present case the testator could not be regarded as having intended to include in the bequest the coffee, wine, and brandy in question at the time he made his will, or even to have thought of providing at such time.

In *Ball v. Dixon*, 83 Hun, 344, 31 N. Y. Supp. 990, pursuant to the probable intention of the testator as determined by the court, it was held that a devise of a farm, together with a bequest of "all the personal property upon said farm, including all of the personal property in the house and in the other buildings on said premises,"

all baskets, 1 green-colored trunk and contents; and also all kitchen furniture of every character and description which she shall have absolutely subject to the rights of my husband.

"Item 4. I give and bequeath to William R. Harris my Bible, large looking glass, 1 rocking chair and 6 cane-bottom chairs, stepladder and all spades, shovels, hoes, etc.

"Item 5. I give and bequeath to Frances Weaver 1 small black trunk and contents therein except deeds and my private papers.

"Item 6. I give and bequeath to Nora Anderson 1 bedstead and bedding complete including pillows.

"Item 7. I give and bequeath to Sadie Harris widow of John Harris, Mattie Har-

ris and Frances Weaver equally to be divided between them all my clothing also all other chattel property not heretofore disposed of—as I do not want sale of my chattel effects.

"Item 8. It is my will and I order and direct that my executor sell all my real estate at public or private sale on such terms as he deems best, and to make and deliver deeds to purchasers as fully and completely as I might do if living and that he convert all other personal property not above disposed of in kind into money.

"Item 9. I give and bequeath to Nellie Jones, Julia Bibba and William Shafers of Oxford, Granville Co., N. C., share and share alike in money all the residue of my

did not convey promissory notes, certificates of deposit, and pass books representing money in bank which were found in a safe in the house on the farm. In determining the testator's intention the court took into consideration the facts that the notes, certificates, and pass books in question represented about one third of the estate, and that there was no apparent reason for favoring the devisee of the farm to such an extent as claimed by him, and that, by allowing such assets to pass under the residuary clause, an equitable and reasonable distribution of the property would be affected.

In *Blackmer v. Blackmer*, 63 Vt. 236, 22 Atl. 600, it was held that a devise of a life interest in testator's home place, together with a similar interest in "all the household goods, furniture, provisions, and other goods and chattels, except the piano, . . . which may be therein," did not convey the income from certain promissory notes found in the house, the court concluding, upon looking at the provisions of the will as a whole and construing the same in the light of the surrounding circumstances, that it was not the intention of the testator to dispose of any interest in the promissory notes by the use of the phrase "other goods and chattels."

In *Lock v. Noyes*, 9 N. H. 430, a bequest of a "trunk and all its contents" was held to pass a promissory note which had been indorsed and placed therein prior to the making of the will, the court finding that such was the intention of the testator, and that the indorsing of the note gave it the necessary locality. It was also said that the indorsing of the note and the placing of it in the trunk before the making of the will strongly indicated that the testator intended it to pass along with the other contents of the trunk.

In *Read v. Stewart*, 4 Russ. Ch. 69, it was held, pursuant to the found intention of the testator, that a bequest of a "cabinet with whatever it contains except money" did not pass a promissory note found in the cabinet.

In *Anonymous*, Prec. in Ch. 8, a devise of money in a certain sum, and "all the L.R.A.1915C.

goods and chattels, plate, jewels, and household stuff and stock upon the ground in and belonging to his house," was held not to cover a sum of money in the house, such being the probable intent of the testator.

In *Dennett v. Hopkinson*, 63 Me. 350, 18 Am. Rep. 227, it was held that crops harvested and in the barns passed under a clause in a will giving all testator's live stock and farming tools and all his household furniture and other articles of personal property in and about the farm buildings, a part of which consisted of the barns containing the crops in question.

Cases illustrating rule *ejusdem generis*—defeating gift.

In *Peaslee v. Fletcher*, 60 Vt. 188, 6 Am. St. Rep. 103, 14 Atl. 1, it was held that a devise of a certain place "with my household furniture and all my personal goods and chattels on said premises at the time of my decease" did not include promissory notes and cash in the house at the specified time, the court saying that the rule was that, except in residuary clauses, general words following, but coupled with, words of a limited meaning, are to be restricted to the same class of things as the latter.

In *Re Reynolds*, 124 N. Y. 388, 26 N. E. 954, affirming 55 Hun, 603, 9 N. Y. Supp. 949, which affirmed 7 N. Y. S. R. 725, it was held that a devise of a building, "including all the furniture and personal property in and upon the same or in any manner connected therewith," did not pass title to bank books, securities, and money contained in a safe on the premises, the court saying that the general rule of construction that, in the absence of a showing of an intention to the contrary, general words used in connection with words of specific import will be restricted to things of the class or classes enumerated, will be applied, at least where there is a residuary clause which prevents intestacy as to any portion of the estate.

In *Gibbs v. Lawrence*, 30 L. J. Ch. N. S. 170, 7 Jur. N. S. 137, 3 L. T. N. S. 307, 9 Week. Rep. 93, set out in *CREAMER v. HARRIS*, it was

estate after the foregoing provisions of my will have been complied with.

"It is my desire and I direct that my executor shall see to it that I be given a nice funeral; but not to cost over \$300. I nominate A. R. [Creamer] executor of this my last will and testament."

This will was executed six years before the death of the testatrix, who was an aged colored woman; she having reached the advanced years of eighty-seven at the time of her death.

The contents of the bureau were made up substantially of female wearing apparel, and in addition the sum of \$320 found in one of the drawers of the bureau.

The testatrix, at the time of the execution of the will, was a married woman, but

childless; her husband, however, did not survive her. She had no blood relatives in Ohio; the only known next of kin being those mentioned in item 9 of the will, the residuary clause.

Both the common pleas and the circuit courts held the description in question sufficiently definite to pass title to the defendant in error, Sarah E. Harris, as to both wearing apparel and the money.

Messrs. Creamer, Creamer, & Thompson, for plaintiff in error.

Messrs. Rankin & Rankin, for defendant in error:

The rule *ejusdem generis* has no application whatever to the case at bar.

State v. Broderick, 7 Mo. App. 19; Smith

held, applying the rule that where general words follow a specific enumeration of articles, the former must be construed as limited to things *ejusdem generis* with the latter, that a sum of money found in a house did not pass under a bequest of "all and singular my household furniture, plate, linen, china, pictures, and other the goods, chattels, and effects which shall be in, upon, or about my dwelling house and premises at the time of my decease."

In *Trafford v. Berrige*, 1 Eq. Cas. Abr. 201, a devise by a testator of "all his goods, chattels, household stuff, furniture, and other things which then were or should be in his house at the time of his death" was held not to pass money found in the house, it being said that "by the words 'other things' shall be included things of like nature and species with those before mentioned."

In *Smith v. Knight*, 18 Grant, Ch. (U. C.) 492, it was held that both controlling authority and the rule *ejusdem generis* require that a bequest to K. of the testatrix' "carpet, blankets, and whatever else I may have at his house" must be held to pass neither certain mortgages nor a bank deposit receipt belonging to the testatrix and found at K.'s house.

In *Re Miller*, 61 L. T. N. S. 365, applying the doctrine *ejusdem generis*, it was held that a bequest of "all the rest of the furniture and effects" at testator's house, following a specific bequest of certain books, wine, and plate, must be held not to pass a large sum in bank notes, stock receipts, and certificates or jewelry found in the house.

And in *Northey v. Paxton*, 60 L. T. N. S. 30, a bequest of "all the household furniture and effects belonging to me in and about my country residence" was held to be so limited under the rule *ejusdem generis* as not to pass jewelry found in the house.

In *Ludwig v. Bungart*, 33 Misc. 177, 67 N. Y. Supp. 177, it was held that a devise of all testator's "household furniture and store with contents of house," the store being under the living rooms, did not carry money, watches, and jewelry which were in a safe in the store, it being said that the L.R.A.1915C.

general phrase "contents of house" following the specific one of "household furniture" must be confined to matters *ejusdem generis* with the latter.

In *MacPhail v. Phillips* [1904] 1 I. R. 155, the doctrine *ejusdem generis* was held to prevent a bequest of "all my household furniture and effects in my residence" from passing a large amount of wool, part of testator's stock in trade, stored in a store which was at the rear of, and which admittedly formed a part of, the residence.

—aided by general intent.

In *Re O'Brien* [1906] 1 L. R. 649, applying the general rules of intention and *ejusdem generis*, it was held that a bequest of testator's "house, furniture, and whatever is in the house I now dwell in and in the house adjoining, so far as it belongs to me," did not pass a comparatively large sum of money found in a box in one of the houses.

In *Campbell v. M'Grain*, Ir. Rep. 9 Eq. 397, pursuant to the intention of the testator as determined from the will as a whole, aided by application of the rule of construction *ejusdem generis*, a bequest of all testator's household furniture, plate, linen, and all other effects in his dwelling house was held not to pass £310 found in the house. And following *Campbell v. M'Grain*, supra, it was held in *Watson v. Arundel*, Ir. Rep. 10 Eq. 299, that a bequest of "my plate, house linen, furniture, and all other effects in my house at the time of my death" did not pass a "sum of cash" found in the house.

In *Fenton v. Fenton*, 35 Misc. 479, 71 N. Y. Supp. 1083, the court applied both the general rule of intent and the rule of *ejusdem generis* in case of a devise of a house and a bequest of "all the contents of every kind and nature therein contained, . . . and the furniture and all the contents thereof," holding that bonds, mortgages, bank books, and cash found in a safe in the house did not pass under the quoted clause of the will,—the terms of the will, taken as a whole and considered in connection with the theory that if possible effect must be given to all the provisions of the

v. Jewett, 40 N. H. 513; Lock v. Noyes, 9 N. H. 430; Pein v. Miznerr, 41 Ind. App. 255, 83 N. E. 785; National Bank v. Ripley, 161 Mo. 126, 61 S. W. 587; Martin v. State, 156 Ala. 89, 47 So. 104.

Nichols, Ch. J., delivered the opinion of the court:

The testimony in the case shows that the testatrix died seised of real estate of the approximate value of \$4,000, and chattel property, exclusive of the money in dispute, of a value less than \$50.

The executor maintains that, viewing the will as a whole, it cannot be said that the testatrix intended to bequeath the \$320 found in the bureau to the defendant in error, while the legatee mentioned in item

3 just as strongly contends that the plain and unambiguous meaning of the term "contents" is of a such a character as to carry all the bureau might contain, whether it be wearing apparel, notes, credits, moneys, or what not.

No direct authority can be found in Ohio which will aid the court in its interpretation of the dispute in question, although in other jurisdictions, both in England and United States, cases are not few which construe substantially similar expressions. In volume 51 of the Connecticut Reports, at page 569, in the case of Webster v. Wiers, the court holds: "A testatrix made the following bequest: 'I give to M all my household effects, books and papers of value, and everything the house contains.' . . .

will, manifesting a lack of intention to pass the securities under the quoted provision. In this case, had the will been given the construction contended for by the devisee of the house and contents, it would have rendered other material provisions of the will of no force or effect.

In Dutton v. Hockenhull, 22 Week. Rep. 701, a bequest of a writing desk, together with "all the small coins, curiosities, and other articles" therein contained, following a legacy of money to the same person, was held not to pass a sum of £321 consisting of gold, bank notes, silver, and copper found in the desk, it being said that the term "small coins" must be regarded as *ejusdem generis* with curiosities, and that the indicated intention of the testator was not to include any considerable sum of money in the bequest of the desk and its contents.

In Webster v. Wiers, 51 Conn. 569, both the headnote and opinion of which are quoted in CREAMER v. HARRIS, it was held that a bequest of "all my household effects, books and papers of value, and every thing the house contains," did not include a promissory note and bank book representing large deposits found in the house, the court saying that the articles intended by the quoted clause were strictly "household effects," or in other words were things *ejusdem generis* with the specific articles enumerated.

In Re Delaney, 133 App. Div. 409, 117 N. Y. Supp. 838, affirmed without opinion in 196 N. Y. 530, 89 N. E. 1098, it was held that a bequest of "all the household furniture and personal property of whatsoever kind in my dwelling house" did not include money evidenced by bank pass books, or cash or jewelry, in such house at the testatrix' death, the court applying the rule that the intention, as gathered from the will and the surrounding circumstances, must control. And in this case it was further held that the fact that there was no residuary clause in the will did not necessarily bring it within the exception sometimes made to the rule *ejusdem generis*, namely, that general words will not be limited to less than their natural import by reason of their

use in connection with specific terms where there is no residuary clause, and that such exception or rule did not preclude application of the rule that the intention of the testator must govern. And upon the latter point, see Mahony v. Donovan, 14 Ir. Ch. Rep. 388, as set out in the next following subdivision.

And see CREAMER v. HARRIS.

—not defeating gift; rule as subordinate to general intent.

In Mahony v. Donovan, supra, a bequest of "my dwelling house, household furniture, and all things now therein in my possession, especially my car horse and covered and side cars," was held to pass a large sum in bank notes found in the house, which were known by the testator to be therein at the time he made his will. In this case the will contained no residuary clause, and while the court, in determining the testator's intention, laid some stress upon the fact that the will, unless given the above stated construction, would not dispose of the whole estate, did not expressly point out that the rule *ejusdem generis* does not apply to general terms used in wills containing no residuary clause. Such a rule has been laid down in some cases foreign to the present note.

It has been held that the rule that words of general description must be confined to matters or things *ejusdem generis* with specified subjects cannot be applied so as to overthrow the intention of the testator ascertained from the will as a whole and the circumstances.

Applying this theory it was held in Bromberg v. McArdle, 172 Ala. 270, 55 So. 805, Ann. Cas. 1913D, 855, that a pocket book containing a sum of money, found in a bureau, passed under a devise of a certain residence "together with all the household and kitchen furniture, and all other personal property contained in said residence."

So, in Perea v. Barela, 5 N. M. 458, 23 Pac. 766, the rule *ejusdem generis* was said to rest on a mere presumption easily rebutted by anything showing that a larger subject than any specifically named was in

Held, not to include a promissory note of \$100, and a savings bank book with deposits of \$2,500 represented by it, which belonged to the testatrix and were found among her papers in her dwelling house immediately after her death."

Park, Ch. J., in his opinion in this case, at page 575 of 51 Conn., says: "It seems clear to us that the articles . . . intended are strictly household effects, such articles as were kept for household and family use. It is true that she uses, at the close of the bequest, the sweeping expression, 'and everything the house contains' . . . It would be a very unnatural thing that a testator should describe such property, and of such value, merely as household effects and as a part of all the house

contained. . . . It is hardly credible that a particular allusion to them should not have been made if she had intended to embrace them in the bequest."

In the case of *Gibbs v. Lawrence*, 7 Jur. N. S. 137, Vice Chancellor Wood, a jurist of great learning and high repute, held that a bequest of "all and singular my household furniture, plate, linen, china, pictures, and other the goods, chattels, and effects which shall be in, upon, or about my dwelling house and premises at the time of my decease," would not include a sum of money (in that case £400) found in the house.

Consulting some of the leading text writers on will construction, we find it to be an established course of interpretation that it is a rule of presumption, especially

the testator's view, it being held that a bequest of "all articles of goods in my house, personal furniture, household furniture, and all that therein exists," passed a sum of money found in an iron box or safe in such house. In determining the intention of the testator much stress was laid on the clause, "and all that therein exists," it being said that this related to the contents of the things before enumerated, and that, as testator knew of the large sum of money in the box, the clause was obviously added for the express purpose of disposing of the money.

In *Re Lea*, 104 L. T. N. S. 253, a bequest of "all my furniture, plate, linen, china, glass, books, pictures, and household effects of every description, and all other the contents of the said dwelling house," except certain enumerated articles, was held to pass title to money consisting of bank notes and cash, and jewelry, in the house at the time of the death of the testatrix, the court finding that such was her intention.

And see *CREAMER v. HARRIS*.

Things germane to the place or the receptacle.

In a few instances the courts have seemingly attached some weight to the fact that the things in question were or were not such as usually were kept in or appertained to the place or receptacle mentioned.

Thus, in *Re McCalmont*, 19 Times L. R. 490, a bequest of a freehold town house, "together with the furniture and contents therein and appertaining thereto," was held to pass unset brilliants, a collection of medals and coins, and yacht linen found in the house, and a motor car used in connection with the house, and some carriages used in season, but at the time at a coach builder's for safe custody, but not to pass money, foreign and domestic, guns, corporate stock, debentures, and certificates, or promissory notes also found in the house, the court saying that the latter articles did not appertain to the house.

And in *Boon v. Cornforth*, 2 Ves. Sr. 277, applying the rule of construction *ejusdem* L.R.A.1915C.

generis, it was held that a bequest of "all my goods, furniture, plate, books, pictures, and everything else which at my decease shall be at my house" passed things enumerated and such others as were proper to go with the house, but not to pass watches, a cane, or India pieces for handkerchiefs not yet made up.

And in *Roberts v. Kuffin*, 2 Atk. 112, a devise to testator's daughter of all goods and things of every kind and sort which shall be found in her closet at the time of his death was held not to include a sum of money found in the closet at his death, the lord chancellor saying that since goods are first named, the subsequent word "things" must be confined to household goods and what is of the same species, and that it would be unnatural to extend it to money, especially as a closet is a very improper place to refer to for the same.

Things which have no locality.

The decisions in another line of cases have been based in part at least upon the fact that the thing in question had no locality in the place or receptacle, but that what was therein was merely evidence of something which was somewhere else.

Thus in *Parrott v. Avery*, 159 Mass. 594, 22 L.R.A. 153, 38 Am. St. Rep. 465, 35 N. E. 94, a bequest of a "chest and its contents, except the bank books," was held not to operate as a devise of land described in a deed contained in the chest, it being said that the deed in itself could not be regarded as property, but merely evidence of title to property elsewhere situated, and that the land itself could not be deemed to be included among the contents of the chest because a deed conveying it or an undelivered deed describing it was found in the chest.

So, in *Fleming v. Brook*, 1 Sch. & Lef. 318, 9 Revised Rep. 35, a much cited case, a bequest to F. of "all my property of whatever nature or kind the same may be, that shall be found in her house," except a certain bond, was held not to pass either mort-

in clauses not residuary, that, where a more general description is coupled with an enumeration of things, the description shall cover only things of the same kind; and doubtless words of a general description may, by due regard to the context, be considered as limited by an attempt at particular description.

But let us disregard for the moment all case law on the subject, and also the general rules of construction, excepting the most important rule "that all the words of the will are to be taken into view, and not a part of them only, as every word is employed to develop the intention of the testator, and all of them, taken in connection, exhibit a transcript of his mind," and so, invoking this cardinal rule, we are irresist-

bly forced to the conclusion that this aged colored woman did not have the remotest idea of bequeathing to Sadie Harris the money found in the bureau.

A reading of the instrument, a consideration of the circumstances surrounding the testatrix at the time of the execution of the instrument, together with the exercise of a knowledge of human nature, forbid the conclusion that the testatrix wished to bequeath this money in this manner. The very great detail to which the testatrix resorts in the matter of enumeration of the various articles she specifically bequeaths demonstrates that she, in common with the older people of her race and condition, held little things, even old trumpery, in high esteem.

gages or bonds or bankers' receipts, because, being choses in action, they had no locality; and the lord chancellor did not consider the exception in the bequest as evidence sufficiently strong of the testator's intention to pass the enumerated choses in action.

And in *Re Craven*, 99 L. T. N. S. 390, 24 Times L. R. 750, affirmed in 100 L. T. N. S. 284, it was held that a bequest of a house and "its contents except pictures" passed domestic and ornamental furniture, cash, bank of England notes, books, jewelry, a collection of coins, cameos, medals, and the like, in fact everything except the pictures which were expressly reserved, and choses in action such as title deeds, bonds, checks, and other securities, which could not pass because they were merely evidence of title to things outside, and not in, the house.

And in *Andrews v. Schoppe*, 84 Me. 170, 24 Atl. 805, applying the rule of intention as gathered from the whole will in connection with the rule *ejusdem generis*, it was held that a bequest of "all my housekeeping articles, including all my household furniture, beds and bedding, kitchen and table furnishings, books and pictures, all my wardrobe, and all other articles of personal property in the house at the time of my death belonging to me," did not pass four promissory notes belonging to the testatrix, the court, among other things, saying that not much force could be given to the fact that the testatrix spoke of the property as being in the house so far as the notes were concerned, because promissory notes have no locality and strictly follow the person of the owner.

And in *Aylesbury's Case*, as cited in *Stuart v. Bute*, 11 Ves. Jr. 657, at page 662, a bequest of "my house and all that shall be in it at my death" was held to pass cash and bank notes found in the house, but not to pass promissory notes and securities, as they were evidence of title to things out of the house, and not things in it.

So, in *Chapman v. Hart*, 1 Ves. Sr. 271, it was held that a bequest of all the goods and chattels in testator's house, while it would pass bank notes and cash if not in too large a sum, would not pass choses in

action, as they could not be regarded as properly in possession.

In *Popham v. Aylesbury*, 1 Ambl. 68, a gift of the remainder of testator's term in a house, together "with all that should be in it at his death," was held to pass cash and bank notes found in the house, but not to pass bonds or other securities, which were only evidence of the money due thereon.

But this rule, if such it may be called, yields when it is clear that the intent of the testator was to pass the articles in question under the general terms of the bequest. Thus, in *Re Robson*, 60 L. J. Ch. N. S. 851 [1891] 2 Ch. 559, 65 L. T. N. S. 173, it was held (per Chitty, J.) that a bequest of a "desk with the contents thereof" passed bank of England notes, coins, a receipt for a bank deposit, a check, and several undorsed promissory notes, notwithstanding a number of such articles were choses in action, it being said that the things in question were not only such as were usually kept in a desk, but it was clearly the intention of the testator to pass the choses in action to the devisee of the desk, and that such intention must control. And see *Fleming v. Brook*, as set out *supra* this subdivision.

Things not actually in mentioned place or receptacle.

A question has also arisen as to whether anything not actually in the mentioned place or receptacle can pass under a bequest of the contents of such place or receptacle.

This question in a few instances has been answered in the affirmative.

Thus, in *McCoy v. Vulte*, 30 How. Pr. 265, it was held that a bequest of "all my wearing apparel, household linen and stuffs, silver and jewelry, . . . which is now contained in eight trunks, together with said trunks," passed jewelry contained in a separate valise, there being none found in the trunks, the court saying that the words, "which is now contained in eight trunks" were words of description, and not of limita-

Is it not unreasonable to believe that she would bequeath and specifically mention "window blinds, washtub and board, baskets, crocks and jars," and leave unmentioned, except under the general head of "the contents of a bureau," the sum of \$320 in money, which exceeded by nearly sevenfold the total value of all her other chattels? And is it not equally incredible that she would employ five of the nine items of her will to dispose of her chattels, of a less value than \$50, and not regard the bequest of \$320 in money of sufficient moment to justify a line at least for its disposal? The will speaks eloquently in its wealth of detail in proof of the fact that the aged woman felt that the slightest article which

she owned was of sufficient importance to have a place in her will.

Under all these circumstances, we feel that it would be doing violence to the intention of the testatrix to pass title to this money under the poor and meager description of "the contents of a bureau," and it must be held as passing to the next of kin, the residuary legatees mentioned in item 9 of the will.

Judgment reversed.

Shauck, Johnson, Newman, and Wilkin, JJ., concur.

Petition for rehearing denied.

tion, and that since they were not applicable to any existing subject, they should be regarded as erroneous or surplusage.

And in *Re Fraser*, 92 N. Y. 239, it was held that a bequest of the use of a dwelling house and "all of the household property in" such house included coal and wood provided for use in the house, and a shotgun not proven not to have been kept for the defense of the house, all of which were in an outhouse.

And in *Re Howe* [1908] W. N. 223, a devise of "my house Thornleigh and its appurtenances and surrounding land, and all my household furniture and effects in Thornleigh (just as it now stands)," was held to pass as "household furniture and effects" three motor cars kept in a separate motor house built on the premises, which were used as private carriages in connection with the occupation of Thornleigh, it being said that "it was a question of intention," and that the court had "to determine whether the words, 'my household furniture and effects in Thornleigh (just as it now stands),' were sufficiently wide,—qualified as they were by the word 'household'—to include the motor cars in question."

So, in *Watson v. Arundel*, 1r. Rep. 10 Eq. 299, it was held that a bequest of "my plate, house linen, furniture, and all other effects in my house at the time of my death" was not prevented by the rule *ejusdem generis* from passing to the legatee a horse, carriage, car, and hay in the yard and outoffices attached to the testator's house.

And in *Re Johnson*, 53 L. J. Ch. N. S. 645, L. R. 26 Ch. Div. 538, 52 L. T. N. S. 44, 32 Week. Rep. 634, a bequest of "all the household furniture, paintings, pictures, books, china, and the whole contents of my said house," was held to pass a box of jewelry consisting of personal ornaments which belonged to the testatrix, but which at the time of her death was at her banker's for safe-keeping, the court saying that since the jewelry was at the bank only temporarily, and merely for the purpose of safe-keeping, the locality to which it ought to be ascribed was the house, and that so ascribing it it passed under the above quoted bequest. The court also said that it re-

garded such disposal as giving effect to the intention of the testatrix.

In *Re Lea*, 104 L. T. N. S. 253, a bequest of the contents of a house, which bequest was intended to cover jewelry and money, was held to pass jewelry which, during the testatrix' last illness and without her knowledge, had been taken to a bank for safe-keeping, the court saying that the jewelry so deposited was notionally in the house; but not to pass money deposited at the same time, and under the same circumstances, knowledge of the fact having been brought home to the testatrix, and it being presumed that in the ordinary course of events the testatrix would have herself deposited the same.

But it has been held that a bequest of "a desk with the contents thereof" does not pass securities contained in a tin box, the key to which was in the desk, as the key was only accessory to the box, which was not given. *Re Robson*, supra. As to transfer of key to receptacle as delivery of possession sustaining gift of contents, see note to *Apache State Bank v. Daniels*, 40 L.R.A. (N.S.) 901.

And in *Johnson v. Johnson*, 48 S. C. 408, 26 S. E. 722, it was held that a bequest of all the contents of a certain barn did not include six bales of cotton stored under a building known as a buggy shed.

And in *Pennefather v. Bury*, 9 Ir. Eq. Rep. 586, 3 Jones & L. 727, a devise of testator's house and adjoining lands, and "also all and every the household and other furniture, pictures, plate, books, and all other things whatsoever usually therein or considered as belonging thereto (except only cash, bank notes, or securities for money), for the term of her life," was held, under the doctrine *ejusdem generis*, not to pass carriages and horses used for family purposes, or farming stock and utensils used by the testator in cultivating the lands, all of which were usually in the buildings appurtenant to the house and on the premises.

General cases.

A few cases have decided the question under consideration without more than in-

ferential references to any of the pertinent rules of construction.

Thus, in *Tempest v. Tempest*, 2 Kay & J. 635, varied on another point on appeal in 7 De G. M. & G. 470, 26 L. J. Ch. N. S. 501, 3 Jur. N. S. 251, 5 Week. Rep. 402, a bequest of "household furniture, plate, linen, china, glass, books, pictures, plated articles, prints, and all and singular other my household furniture and effects which, at the time of my decease, shall be in or about my said mansion house," was held not to include personal ornaments, but to include only articles for the use and ornament of the house.

So, in *Jones v. Sefton*, 4 Ves. Jr. 166, where the testator gave all the residue of his personal estate to his wife "except such parts as should be in and about his house," which parts he gave to his son, it was held that a bond for arrears of rent and cash found in the house in a chest in which the steward kept rents were personal property which passed to the widow.

But in *Paget v. Bridgewater*, 3 Bro. P. C. 79, a devise of a "strong box and whatever is in it; all my chests and cabinets and whatsoever is in them," was held to pass gold and silver coin, exchequer notes and individual notes, found in the drawers to a frame upon which the strong box was fastened.

And in *Re Seton-Smith*, 71 L. J. Ch. N. S. 386, [1902] 1 Ch. 717, 86 L. T. N. S. 322, 50 Week. Rep. 456, a bequest of "all the furniture and other personal effects belonging to me and which at the time of my death are at the Roebuck Hotel," of which hotel the testator was tenant, was held to pass all the furniture, linen, plate, glass, china, and other effects belonging to the testator which at the time of his decease were at the Roebuck, whether used for the hotel or by the testator personally, but not to pass tenant's fixtures. G. J. C.

OKLAHOMA SUPREME COURT. (Division No. 2.)

FRANK N. IRELAND et al., Plffs. in Err.,
v.
H. W. FLOYD.

(42 Okla. 609, 142 Pac. 401.)

Bills and notes — guaranty — effect.

The words, "For value received I hereby guarantee payment of the within note, and waive demand and notice of protest on same

Headnote by HARRISON, C.

Note. — Transfer of title to note by indorsement in form of guaranty.

This note is supplementary to the notes to *Dunham v. Peterson*, 36 L.R.A. 232, 232, and *McNary v. Farmers' Nat. Bank*, 41 L.R.A. (N.S.) 1009. L.R.A. 7915C.

when due," written on the back of a note by the payee, do not constitute an indorsement and transfer in due course, but constitute a mere guaranty of payment. And the maker of such note is entitled to make the same defenses against same in the hands of the holder under such guaranty that he would be entitled to make if it were in the hands of the original payee.

(July 28, 1914.)

ERROR to the Jefferson County Court to review a judgment in defendant's favor in an action brought to recover the amount alleged to be due on certain promissory notes. Affirmed.

The facts are stated in the Commissioner's opinion.

Messrs. Bridges & Vertrees, for plaintiffs in error:

When defendant failed to introduce any testimony showing notice of fraud, the court should have directed a verdict for the plaintiffs.

Forbes v. First Nat. Bank, 21 Okla. 206, 95 Pac. 785; *Norton, Bills & Notes*, 303; *Hamilton v. Vought*, 34 N. J. L. 187.

Messrs. Jones & Green, for defendant in error:

The guaranty on this note permits any defense against the note in the hands of Ireland & Son as could have been made against it in the hands of Burgess & Son.

Central Trust Co. v. First Nat. Bank, 101 U. S. 68, 25 L. ed. 876; *Park v. Johnson*, 20 Idaho, 548, 119 Pac. 52.

If the consideration of the note failed through fraud, payment of the note could be resisted.

Hefner v. Haynes, 89 Iowa, 616, 57 N. W. 421; *Humbert v. Lawson*, 89 Iowa, 258, 56 N. W. 454; *Hallwood Cash Register Co. v. Berry*, 35 Tex. Civ. App. 554, 80 S. W. 857; *Cash v. Delong*, 21 Ky. L. Rep. 1063, 53 S. W. 1037; *Winter v. Nobs*, 19 Idaho, 18, 112 Pac. 525, Ann. Cas. 1912C, 302.

Harrison, C., filed the following opinion:

This was an action by Frank Ireland & Son, a firm doing a general banking and commercial paper business at Washburn, Illinois, against H. W. Floyd, upon two certain promissory notes executed by defendant to Robert Burgess & Son, breeders and importers of stallions, as part payment for what was represented to be an imported thoroughbred bay Belgian stallion, now de-

IRELAND v. FLOYD, while supported by some of the earlier cases, as appears from the note in 36 L.R.A. 232, seems to be opposed to all the other cases decided since the time of the preparation of that note, as well to the numerical weight of authority among the earlier cases.

ceased. Plaintiffs claimed to be the owners and holders of said notes for a valuable consideration in due course. Defendant denied such allegations and sought to defend against same on the alleged ground that they were without consideration, and were obtained through fraud and misrepresentation in this, to wit: That the horse was represented to them to be a thoroughbred imported Belgian draft horse, in a perfectly sound and healthy condition; to be a sure foal-getter; that he was deep bay, and that his colts would be the same color,—whereas in truth and in fact said horse was not in a healthy condition, was worthless as a foal-getter, and what few colts he did sire were of all colors, and that he was continually sore footed, sore kidneyed, and otherwise indisposed, impotent, inefficient, and wholly unsatisfactory and utterly worthless for the purpose for which he was purchased; that his colts were so variegated in colors that at the beginning of the second season patrons refused to breed to him on this account. This, however, is probably immaterial, as the horse died before the season was over. Plaintiffs introduced some

ten witnesses, whose testimony very strongly tended to establish such allegations. The cause was tried, and verdict and judgment rendered in favor of defendant, and from such judgment plaintiffs appealed to this court.

As we view the case, there is but one decisive proposition involved, namely, whether the defendant could make the same defenses against said notes in the hands of plaintiffs that he could have made had they been in the hands of Burgess & Son, the original payees. Each was in the following form, and each bore the following indorsement, to wit:

\$100.00.

Hastings, Oklahoma, April 25, 1907.

July 1st, 1908, after date I promise to pay to the order of Robert Burgess & Son, one hundred and no/100 dollars, with interest at the rate of 8 per cent per annum, payable annually at Hastings, Oklahoma, value received.

H. W. Floyd.

No. B. 701.

For value received, I hereby guarantee payment of the within note, and waive de-

As said in *Hendrix v. Bauhard Bros.* 138 Ga. 473, 43 L.R.A.(N.S.) 1028, 75 S. E. 588, Ann. Cas. 1913D, 688: "On the subject of indorsements like the one here involved, there are two conflicting lines of authority. On the one hand it has been held by the Supreme Court of the United States and some inferior Federal courts, and by the courts of two or three states, that an entry of a guaranty, followed by the signature of the payee, on the back of a note payable to order, does not amount to such an indorsement as to carry title and cut off defenses existing against the payee. . . . The reasoning on which this class of cases is based is that the indorsement is not in blank, but is filled up; that it expresses fully the contract, and can raise no implication of another. Opposed to this view are the decisions in a very large number of states. Numerically, the latter class of decisions greatly preponderates, and we think the reasoning on which they are based is sounder than that contained in the class first mentioned."

And, accordingly, it is held in this case that an indorsement. "For value received, we hereby warrant the makers of this note financially good on execution," written and signed by the payees on the back of a promissory note payable to order, which they have negotiated and delivered for value, is sufficient to transfer title to the note; and if made before maturity to a bona fide purchaser, without notice of any defense, he will be protected from all defenses which the maker may have, except those expressly allowed by statute.

And an indorsement made and signed by the payees on the back of a negotiable note, "For value received, we hereby guarantee L.R.A.1915C.

the payment of the within note at maturity, waiving demand, notice of nonpayment, and protest," operates as a transfer of the note, and as an indorsement thereof with enlarged liability. *National Exch. Bank v. McElfish Clay Mfg. Co.* 48 W. Va. 406, 37 S. E. 541.

So, where an owner of land mortgaged the same to a trustee in trust for a banking corporation, to secure a note made payable to the trustee, who was the legal owner of the note and mortgage, the corporation being the equitable owner, and the trustee has assigned the mortgage, together with the note secured thereby, and the note has also been indorsed by the corporation by an indorsement amounting to a guaranty, this is in law an indorsement, and passes the interest of the corporation in the note and mortgage to the holder of the note. *Brown v. Hall*, 32 S. D. 225, 142 N. W. 854.

And one who writes on the back of a note an assignment with a guaranty of payment is an indorser. *Maddox v. Duncan*, 143 Mo. 613, 41 L.R.A. 581, 65 Am. St. Rep. 678, 45 S. W. 688.

In *Lowry Nat. Bank v. Maddox*, 4 Ga. App. 329, 61 S. E. 296, however, it was held that a mere guaranty of payment at maturity, written by the payee upon a promissory note payable to order, which he pledged to the plaintiff before its maturity, as collateral security, was not such an indorsement as would cut off the defenses of the maker against the original payee. although the plaintiff claimed protection as a bona fide purchaser for value. The court said: "To enable the holder of a promissory note payable to the order of a named payee to assert successfully the rights of a bona fide

mand and notice of protest on same when due.
Robert Burgess & Son.

The form of the foregoing writing presents two questions: First, whether it is an indorsement or a mere guaranty; second, whether, if a mere guaranty, the defendant would be entitled to make the same defenses against the note in the hands of plaintiffs that he would have been entitled to make in the hands of Robert Burgess & Son.

On the first proposition, as to whether such an indorsement would in fact constitute an indorsement in blank, or a separate contract of warranty, in *Lamourieux v. Hewit*, 5 Wend. 307 which was a suit on a note bearing the following indorsement to wit: "I warrant the collection of the within note for value received"—at the trial of the cause, in order to make the above wording on the back of the note constitute an indorsement, the plaintiff was allowed to amend by interlining the following words: "To John G. Hewit." After the interlineation the court decided that the warranty partook of the negotiable nature of the note, and that action might be maintained on it

in the name of whomsoever was the holder of the note. In reversing the trial court on this view of the law, the appellate court said: "I am of opinion, however, that an action cannot be maintained on the guaranty in the name of the present plaintiff. The defendant was liable upon his guaranty, not as an indorser of negotiable paper, but as the party to a special contract, which might have been written on a separate piece of paper as well as on the back of the note. . . . Where a note is indorsed in blank, the body of the indorsement may be filled up on the trial, but a warranty cannot be altered."

In *Snevily v. Johnston*, 1 Watts & S. 307, the following words: "I guarantee the within note to John Johnston"—were held to be a warranty, and not an indorsement.

In *Miller v. Gaston*, 2 Hill, 188, the court, in discussing whether a similar indorsement on the back of a note constituted a contract of indorsement or one of guaranty, held that it was a contract of guaranty, and concluded the opinion as follows: "We have recently refused to allow the holder of a note to change a contract of indorsement

purchaser for value, it must appear that the note was formally indorsed by the payee in writing before its maturity. . . . The indorsement of a negotiable instrument does not lose its force and efficacy because it includes a guaranty as well as a transfer. . . . An indorsement by the original payee of such a note, containing words of guaranty alone, without words of transfer, but accompanied by a physical transfer of the paper, may operate to pass title to the instrument, and give to the holder the right to treat the payee as indorser with an enlarged liability. . . . But such a guaranty, in the absence of the ordinary words of transfer or assignment, does not constitute the holder such a purchaser for value as to protect him from defenses already accrued to the maker against the original payee."

But in the later case of *Hendrix v. Bauhard Bros.* supra, the supreme court of Georgia said: "It has been suggested that an indorsement of the character of the one now under consideration, accompanied by a physical transfer of the paper, may operate to pass title to the instrument and give the holder the right to treat the payee as an indorser, with a prescribed liability; but that such an indorsement, without express words of transfer or assignment, does not constitute the holder such a purchaser for value as to protect him from defenses already accrued to the maker against the original payee. In this distinction we cannot concur. An entry on the back of a note payable to order, signed by the payee, is either an indorsement or it is not an indorsement, in the legal sense of the term. Of course, an entry may be physically indorsed or written on the back of a note

without being in the legal sense an indorsement; but we are unable to accede to the proposition that it may be both an indorsement and not an indorsement. If it is such an indorsement of a negotiable note as will pass the legal title to it upon delivery, and will place on the indorsee the duty of recognizing the indorser as such, and of treating him as an indorser under the law merchant, it would be peculiar if it were an indorsement to the holder for burdens, but not for benefits. We cannot concur in the argument that the indorsement under consideration is an indorsement sufficient to carry legal title upon delivery, but not sufficient to give the corresponding benefit to him who thus acquires it, arising from being a bona fide taker before due, and for value."

It will be observed that there is no necessary inconsistency between the case of *McNary v. Farmers' Nat. Bank*, 41 L.R.A. (N.S.) 1009, and *IRELAND v. FLOYD*. In the former case the instrument involved was a non-negotiable note, and so the question was merely whether the guaranty indorsed on the back operated to transfer the title, and there was no question as to whether it gave the transferee the standing of an indorsee and bona fide holder. Some of the cases, however, relied upon in the opinion in the former case as authority for the effect of the guaranty to transfer the title, went further and held that the guaranty operated as an indorsement giving the indorsee the position of a bona fide holder, protected as against defenses between prior parties, and in that respect are opposed to the decision in *IRELAND v. FLOYD*.

A. C. W.

into one of guaranty. *Seabury v. Hungerford*, 2 Hill, 80. And I am equally opposed to allowing a contract of guaranty to be turned into one of indorsement."

As to the second question, in *Central Trust Co. v. First Nat. Bank*, 101 U. S. 68, 25 L. ed. 876, the United States Supreme Court had before it for determination, not only the question as to whether a writing identical in effect and meaning, and almost identical in words, with the one under consideration in the case at bar, constituted an indorsement or a guaranty, but also had under consideration the question as to whether the maker of the note was cut off from his defenses against such note in the hands of a holder under such warranty. The court, speaking through Mr. Justice Strong, said: "The note was not indorsed to the trust company, and it was not therefore taken in the usual course of business by that mode of transfer in which negotiable paper is usually transferred. Had it been indorsed by the Cook County Bank, it may be that the trust company would hold it unaffected by any equities between the maker and the payee. But, instead of an indorsement, the president of the Cook County Bank merely guaranteed its payment, and handed it over with this guaranty to the trust company. The note was not even assigned. There was written upon it only the following:

"For value received, we hereby guarantee the payment of the within note at maturity or at any time thereafter, with interest at 10 per cent per annum until paid, and agree to pay all costs and expenses paid or incurred in collecting the same.

"[Signed] B. F. Allen, Prest't."

Continuing, the court said: "In no commercial sense is this an indorsement, and probably it was not intended as such. Allen had agreed that the note should not be negotiated, and for this reason, perhaps, it was not indorsed. That a guaranty is not a negotiation of a bill or note, as understood by the law merchant, is certain. *Snevily v. Ekel*, 1 Watts & S. 203; *Lamourieux v. Hewit*, supra; *Miller v. Gaston*, 2 Hill, 188. In this case the guaranty written on the note was filled up. It expressed fully the contract between the Cook County Bank and the trust company. Being expressed, it can raise no implication of any other contract. . . . The contract cannot therefore be converted into an indorsement or an assignment. And if it could be treated as an assignment of the note, it would not cut off the defenses of the maker. Such an effect results only from a transfer according to the law merchant; that is, from an indorsement."

It follows, therefore, that the writing on

the back of the note in the case at bar did not constitute an indorsement, transfer, and delivery for a consideration in due course, but constituted a mere guaranty of payment under which the guarantors were liable to the guaranteees, and that defendant was not cut off from any defenses he would have been entitled to make against such notes in the hands of the original payees and guarantors, *Robert Burgess & Son*. This being true, the testimony submitted by defendant in support of the allegation that the notes in question were obtained through fraud and false representation was admissible. We believe the issue of fraud was fairly submitted to the jury, and that the verdict of the jury is strongly supported by the evidence. Hence the judgment of the trial court is affirmed.

Per Curiam:

Adopted in whole.

SOUTH CAROLINA SUPREME COURT.

Y. S. GILKERSON, Appt.,
v.

ATLANTIC COAST LINE RAILROAD
COMPANY, Respt.

(— S. C. —, 83 S. E. 592.)

Carrier — Liability for neglect to waken passenger.

A carrier is liable in damages for failure to comply with the conductor's promise to see that a passenger is awake in time to leave the train at his destination, which will be reached in the night, where he informed the conductor that because of weariness he feared that he would not be able to keep awake, and requested the conductor to assist him to leave the train.

(Watts and Gage, JJ., dissent.)

(October 9, 1914.)

Note. — Duty as to notification of passenger of arrival at station.

As to duty to notify passenger of arrival at place where he must change cars, see note to *Lilly v. St. Louis & S. F. R. Co.* 39 L.R.A. (N.S.) 663.

Duty to announce stations, generally.

For other cases, see note to *Texas & P. R. Co. v. James*, 15 L.R.A. 347.

It is the duty of a carrier to announce the arrival of a train at the station to which it has undertaken to carry a passenger. *Central of Georgia R. Co. v. Carlisle*, 2 Ala. App. 514, 56 So. 737; *Louisville, N. A. & C. R. Co. v. Cook*, 12 Ind. App. 109, 38 N. E. 1104; *Atchison, T. &*

APPEAL by plaintiff from a judgment of the Common Pleas Circuit Court for Florence County granting defendant's motion for direction of a verdict in its favor in an action brought to recover damages for failure of defendant's conductor to keep his promise to waken plaintiff in time to leave the train at destination. Reversed.

The facts are stated in the opinion.

Messrs. J. W. Ragsdale and Whiting & Baker, for appellant:

If plaintiff was deprived of, or hindered in obtaining, the enjoyment of his legal right by the wilful default of the officers or agents of the company intrusted with the performance of the duties resting upon the company, or by their wanton or reckless disregard of the rights of the plaintiff, he

would have a cause of action against the company.

Gillman v. Florida C. & P. R. Co. 53 S. C. 210, 31 S. E. 224.

It was defendant's duty to give plaintiff reasonable notice of arrival at his destination.

Ford v. Southern R. Co. 75 S. C. 286, 55 S. E. 448; Campbell v. Seaboard Air Line R. Co. 83 S. C. 454, 23 L.R.A.(N.S.) 1056, 137 Am. St. Rep. 824, 65 S. E. 628; Martin v. Southern R. Co. 77 S. C. 371, 122 Am. St. Rep. 574, 58 S. E. 3.

Failure of a passenger who is asleep when the train reaches his destination, to waken and leave the train immediately upon its coming to a stop, does not terminate the relation of passenger and the carrier's duty

S. F. R. Co. v. Calhoun, 18 Okla. 75, 89 Pac. 207, 11 Ann. Cas. 681; Brooks v. Philadelphia & R. R. Co. 218 Pa. 1, 66 Atl. 872; Texas & P. R. Co. v. Pollard, 2 Tex. App. Civ. Cas. (Willson) 424; Wilson v. Southern R. Co. 93 S. C. 17, 75 S. E. 1014.

It is the duty of a carrier to give reasonably sufficient notice of stations. Missouri, K. & T. R. Co. v. Perry, 8 Tex. Civ. App. 78, 27 S. W. 496, 6 Am. Neg. Cas. 685; Gulf, C. & S. F. R. Co. v. Bagby, — Tex. Civ. App. —, 115 S. W. 858.

And in such manner as to carry notice to a passenger intending to alight thereat. Central of Georgia R. Co. v. Crane, — Ala. —, 66 So. 604.

But it has been held that failure to announce the arrival of a train at a station is not negligence *per se*, it being a question for the jury. Houston & T. C. R. Co. v. Goodyear, 28 Tex. Civ. App. 206, 66 S. W. 862, 11 Am. Neg. Rep. 505; Missouri, K. & T. R. Co. v. Morgan, 49 Tex. Civ. App. 212, 108 S. W. 724.

In the Morgan Case the court stated that there is no statute requiring this to be done, and it is not one of those absolute duties which are indispensable to the safety of passengers; that the arrival of a train at a station may be known without the necessity of calling its name; and it knew of no rule that would justify the court in peremptorily instructing the jury that the duty was imposed upon those in charge of the train to call the station.

In this case, however, the instruction which was held erroneous was to the effect that it was the duty of the employees to call the station in a sufficiently loud tone of voice to apprise the passenger, — a form of instruction impliedly criticized in Gulf, C. & S. F. R. Co. v. Bagby, *supra*, which recognizes the duty to announce the station.

The only duty a railroad company owes to a passenger is to have the station called out so that he may be put on notice to alight. Southern R. Co. v. O'Bryan, 115 Ga. 659, 42 S. E. 42.

And so announcement of stations need not be made by the conductor personally, but the company is at liberty to select L.R.A.1915C.

any of its employees it sees fit to perform for it this duty. *Ibid*.

The duty of a carrier of passengers is ordinarily discharged in respect to giving notice of the arrival of its trains at stations along its line of road, when it has caused the name of the stations to be distinctly and audibly announced in each passenger car of the train, giving those desiring to do so reasonable time and opportunity to leave the train. Passengers must exercise ordinary care to avoid the mistake of alighting at the wrong station. Texas & N. O. R. Co. v. Richardson, — Tex. Civ. App. —, 143 S. W. 722.

So, if after a station signal is blown, the train reporter goes through the car calling the name of the station, and just before the train stops the conductor opens the car door and announces the station within a few feet of a passenger destined for that place, there is a sufficient and timely announcement. Central of Georgia R. Co. v. Crane, — Ala. App. —, 65 So. 866.

And under a statute which requires a carrier to call the stations twice in the car in which passengers are riding, it is not required to insure that passengers destined for that station shall hear the call. Chesapeake & O. R. Co. v. Robinson, 135 Ky. 850, 123 S. W. 308,

Duty to give personal notice.

It is the duty of a passenger on a railroad train to use his senses and take notice of the usual announcement of stations, and if, by reason of his negligence, the passenger fails to hear notice given of the arrival of the train at his place of destination, and remains on the train and is carried beyond, the fault is the passenger's and the carrier is not liable therefor. St. Louis Southwestern R. Co. v. Ricketts, 22 Tex. Civ. App. 515, 54 S. W. 1090.

It is not the duty of a conductor to personally notify a passenger when they reach his stopping place other than in the usual and customary manner. St. Louis Southwestern R. Co. v. McCullough, — Tex.

to a passenger, if those in charge of the train, knowing it to be his destination, fail to waken him and acquaint him with the fact that he should alight.

2 Hutchinson, Carr. 1171; Bass v. Cleveland, C. C. & St. L. R. Co. 142 Mich. 177, 2 L.R.A.(N.S.) 875, 105 N. W. 151, 7 Ann. Cas. 718, 19 Am. Neg. Rep. 317.

If the agents of a railroad undertake to give information, they must give correct information.

Schockley v. Southern R. Co. 93 S. C. 535, 77 S. E. 221; Wilcox v. Southern R. Co. 91 S. C. 71, 74 S. E. 122; Ford v. Southern R. Co. 75 S. C. 286, 55 S. E. 448; Bing v. Atlantic Coast Line R. Co. 86 S. C. 528, 68 S. E. 645; Cave v. Seaboard Air Line

R. Co. 94 S. C. 287, L.R.A.1915B, 915, 77 S. E. 1017, Ann. Cas. 1915A, 1065.

Messrs. F. L. Willcox, M'Neill & Oliver, and S. M. Wetmore, for respondent:

It is not the duty of a railroad company to awaken a sleeping passenger in order to advise him that his destination is reached.

Seaboard Air-Line R. Co. v. Rainey, 122 Ga. 307, 106 Am. St. Rep. 134, 50 S. E. 88, 2 Ann. Cas. 675; 4 Elliott, Railroads, p. 2532, § 1621; Sevier v. Vicksburg & M. R. Co. 61 Miss. 8, 48 Am. Rep. 74; Nunn v. Georgia R. Co. 71 Ga. 710, 51 Am. Rep. 284.

Where a passenger was asleep the failure to announce his station could afford no cause of action for carrying him beyond his destination, for had the station been called,

Civ. App. —, 33 S. W. 285; Missouri, K. & T. R. Co. v. Middleton, — Tex. Civ. App. —, 172 S. W. 1114; Chicago & A. R. Co. v. Meyer, 127 Ill. App. 314.

And a promise to that effect given by the conductor to the passenger is not binding on the company. *Ibid.*

So, if a station has been called and the passenger hears it, it is her duty to make some effort to get off, although she is not well and has been promised assistance by one of the employees. Missouri, K. & T. R. Co. v. Morgan, 49 Tex. Civ. App. 212, 108 S. W. 724.

And if a passenger knows when the train arrives at the station at which he is to alight, and he fails to alight from the train, it is immaterial that an employee of the carrier promised to personally notify him of such arrival, but failed to do so, and so he cannot recover for being carried past his station. Missouri, K. & T. R. Co. v. Miller, 20 Tex. Civ. App. 570, 50 S. W. 168.

Where a passenger hard of hearing mistook the name of the station as called, and was assisted off by a porter who did not know her destination, the carrier is not liable where the porter announced the station in a distinct and audible voice in the car in which such passenger was riding; he not being required to go further and inquire if that was the station of her destination and assist her to alight unless she requested him to do so, or unless he knew or it was apparent that such passenger was suffering from defective hearing. Texas Midland R. Co. v. Terry, 27 Tex. Civ. App. 341, 65 S. W. 697.

A case perhaps not strictly within the scope of this note, which is distinguished from the Weightman Case, *infra*, is Gage v. Illinois C. R. Co. 75 Miss. 17, 21 So. 657, 2 Am. Neg. Rep. 395, where it was held that the railroad company was not bound by a conductor's promise to look after a seven-year-old child traveling alone, and to request the succeeding conductor to do the same, and so was not liable for carrying the child past his destination, and this although the child's father was at the sta-

tion and made inquiry from the conductor concerning the boy, but was informed that he was not on the train when in fact he was.

But circumstances involving the consideration of age, defects, or physical infirmities may bring that within the scope of a conductor's duty toward a passenger which would otherwise be beyond the limits of such obligation. Chicago, R. I. & T. R. Co. v. Boyles, 11 Tex. Civ. App. 522, 33 S. W. 247. And so, in this case, where a woman was traveling with a very sick infant, it was held that if the conductor, noticing the condition of a child and its need of constant attention, told the mother to give all her attention to the child, and he would personally notify her when she arrived at the place of her destination, such promise was within the apparent scope of his authority and binding on the company.

And in Louisville & N. R. Co. v. Quick, 125 Ala. 553, 28 So. 14, as the evidence tended to show that the conductor had promised an old and infirm female passenger that he would go to her when she arrived at her destination and inform her of that fact, and that she relied on such promise, it was held that there was no error in an instruction that under such a state of facts she was under no obligation to listen for an announcement of the station or depend upon such announcement, but could, relying upon the conductor's promise, wait in her seat for him to come to her. Generally, as to duty to assist infirm passenger, see note in 8 L.R.A.(N.S.) 299.

And so, also, that a carrier owes a duty to personally notify a sick passenger known to its employees to be sick, of his arrival at destination, would appear from the decision in Nelson v. Chicago & N. W. R. Co. 130 Wis. 214, 109 N. W. 933, where a passenger who had suffered an attack of paralysis and had notified the conductor that he was sick and requested that he be notified when he reached his stopping place, and, not hearing the announcement of the station, was carried by, was held to be entitled to recover for the natural and proximate consequences of such negligent act, there being no discussion whatever as to

he could not have heard it, hence it could not have been the proximate cause of his injury in being carried past his getting-off place.

Seaboard Air-Line R. Co. v. Rainey, 122 Ga. 307, 106 Am. St. Rep. 134, 50 S. E. 88, 2 Ann. Cas. 675; 2 Hutchinson, Carr. p. 1316, § 1121.

It is not the duty of a railroad company to see that passengers are awake when the train reaches their destination, and the company is not bound by the conductor's promise to so awaken them.

Ibid.

Gary, Ch. J., delivered the opinion of the court:

On the — day of August, 1912, the

the duty of a carrier to give personal notification of arrival at destination.

And where the announcement of the station is made upon the approach of the train, but the train stops at a water tank before reaching the depot, and the passenger is informed by an employee that the station is not reached and that he will inform her when it is, it is a question for the jury whether or not under such circumstances the passenger is entitled to further notice that the station is reached. *Missouri, K. & T. R. Co. v. Miller*, 20 Tex. Civ. App. 570, 50 S. W. 168.

Duty to awaken passenger.

As to passenger in sleeping car, see note to *Pullman Co. v. Lutz*, 14 L.R.A.(N.S.) 907.

The law does not impose upon a carrier the duty of taking notice that a passenger has fallen asleep and causing him to be aroused. It is ordinarily the duty of a passenger to use his senses and take notice of the usual announcements of the stations, and if, by reason of being asleep, unknown to the carrier, he fails to hear the notice given of the arrival of the train at his place of destination, and remains on the train and is carried beyond, the fault is his, and the carrier is not liable therefor. *Missouri, K. & T. R. Co. v. Perry*, 8 Tex. Civ. App. 78, 27 S. W. 496, 6 Am. Neg. Cas. 685.

So, a carrier does not owe a duty to a passenger who has fallen asleep to awaken him and notify him of his arrival at his destination. *Seaboard Air-Line R. Co. v. Rainey*, 122 Ga. 307, 106 Am. St. Rep. 134, 50 S. E. 88, 2 Ann. Cas. 675; *Nichols v. Chicago & W. M. R. Co.* 90 Mich. 203, 51 N. W. 364, 4 Am. Neg. Cas. 127; *Texas & P. R. Co. v. Alexander*, — Tex. Civ. App. —, 30 S. W. 1113.

And although a conductor may have promised a passenger to awaken her when she arrives at the place where she is to change cars, the carrier will not be liable for his failure to do so. *Missouri, K. & T. R. Co. v. Hendrick*, — Tex. Civ. App. —, 32 S. W. 42. L.R.A.1915C.

plaintiff purchased a ticket from the defendant, at Florence, South Carolina, for the purpose of being carried as a passenger to Laurens, South Carolina. In making the trip it was necessary for him to change cars at Sumter, South Carolina, about 4 o'clock in the morning. There is evidence that when the conductor came to the plaintiff to collect his fare, he told the conductor that he was very tired, and probably would not be awake when the train arrived at Sumter, and thereupon requested the conductor to see that he was awake, in order that he might make the necessary change of cars. The conductor promised to comply with his request. When the train arrived at Sumter, the plaintiff had fallen asleep, but the conductor failed to awake him, and he was

But in *Weightman v. Louisville, N. O. & T. R. Co.* 70 Miss. 563, 19 L.R.A. 671, 35 Am. St. Rep. 660, 12 So. 586, 9 Am. Neg. Cas. 491, where right to recover was predicated on the negligent failure of the conductor to awaken and put off a sick passenger at his destination, which was distinguished from *Sevier v. Vicksburg & M. R. Co.* 61 Miss. 8, 48 Am. Rep. 74, cited in note in 15 L.R.A. 347, it was held that a railroad company which carried a sick passenger past his destination while unconscious, although the conductor and station agent had agreed to give him care on the way, and to have him carried from the train at his destination, and put him off in fact at a small way station, where he was left nearly forty hours without care and attention and then brought back to his destination, is liable for the injury which results to him therefrom.

So, also, failure of a passenger who is asleep when the train reaches his destination, to awaken and leave the train immediately upon its coming to a stop, does not terminate his relation as passenger and the carrier's duty of protection, if those in charge of the train, knowing the facts, failed to awaken him and acquaint him with the fact that he should alight. *Bass v. Cleveland, C. C. & St. L. R. Co.* 142 Mich. 177, 2 L.R.A.(N.S.) 875, 105 N. W. 151, 7 Ann. Cas. 718, 19 Am. Neg. Rep. 317.

But in a dissenting opinion, Judge Grant contended that the relation of passenger had ceased; that it was not the duty of an employee of the company to awaken him, but that it performed its full duty in this respect in calling out in the car the name of the station and giving the passenger sufficient time to alight.

Effect of failure to announce.

See also note in 15 L.R.A. 347, 348.

While it is the duty of a railway company to duly announce to passengers the approach of its trains to a regular station in order that they may be prepared to alight promptly at their respective points of destination, yet a failure to comply with this

carried several miles beyond said station. At the close of the testimony, the defendant's attorneys made a motion for the direction of a verdict, on the ground that no duty was imposed by law upon the defendant to see that the plaintiff was awake when the train arrived at Sumter. The motion was granted, and the plaintiff appealed.

The question to be determined is whether there was error on the part of his Honor, the presiding judge, in directing a verdict on the ground just stated. The question is not whether it is the duty ordinarily of a conductor to awake a sleeping passenger, but whether it is his duty to render assistance to a passenger, in order that he may alight from the train at the proper time, when his physical condition renders such assistance necessary and the conductor has knowledge of such fact. Under such circumstances, a promise on the part of the conductor is merely incidental to his duty to render assistance to passengers in getting

off the train when he has notice of the fact that his aid is needed. This is not a case in which the passenger was attempting to convert an ordinary coach into a sleeping apartment, but where he was afraid he would be overcome by sleep involuntarily, on account of his physical condition, and therefore sought the assistance of the conductor, in order that he might be in a condition to make the necessary change of cars. The rule is well settled that if there are circumstances which require the assistance of the conductor to a passenger in alighting from a train, the railroad company is liable if the conductor had notice of such circumstances and fails to render the necessary assistance. *Madden v. Port Royal & W. C. R. Co.* 41 S. C. 440, 19 S. E. 951, 20 S. E. 65, 6 Am. Neg. Cas. 428; *Doolittle v. Southern R. Co.* 62 S. C. 130, 40 S. E. 133. In the present case, the conductor not only was notified that the plaintiff would probably need his assistance, but

duty cannot count against the company as to a passenger who knows that she has arrived at her destination and so is in no way misled thereby. *Southern R. Co. v. Hobbs*, 118 Ga. 227, 63 L.R.A. 68, 45 S. E. 23, 14 Am. Neg. Rep. 523.

And the neglect of a railroad company to announce the arrival of a train at the station where a passenger wishes to alight is immaterial upon the question of liability for injury to passenger, where he testifies that he knew that the train had reached his destination and attempted to alight, so that failure to announce the station did not contribute to the injury. *Chicago, B. & Q. R. Co. v. Lampman*, 18 Wyo. 106, 25 L.R.A.(N.S.) 217, 104 Pac. 533, Ann. Cas. 1912C, 788.

And where there is no evidence which tends to prove that the failure of the conductor to announce a station has anything to do with a passenger's being carried beyond it, the jury should not be permitted to consider such omission as a cause contributing to an injury claimed as a result thereof in having to walk back from the stop beyond. *Anniston Electric & Gas Co. v. Anderson*, — Ala. App. —, 66 So. 924.

So, also, where a passenger had fallen asleep the failure of a railroad company to duly announce to the passengers the arrival of such train at a particular station ought not to count against the company relatively to such passenger, where he is not able to show by any satisfactory proof that he was misled thereby. *Seaboard Air-Line R. Co. v. Rainey*, 122 Ga. 307, 106 Am. St. Rep. 134, 50 S. E. 88, 2 Ann. Cas. 675.

But if a carrier fails to call a station in a car twice, as required by statute, a reasonable time before its arrival at that station, or fails to light its platform in such a manner as to afford passengers a reasonably safe means for alighting from the train, and a passenger, by reason of such

failure to announce the station, is delayed in getting off the train, and when he undertakes to get off, the train starts suddenly as he is stepping from it, and he is injured by reason of the failure to announce the station or to have the platform lighted, the carrier is liable therefor. *Chesapeake & O. R. Co. v. Robinson*, 135 Ky. 850, 123 S. W. 308.

Effect of negligent or incorrect announcement or information.

See also *infra*, "Passenger in Pullman or sleeping car."

A passenger who is induced to alight short of his destination through negligence of trainmen in announcing the wrong station is entitled to recover for the damages suffered thereby. *Louisiana & A. R. Co. v. Rider*, 103 Ark. 558, 146 S. W. 849; *Louisville & N. R. Co. v. Jenkins*, 15 Ky. L. Rep. 239; *St. Louis Southwestern R. Co. v. Foster*, 46 Tex. Civ. App. 517, 103 S. W. 194.

So, also, where a passenger is induced to alight at a wrong station through being misled by the carrier's employees informing him that that is the place of his destination, the carrier is liable for the injuries proximately resulting from such misinformation. *St. Louis Southwestern R. Co. v. Pearson*, 88 Ark. 200, 114 S. W. 211; *Cleveland, C. C. & St. L. R. Co. v. Quillen*, 22 Ind. App. 496, 53 N. E. 1024; *Yazoo & M. Valley R. Co. v. Hughes*, 100 Miss. 95, 50 So. 627; *Gulf & S. I. R. Co. v. Cole*, 101 Miss. 411, 58 So. 208; *Moss v. Missouri P. R. Co.* 128 Mo. App. 385, 107 S. W. 422; *Atkinson v. Pacific R. Co.* 90 Mo. App. 489; *St. Louis, I. M. & S. R. Co. v. Freeland*, 39 Okla. 60, 134 Pac. 47; *Ford v. Southern R. Co.* 75 S. C. 286, 55 S. E. 448; *Texas & P. R. Co. v. Hartnett*, — Tex. Civ. App. —, 34 S. W. 1057; *Beaumont, S. L. & W.*

he promised to comply with the plaintiff's request.

It is the judgment of this court that the judgment of the Circuit Court be reversed, and the case remanded to that court for a new trial.

Hydrick and Fraser, JJ., concur.

Watts, J., dissenting:

This was an action for actual and punitive damages by plaintiff against the defendant for carrying the plaintiff beyond his station. Plaintiff alleges a special contract with the conductor to awake him when the train arrived at his station, and that, by reason of the failure on the part of the conductor to do it, he was carried several miles beyond his station and compelled to walk back, and this constitutes his cause of action. At the close of the testimony the court on defendant's motion directed a verdict in favor of defendant. The plain-

tiff appeals on several grounds, and by three exceptions alleges error on the part of the court in that there was testimony tending to show various acts of negligence, wantonness, and wilfulness as alleged in the complaint, and in not holding the defendant company liable for the failure to awake the passenger and acquaint him that he had arrived at his station and should alight, and that wilfulness, recklessness, and wantonness could be inferred from the evidence that the conductor failed to keep his promise to awaken the passenger, and gave misleading information as to the distance back to the station, where plaintiff should have alighted, and failed to notify the passenger of certain trestles on the route back to the station. The evidence shows that the plaintiff lived at Florence, South Carolina, and started to Laurens, South Carolina, on August 25, 1912, and that it was necessary for him to change cars at Sumter, South Carolina, in order to get on the train that runs

R. Co. v. Bishop, — Tex. Civ. App. —, 160 S. W. 975; Brown v. Chicago, M. & St. P. R. Co. 54 Wis. 342, 41 Am. Rep. 41, 11 N. W. 356, 911, 7 Am. Neg. Cas. 203; Gulf, C. & S. F. R. Co. v. Sain, — Tex. Civ. App. —, 24 S. W. 958.

If a carrier negligently announces, as the station to which the passenger is destined, another and different station, and through no fault of the passenger he is thereby misled and induced to alight at such wrong station, or should the carrier negligently permit a passenger to leave the train at a station knowing that such station is not the destination of the passenger, and knowing or having good reason to believe that the passenger believes such station to be his destination, without informing the passenger of the mistake he is making, then the carrier will be liable to such passenger for such actual damages as proximately resulted to him from such negligence. Texas & N. O. R. Co. v. Richardson, — Tex. Civ. App. —, 143 S. W. 722.

And to the same effect as to the latter part of the foregoing proposition is Kirkland v. Texas & N. O. R. Co. — Tex. Civ. App. —, 140 S. W. 505.

It is the duty of a conductor, brakeman, or other employees who assist passengers at a station to get off the train, to give a passenger correct information as to the name of the station when such a passenger, who is about to leave the train, expresses a desire for such information. Louisville, N. A. & C. R. Co. v. Cook, 12 Ind. App. 109, 38 N. E. 1104.

So, while a conductor may not be obliged to agree to let a passenger off at an intermediate point, if he does so agree and undertakes to let him off at such point, he owes a duty to give such passenger correct information as to where he is being put off, and it is in violation of that duty to misinform him either wilfully or negligently L.R.A.1916C.

in respect to the place at which he is being induced to leave the car. Williamson v. Central of Georgia R. Co. 127 Ga. 125, 56 S. E. 119.

In Tennessee C. R. Co. v. Brasher, 29 Ky. L. Rep. 1277, 97 S. W. 349, where a passenger asked to be let off at a certain place, the name of which it appears had been changed and was unfamiliar to the conductor, and through mistaken assurance of the conductor that she had arrived at her destination she got off at a wrong station, it was held that the carrier was liable for the proximate damages resulting therefrom.

And where a conductor negligently induced a passenger to believe that the next stopping place of the train would be the place of her destination, the company is liable for resulting damages, although after such information was given the train was signaled to stop to allow another train to pass, which fact was not announced to the passenger. Pennsylvania Co. v. Hoagland, 78 Ind. 203.

The fact that the conductor correctly announced the name of the station which the train was approaching will not prevent recovery by a passenger who, not understanding the name of the station called, asked another employee and was misled into believing that she had arrived at her destination, and so was induced to alight at the wrong station. Missouri, K. & T. R. Co. v. Dickson, — Tex. Civ. App. —, 153 S. W. 933.

Passenger in Pullman or sleeping car.

See also note to Pullman Co. v. Lutz, 14 L.R.A.(N.S.) 907.

A sleeping car company is liable for injury resulting from negligence and carelessness of its porter in informing a passenger on one of its cars that her station has been reached and directing her to alight when

from Charleston to Greenville by Laurens; that he bought a ticket to Laurens, and boarded the train, and told the conductor that he had been working very hard and was tired and sleepy, and to please see that he got off at Sumter, and that the conductor promised to see that he got off there. The train passed Sumter while he was asleep, and he was not called or notified of its arrival there. He was on the train in a day coach, and not a Pullman or sleeping car. After he had passed Sumter the conductor found him on the train, and informed him that they had passed Sumter and were a mile from there, and that he would stop the train and let him off, or he could go on to the next station and get off and get on a train going to Sumter. The plaintiff concluded to get off and walk back to Sumter, which he did. It was several miles, and he was encumbered with his baggage, and crossed some long trestles, and it was not daylight. It being Sunday, he was informed that there were no freight trains on the road. He was inconvenienced and made tired, but he got to Sumter in time to catch his train and get to Laurens at the time he was scheduled to arrive. The conductor did not call for any additional fare or eject or threaten to eject him from the train. The plaintiff voluntarily left the train under a mistaken idea as to the distance to Sumter. There was a conflict of testimony between plaintiff's and defendant's witnesses as to most of the material issues in the case, and as to what actually occurred as to the promise to call him at Sumter, and what took place when he got off of the train.

We think the whole question turns on the duty of the railroad company in respect to notifying its passengers when their destination is reached. The law imposes the duty on the railroad of stopping its trains at the stations a sufficient length of time

for its passengers to safely get off and on the trains, and to call out the stations. The uncontradicted evidence in this case shows that this was done when the train arrived at Sumter. When this was done the defendant performed its full duty, and if plaintiff went to sleep and failed to hear the station called and get off, the defendant cannot be held in damages, and, even if the conductor promised to call him and did not hunt him up and wake him up, the plaintiff would not be entitled to recover damages for being carried beyond his station. The conductor's and flagman's duties when they arrived at the station were to assist passengers off and on the train, and the law imposes no duty on them in a day coach to go through the train and wake up the sleeping passengers.

In the whole evidence there is not a particle of evidence that shows any negligence, wilfulness, or wantonness that would form a basis for damages, actual or punitive. It is not the duty of a railroad company to a day coach passenger to advise him that his destination is reached. *Seaboard Air-Line R. Co. v. Rainey*, 122 Ga. 307, 106 Am. St. Rep. 134, 50 S. E. 88, 2 Ann. Cas. 675; *Nunn v. Georgia R. Co.* 71 Ga. 710, 51 Am. Rep. 284.

The law is different between a day coach and a sleeping car company. In the latter case it is the duty of the employees of a sleeping car company to awaken them in plenty of time for them to prepare to get off before reaching their destination. To hold that the railroads should be held liable in damages because the conductor could contract to go through the trains and call each passenger individually on the arrival of a day coach at a station was never contemplated as being within the scope of his employment, and would seriously hamper and endanger the traveling public, would

in fact the train was some distance from the station. *Pullman Co. v. Hoyle*, 52 Tex. Civ. App. 534, 115 S. W. 315.

And a railroad company is not relieved of any of the duties which it owes to a passenger by reason of a passenger making a separate contract with a sleeping car company for special accommodations, and so is liable for the act of a porter of a Pullman car in putting off a passenger at the wrong station, where it relies upon him to notify sleeping passengers of the approach of the train to their station. *Campbell v. Seaboard Air Line R. Co.* 83 S. C. 448, 23 L.R.A.(N.S.) 1056, 137 Am. St. Rep. 824, 65 S. E. 628.

It has been held that a railroad company is entitled to judgment over against a sleeping car company sued with it, for injuries to a passenger in a sleeping car due to the negligence and carelessness of the sleeping

car porter in informing the passenger that her station had been reached and directing her to alight when in fact the train was some distance from the station, where the evidence shows that the railroad company had nothing to do with the discharge of passengers riding in the sleeper, but that it was the duty of a Pullman company to see that such passengers were properly looked after and aided by it in getting on and off the cars, and further that the Pullman company prohibited the trainmen from entering its cars or having anything whatever to do with the Pullman passengers or the business of the car except to take up the railroad fare and transportation of such passengers, and also that the conductor and porter of a Pullman car were employed and paid by it, and not by the railroad company, and were under its control. *Pullman Co. v. Hoyle*, supra.

J. H. B.

prevent the conductor and trainmen from discharging their duties in being where they could assist passengers off and on the train, and bring about confusion, annoyance, and vexatious delays. We see no merit in the exceptions, and they are overruled.

I think the judgment should be affirmed.

Gage, J., concurs.

WASHINGTON SUPREME COURT.
(Department No. 1.)

JOHN T. HUETTER et al.

v.

WAREHOUSE & REALTY COMPANY.

(81 Wash. 331, 142 Pac. 675.)

Contract — for construction — defect of plans — right of subcontractor.

A subcontractor who is prevented from

Note. — Effect of defective or insufficient plans upon rights and liabilities of contractors and subcontractors who do not expressly warrant them.

I. Where a contract is fully executed.

- a. Right of contractor or subcontractor to contract price as affected by defects resulting from insufficient or defective plans, 671.
- b. Right of contractor or subcontractor to recover for extra work or materials necessitated by insufficient or defective plans, 675.
- c. Right of owner against contractor or subcontractor for defects caused by insufficient or defective plans, 676.
- d. Liability of contractor or subcontractor for damages for delay caused by insufficient or defective plans, 677.

II. Where contract is not fully executed because of defective plans.

- a. Right of contractor or subcontractor to recover contract price, 677.
- b. Right of contractor or subcontractor to recover the value of work done, 677.
- c. Right of owner against contractor or subcontractor for failure to complete, 678.

Scope.

Generally as to who must bear the loss caused by destruction of building or other structure in process of erection, see note to *Milake v. Steiner Mantel Co.* 5 L.R.A. (N.S.) 1105, and *Loneragan v. San Antonio Loan & T. Co.* 22 L.R.A. (N.S.) 364. And see also other notes referred to in Index to L.R.A. Notes, "Contracts," § 135.

As to the responsibility of contractor under a contract for performance of entire work for a gross sum, for defective con-

structing his work because of defects in the plans furnished by the owner may hold the contractor liable for the cost of services rendered, but not for profits which he would have realized had he completed the work, although he saw the plans before entering into the contract; since he does not assume any responsibility for the sufficiency of the plans.

(August 15, 1914.)

CROSS APPEALS from a judgment of the Superior Court for Spokane County in plaintiffs' favor in an action brought to recover the amount alleged to be due upon a construction contract; defendant appealing from the judgment in plaintiffs' favor; and plaintiffs appealing from so much of the judgment as refused to allow them profits which they would have realized had they completed the contract. Affirmed.

The facts are stated in the opinion.

dition of portion of completed work due to interference or directions of other party, see note to *McConnell v. Corona City Water Co.* 8 L.R.A. (N.S.) 1171.

As to right to recover on *quantum meruit* where work on local improvement is defective, see note to *People ex rel. Raymond v. Whidden*, 56 L.R.A. 915.

As to right to rescind or abandon contract because of other party's default, see note in *Lake Shore & M. S. R. Co. v. Richards*, 30 L.R.A. 47.

As to right of contractor to sue on *quantum meruit* upon breach of construction contract by other party thereto, see *Valente v. Weinberg*, 13 L.R.A. (N.S.) 448, and note.

And see note to *Wells v. National Life Asso.* 53 L.R.A. 59, upon the question of the effect of preventing performance which results in loss of profits as an element of damages for breach of contract by employer or owner.

The present note is confined to cases dealing with the effect of defective plans upon the rights and liabilities existing between contractors and subcontractors, or between owners and contractors or subcontractors, and does not include cases relating to the liability of architects for defects in plans and specifications. Neither does it include cases involving the liability to third persons for injuries resulting from improper construction.

I. Where contract is fully executed.

- a. *Right of contractor or subcontractor to contract price as affected by defects resulting from insufficient or defective plans.*

The right of a contractor or subcontractor to recover the full amount of the contract price is not affected by defects in the completed work, where such defects are the result of faulty plans, the sufficiency

Mr. E. Eugene Davis, with Messrs. Cullen, Lee, & Hindman, for defendant:

Where a party makes a binding contract to do a particular act, which is not upon its face impossible, he is bound to do the act, regardless of any contingencies that may arise in the future.

American Surety Co. v. San Antonio Loan & T. Co. — Tex. Civ. App. —, 98 S. W. 387; *Loneragan v. San Antonio Loan & T. Co.* 101 Tex. 63, 22 L.R.A. (N.S.) 364, 130 Am. St. Rep. 803, 104 S. W. 1061, 106 S. W. 876; *Rowe v. Peabody*, 207 Mass. 226, 93 N. E. 604; *Exeter Mach. Works v. Wingham-Magor Engineering Works*, 134 App. Div. 386, 119 N. Y. Supp. 105; *Public Schools v. Bennett*, 27 N. J. L. 513, 72 Am. Dec. 373; *Dermott v. Jones* (Ingle v. Jones)

2 Wall. 1, 17 L. ed. 762; *Stees v. Leonard*, 20 Minn. 494, Gil. 448; *School Dist. v. Dauchy*, 25 Conn. 530, 68 Am. Dec. 371; *Tompkins v. Dudley*, 25 N. Y. 272, 82 Am. Dec. 349; *Adams v. Nichols*, 19 Pick. 275, 31 Am. Dec. 137; *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 31 Fed. 440; *Reichenbach v. Sage*, 13 Wash. 364, 52 Am. St. Rep. 51, 43 Pac. 354; *Isaacson v. Starrett*, 56 Wash. 18, 104 Pac. 1115; *Bartlett v. Bisbey*, 27 Tex. Civ. App. 405, 66 S. W. 70; *Vogt v. Hecker*, 118 Wis. 306, 95 N. W. 90; *Leavitt v. Dover*, 67 N. H. 94, 68 Am. St. Rep. 640, 32 Atl. 156; *Harmony v. Bingham*, 12 N. Y. 99, 62 Am. Dec. 142; *Anderson v. May*, 50 Minn. 280, 17 L.R.A. 555, 36 Am. St. Rep. 642, 52 N. W. 530; *Bastrop & A. B. Rice Growers' Assn. v. Cochran*, —

of which the contractor or subcontractor has not warranted.

HUETTER v. WAREHOUSE & REALTY Co. is in accordance with this rule.

Thus it has been held that subcontractors who install plumbing in strict accordance with plans and specifications the sufficiency of which they do not warrant are entitled to enforce their mechanics' liens on the property, irrespective of any defects resulting from mistakes in the plans. *Ward v. Pantages*, 73 Wash. 208, 131 Pac. 642.

And a contractor who agreed to build a baker's oven and furnace in a workman-like manner in accordance with plans and specifications furnished by the other party was held to be entitled to recover the contract price, although the oven did not work satisfactorily, where he did the work in accordance with the plans and specifications, which were defective. *Perkins v. Roberge*, 69 N. H. 171, 39 Atl. 583.

In *Culbertson v. Ashland Cement & Constr. Co.* 144 Ky. 614, 139 S. W. 792, it was held that a contractor who relies upon plans and specifications in the performance of his work may recover for the work done, regardless of any defect resulting from an error or mistake in the plans or specifications.

So, in an action by a contractor for the balance due on a contract for the construction of a church, the court held that where a building was constructed in a workman-like manner in accordance with plans furnished by the owners, there was no responsibility resting on the contractor, no matter from what cause the building might be destroyed, whether from its own inherent weakness in the mode of construction or from extraordinary violence of storms; and that the undertaking was simply to do the work with reasonable skill after the designs furnished by the architect; and that the contractors were not guarantors as to the strength of the building when finished or of its capacity to withstand the violence of storms. *Clark v. Pope*, 70 Ill. 128.

In an action by a contractor for the balance due for work and materials fur-

nished in constructing a building, the owner cannot defend on the ground of defects due to faults in the architect's plans, where the contractor has not guaranteed their sufficiency. *Hills v. Farmington*, 70 Conn. 450, 39 Atl. 795. The court holds, further, that, where the building contract is in writing, oral evidence that contractor guaranteed the plans is inadmissible, since its effect would be to vary the terms of the written agreement.

In *Schliess v. Grand Rapids*, 131 Mich. 52, 90 N. W. 700, it was held that a contractor who agreed to construct the foundation for a building in accordance with certain plans and specifications could not be held responsible, in an action to recover the balance due on the contract, for the condition of the wall of the building caused by freezing, where "he made the mortar as provided by the contract, and protected it as he agreed, and performed the work as he was directed or permitted to do" by the owner, since he was not an insurer of the success of the work.

In an action on his contract by a contractor who has constructed a building in accordance with plans furnished by the owner, the latter cannot depend for a defense upon the fact that the roof swings or the sides bulge, where such defects are attributable to faulty plans. *Porter v. Wilder*, 62 Ga. 520.

And, in *Hebert v. Weil*, 115 La. 424, 39 So. 389, where the owner defended on the ground of improper construction of his building, it was held that the contractor was not liable, either for errors in an architect's plan which were not patent on the face of the plan, or for those which were not easy to detect.

So, in *McLane v. DeLeyer*, 56 N. Y. 619, it was held that, in an action on a contract for building a wall, the owner could not set up a counterclaim on account of defects caused by the use of improper sand which he directed the contractor to use.

In *MacKnight Flintic Stone Co. v. New York*, 160 N. Y. 72, 54 N. E. 661, an action to recover money due under a building contract, it is held that where the city

Tex. Civ. App. —, 138 S. W. 1189; Carlson v. Sheehan, 157 Cal. 692, 109 Pac. 29; Eaton v. Joint School Dist. 23 Wis. 374; Smith v. North American Transp. & Trading Co. 20 Wash. 580, 44 L.R.A. 557, 56 Pac. 372, 5 Am. Neg. Rep. 738; Lawing v. Rintles, 97 N. C. 350, 2 S. E. 252.

The contract was not impossible of performance so as to exonerate respondents.

2 Parsons, Contr. 5th ed., p. 673; Chitty, Contr. 11th Am. ed., p. 64; Wald's Pollock, Contr. 2d Am. ed. pp. 352, 353; Beebe v. Johnson, 19 Wend. 500, 32 Am. Dec. 518; Reid v. Alaska Packing Co. 43 Or. 429, 73 Pac. 337; American Surety Co. v. San Antonio Loan & T. Co. — Tex. Civ. App. —, 98 S. W. 387; Lonergan v. San Antonio Loan & T. Co. 101 Tex. 63, 22 L.R.A.(N.S.)

364, 130 Am. St. Rep. 803, 104 S. W. 1061, 106 S. W. 876; Bastrop & A. B. Rice Growers' Asso. v. Cochran, — Tex. Civ. App. —, 138 S. W. 1188; Rowe v. Peabody, 207 Mass. 226, 93 N. E. 604.

Plaintiffs are not entitled to recover the 20 per cent held back, because they have not complied with their contracts.

Siegel, C. & Co. v. Eaton & P. Co. 165 Ill. 550, 46 N. E. 449; Newman Lumber Co. v. Purdum, 41 Ohio St. 373; Cunningham v. Morrell, 10 Johns. 203, 6 Am. Dec. 332; Bassett v. Child, 11 Ill. 569; Bartlett v. Bisbey, 27 Tex. Civ. App. 405, 66 S. W. 70; Bastrop & A. B. Rice Growers' Asso. v. Cochran, — Tex. Civ. App. —, 138 S. W. 1188; Cox v. Western P. R. Co. 44 Cal. 18.

selects material and furnishes plans and specifications by which a contractor is to be guided in making water-tight the basement of a municipal building, and the contractor faithfully follows the plans and specifications, and no objection is made while he is doing the work, he fulfils his contract even though the basement is not in fact water-tight, and although he has agreed to turn the work over to the other party in perfect order, and has guaranteed it to be absolutely water and damp proof for a term of years, as he must be deemed to have agreed merely to make the basement water-tight in so far as the plans and specifications permitted, and to have guaranteed the quality of the work and the materials under such plans and specifications, and not to have guaranteed the sufficiency of the plans and specifications themselves. The court says: "The responsibility rests upon the party who fathers the plan and presents it to the other with the implied representation that it is adequate for the purpose to be accomplished. A stipulation requiring a contractor to produce a certain result by following the plan and directions of the owner is an undertaking that it can be done in that way. Interpreting their language in the light of surrounding circumstances, we do not think the parties meant that the plaintiff was to be responsible for a bad result unless there was some default on its part in doing the work or furnishing the materials; for, to use the language of a learned court in an analogous case, 'it would certainly be regarded as most extraordinary to find that a contractor had undertaken to warrant the perfection of a plan which is designed by the person for whom he is to do the work, or the wisdom of directions given during the progress of the work by one whom he cannot control, but whose orders in the execution of the work he is, by the terms of the contract, bound to obey.'"

And in Tide Water Bldg. Co. v. Hammond, 144 App. Div. 920, 129 N. Y. Supp. 355, following the preceding case, it was held that where a contractor agrees to build the walls and roof of a building ac-

cording to the plans and specifications, and guarantees them to be water-tight, the owner, and not the contractor, is the guarantor of the plans, and the contractor fulfils his agreement when he does the work according to such plans and specifications, regardless of the fact that the building is not water-tight.

So, in Bush v. Jones, 6 L.R.A.(N.S.) 778, 75 C. C. A. 582, 144 Fed. 942, it was held that a provision in a contract for the construction of a cellar according to specifications, "the whole to be perfectly water-tight and guaranteed," bound the contractor only so far as his own work is concerned, and did not constitute a guaranty on his part that the plans would produce a water-tight cellar.

And in Filbert v. Philadelphia, 181 Pa. 530, 37 Atl. 545, an action to recover the balance due on a contract to construct a reservoir, it was held that where the contractor agreed to construct the reservoir for the city according to its plans and specifications, and to do all work necessary to make a complete and perfect reservoir ready for use, he did not warrant that the reservoir would be perfect, and was not responsible for leaks resulting from the use of the clay bottom which was specified.

So, in Harlow v. Homestead, 194 Pa. 57, 45 Atl. 87, it was held that a contractor who had agreed to furnish the materials and work for the construction of a reservoir according to plans and specifications furnished by a city could recover on his contract, although the reservoir as constructed was not water-tight as provided for by the specifications, where the defect was due to faulty plans.

In Salfisberg v. St. Charles, 154 Ill. App. 531, in which it was held that one who contracts to construct a reservoir for a city cannot recover a balance due on his contract where he departs from the specifications, and constructs a wall materially different from that called for in the specifications, even though with the sanction and under the direction of the engineer, the court says *obiter* that had the proof shown that the city had accepted the work, or,

Messrs. Post, Avery, & Higgins for plaintiffs.

Crow, Ch. J., delivered the opinion of the court:

Action by John T. Huetter and Joseph Zirngibl, copartners, against the Warehouse & Realty Company, a corporation, to recover the amount claimed to be due upon a construction contract. From a judgment in plaintiffs' favor, the defendant has appealed, and plaintiffs, being dissatisfied with the amount of the judgment, have cross appealed. We will refer to the parties as plaintiffs and defendant.

On August 24, 1908, the defendant, Warehouse & Realty Company, for an agreed consideration of \$86,900, entered into a

that it had been performed in substantial compliance with the contract plans and specifications, and tendered to the city, and that the city had unreasonably refused to accept the same, the contractor could recover even though the reservoir did not fulfill the purpose for which it was constructed.

So, where plans and specifications specify the manner in which an underground flue is to be reconstructed, and provide that such flue shall be made thoroughly watertight, the contractor does not guarantee the sufficiency of the plans and specifications, but he may recover the value of the work, regardless of the fact that the flue is not watertight, if the construction is in accordance with the plans. *Dwyer v. New York*, 77 App. Div. 224, 79 N. Y. Supp. 17.

But a paving contractor who has agreed to construct a pavement and keep it in repair for a specified time is not relieved from liability to make repairs by the fact that he has fully complied with the specifications in performing the work, and that the repairs were necessitated by the faulty plans adopted for the improvement. *Cameron-Hawn Realty Co. v. Albany*, 207 N. Y. 377, 49 L.R.A. (N.S.) 922, 101 N. E. 162. Referring to *MacKnight Flintic Stone Co. v. New York*, 160 N. Y. 72, 54 N. E. 661, the court says: "The principle applied to the facts of that case is not applicable to the facts of this. It would be applicable if the contract had provided that the plaintiff should construct the pavement, which would remain sound and perfect through the period of ten years, by following the requirements and plan contained in the contract. Under such provision the defendant would have taken upon itself the risk of those requirements and plan effecting a pavement which would remain thus sound and perfect." (The general question as to the conditions or defects covered by a provision in a paving contract requiring contractor to keep pavement in repair is treated in the note to this case in 49 L.R.A. (N.S.) 922.)

In *Rosenblum v. New York Butchers'* L.R.A.1915C.

written contract with the city of Spokane, whereby it agreed to construct a large fill and viaduct on Sprague avenue; the work to be done in accordance with plans and specifications prepared by the city engineer, and under the supervision and to the satisfaction of the city engineer. On October 24, 1908, this contract was sublet by the defendant to plaintiffs; it being agreed that plaintiffs were to perform their sub-contract in exact accordance with the plans and specifications prepared by the city engineer. Plaintiffs were to be paid on stated estimates made by the city engineer; 80 per cent thereof to be paid on each estimate when made and delivered, the remaining 20 per cent to be retained until the entire improvement was completed. Plaintiffs en-

Dressed Meat Co. 61 Misc. 263, 113 N. Y. Supp. 604, it was held that where a contractor agrees to construct lift gates in accordance with plans and specifications furnished him, and further agrees that the gates shall be of first-class workmanship and material, and shall operate satisfactorily when erected, he fulfils his agreement when he produces gates which will operate as well as any gates could be made to operate which are built according to such plans and specifications, although they in fact prove a failure when put into operation.

And in *Riebe v. Mauch Chunk Water Co.* 33 Pa. Super. Ct. 321, an action on a building contract, where it appeared that a contractor had agreed to construct a tunnel in accordance with plans and specifications, and had performed the work in compliance therewith, and that the defects had resulted from a failure of the engineers who designed the plans to anticipate the condition of the soil and to provide for it, it was held that the contractor was bound only to construct the tunnel according to the directions given him, and that his obligation did not render him accountable for the efficiency of the plan adopted.

The court in *Loundsberry v. Eastwick*, 3 Phila. 371, says: "For when a mechanic agrees, as in the present instance, to erect a structure in a particular manner, with materials of a particular strength and thickness, the whole and all the material parts being described and specified in the agreement, he is only bound to perform what he had promised, to give his employer that for which he has stipulated,—he is in no respect answerable, short of fraud or deception, for its fitness for the purpose for which it is built. All that he need do to earn his money is to comply with his contract; the sufficiency or wisdom of the contract is at the risk of the party who has chosen to make it."

And where a contractor agrees to construct a steel cantaliver bridge for a city in accordance with plans and specifications furnished by the city, and in accordance with the instructions of the engineer for the city, and performs the contract in ac-

tered upon the performance of their contract, and continued work until September 17, 1909, when a large portion of the south wall of the fill collapsed and fell. The work had been done in exact compliance with the plans and specifications, under the supervision and direction of the city engineer, who had made and delivered to plaintiffs a number of estimates. Neither of the plaintiffs was an engineer, but, after the wall had fallen, they employed two expert civil engineers to examine the work and the plans and specifications, and report whether performance of the contract would be possible. These engineers, after examination, determined and reported that the plans were defective, and that any wall constructed in accordance therewith would not stand.

cordance with such plans and specifications, he is not a guarantor that certain trusses will not be overstrained if subjected to the large loads provided for in the specifications; and the mere fact that the trusses will not sustain such loads is no defense to an action for the balance due on the contract. *New York v. Pennsylvania Steel Co.* 124 C. C. A. 360, 206 Fed. 455.

In an action to recover for work done in the construction of brick kilns, which were built according to the defendant's plans and specifications and with his material, a charge was held incorrect which stated that if the work was not done in a first-class manner, and was worthless by reason thereof, then plaintiff is not entitled to recover anything, since the contractor would not be totally debarred from recovery in case the faults were due to defects in the plans or material, as some of the evidence tended to show. *Birmingham Fire Brick Works v. Allen*, 86 Ala. 185, 5 So. 454.

In *Dermott v. Jones* (Ingle v. Jones) 2 Wall. 1, 17 L. ed. 762, an action by a contractor for the contract price for the erection of a building which he had constructed faithfully in accordance with plans and specifications, it was held that he might recover in spite of the settling of the foundation caused by a latent defect in the soil; but that the terms of his contract, which bound him to completely finish the building and fit it for use, gave the owner a right to recoupment for the damages suffered in reconstructing the part of the building which fell as the result of the defect. The reason assigned for the latter part of the holding was that "if a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law, or the other party."

Cases of defects in buildings caused by the nature of the soil, generally, are not within the scope of this note, inasmuch as such cases do not depend upon any question of the sufficiency of the plans, but rather upon the extent of the contractor's obligation under the contract.

L.R.A.1915C.

Plaintiffs notified defendant of this report, and announced their readiness to proceed with the work if the plans were modified so as to make the construction possible. The city ordered the defendant corporation to proceed with the work, and defendant in turn ordered plaintiffs to proceed. This the plaintiffs refused to do under the existing plans. The defendant thereupon endeavored to complete the work, and a short time thereafter a large portion of the north wall fell. Thereupon defendant abandoned the work. Some time later the plans were changed, and the work was completed under the new plans.

Prior to October 9, 1909, the defendant had paid plaintiffs \$54,755.86, 80 per cent on estimates. On that date the city engi-

The reason for the rule that the right of recovery is not affected by defects resulting from insufficient plans and specifications is stronger where the contractor objects to the plans, but carries them out at the order of the person in charge.

Thus it is held in *Burke v. Dunbar*, 128 Mass. 499, that where a contractor agrees to build a sea wall of certain dimensions in a thorough and workmanlike manner, and nothing is mentioned in the contract about a pile foundation, the contractor's right to recover under the contract is not affected by defects in the wall due to the lack of a pile foundation, where the contractor, after beginning the work, and upon learning of the necessity of such a foundation, informs the owner of the need thereof, and a pile foundation is furnished in certain places, but neglected in others.

And where a contractor drew a plan for a bridge for a county board of supervisors, the board insisting upon the specification of the use of certain old material over the objection of the contractor, and the board used the plan as modified in obtaining bids, and subsequently let the contract to the contractor who drew the plans, the board, although it does not formally adopt the plan, will be deemed to have adopted the plan as its own, so that in an action for the contract price by the contractor it cannot avail itself of the defense that the bridge as constructed was defective. *Holland v. Union County*, 68 Iowa, 56, 25 N. W. 927.

And see *Moore v. United States*, 46 Ct. Cl. 139, *infra*, I. b.

b. Right of contractor or subcontractor to recover for extra work or materials necessitated by insufficient or defective plans.

Where defects in the plans and specifications the sufficiency of which are not warranted by the contractor necessitate extra work or materials to complete the contract, the contractor may recover therefor from the owner.

Thus, it was held in *Bentley v. State*, 73

neer made and delivered to plaintiffs a further estimate to the effect that all the work then completed, including that previously estimated, was of the value of \$71,359.70, and that there was then due plaintiffs \$2,067.20; it being understood that 20 per cent of the total estimates was still to be withheld. The amount then due, the defendant did not pay. About June 12, 1909, plaintiffs entered into a contract with Brown Bros., of Spokane, for an iron railing to be placed on the fill as required by the plans and specifications, at a cost of \$2,775. This railing was never used, although tendered to the defendant by the plaintiffs.

After the work had been completed by the city, the defendant instituted a pro-

ceeding in mandamus against the city and its officials to compel the engineer to make, and the city to allow, an estimate in the sum of \$18,662.15 for work done by plaintiffs. In that proceeding the defendant asserted and established the fact that the plans and specifications were worthless; that the work could not be performed thereunder, and obtained judgment in accordance with its demand.

At the time plaintiffs ceased work, 1,500 yards of rock had been blasted on defendant's lots for use in the fill. It was stipulated upon the trial that it had cost plaintiffs \$725 to blast this rock. It was also stipulated that plaintiffs had drilled 108 holes for further blasting, at an expense of \$108. Defendant afterwards used this rock,

Wis. 416, 41 N. W. 338, that where a contractor who agreed to furnish all the materials and do all the work for the construction of an addition to a state capitol building in accordance with plans and specifications furnished by the state, proceeded in good faith to perform his contract without any knowledge of defects in the plans and specifications, and, before the work was completed, a large portion of the building fell down in consequence of defects in such plans and specifications, he could recover the expense of labor and materials used in restoring the portion of the building which fell during construction as the result of defects in the plans, and which was rebuilt by request in accordance with altered plans.

And in *Moore v. United States*, 46 Ct. Cl. 139, it is held that where a contractor who agrees to construct a dry dock for the Federal government according to the directions of the government engineer objects to the plan for a cofferdam, and follows it only because it is insisted upon by the engineer, the government is liable for the loss which results to the contractor by reason of such defect.

But a contractor who agrees to dig a well according to plans and specifications furnished him is not entitled to recover, in addition to the contract price, the cost of constructing the well up to the time it caves in as the result of defects in a curb specified by the plans and specifications. *Leavitt v. Dover*, 87 N. H. 94, 68 Am. St. Rep. 640, 32 Atl. 156. The court based its decision on the ground that the contractor, having voluntarily entered into an absolute contract without any qualification or exception to construct the well for the defendant at a stipulated price, must abide by his contract, and perform his undertaking for the price agreed upon.

Where a contractor agrees to replace an old bridge with a new one in accordance with the owner's plans and specifications, concerning which the owner makes no express warranty, the contractor cannot base an action for damages for loss of time and labor resulting from defects in the plans up-
L.R.A.1915C.

on an implied warranty of such plans by the owner. *Thorn v. London*, L. R. 1 App. Cas. 120, 45 L. J. Exch. N. S. 487, 34 L. T. N. S. 545, 24 Week. Rep. 932, 5 Eng. Rul. Cas. 223, affirming L. R. 9 Exch. 163. It is suggested in the opinion that the contractor might have had a right of action in *quantum meruit*.

c. Right of owner against contractor or subcontractor for defects caused by insufficient or defective plans.

Where, after the completion of a contract, damage results from defects in plans the sufficiency of which is not warranted by the contractor or subcontractor, the owner has no right of action against him.

In *Beswick v. Platt*, 140 Pa. 28, 21 Atl. 306, an action by the owner of a wharf against the contractor for damages for the falling of the wharf after completion, the court says: "If the plans and specifications did not call for as strong and substantial a wharf as the plaintiffs wanted, that was no fault of the defendant, who appears to have constructed it in accordance with their wishes."

And, in *Bancroft v. San Francisco Tool Co.*, 120 Cal. 228, 52 Pac. 496, it was held that a contractor was not liable to the owner for damages arising from a defective elevator built by the contractor for the owner under plans and specifications furnished by the owner, where the defect was due to the plans and specifications of the owner, which were strictly followed, either upon the ground of an express warranty in the contract claimed to arise from a provision in the contract whereby the contractor agreed to furnish the work in a first-class workmanlike manner, or upon the ground of implied warranty as to fitness created by a statute, inasmuch as the only warranty in either case is that the work will be done according to the plans and specifications.

In *O'Loughlin v. Jefferson County*, 56 Pa. 62, an action against a contractor and his bondsman for damages for the falling of a bridge, the court sustains the charge

and availed itself of the benefit of the holes in its attempt to prosecute the work. It further appears that, when defendant undertook to complete the work, it used certain tools and equipment belonging to plaintiffs, the rental value of which was stipulated to be \$625. The defendant refused to make any further payments to plaintiffs for the work done by them before the walls fell, and plaintiffs instituted this action to recover the 20 per cent retained, the unpaid estimate, and the other items above mentioned.

On the trial no material dispute appeared as to the facts or the amounts involved, and the trial court directed a verdict and judgment in plaintiffs' favor for \$26,967.29. Plaintiffs had demanded the further sum

of \$2,982.15 as profits which they would have realized had they completed the contract. This item the court refused to allow, and on such refusal plaintiffs predicate their cross appeal.

Defendant's main contention is that it was plaintiffs' duty to complete the work in accordance with their contract. It insists that the contract was an entirety; that plaintiffs are not entitled to recover, having failed to complete it, even though it was impossible of performance; and that plaintiffs are not excused from complete performance by reason of defective plans and specifications prepared by the city engineer. It further insists that the plans were furnished by the city, and not by defendant; that they were on file with the

of the court below to the effect that the contractor is "not responsible for any defect in the plan of the bridge."

An undertaking "to lay and put on said tin roofing well, carefully, and skilfully, shutting out all rain and water, and in every way in a good and workmanlike manner," is held in *Fairman v. Ford*, 70 Vt. 111, 39 Atl. 748, to have "no other effect, as used, than to require work that would keep out the rain as completely as the construction of the roof would permit;" and the owner is held to have no right of action against the contractor for leakage resulting from defects in the plans and specifications.

But it was held in *Lake View v. MacRitchie*, 134 Ill. 203, 25 N. E. 663, reversing 30 Ill. App. 393, that where a contractor agreed to furnish all the material and do all the work required for the complete construction of an inlet pipe and crib, together with a complete branch inlet pipe and intake to be connected with the well of the waterworks, in accordance with the plans and specifications attached to the contract and made a part thereof, all materials and work to be subject to the approval of the city engineer, and guaranteed the work to remain in good condition for one year from date of acceptance, he guaranteed not only the work and materials, but also the sufficiency of the plans and specifications, and consequently was liable for defects occurring in the pipe within the time limit.

And see *Dermott v. Jones* (Ingle v. Jones) 2 Wall. 1, 17 L. ed. 762, supra, I. a.

d. Liability of contractor or subcontractor for damages for delay caused - by insufficient or defective plans.

A contractor is not liable for damages for delay provided for in the contract for the building of a booth to be erected on an exposition floor, where such delay is caused by a defect in the plans which are not adapted to the surface of the floor. *Beattie Mfg. Co. v. Heinz*, 120 Mo. App. 465, 97 S. W. 188.

And in *Murphy v. Liberty Nat. Bank*, L.R.A.1915C.

184 Pa. 208, 39 Atl. 143, it was held that a contractor who performs a building contract in strict accordance with the plans and specifications furnished by the other party is not liable for a penalty for delay caused by faulty plans and specifications.

See also *Sperry v. Fanning*, 80 Ill. 371.

II. Where contract is not fully executed because of defective plans.

a. Right of contractor or subcontractor to recover contract price.

It is held in *Grace v. Osler*, 21 Manitoba L. Rep. 641, that under a contract to the effect that the "contractor shall be responsible for all loss or damage to the works that may occur during the progress of the works," a clause excepting the contractor from such liability in case of loss "due to the negligence or lack of judgment of the architect" does not operate to relieve the contractor from responsibility for failure to make good the defects resulting from insufficient plans. The court says: "When a contractor tenders for the erection of a building he is given the opportunity of examining the plans and specifications, and he may, if he thinks it necessary, take the advice of a skilled engineer. He is not bound to contract to do the work; but, if he does so contract, he assumes, in the absence of a guaranty as to the feasibility of the work in accordance with the plans, the risk of being able to perform it."

b. Right of contractor or subcontractor to recover the value of work done.

Where the failure to complete a tunnel which has caved in was due to the order of the city inspector who was in charge of the work, the contractor could recover the value of the work done and materials furnished at the time the performance of the contract was prevented, notwithstanding a clause in the contract providing that he should be entitled to payment only upon completion of the work in the manner prescribed. The court held that there was

city clerk; that plaintiffs had access to them, and are in no position to insist that, by reason of defects in the plans and specification rendering the contract impossible of performance, they are exonerated from performing their work; that not being so exonerated, and having failed to complete their contract, they are not entitled to recover the 20 per cent of estimates withheld, or to recover upon the other demands presented in their complaint.

In support of its contention that plaintiffs were compelled to finish the work in accordance with the defective plans and specifications, and must suffer any loss occasioned by the falling of the wall, the defendant, with other citations, directs our attention to *American Surety Co. v. San Antonio Loan & T. Co.* — Tex. Civ. App., 98 S. W. 387, and *Loneragan v. San Antonio Loan & T. Co.* 101 Tex. 63, 22 L.R.A. (N.S.) 364, 130 Am. St. Rep. 803, 104 S. W. 1061, 106 S. W. 876; the cases mentioned being the ones upon which it places its main reliance. These Texas cases seem to support defendant's contention; but, from the doctrine there announced, we withhold our con-

sent, believing it illogical, contrary to our previous rulings, and in conflict with decisions from other courts which we are constrained to follow.

In *Ward v. Pantages*, 73 Wash. 208, 131 Pac. 642, the plaintiffs, as contractors, installed a plumbing system and a heating plant in defendants' building in strict compliance with plans and specifications prepared by an architect whom defendants had employed. The work proved unsatisfactory. Holding that plaintiffs were entitled to recover, and citing the case of *MacKnight Flintic Stone Co. v. New York*, 160 N. Y. 72, 54 N. E. 661, to which reference is hereinafter made, we said: "Appellants earnestly contend that the systems adopted, especially for the heating plant, were suggested and warranted by respondents. This respondents deny. The evidence upon the issue thus raised was resolved by the trial court in respondents' favor. If, as respondents contend, and the trial court properly found, the plans were adopted by appellants' architects, all that the respondents can be held to have warranted was that they would install the systems in a work-

nothing in the contract which constituted a warranty of the plans and specifications on the part of the contractor. *Byron v. New York*, 22 Jones & S. 411.

And it is said in *Ford v. Shepard Co.* — R. I. —, 90 Atl. 805, that if an owner of a lot who knows of the existence of quicksand thereon which will increase the cost of erecting a building intentionally omits from the plans and specifications for building, plans and specifications for dealing with the quicksand, for the purpose of deceiving the contractor, the latter may abandon the contract and recover the value of the work done.

And where the plans and specifications of a roof show that skylight superstructures were intended for the building, but no sizes, weights, or other necessary data is given, except the size of the openings, the contractor does not lose his right to recover on *quantum meruit* by refusing to construct such superstructures. *Sexton v. Chicago*, 107 Ill. 323.

Where specifications are vague with respect to the manner in which roofing is to be fastened to a building, a contractor who executes the specifications in accordance with a proper and reasonable interpretation, and is wrongfully dismissed before the completion of the contract, may recover the value of the work done, regardless of the fact that such roof leaks. *Metallic Roofing Co. v. Toronto*, 3 Ont. Week. Rep. 646.

c. Right of owner against contractor or subcontractor for failure to complete.

In *Loneragan v. San Antonio Loan & T. Co.* 101 Tex. 63, 22 L.R.A. (N.S.) 364, 130 L.R.A.1915C.

Am. St. Rep. 803, 104 S. W. 1061, rehearing denied in 101 Tex. 81, 130 Am. St. Rep. 823, 106 S. W. 876, it is held that a contractor who fails to reconstruct a building which falls during erection is liable in an action by the owner for the return of the money paid on the contract, and damages for the failure to complete the structure, although the weakness which caused the building to fall was the result of defective plans and specifications. The court makes a distinction between cases in which the contractor has completed the building before it falls and cases where the fall occurs before erection is complete. It says: "In the cases cited we believe that, without exception, the contractor had performed his work according to the terms of his agreement, and had fulfilled his contract by finishing the structure, terminating his relation as contractor, after which the house was destroyed by some accident or calamity, or had fallen from some defect or weakness in the structure or fault of the soil, and in such cases the courts have held that the contractor does not guarantee the sufficiency of the specifications, but only the skill with which he performs his work and the soundness of the material used therein. He is, therefore, not liable for the destruction of the building after he has performed his agreement by completing the structure."

And in *American Surety Co. v. San Antonio Loan & T. Co.* — Tex. Civ. App., 98 S. W. 387, an action for breach of contract consisting in the failure to complete a building, it is held that, in the absence of an express or implied warranty on the part of the owner against inherent defects in plans and specifications, defects which

manlike manner, in strict compliance with the adopted plans, and there is sufficient evidence to sustain the finding that this was done. We conclude from the evidence that respondents made no warranty of the systems adopted, but that their only warranty was to install them in strict compliance with the plans and specifications, which they did. 'Where the builder performs his work strictly in conformity with plans and specifications, he is not liable for defects in the work that are due to faulty structural requirements contained in such plans and specifications, and may recover under the contract, unless he has warranted that the plans and specifications are correct.' 6 Cyc. 63."

In the record before us there is nothing to indicate that the plaintiffs warranted the plans and specifications prepared by the city engineer. They were not civil engineers, nor did they have any special knowledge of the fact that the plans and specifications were defective, or that it would be impossible to construct the improvement in accordance therewith.

In *MacKnight Flintic Stone Co. v. New*

result in the falling of a building before completion do not excuse the contractor, who has obligated himself to erect the building in accordance with such defective plans, from the performance of his undertaking. The court says: "Such plans were before him [contractor], and subject to his inspection, consideration, and judgment before he entered into the contract, and they became a part of it. He was free to make the contract or not, just as he pleased. No power on earth could compel him to enter into the agreement. It was purely voluntary. He must necessarily have determined from an inspection and study of the plans that he could erect the building in accordance with them before he made the contract. If he deemed the plans so defective that the building could not be erected by them, he should either have refrained from the agreement, or had the other party to guarantee that the building could be constructed in conformity to them. But, having entered into the contract without requiring of the other party any such guaranty or warranty, he should not be allowed to relieve himself from the consequences of his failure to do what he voluntarily agreed to do, by shifting the burden of its nonperformance to the other party, who was no more to blame for entering into the contract than he was."

And where a contractor agreed to build and equip a theater building completely in accordance with plans and specifications to be prepared by an architect, and neither the contract nor the plans and specifications, which were prepared as the building progressed, stated what should constitute the equipment of the building, the contractor was held liable for damages for failure

York, supra, in discussing the question here presented, Vann, J., of the New York court of appeals, said: "The defendant specifically selected both material and design and ran the risk of a bad result. If there was an implied warranty of sufficiency, it was made by the party who prepared the plan and specifications, because they were its work; and, in calling for proposals to produce a specified result by following them, it may fairly be said to have warranted them adequate to produce that result. If I agree to produce a certain result according to my own plan, I impliedly warrant its sufficiency; but, if I agree to produce that result by strictly following the plan prepared by another party, he impliedly warrants its sufficiency. The responsibility rests upon the party who fathers the plan and presents it to the other with the implied representation that it is adequate for the purpose to be accomplished. A stipulation requiring a contractor to produce a certain result by following the plan and directions of the owner is an undertaking that it can be done in that way. . . . It would not be reasonable to hold the par-

to furnish such items of equipment as were shown to be usual and necessary. *Orpheus Vaudeville Co. v. Crayton Invest. Co.* 44 Utah, 453, 140 Pac. 653.

In *Ferrier v. Knox County*, — Tex. Civ. App. —, 33 S. W. 896, where the specifications required chimneys to be topped as shown by the "elevation," but the "elevation" did not show the chimneys, the court allowed a counterclaim for the failure to erect the chimneys in accordance with additional drawings furnished after the defect was discovered. In this case, however, the contract provided that "additional drawings may be furnished in exemplification of the foregoing from time to time, as they may be required, and it is distinctly understood that all such additional drawings shall be of equal force with those which are herein specifically cited."

In an action by the owner of a building which fell during construction, against the contractor, for damages for the failure to perform his contract, the court says: "It is no defense to the action, that the specifications directed that 'footings' should be used as the foundation of the building, and that the defendants, in the construction of these footings, as well as in all other particulars, conformed to the specifications. The defendants contracted to 'erect and complete the building.' Whatever was necessary to be done in order to complete the building, they were bound by the contract to do. If the building could not be completed without other or stronger foundations than the footings specified, they were bound to furnish such other foundations." *Stees v. Leonard*, 20 Minn. 494, Gil. 448.

E. L. D.

ties to have intended that the plaintiff was to do a great deal of work and furnish a large quantity of materials according to the specifications of the defendant and under the direction of its officers, with no right to vary from the materials or construction specified, and yet get no pay for it unless it produced a certain result, without very plain language to that effect, which we do not find in the instrument before us, although it is elaborate in form and embraces the most minute details. Parties might make such an agreement, but, if the language used admitted of a different construction, the courts would be apt to adopt it and thus avoid the conclusion that an impossible result was intended. The fault of the defendant's plan should not prevent the plaintiff from recovering payment for good work done and good materials furnished precisely as the defendant required. The reasonable construction of the covenant under consideration is that the plaintiff should furnish the materials and do the work according to the plan and specifications, and thus make the floors water-tight, so far as the plan and specifications would permit."

The learned judge then cites the following authorities, which sustain his conclusions: *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 28 L. ed. 86, 3 Sup. Ct. Rep. 537; *MacRitchie v. Lake View*, 30 Ill. App. 393; *Filbert v. Philadelphia*, 181 Pa. 530, 37 Atl. 545; *Bancroft v. San Francisco Tool Co.* 120 Cal. 228, 52 Pac. 496; *Bentley v. State*, 73 Wis. 416, 41 N. W. 338; *Cunningham v. Hall*, 4 Allen, 268; *Burke v. Dunbar*, 128 Mass. 499; *Perkins v. Roberge*, 69 N. H. 171, 39 Atl. 583; *Clark v. Pope*, 70 Ill. 128; *Rice v. Forsyth*, 41 Md. 389; *Weld v. Goldenberg*, 13 C. C. A. 12, 26 U. S. App. 491, 65 Fed. 466; *Smith v. Consumers' Cotton-Oil Co.* 30 C. C. A. 103, 52 U. S. App. 603, 86 Fed. 359; *Hoe v. Sanborn*, 21 N. Y. 552, 78 Am. Dec. 163; *Byron v. New York*, 22 Jones & S. 411.

The theory upon which defendant insists that plaintiffs, as a condition precedent to their right to recover, should have completed their contract, conceded to have been impossible of performance, is that, having contracted after seeing the plans and specifications, they impliedly warranted the sufficiency of such plans. In the absence of an express warranty incorporated in their written contract, they cannot be held to have made any warranty whatever. If a contractor cannot perform by reason of defective plans which he is required to follow, which render the contract impossible of performance, which were not prepared or provided by him, but were prepared and provided by the owner, or by his architect

or engineer, there would seem to be no just reason why the contractor may not recover for work done in strict compliance with such plans and specifications, under the supervision and to the satisfaction of the owner, architect, or engineer, in an attempt to perform the contract.

In *Bentley v. State*, 73 Wis. 416, 41 N. W. 338, the state entered into a contract with Bentley, whereby he agreed to erect additions to a public building in accordance with plans and specifications prepared and furnished by an architect employed by the state. Portions of the building fell because the plans and specifications, which had been carefully followed, were defective. Thereafter the contractor restored the building and sued to recover for labor and material used in so doing. The state defended upon the ground that the plaintiffs, at their own cost and expense, were bound to furnish all materials and perform all work necessary to restore the construction according to new and modified plans which were adopted and followed. In other words, the state in substance contended that the contractors assumed the risk of the sufficiency of the original plans and specifications. Passing upon this question, the court said: "The state undertook to furnish suitable plans and specifications, and required the plaintiffs to conform thereto, and assumed control and supervision of the execution thereof, and thereby took the risk of their efficiency. What was thus done, or omitted to be done, by the architect must be deemed to have been done or omitted by the state. Moreover, we must hold, notwithstanding the English case cited [*Thorn v. London*, L. R. 1 App. Cas. 120, 45 L. J. Exch. N. S. 487, 34 L. T. N. S. 545, 24 Week. Rep. 932, 5 Eng. Rul. Cas. 223], that the language of the contract is such as to fairly imply an undertaking on the part of the state that such architect had sufficient learning, experience, skill, and judgment to properly perform the work thus required of him, and that such plans, drawings, and specifications were suitable and efficient for the purpose designed. There seems to be no lack of able adjudications in support of such conclusions."

The English case of *Thorn v. London*, supra, affirms the previous decision of the court of exchequer in the same case, reported in L. R. 9 Exch. 163, cited and followed in *American Surety Co. v. San Antonio Loan & T. Co.* — Tex. Civ. App. —, 98 S. W. 387, and was distinguished with irresistible logic in *Bentley v. State*, supra, from which we have quoted the foregoing excerpt. The defendant has contended that the plans and specifications were not furnished by it, but were furnished by the

city. This suggestion is immaterial for the reason that, when the defendant contracted with the plaintiffs, it required the plaintiffs to follow the plans and specifications prepared by the city engineer, thus adopting and approving such plans as between plaintiffs and itself.

The trial court, in the final judgment, permitted the plaintiffs to recover all items demanded as above stated, except the profits which plaintiffs claim they would have realized had they completed the contract. We do not find it necessary to enter into a detailed statement of the items allowed by the trial judge. The amounts were not in dispute. We hold that a just conclusion was reached. The plaintiffs have been permitted to recover the full value of work done by them in their attempt to fulfill a contract which was impossible of complete performance by reason of the defective plans and specifications. We see no reason why they should recover any further sum.

Other assignments of error need not be discussed. We find no prejudicial error in the record, and the judgment will be affirmed. Neither party will recover costs on this appeal.

Chadwick, Main, Ellis, and Gose, JJ., concur.

Petition for rehearing denied.

KENTUCKY COURT OF APPEALS.

LOUISVILLE RAILWAY COMPANY,
Appt.,
v.

ALBERT DOTT.

(161 Ky. 759, 171 S. W. 438.)

Carrier — injury to passenger — missile thrown by rioters.

Mere failure of the conductor of a street car which stops for passengers at a place

Note. — Carrier's liability for assault upon passenger by strikers, mob, or third persons.

This note is supplemental to the note appended to *Fewings v. Mendenhall*, 55 L.R.A. 713.

See also the note to *Bevard v. Lincoln Traction Co.* 3 L.R.A.(N.S.) 318.

The liability of a carrier for an assault committed by a fellow passenger does not come within the scope of this note. For a discussion of that question, see *Jansen v. Minneapolis & St. L. R. Co.* 32 L.R.A.(N.S.) 1206, and the earlier notes referred to therein.
L.R.A.1915C.

where rowdies are making an attack on intending passengers, to start the car as soon as the passengers are on board, does not, even though the passengers have requested him to do so, render the company liable for injury to a passenger by a missile thrown into the car, if the attacking party attempt to follow the passengers onto the car, and the delay is due to the conductor's ignorance as to which persons entering the car are passengers and his removal of the trespassers as soon as he discovers which they are, so that the car can be moved without danger to persons on the steps or platform.

(December 18, 1914.)

A PPEAL by defendant from a judgment of the Common Pleas Branch, Fourth Division, of the Circuit Court for Jefferson County, in plaintiff's favor in an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. Reversed.

The facts are stated in the opinion.

Messrs. Frank P. Straus and Howard B. Lee, for appellant:

A person in danger of being assaulted cannot board a street car and become a passenger thereon, and thereby place liability upon the street car company, if he is injured as a result of the assault, which he knew was threatened at the time he boarded the car.

29 Cyc. 505, 515, 518, 520; *Penny v. Atlantic Coast Line R. Co.* 153 N. C. 296, 32 L.R.A.(N.S.) 1212, 69 S. E. 238, 3 N. C. C. A. 379; *Illinois C. R. Co. v. Minor*, 69 Miss. 710, 16 L.R.A. 629, 11 So. 101.

A common carrier is liable to a passenger for an injury inflicted by a stranger only when its employees could have reasonably anticipated the danger, and could have, by the exercise of the highest degree of care, prevented it; and the passenger could not have reasonably anticipated the danger, and could not, by the exercise of ordinary care, have prevented it.

Pittsburgh, Ft. W. & C. R. Co. v. Hinda, 53 Pa. 512, 91 Am. Dec. 224, 8 Am. Neg.

As to the liability of a carrier for assaults committed by its servants upon passengers while on its trains, see *Houston & T. C. R. Co. v. Bush*, 32 L.R.A.(N.S.) 1201, and the earlier notes referred to therein; and for other notes treating of different phases of the liability of a carrier for assaults on passengers by its employees, see *Index to L.R.A. Notes, "Carriers,"* § 14.

And for notes discussing the liability of a carrier for the arrest of a passenger, or for failure to prevent his arrest, see *Index to L.R.A. Notes*, §§ 15, 15a.

The liability of a carrier for an assault upon a passenger by one not a servant or fellow passenger depends upon whether it

Cas. 602; *Kinney v. Louisville & N. R. Co.* 99 Ky. 61, 34 S. W. 1066; *Louisville R. Co. v. Wellington*, 137 Ky. 723, 126 S. W. 370, 128 S. W. 1077; *Penny v. Atlantic Coast Line R. Co.* 153 N. C. 296, 32 L.R.A.(N.S.) 1212, 69 S. E. 238, 3 N. C. C. A. 379; *Illinois C. R. Co. v. Minor*, 69 Miss. 710, 16 L.R.A. 629, 11 So. 101.

Messrs. Popham, Trusty, & Roose for appellee.

Nunn, J., delivered the opinion of the court:

The appellee had just become a passenger on one of appellant's street cars in the city of Louisville, when someone outside, unknown to him, threw a brick or piece of ice into the car that struck him in the face,

had notice of the danger of an assault being made, or of circumstances from which it should have anticipated that it would be made; and where it had no such notice it is generally held that it is not liable.

Thus, in *Irwin v. Louisville & N. R. Co.* 161 Ala. 489, 135 Am. St. Rep. 153, 50 So. 62, 18 Ann. Cas. 772, the court said that railroad companies, as common carriers of passengers, are perhaps not bound to protect their passengers from assaults by third persons to the same extent and degree as from like injuries by their own agents or employees, yet they must use a high degree of care to prevent such assaults by strangers; but if the carrier or its agents had no knowledge of the condition of danger to which the passenger was subjected, and could not reasonably have anticipated the injury or provided against it, the carrier is not and ought not to be liable for any injuries suffered by a passenger at the hands of a stranger.

So, it is not to be anticipated that miscreants will throw missiles through the windows of cars and thus injure passengers, and a carrier was not negligent in not lowering the blind upon a car window, which might perhaps have arrested the missile which injured plaintiff, the blinds not being intended for such a purpose, but merely to exclude or admit light and air, and there being no facts to show that such assault or injury could have been reasonably anticipated at the time and place at which it happened. *Ibid.*

And in *Fewings v. Mendenhall*, 88 Minn. 336, 60 L.R.A. 601, 97 Am. St. Rep. 519, 93 N. W. 127, 13 Am. Neg. Rep. 346, which is a second appeal of the case reported in 55 L.R.A. 713, it was held that the failure of defendant to pull down the blinds of the car in which plaintiff was riding, or stretch heavy canvas over the windows outside the car, was not negligence justifying a recovery against it for an injury received from a missile thrown by a strike sympathizer.

In *Bosworth v. Union R. Co.* 26 R. I. 309, 58 Atl. 982, 3 Ann. Cas. 1080, 17 Am. Neg. Rep. 375, which was an appeal from a trial L.R.A.1915C.

breaking his jawbone, and causing very painful and permanent injuries. He sued to recover \$10,000 general damages, and \$1,329, special damages for loss of time and expense of surgical treatment. He recovered a verdict for \$5,200, and the Street Railway Company appeals. As we view the case, the only question is whether there was any evidence of negligence on the part of the appellant which was the proximate cause of the injury.

About 10 o'clock one night in January, 1912, the appellee, Dott, whom we shall refer to as the plaintiff, was standing at the corner of Preston and Chestnut streets waiting for a car. Mr. Robbins, Mr. Baldea, and Mr. Ochsenhirt, a mail carrier, were also waiting at that corner for the same pur-

on the merits of the preceding case, where it appeared that the injury to plaintiff occurred when strikers or their sympathizers threw a stone into the car upon which plaintiff was riding, and that there was no indication of danger visible to the motorman or anyone on the car until the stones were thrown, except the presence of a large number of people on the street, the court approved a direction of a verdict in favor of defendant, saying: "We are unable to see how the court could have taken any other view of the situation. A motorman saw ahead of him a number of men walking, as one witness says, slowly along the street making, as all agree, no hostile demonstration. Among them were two policemen, charged by law with the duty of suppressing disturbances. The motorman could not have known that a car had been stoned by these people fifteen minutes before. No warning came from the policemen or others that the crowd had hostile intentions, and the motorman's duty was clearly to carry his passengers along his route as far as they wished to go, until, at least, some threat or show of obstruction should be made. . . . Having the same knowledge which the motorman possessed, the plaintiff could have left the car before approaching the crowd if he had chosen to do so. The risk, if any there was, was as obvious to him as to the defendant's servants."

In *Woas v. St. Louis Transit Co.* 198 Mo. 664, 7 L.R.A.(N.S.) 231, 96 S. W. 1017, 8 Ann. Cas. 584, it was held that the fact that a motorman of a street car saw a person with something in his hand near the track at a place where the car was not required to stop for passengers, making violent motions toward the car, did not charge him with notice that his failure to stop the car would result in the person throwing a missile at himself which might strike and injure a passenger, and charge him with the duty of protecting the passenger, so as to render the company liable for injuries by his neglect to do so.

In *Ormandroyd v. Fitchburg & L. Street R. Co.* 193 Mass. 130, 78 N. E. 739, 118 Am. St. Rep. 457, where plaintiff was injured

pose. While so waiting, three rowdies passed, and one jostled against the mail carrier. When he warned them to be careful, they came back and got into a fight with him. Of the prospective passengers, the mail carrier was the only one involved in the difficulty, and he seems to have been getting the best of it. About the time the car came the rowdies took flight, but before the passengers could get aboard, the rowdies with five recruits renewed the attack. The plaintiff had boarded the car, paid his fare, and was standing on the rear platform, while the letter carrier and others named were getting aboard. A rowdy on the step at each side of the car was trying to enter, and it seems that others on the outside were throwing missiles aboard. It was during

the progress of this fight that someone on the outside threw something through the rear of the car and hit the plaintiff, as above stated. For cause of action, it is contended that the motorman and conductor detained the car an unreasonable length of time, whereas, if they had broken away from the fight, the plaintiff might not have been injured. After averring that he hailed and boarded the car, paid his fare, and became a passenger, the petition states: "That at said time and place, an altercation and a general fight and disturbance was in progress at said intersection, between a number of drunken, rowdy, and boisterous persons, who were creating violent demonstrations, hurling missiles in various directions, and creating danger to plaintiff and other pas-

sengers by a wad shot from a canon with which a resident along defendant's right of way was celebrating the 4th of July, it was held that defendant was not liable as the firing had been going on all day, and there was nothing to indicate that it was apt to be dangerous to passengers upon defendant's cars.

A carrier is not liable for an assault by a stranger upon a passenger while waiting in its station, unless the agents or employees knew, or in the light of the surrounding circumstances ought to have known, that danger was threatened or was to be apprehended, and then failed to use their authority and power to protect the passenger from the impending peril. *Southern R. Co. v. Hanby*, 183 Ala. 255, 62 So. 871. Generally, as to degree of care toward passenger at station, see note to *St. Louis, I. M. & S. R. Co. v. Woods*, 33 L.R.A. (N.S.) 855.

In *Savannah, F. & W. R. Co. v. Boyle*, 115 Ga. 830, 59 L.R.A. 104, 42 S. E. 242, where plaintiff, an express messenger, held to be entitled to the same protection as a passenger, was shot by one of two tramps who had been caught stealing a ride on the train and had been confined in the department assigned to the express company, while an employee of defendant was attempting to prevent their escape from the car, it was held that the fact that the tramps were secreted on the train and were stealing a ride would not alone be sufficient to cause the employees in charge of the train to suspect that they were armed with deadly weapons, and anticipate that they would use them in attempting to escape, so as to render the company liable to plaintiff for the failure of the employees to search them for such weapons.

In *Thweatt v. Houston, E. & W. T. R. Co.* 31 Tex. Civ. App. 227, 71 S. W. 976, 13 Am. Neg. Rep. 452, it was held that the leaving of defendant's train without anyone in charge while the crew were taking their meals at a regular meal station was a reasonable practice, and defendant was not liable for an assault committed by an outsider upon a passenger who remained upon L.R.A.1915C.

the train, which assault could not reasonably have been anticipated by the servants and agents of defendant.

In *Prokop v. Gulf, C. & S. F. R. Co.* 34 Tex. Civ. App. 520, 79 S. W. 101, the court said that the duty of a carrier to protect passengers from assaults and insults of third persons arises only when a threatened wrong occurs in the presence or within the knowledge of its agents, or when, from the facts and circumstances attending or preceding the injury, the carrier might have foreseen and prevented it, and held that defendant was not liable for an assault with attempt to rape committed upon a passenger while she was waiting alone in defendant's waiting room for her train, there being no causal connection between the failure to light the waiting room and the offense complained of, and nothing to put defendant upon notice that such a consequence might follow from its failure to light the room.

In *Segal v. St. Louis Southwestern R. Co.* 35 Tex. Civ. App. 517, 80 S. W. 233, which was an action for an assault and attempt to rape committed upon plaintiff by a negro who entered a lighted coach in which plaintiff was alone during a short stop at a station, it was held that defendant was not liable, as the probability that an assault would be made under such circumstances was so unreasonable and out of the ordinary that it could not have been contemplated by a prudent person.

In *Missouri, K. & T. R. Co. v. Smith*, — Tex. Civ. App. —, 133 S. W. 695, the court followed the *Prokop* and *Segal* Cases, *supra*, and held that plaintiff was not entitled to recover for damages inflicted by boys who were scuffling in defendant's station while she was waiting for her train, at a time when none of defendant's employees were on the premises.

But when the servants of the carrier knew of the intended assault in time to interfere, or are aware of the facts from which it should be anticipated, the carrier will be liable to the passenger for failure to afford him reasonable protection.

In *Southern R. Co. v. Haynes*, — Ala. —,

sengers upon said car, and to persons generally. He states that said conditions, facts, and dangers were well known to and were observed by the defendant and its agents in charge of said car at said time, and that the passengers of defendant on said car at said time requested and implored the agents of defendant in charge of said car at said time to proceed with said car and to move said car from said danger and said scene, and that said agents could have so moved said car from said scene and from said danger, and have prevented any injury to plaintiff by so doing. He states that the defendant and its agents in charge of said car, with gross negligence and carelessness, caused and permitted said car to stand at said scene and in said zone of danger for an unreasonable length of time, and negligently and wrongfully failed and refused to start or move said car with reasonable promptness and regard for the safety of plaintiff and other passengers, and with further gross negligence and carelessness, allowed and permitted certain persons engaged in said fight and altercation, whose names are unknown to plaintiff, to throw and hurl particles of bricks, and other missiles onto, in, and against said car and against this plaintiff and his person, thereby fracturing the right side of his jaw. . . . Plaintiff states that by the exercise of proper care upon the part of defendant

and its agents in charge of said car at said time, said attack upon him could have been prevented, and his injury and damage could have been prevented."

As to the fighting on the arrival of the car, we reduce plaintiff's evidence to narrative form:

Three young men came along Preston street going north, and they ran into—bumped into—Mr. Ochsenhirt (the letter carrier), though they had plenty of room. They got into an argument, and the fight began. I never had anything to do with the fight at all. They were still fighting when the car came, and I got on the car as quick as I could; stayed in the rear, because people were coming in and out at the time,—it was sorter crowded.

Q. How long did the conductor allow that car to stand there?

A. Well, I suppose somewhere around three or four minutes; it looked a mighty long time.

Q. Did anybody say anything to him during that time?

A. Who?

Q. The conductor?

A. Yes, sir; I told him to ring off several times.

Q. Why?

A. I knew there was a whole lot of

65 So. 339, an action for an assault and battery committed by a third person upon plaintiff, a passenger, while waiting in defendant's station or waiting room, an allegation in the complaint that the servant and agent of defendant in charge of the station had knowledge of the danger that was impending over plaintiff, and was informed that the assault was impending, or had knowledge that it was necessary to intervene in order to protect plaintiff, but failed or refused to discharge the duty devolving upon him to interfere, was held to be sufficient to charge the defendant with negligence, distinguishing *Southern R. Co. v. Hanby*, 183 Ala. 255, 62 So. 871, in which recovery was denied to plaintiff under similar circumstances on the ground that there was no averment in that case that the station agent knew or had the opportunity to know that the injury was threatened.

In *Seawell v. Carolina C. R. Co.* 132 N. C. 856, 44 S. E. 610, 14 Am. Neg. Rep. 445, petition for rehearing denied in 133 N. C. 515, 45 S. E. 850, in which a verdict for plaintiff was sustained for damages received when he was assaulted by a crowd at defendant's station pelting him with eggs, from which assault defendant's servants not only failed to protect plaintiff, but actively participated therein, the court said that while a carrier is "not required to furnish a police force sufficient to overcome all force when unexpectedly and sud-

denly offered, it is his duty to provide ready help sufficient to protect a passenger against the assaults from every quarter which might reasonably be expected to occur under the circumstances of the case and the condition of the parties."

In *Kennedy v. Pennsylvania R. Co.* 32 Pa. Super. Ct. 623, in which defendant's railway company was held liable for injury to a passenger at a station by a crowd of boisterous students, the court approved an instruction given by the trial court as follows: "If, prior to the accident, the students and their followers gave no substantial notice of a disposition to indulge in physically violent conduct, dangerous to defendant's patrons; if their charge, supposing they made one, in which the plaintiff was injured, was their first movement of that character,—the defendant is not, in the opinion of the court, answerable. Or, if the students had made it plain that they were a menace to passengers, but the defendant was unable to cope with them, and did what it could to protect passengers, then it is not answerable. On the other hand, if, for a considerable time prior to the accident, there was a large crowd of students and followers in the station, indulging in such boisterous conduct as manifestly threatened personal injury to passengers, and the defendant could, by the exercise of due vigilance, have ejected this mob or reduced it to order and control be-

trouble; they were throwing bricks and ice and everything else.

As to when he was struck by the missile plaintiff testified as follows:

Q. Mr. Dott, had any bricks hit that car or anything before you were hit?

A. Well, there was a lot of racket going on there.

Q. Well—

A. I think so.

Q. Did that make much or little noise?

A. Well, it was quite an excitement there.

Q. Did that make a noise that the conductor did or could hear?

A. Certainly he could hear it; everybody in the car heard it.

Q. After the car was first hit, did the conductor then move on, or still standing there?

A. Still standing there.

On cross-examination the plaintiff testified as follows:

Q. After the people on the car had gotten off, then you were the first one on the street to get on?

A. As soon as I could get on, as soon as it stopped.

Q. After you got on did you say right away to the conductor, "Pull away from here?"

A. No, sir.

fore the plaintiff was injured, then its failure to do so renders it answerable to the plaintiff if she was subsequently injured by a rush of this crowd."

In *Houston & T. C. R. Co. v. Phillio*, 98 Tex. 18, 59 L.R.A. 392, 97 Am. St. Rep. 868, 69 S. W. 994, 12 Am. Neg. Rep. 637, it was held that, plaintiff's wife having entered the station and a ticket having been procured for her, she became a passenger of the defendant company, and the duty devolved upon the company's agent to protect her against assault and insulting conduct on the part of third persons, provided he knew of such misconduct or had reasonable grounds to anticipate it; but that no such duty existed as to plaintiff, who merely accompanied his wife to the station without intending to become a passenger, the duty as to him being merely to use ordinary care to see that the premises were kept in a reasonably safe condition.

In *Texas & P. R. Co. v. Dick*, 26 Tex. Civ. App. 256, 63 S. W. 895, 10 Am. Neg. Rep. 196, which was an action for damages for an assault upon plaintiff while he was in the act of leaving defendant's premises after having alighted from its train, while he was still entitled to the protection of a passenger, it was held that the recovery of damages was justified where it appeared that the defendant's station agent knew that the assault would likely be made upon

Q. Was the fighting going on when you stepped on?

A. They had to wait until somebody else got on; that man in the fight got on.

Q. The letter carrier?

A. Yes, sir.

Q. And still another man got on?

A. Then these fellows came up closer; I said, "You had better pull the bell."

Q. After the carrier got on, wasn't there a third man got on?

A. I don't remember.

Q. Wasn't there a man got his hand cut standing there on the corner?

A. I don't know; after I was hit I didn't know anything.

Q. Before you got hit?

A. I could not say.

Q. After the letter carrier got on the car, these other men rushed on there after him?

A. I suppose so; after I turned my back I don't know what happened.

Q. When you got on the car you turned your back to the fight?

A. No, sir; it was turned in getting on.

Q. Did you see one of those three rowdies, as you call them, or two of them, get on that car, and one of them had a knife?

A. One got on—I don't know which one; there was one of them got on.

Q. What?

A. I think one got on the car.

Q. Did you see a man hop on that car im-

plaintiff that night, if he did not in fact instigate it, and that he took no steps whatever to prevent it, nor to interfere to protect the plaintiff after it was begun.

In *McCardell v. Gulf, C. & S. F. R. Co.* — Tex. Civ. App. —, 102 S. W. 941, where it appeared that after the plaintiff, a negro, had purchased a ticket and was waiting for his train in defendant's waiting room, he was assaulted by strangers in the presence of defendant's agents, and driven from the waiting room, it was held to be error to fail to submit the question of defendant's negligence to the jury.

In *Bosworth v. Union R. Co.* 25 R. I. 202, 55 Atl. 490, 14 Am. Neg. Rep. 465, where a plaintiff's declaration for damages alleged that the defendant was negligent in not exercising proper and adequate care and vigilance in guarding and protecting him from mob violence while he was its passenger, and in attempting to run its car through a mob without warning plaintiff of the dangers to which he was being exposed thereby, it was held on demurrer that, in approaching a place of danger, it is the duty of a common carrier of passengers and its servants to exercise the utmost care, caution, vigilance, and skill which a prudent man would use under like circumstances, and that whether or not defendant used such care in this case was a question for the jury.

R. L. S.

mediately behind the letter carrier, with a knife in his hand?

A. No, sir.

Q. Did you see anyone get cut there on the rear platform?

A. No, sir; he must have been cut the same time I was hit, I didn't notice that.

Q. Did the motorman come back there, that you saw?

A. I don't know; he must have come after I was hit.

As to the hurling of missiles at the car, plaintiff also testified as follows:

Q. Now, I will ask you if it wasn't one of the men that the conductor put off that car; after he got off he then threw the rock at the letter carrier?

A. I didn't see that.

Q. How many rocks were thrown there that you saw?

A. How many rocks?

Q. Yes, at the street car?

A. I didn't see any,—just there was a lot of commotion there.

Q. A great deal of excitement around there?

A. Yes, sir.

Q. All the people on the rear platform were disturbed and excited?

A. I suppose the whole car of people were disturbed.

Q. Did you say anything to the conductor there on that occasion?

A. Told him to ring off several times.

Plaintiff introduced R. C. Kissler, who was a passenger on the front end of the car, and testifies as follows:

Well, the conductor rang twice to go ahead, and gave three bells again, three bells in rapid succession (stop signal). I opened the folding doors, thought somebody had got throwed off the car; passing on back someone said something about a fight, and when I got about a foot of the back door somebody hit me with a brick; who it was I don't know, and that made me mad.

Q. Did that come through the car?

A. Yes, sir; it was a brick or a piece of ice; I stood by the money box, and there was a fellow coming on the car with a knife in his hand; he said something to me; he passed some remark, and I kicked him off the car, and another fellow was coming on in the back end, and Will Ochsenhirt kicked him off, and they started throwing again, and like here is the money box, Dott was standing over here, like anybody would pay their fare and step aside; he got hurt, and he went down to his knees, and I said, "You stopped something;" he didn't say a word.

Q. Did he seem like he would be knocked out or not?

A. You can imagine,—yes, sir; one of L.R.A.1915C.

those fellows started to the front end of the car, and I went through, and Lucas, the motorman, and myself, got off. One fellow hallooed, "Don't hit those fellows." I know that they made several passes at us; Lucas didn't make any pass,—I made one. Lucas said, "Let's get away before they do any more damage." We got on the front end of the car, and Lucas struck his bell twice to go on, and the conductor didn't give a signal to go, and then he gave a signal, I don't how much time elapsed, maybe five or ten seconds elapsed, and we pulled away from there and got to Preston and Breckenridge, and we took Baldes off.

Q. Do you know how many minutes the car stood there while the fight was going on?

A. About three minutes.

Plaintiff introduced B. C. Robbins, who also boarded the car at Preston and Chestnut streets, and testified as follows in regard to the fight:

Q. What was the first you saw about any trouble?

A. The first I saw was the conductor rang the motorman down and gave him three bells, and I supposed that meant trouble some way, so I went back into the car to see what was going on, and then when I saw what was going on I came back out on the front end.

Q. What was going on back there when you went back?

A. There was a bunch of fellows fighting.

Q. How were they fighting?

A. Throwing bricks and cutting one another.

Q. How close were they standing to the street car?

A. They were right upon the street car.

Q. Can you point out about how many feet it was, if you know?

A. No, I never paid that much attention.

Q. Was it more or less than 15 feet?

A. Right upon the street car.

Q. Do you mean to say they were on the street car?

A. No, sir.

Q. Can you tell the jury about how many feet they were away from the street car?

A. I could not exactly say, but as I say, they were right up against it.

Q. Were they close enough for their missiles and bricks and things to hit the car when they threw them?

A. Certainly, could not hardly miss it.

Q. How many minutes did the conductor let the car stand there?

A. I would judge, for this boy to go back in the car as he did, and come back on the front end, and the motorman to get

off and go back, I would judge about three minutes.

Samuel Goldsmith, plaintiff's witness, who was also a passenger on the car, testified as follows:

Q. Did you notice any trouble going on on the street?

A. I never noticed any on the street, but on the car.

Q. What was the first that attracted your attention?

A. Well, one fellow he jumped up and hit another man, and another one got hit with a rock or lump of ice,—I could not tell what it was.

Q. In the car?

A. In the car.

Q. After you stopped there, could you tell the jury as best you remember, how many minutes, if you know, the conductor left the car standing there?

A. I said to the conductor myself, "Ring that bell off," but he looked like he was kind of amazed, and meantime the motorman thought the conductor was in trouble, and he came back on the rear end before I realized what had happened.

Q. Could you state how many minutes the street car stayed there?

A. I know at least it was over a minute, it was uncalled for.

Q. Did you see Mr. Dott get hit?

A. I saw him, and the same time I never seen it.

He further testifies as to the occurrence while the car was standing:

Q. During the minute or two the car stayed there, as you have mentioned, was there anything to keep the conductor from seeing these men fighting and going on?

A. No, sir; he was on the rear end of the car; it was right there in front of him.

Q. Why was it you had to tell the conductor to ring off and go ahead?

A. It looked like this fellow became excited and didn't know what to do; I mentioned it myself, "Ring your bell off."

Q. Did he still stay there?

A. He did, for the motorman to get back to the front before he could go. The motorman thought the conductor was in trouble and came around the rear end; meantime he goes back on the other end before he rang off, after I mentioned it to him.

Q. How long did the car stand there, which made the motorman think he was in trouble?

A. Fully a minute after all this thing had happened.

Q. Before Dott was hit?

A. Yes, sir.

L.R.A.1915C.

Q. Did you hear anybody else trying to get the conductor to ring off and go on?

A. Not after I seen this one young fellow was cut and Dott was hit; I became kind of excited myself.

J. A. Baldes, who also boarded the car with the plaintiff, testified for him as follows:

Q. When the car came up, what about the fight, what was the stage of it?

A. They had run—Mr. Ochsenhirt had run them—we thought everything was over and started to get on the car, and I don't know who got on first, I was one of the last ones to get on; we got on, and the first I knew, I don't know whether it was a lump of ice or brick went through the window on the back platform. Several of them came; I don't know how many; one of them hit Mr. Dott in the mouth.

Q. How many bricks and cakes of ice and things were thrown before he was hit?

A. When they came back I judge there was about eight fellows.

Q. I wasn't asking about the men; how many bricks and cakes of ice were thrown around the car before Mr. Dott was hit?

A. I could not tell you, he got hit by some of the first thrown, I judge.

As to when the plaintiff was struck and injured, he testified as follows:

Q. Do you know how long it was after Kissler was hit before Dott was hit?

A. I could not tell you that, the car went out the street, and everything was in commotion.

William N. Ochsenhirt, who seems to have been the principal figure in the fight, testified for plaintiff as follows:

Q. What was the first of any trouble that happened Mr. Ochsenhirt?

A. Why, Mr. Dott and Jack Baldes and another boy, I can't think of his name, in fact I don't know who he was, was standing in the crowd with myself, all standing there, when these three young men, I don't know who they were, never seen them before, I don't know whether I could recognize any of them now, they came along, and we were talking and waiting for the car; it was, an awful cold night; they came along and bumped into us and nearly walked all over us. I said, "Why," I said, "be a little careful where you are going," and with that they came back and one of them struck at me. At that I struck back, but I am sure I didn't hit him, and with that the three started to throwing ice, and one picked up a board and threw it at me, I raised up my arm and warded off the blow. I picked up the board and threw it back, and the three

started to run. The car came about that time and all three of us got on the car, and before Mr. Dott said to them, he said, "Here, why don't you go ahead, don't start any fight," like that. The car came, and we got on; as we got on they started to throwing again; he was on the back of the car, the one kicking at me, I kicked back and think he went off the car.

Q. How many minutes did the conductor hold the car while the fight was going on?

A. Between three and five minutes.

Q. And was everybody on the car?

A. Yes, sir; the car was crowded.

Q. Any reason for him holding it?

A. No, there was no reason for him holding it, he could have rang off and went ahead; perhaps Mr. Dott wouldn't have been hit.

As to when the plaintiff was hit, Ochsenhirt testified as follows:

Q. When was it Mr. Dott got hit, right after he got on?

A. He was on the car possibly two or three minutes.

Q. Were you all fighting there on the rear platform two or three minutes?

A. Possibly two minutes—yes, sir; they were kicking me, and I kicked back.

Q. Was there a man there with a knife?

A. Came in the side by the conductor with a knife open, and one came after me, and this man came after Mr. Kissler with the knife and he kicked at him.

Defendant's witness, B. P. Ferguson, the conductor on the car, gave the following description as to what took place when the car stopped:

A. When we rolled up to Chestnut street there was some passengers there to get on, and if they were fighting I never saw nothing; then they got on the car; three or four boarded the car; there was three other fellows that started to jump on the car, they were fighting, and I got these fellows off the car that was trying to fight these other fellows, and we went on.

Q. Was anything thrown at the car while they were fighting on the platform?

A. Yes, sir; one of the fellows right back of the car, he picked up a big chunk of ice and threw it and hit a passenger on the back end of the car.

Q. Any other missiles besides the lump of ice thrown?

A. No, sir.

Q. I will ask you, when you came up there, if the fighting was going on, and anything thrown at the car?

A. Nothing thrown at the car at all.

Q. What did you do when the fight started on the platform?

A. Tried to get them to quit and get these fellows off.

L.R.A.1915C.

Q. Did anyone have a weapon in his hand?

A. Yes, a fellow had a knife in his hand.

Q. Did you know which ones wanted to become passengers and which ones were just getting on to attack them?

A. No, sir; when they went to get on the car I did not.

Q. How long did your car stand there?

A. Not more than, I would say, a minute or a minute and a half, something like that.

On cross-examination Ferguson testified as follows:

Q. You gave an emergency stop after he had already started once?

A. No, sir.

Q. What kind was it?

A. Gave him one bell.

Q. To stop again?

A. Yes, sir.

Q. And he did stop?

A. Stopped.

Q. And you stood there a couple of minutes these men were fighting?

A. Yes, sir.

Q. Why did you stand your car for two minutes with this fighting going on?

A. Pulled off with them on the car, and they were fighting.

The motorman on the car, John C. Lucas, gave the following description of what he saw:

Q. Just go ahead and tell what took place.

A. When I was approaching Chestnut, after I crossed Gray and saw this little commotion, I never thought anything about it. I saw these fellows go down that way, and some women passengers standing on the south side. I went over and stopped and got the go-ahead signal—a bell—but the same time I got a signal to stop, and somebody said there was fighting on the back end and opened the front vestibule door and went back, and as I got to the back some fellow swung off the car and struck at me and just knocked his lick off, and somebody else on the street said, "Don't hit that man." He said why did I butt in, and used an oath, and I said it didn't make any difference. I said to the conductor, "Let's get away as quick as we can; and I hopped on the car and went on. . . .

Q. About how long, altogether, were you standing there?

A. I suppose not more than two minutes, at the most.

The instructions of the court submitted the case in the following manner: "If you believe from the evidence that when the car in question, at the time mentioned, stopped at the south side of Chestnut street for

the purpose of permitting passengers to alight from said car and persons to board same, a fight occurred on the rear end of said car, being brought about by parties coming from the street renewing an attack on certain passengers on the rear end of said car, and that said parties so boarding said car for the purpose of attack were thrown or kicked off of the car, and that when all the passengers who were destined to said point, and the parties desiring to board same to become passengers, had done so, the parties on the street continued or renewed the attack by throwing missiles against or in said car or at parties thereon, and that thereupon the passengers on said car requested the conductor to ring off the car and allow it to pass on out of danger, and that the conductor and motorman in charge of said car knew of the conditions existing at the time, as above stated, and that the passengers were in danger of injury by reason thereof, and had a reasonable time in which to move said car out of danger from said missiles, and failed to do so, but permitted said car to stand in its then position an unreasonable length of time, and that, by reason thereof the plaintiff, Dott, was struck and injured as complained of in his petition, then the law is for the plaintiff, and the jury should so find."

Certainly this instruction was erroneous, because there was no evidence that while the car was stopped there was either a cessation of the difficulty or renewal of the attack. All the evidence makes it clear that the fight was continuous, and if there was any difference in the intensity of it, it was at its highest when plaintiff was hit. The passengers, of course, were all excited. The onslaught was sudden, and all were fearful for their safety. Some suggested, and others demanded, that the conductor ring off, that is, give the motorman orders to start the car, and because he did not obey argument is made that the company is liable. While the carrier must exercise the highest degree of care for the protection of passengers from assault by fellow passengers, even strangers, it does not follow that it owes obedience to them. All the evidence does show that when the car was rid of the intruders, the conductor signaled the motorman to move on, and the motorman did not delay in obeying the signal. When the car stopped, the passengers began to get aboard, and the others followed so closely that it was impossible for the conductor to tell one from the other. When it became apparent that their purpose was not lawful, the conductor, with the help of some passengers and the motorman, who ran back to assist, did their best to expel them, but before this was accomplished the plaintiff

L.R.A.1915C.

had been injured. There is no proof that plaintiff would not have been injured if the car had started. The mere starting of the car would not have prevented the ruffians throwing missiles, and had the conductor started it any time earlier than he did, he would have violated other duties that he owed. With possible passengers hanging on the platform attempting to get aboard,—even trespassers,—it was the duty of the conductor to either get them safely aboard, if passengers, or expel them, if trespassers, before starting the car. If it owed plaintiff the duty of starting the car, it owed the oncoming passengers the duty of holding the car until they could safely get aboard. There were those on the car steps who it developed did not intend to become passengers; in fact they were trespassers. They would have been imperiled by starting the car, and, the conductor knowing this, he owed them the duty of not starting the car or doing anything to increase their peril. Neither appellant nor its servants were in any wise responsible for the difficulty. It arose before the car reached there. It did not originate on their property, nor were the participants subject to their control. Without their knowledge or consent the difficulty and the participants were transferred to the car. The carrier undertakes to transport a passenger to his destination,—not to carry him away from his pursuers. In other words, its business is the carrying of passengers, not fugitives.

It is conceded that the case of *Kinney v. Louisville & N. R. Co.* 99 Ky. 61, 34 S. W. 1066, gives a clear statement of the protection the carrier owes to passengers: "Carriers are not held to be the insurers of the absolute safety of their passengers or of their entire immunity from the misconduct of fellow passengers or of strangers; but there is an implied obligation, growing out of the contract between the carrier and the passenger, that the former shall afford to the latter reasonable protection and immunity from the insults, violence, and wanton interference of intruders, fellow passengers, and the carrier and his servants. *Winnegar v. Central Pass. R. Co.* 85 Ky. 553, 4 S. W. 237; *Sherley v. Billings*, 8 Bush, 147, 8 Am. Rep. 451. Out of this obligation, and the doctrine that carriers of passengers are required to use the utmost care in the management of their trains in order to prevent or avoid injury to their passengers, arises the rule that makes it the duty of carriers to exercise the highest practicable degree of care and diligence in protecting and guarding their passengers from violence and assaults, from whatever source, which may be reasonably anticipated or naturally expected to occur under the circumstances of

the case and the condition of the parties; and, if this duty is neglected or, without good cause, omitted by the carrier or his servant, the carrier will be held responsible for any injury to a passenger resulting from such neglect or omission, and which, but for same, might have reasonably been foreseen and prevented. These principles, it seems, are recognized and enforced by an almost unbroken line of decisions in this country."

But all the cases to which our attention has been called where a passenger has been allowed to recover for injury inflicted upon him by a fellow passenger, trespasser, or intruder arise from circumstances or altercations originating on the car or property of the carrier; that is, in places where the carrier or its servants have such control over the parties as to make the failure to exercise such control a matter of negligence. Appellant says that plaintiff could have avoided the injury by running away from the rowdies before the car came. But he had a right to wait for the car, and he had a right to become a passenger. However, when he became a passenger, appellant only assumed the burden of protecting him as a passenger. If in becoming a passenger he carried a difficulty with him, he cannot burden appellant with that unless appellant knew of it and accepted him as a passenger notwithstanding. The conductor was confronted with uncertain, if not conflicting, duties. He stopped his car unwittingly in the middle of a difficulty going on in the street, and the place of difficulty was almost immediately transferred to his car. During the course of it, and after plaintiff boarded the car, he was struck by a missile which it seems was hurled from someone without. What could the conductor have done in the exercise of ordinary or the highest degree of care to prevent the injury? He might have moved his car out of the danger zone, but by moving the car he might have injured passengers or trespassers whom he saw on the rear steps. Was it not a safer plan to hold his car until the trespassers were expelled? It certainly cannot be maintained that he was guilty of any wrong, or violated any duty which he owed to on-coming passengers, in so handling his car; and, unless he was so guilty, they have no right of recovery, although injured during the time.

In this case it is immaterial that passengers requested the conductor to move his car. His duty was not in any wise altered or changed by those requests. If there was negligence in failing to move the car, it existed independently of any requests, nor did the requests enhance the degree of it. No one contends that the conductor or motor-man had knowledge of the difficulty before L.R.A.1915C.

the car reached the point, and after that time there is no pretense that anyone remained in ignorance of it. Consequently, advice or suggestion from passengers as to what the conductor should or should not do could not affect the liability.

Advice, requests, or suggestions to those upon whom a duty is imposed merely go to carry knowledge of the danger. In cases where one's peril is seen or notice is given of it, of course it becomes the duty of those in charge to avert it if possible.

No such case is here presented. Believing there was no evidence of negligence on the part of appellant, a peremptory instruction should have been given, and the case is reversed for that reason.

MISSOURI SUPREME COURT.
(Division No. 2.)

JOHN N. MILLER

v.

C. L. KEATON.

(260 Mo. 708, 168 S. W. 1140.)

Evidence — contents of order for publication.

The files of a newspaper in which an order for publication of notice in a tax proceeding was published are, when produced from proper custody, admissible in evidence as to the contents of the order, if all papers in the proceeding, including the order for publication, have disappeared from the files of the court.

(June 23, 1914.)

Note. — Admissibility of newspaper files to prove the publication or contents of an order of publication.

While an extensive search has disclosed but few cases in point upon this question, the decision in *MILLER v. KEATON* seems clearly to be correct, under the general rules as to the admissibility of secondary evidence (see 17 Cyc. 468, 518 *et seq.*), and is supported by the few cases which have been found. Thus, in the earlier Missouri case of *Davis v. Montgomery*, 205 Mo. 271, 103 S. W. 979, it was held that the files of the paper in which was published the order of publication in a tax suit were properly admitted in evidence to prove the publication and contents of the order, where the record of the order of publication and the certified copy which had been delivered to the publisher were both lost or destroyed, and the editor swore that the files contained a true and correct copy of the order delivered to him by the clerk for publication.

Somewhat similarly, a copy of the official county paper containing what purports to be the redemption notice upon which a tax

CROSS APPEALS from a decree of the Circuit Court for Butler County vesting in plaintiff title to a life estate in certain real estate, but quieting in defendant title to the remainder in fee, subject to the life estate. Affirmed.

The facts are stated in the opinion.

Messrs. Henry S. Shaw, Mozley & Woody, and Wammack & Welborn, for plaintiff:

Defendant's so-called supplied files are incompetent for any purpose.

George v. Middough, 62 Mo. 549; McClanahan v. West, 100 Mo. 309, 13 S. W. 674.

Messrs. Keaton & Keaton and Phillips, Lentz, & Phillips, for defendant:

The testimony of the publisher of the paper, and the custodian of the files of the paper in which the publication was had, was competent and relevant testimony to show the contents of that order as published.

Davis v. Montgomery, 205 Mo. 281, 103 S. W. 979.

Farris, J., delivered the opinion of the court:

This is a case which embraces a consolidated cross appeal in an action originally brought in Stoddard county to determine interest to certain lands in said county. It has been here before, and is reported under the style of *Miller v. Keaton*, 236 Mo. 694, 139 S. W. 158. It is likewise practically in all respects a companion case to *Keaton v. Jorndt*, heretofore decided and

reported in 220 Mo. 117, 119 S. W. 629. The latter case of *Keaton v. Jorndt*, on a second appeal, is again here, and an opinion has been rendered therein at this sitting. [259 Mo. 179.] To the cases of *Miller v. Keaton* and *Keaton v. Jorndt*, supra, and to the opinion in the latter case rendered at this term, reference for the facts as well as for the major part of the holding is made; all of them being companion cases, and all of them resting upon the same common source of title, the same tax suit, and the identical will discussed in the opinion at this term in *Keaton v. Jorndt*.

When the instant case was here before it was reversed and remanded, with directions (*Miller v. Keaton*, supra), which directions are as follows: "We have no satisfactory basis for a final judgment upon the nature and extent of the interests of the parties. We reverse the judgment and remand the cause, with directions to the circuit court to enter a judgment in favor of plaintiff, vesting in him the title to whatever interest Carrie E. Thurber had in the lands acquired under the sheriff's deed, and also vesting in him the title to the interest of Katie A. Vigar, if the evidence shows that in the order of publication her true name is correctly written as Katie A. Vigar; such judgment to ascertain and declare the nature and extent of the title so acquired by plaintiff. We further direct the circuit court by its judgment to ascertain and declare, upon proper proof, whether the defendant has acquired

deed was based, found in the office of the county treasurer, although not required by law to be kept there, is admissible in evidence, and sufficient to establish prima facie the contents of the official notice published by the county treasurer, if better evidence cannot be produced. *Morrow v. Inge*, 89 Kan. 481, 131 Pac. 1184.

And where the original files in a case have been destroyed by fire, a copy, produced on the witness stand by the publisher, of the newspaper in which the notice of a sheriff's sale of real estate was published, is admissible in evidence to show the contents of such notice, especially if such evidence corroborates the recitals in the sheriff's deed, and does not contradict them. *Rice v. Poynter*, 15 Kan. 283.

In *Colton v. Rupert*, 60 Mich. 318, 27 N. W. 520, even though no loss of records or papers was involved, and there was an affidavit showing a sufficient publication, it was held that the files of the paper in which the order for appearance in a foreclosure suit against a nonresident had been published were admissible in evidence to show the fact of publication.

And in *Claybrook v. Wade*, 7 Coldw. 555, where one ground of error assigned was that L.R.A.1915C.

the record did not show that publication requiring the defendant to appear and plead, etc., had been made as required by law,—although the admissibility of newspaper files was not involved,—it is said that § 4359 of the Tennessee Code provides that the fact of publication in pursuance of an order may be proved by affidavit of the printer, or actual production of the newspaper in court.

In *Ormsby v. Jamison*, 9 Ky. L. Rep. 325, an action to enforce a lien for street improvements, it is said that copies of the respective newspapers in which notice was published of the time and place for the engineer's inspection of the work and determination whether it was completed in accordance with the ordinance were the best evidence of the publication of the notice; "but, as the allegations of the petition as to publication were not denied in the answer, it was unnecessary to prove it, and the admission of the statements of witnesses as to the publication could not have prejudiced the defendant."

For newspaper quotations as evidence of value, see note to *Mt. Vernon Brewing Co. v. Teschner*, 16 L.R.A.(N.S.) 758.

A. C. W.

any interest in said lands, and, if so, the extent and nature thereof."

In accordance with the mandate of this court, which followed the direction of the clause in the opinion above quoted, the learned judge of the circuit court of Butler county, to which court the instant case was removed from Stoddard county by change of venue, proceeded to hear and determine the same in accordance with the directions of this court. He found that the order of publication recited the name of *Katie A. Viger as Kittie A. Vigar*, and that the interest of said Katie did not pass to plaintiff. He further found that Carrie E. Thurber had, at and prior to the tax sale, a life estate in the whole of the land, and, following our opinion in *Miller v. Keaton*, supra, rendered judgment for plaintiff therefor and for defendant for the remainder in fee, subject to the life estate therein of the said Carrie. From this judgment both plaintiff and defendant have appealed, and are here upon cross appeals, which have been consolidated for the purpose of this hearing. It may be said in passing that since this case has been submitted, plaintiff, J. N. Miller, has departed this life testate. His devisees have been properly made parties herein in his stead, but no occasion is seen for interfering with the style of the case and thus destroying its identity with matters heretofore adjudicated.

We have disposed of all of the contentions made by defendant, Keaton, touching the question of whether the parties to this action are concluded by the former decision herein. We have also considered the effect of the tax sale in 1898, prior to the election on the part of Carrie E. Thurber, which was exercised five years or more thereafter, to convert her life estate in the whole of the land into a fee, and to thus cut out the remaindermen, who were given a contingent life estate. All of these things are considered and ruled upon in the companion case of *Keaton v. Jorndt*, and we need not therefore burden the books by repeating them.

One sole point remains. This point differentiates in a slight degree this case from the case of *Keaton v. Jorndt*. That is the question as to the correctness of the ruling of the trial court upon the evidence offered as to the existence and contents of the order of publication. The original files were lost, mislaid, or destroyed some time in the fifteen years which had elapsed since the tax suit was filed and adjudged. No record of the order of publication appeared, nor any proof of publication, nor any evidence of same, except that noted below herein, further than the finding contained

in the judgment that the court had acquired jurisdiction by publication. There was offered, however, the files for the month of July, 1897, of the *Bloomfield Vindicator*, a newspaper published in Stoddard county, and which purported to contain the published copy of an order of publication in the case of "*State of Missouri at the Relation and to the Use of A. L. Harty, Collector of the Revenue of Stoddard County, Missouri, Plaintiff, v. Carrie E. Thurber, Mollie H. Lemen, Austin H. Lemen, Kittie A. Vigar, Edward R. Vigar, Birdie E. Stone, and Harry L. Stone, Heirs of Nathan L. Thurber, Deceased, Alexander McMurtrey and Louis DeMont, Court [sic] Mortgagee, Defendants.*" This order, the above caption thereto not repeated, is as follows:

Now at this day comes the plaintiff herein by his attorney Ralph Wammack and files his petition and affidavit, alleging, among other things, that defendants are not residents of the state of Missouri. Whereupon it is ordered by the clerk in vacation that said defendants be notified by publication that plaintiff has commenced a suit against them in this court, the object and general nature of which is to enforce the lien of the state of Missouri, at the relation and to the use of A. L. Harty, collector of the revenue of Stoddard county, for taxes due and remaining unpaid for the years 1894 and 1895 upon the following described real estate, to wit: The S. W. $\frac{1}{4}$ and the W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ and the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ and the W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 4, township 23, range 12 east, 300 acres, situated in Stoddard county, Missouri. And that unless said defendants shall be and appear at this court, at the next term thereof to be begun and holden at the courthouse in the city of Bloomfield in said county on the 13th day of September, next, and on or before the 3d day of said term, if the term shall so long continue, and if not, then on or before the last day of said term, answer, or plead to the petition in said cause, the same will be taken as confessed, and judgment will be rendered accordingly. And it is further ordered that a copy hereof be published according to law, in the *Bloomfield Vindicator*, a newspaper published in said county of Stoddard, for four weeks successively, published at least once a week, the last insertion to be at least fifteen days before the first day of said next September term of this court.

Witness my hand and seal of the circuit court of Stoddard county, this 28th day of June, 1897.

[Seal] M. S. Phelan, Circuit Court.

The present publisher of that newspaper, one Louis Jobe, was thereafter offered as a witness, and from his testimony it appeared that all of the files for the month of July, 1897, of said newspaper, were in the custody of the witness. One of these the witness produced, and from it read into the record the order of publication as above set out. The witness further stated that this same order appeared in the issues of the Bloomfield Vindicator of July 2d, July 9th, July 16th, July 23d, and July 30th, all of the year 1897. There was further offered what purported to be a supplied order of publication, containing the above facts in a shorter and more concrete form, and which said supplied order of publication was sworn to on the 29th day of July, 1911, by the witness Louis Jobe. This supplied order, however, seems to have been stricken out by the court on objection thereto, on the ground that the manner in which the same was supplied did not appear, or, appearing, was not in compliance with the law in relation to the supplying of files. No attack, naturally, is made by the defendant Keaton to the finding of the court that the order of publication recited the name of *Katie A. Viger* as *Kitie A. Vigar*, and was therefore ineffectual as a foundation for a judgment passing the title of said Katie. Nor do we understand that plaintiff is making any serious contention as to this finding, since we gather from his brief that he practically concedes that the order of publication did in fact recite the name of *Katie A. Viger* as *Kitie A. Vigar*.

But be this as may be, it is one question to ascertain whether, in the order of publication as made, the name of *Katie A. Viger* was set out as *Kitie A. Vigar*, and an entirely different one to decide as a matter of law the question of the sufficiency of the order of publication to constitute such constructive notice as to confer jurisdiction on the trial court to hear and determine the original tax suit. The latter question was determined upon the former appeal. This court there held that the tax sale as to *Katie A. Viger* was valid, therefore by the very strongest and most conclusive implication holding that the order of publication was properly made and properly published. *Miller v. Keaton*, 236 Mo. 694, 139 S. W. 158. The sole duty relegated back to the trial court was to determine whether in such order of publication, as published and made to the trial court, the name of Mrs. Viger was printed *Kitie* or *Katie*. The learned trial court found that such order of publication as printed and filed recited her name was *Kitie*, and that her interest did not pass. This was the identical thing, and only thing, the trial judge was re-

quired by this court to do on this phase of the case. Did the court nisi, in order to determine this question (which we differentiate, and which in logic we ought to differentiate, from the proof of making, and the proof of publishing, an order of publication which shall be meet to give, and suffice as, constructive notice to confer jurisdiction in a tax suit over a nonresident), admit incompetent evidence when he allowed the present publisher of the Bloomfield Vindicator, who, while not the publisher fifteen years before the instant case was tried below, was yet at the time of the trial in possession of the ancient files of that paper, to identify such files and to read therefrom the order of publication which we set out herein? The files, as well as all papers of whatever kind, in the old suit of "*Harty, Collector, etc., v. Thurber et al.*," being the original tax suit in issue herein, were not to be found after a sufficient search by the clerk who was the proper custodian thereof. Neither was the order of publication as originally made to be found upon the record. What, then, in this state of things, was the next best evidence of the contents of the order of publication as published? We premit, for the reasons stated, the questions whether such order was made, whether it was published, whether as to its general contents and the number of insertions it was a sufficient notice to confer jurisdiction. For these things were found in the affirmative on the former appeal. Clearly, when the old files and papers and judgment rolls were lost, and such loss shown, the only proof of what the original order of publication contained must of necessity come either from the newspaper files themselves, or come orally from someone who read the order of publication as it appeared in the newspaper fifteen or more years ago, and now remembers its contents in the behalf mentioned, and now testifies on oath touching the same. Can there, in common sense, be two minds as to which should be accorded the greater degree of credence? We think not, and so thinking, rule that on the precise point before the court below, that of allowing the old newspaper files from a proper custody to be competent evidence of the contents of a legal publication contained therein, all better evidence being lost, he did not err.

We have disposed, in the companion case above referred to and decided at this term, of the question of the amount of interest held by *Carrie E. Thurber* when the land was sold for taxes. The judgment nisi accords with our conclusions. The former opinion disposed of the question as to the taker of that interest. It, therefore, results

that this case should be affirmed. Let this be done.

Walker, P. J., concurs. Brown, J., not sitting.

Motion to modify judgment overruled July 14, 1914.

MISSOURI SUPREME COURT.
(Division No. 1.)

St. LOUIS LODGE NO. 9, BENEVOLENT
& PROTECTIVE ORDER OF ELKS,
Appt.,

v.

EDMOND KOELN, Collector of Revenue
for the City of St. Louis, Respt.

(— Mo. —, 171 S. W. 329.)

Tax — lodge — charity — exemption.

A building owned by a lodge and used as meeting place for its members and for the

Note. — Use of lodge or club building for entertainment or social purposes as affecting right of exemption from taxation.

As to whether a fraternal benefit society is a benevolent or charitable association within an exemption statute, see note to Royal Highlanders v. State, 7 L.R.A.(N.S.) 380.

The present note does not consider the question whether organizations such as Masonic or Elk lodges can, under any circumstances, be considered charitable organizations (on that question see note to Royal Highlanders v. State, 7 L.R.A.(N.S.) 380), or whether the fact that their benevolence and charity are confined to the members of the lodge and their relatives takes them out of the exemption (see notes to Widows' & Orphans' Home v. Com. 16 L.R.A.(N.S.) 829, and Re Wilson, 26 L.R.A.(N.S.) 696, on effect of fact that property otherwise exempt from taxation is devoted to purposes of a particular society).

As to effect of using property of religious, charitable, or educational institution in secular business or for revenue, upon its right to exemption from taxation, see notes to Book Agents v. Hinton, 19 L.R.A. 289, and Com. v. Lynchburg Y. M. C. A. 50 L.R.A.(N.S.) 1197.

Other notes on closely related questions will be found in Index to L.R.A. Notes, "Taxes," §§ 24-26, attention being called especially to note in 52 L.R.A.(N.S.) 995, on exemption of college fraternity house from taxation.

The case of ST. LOUIS LODGE v. KOELN seems to be supported by the weight of authority and to be sound in principle, although a contrary conclusion has been reached in at least one instance where the facts were somewhat similar.
L.R.A.1915C.

social enjoyment of members and their guests, the surplus funds of which, together with voluntary contributions of members, are devoted to the relief of the needy, is not exempt from taxation as being exclusively used for services purely charitable.

(December 2, 1914.)

A PPEAL by plaintiff from a judgment of the Circuit Court of the City of St. Louis in defendant's favor in a suit to cancel a tax bill issued for city and school taxes. Affirmed.

The facts are stated in the opinion.

Messrs. Brownrigg & Mason for appellant.

Messrs. Edward W. Foristel and Frank H. Haskins, for respondent:

To be exempt from taxation the property must be used exclusively for religious worship, for schools, or for purposes purely charitable.

Green Bay Lodge v. Green Bay, 122 Wis. 452, 106 Am. St. Rep. 984, 100 N. W. 837;

In accord with the rule laid down in the reported case is Boston Lodge v. Boston, 217 Mass. 176, 104 N. E. 453, where it was held, under a statute exempting from taxation the real estate of charitable institutions "owned and occupied by them . . . for the purposes for which they are incorporated," that a club building belonging to the order of Elks, in which the secretary's office and lodge room were located, was not exempt from taxation, although large sums were expended by the lodge for poor relief to members and others, and the purposes of the order as stated in its charter and constitution might be presumed to be charitable, where the dominant use for which the building was equipped and to which it was devoted was that of a private club for the social enjoyment of its members, rather than a headquarters for the disposition of charitable relief.

And in Lacy v. Davis, 112 Iowa, 106, 83 N. W. 784, under a statute exempting from taxation all buildings used for charitable, benevolent, and religious institutions and societies, "devoted solely to the appropriate objects of these institutions," and not leased or otherwise used with a view to pecuniary profit, it was held that buildings belonging to a grand commandery of the Knights Templars were not exempt from taxation, where, during not to exceed four days in each year, they were used for the appropriate objects of the order during the annual session of the commandery, and at other times were used as a summer resort by members of the organization, all Knights Templars being privileged to use the grounds and buildings at pleasure for a nominal fee.

It has been held also that a clubhouse belonging to the order of Elks, and used chiefly for the purpose of providing enter-

Y. M. C. A. v. New York, 113 N. Y. 187, 21 N. E. 86.

Provisions of the Constitution and statutes exempting from taxation must be strictly construed.

Fitterer v. Crawford, 157 Mo. 58, 50 L.R.A. 191, 57 S. W. 532; *State ex rel. Spillers v. Johnston*, 214 Mo. 662, 21 L.R.A. (N.S.) 171, 113 S. W. 1083; *Adelphia Lodge v. Crawford*, 157 Mo. 356, 57 S. W. 1020.

The use must be directly and immediately connected with the charitable purpose, and not indirectly or remotely.

St. Mary's College v. Crowl, 10 Kan. 442.

Brown, C., filed the following opinion:

This is a suit to cancel a tax bill issued against a lot in the city of St. Louis for city and school taxes for 1912. The lot is owned by the plaintiff and occupied exclusively by a building containing its lodge room, a hall used by the members and their wives, daughters, and friends for entertainments such as dancing, card, or other social

tainment, amusement, and refreshments to members, their families and guests, the clubhouse features being maintained by a system of charges to members under a fixed scale of prices designed to cover the expense, is not exempt from taxation under a statute exempting real property of benevolent associations not leased or otherwise used for pecuniary profit, and necessary for the location and convenience of the association. *Green Bay Lodge, No. 259, B. P. O. E. v. Green Bay*, 122 Wis. 452, 106 Am. St. Rep. 984, 100 N. W. 837. It was said that, "while some of the aims of the order are the promotion of benevolence and charity, it is the avowed and obvious purpose of the order to maintain this clubhouse as a suitable place for the members and their families to congregate for entertainment, amusement, and to provide refreshments. The bestowal of these privileges and benefits is not of a benevolent or charitable character. These privileges and benefits which every person may secure for himself and family for a consideration, according to his tastes, wishes, and means, and which the members of this lodge thus provide by co-operation as a body for their mutual advantage, are not of a benevolent character, and serve no such purpose. The learned trial judge pertinently suggests that, if the furnishing of club rooms, facilities for enjoying games, or cards, billiards, pool, and tenpins, and providing the necessities for a buffet and dining and bath rooms, are benevolent within the meaning of the statutes, then any number of men may organize themselves into a corporate body to provide these privileges and benefits for themselves and their guests, and claim the exemption of the statutes. We do not find that the maintenance of the clubhouse is a benevolent purpose within the meaning of the statutes." L.R.A.1915C.

parties, a rathskeller, where meals and other refreshments, including liquors, are served to the members and such guests as by the rules of the lodge they are permitted to entertain there, and an auditorium in which vaudeville and similar entertainments, including on one occasion a boxing exhibition, are given for the entertainment of the members and their guests. There are also billiard and card rooms for similar use. No admission fee to the entertainments is charged. The general constitution of the order to which the lodge belongs states that it is established "to inculcate the principles of charity, justice, brotherly love, and fidelity; to promote the welfare and enhance the happiness of its members; to quicken the spirit of American patriotism; to cultivate good fellowship; to perpetuate itself as a fraternal organization." The by-laws of the plaintiff lodge provide for the relief of destitute and unemployed Elks to the extent of \$10 per week out of the funds of the lodge.

On the other hand, it was held by a majority of the court in *Salt Lake Lodge v. Groesbeck*, 40 Utah, 1, 120 Pac. 192, Ann. Cas. 1914C, 940, under facts somewhat similar to those in *St. Louis Lodge v. Koeln*, that a club building belonging to the order of Elks was exempt from taxation as used exclusively for charitable purposes. On the first floor of the building in this instance the club maintained a buffet where liquors and cigars were sold to members only for profit at customary prices; on the second floor refreshments and lunches were served for profit to members only, and the club maintained reading, billiard, and card rooms; and on the third and top floor dancing and other social events sometimes occurred in the lodge meeting room. The profit from the sale of liquors, cigars, and refreshments was included in the general fund of the lodge for charitable purposes, the members of the lodge also paying dues for this purpose and for the maintenance of the lodge. The average annual amount expended for charity (contributions being made to the public at large as well as to members of the lodge) exceeded \$1,700. The court took the position that the statute exempting from taxation property used exclusively for charitable purposes should be liberally construed, and that the social and amusement features were incidental to the charitable purposes of the lodge.

The reasons for holding the property exempt in *Salt Lake Lodge v. Groesbeck*, supra, appear in the following: "The admitted facts show, and the court found, that appellant is an organization the purpose and object of which is 'to promote good fellowship among its members and for charitable purposes, and in addition thereto inaugurate and conduct a social club for the benefit of its members.' And we think it is apparent that the maintenance of a

A liberal construction has been given to this rule, and by reason of the fortunate rarity of destitute Elks, it has been tacitly extended to cover general charities without limit as to the amount, and in winter, and especially at Christmas time, large sums have been raised from the voluntary contributions of members to be dispensed for such purposes, and for Christmas gifts to children who, it is presumed, would not otherwise be able to partake of the pleasures of that blessed season. Their entire lodge fund, arising from membership dues and including the profits upon refreshments, except the sinking fund provided for the payment of the amount unpaid upon the property in question, has been devoted to these charities. The lodge is incorporated under the state law providing for the incorporation of benevolent, religious, scientific, educational, and miscellaneous associations. The only question presented for our consideration is whether or not the property in question is exempt from these taxes because it is used exclusively for purposes purely charitable within the meaning of that expression as used in § 6 of article 10 of our state Constitution.

In construing this same section this court recently said: "It must be conceded to the state that, whether a tax-exempting clause be viewed from the standpoint of the state down to the people, or from the standpoint of the people up to the state, there must be unbending and inviolate rules which, as sure words of the law, are always to be reckoned with; and those rules (from the standpoint of the state) are that an abandonment of the sovereign right to exercise the vital power of taxation can never be presumed. The intention to abandon must appear in the most clear and unequivocal terms (*Pacific R. Co. v. Cass County*, 53 Mo. loc. cit. 27); and from the standpoint of the people they are that equality is equity in taxation." *State ex rel. Spillers v. Johnston*, 214 Mo. 656, 21 L.R.A. (N.S.) 171, 113 S. W. 1083.

The same rule is distinctly stated in the cases cited in that opinion, as well as in *State ex rel. Mt. Mora Cemetery Asso. v. Casey*, 210 Mo. 235, 248, 109 S. W. 1. It is a just and reasonable one, and, whatever may be the doctrine of the adjudications in other jurisdictions, must be taken as the well-settled law of this state.

reading room, a room in which billiards are played, a room where cards are played, and a lodge meeting room which appellant occasionally uses for dancing and other social purposes, and rooms in which liquors, cigars, and refreshments are sold at a profit to members only, are the means by which the objects of the organization are attained and its purposes carried out; namely, the promotion of 'good fellowship among its members' and the dispensing of 'charity in the general relief of the distress of the human family, not only to its members and their families, but also to the public at large.' As stated by counsel for appellant in their brief, 'to maintain the organization it is necessary to have officers and committees, and to hold meetings, even though all of these may not be immediately concerned in dispensing charity. It must have a permanent meeting place, and in the building used for this purpose it has rooms for accommodating its membership, places where they may meet, not only to talk over lodge business concerned with the dispensation of charity, but for social purposes, and to partake of refreshments, or to indulge in a game of cards or billiards. It is all a method of holding the members together, of solidifying the organization, to the end that charitable aims of the organization may be more effectively carried out.' That is, the maintenance and occupation of the building and the use made of it as a whole by the organization tends directly to promote and further the purposes, and to carry out the objects for which the organization was created." It was said also that the amount distributed for charitable purposes was not of control. L.R.A.1916C.

ling importance. There was, however, a strong dissenting opinion by one of the three justices, which was approved in *Boston Lodge v. Boston*, 217 Mass. 176, 104 N. E. 453, and the case is cited, but not followed, in *St. Louis Lodge v. Koeln*.

The property of a Masonic lodge was held exempt from taxation in *Cumberland Lodge v. Nashville*, 127 Tenn. 248, 154 S. W. 1141, as used for purposes purely educational and charitable, but the extent to which it was used for social purposes was not set out, and the effect thereof not considered beyond the mere statement that the reading and lodge rooms maintained by the order were but agencies for the advancement and enjoyment of its general purposes, which were stipulated to be "ethical and fraternal teaching, patriotism, benevolence," etc., and the maintenance of a widows' and orphans' home, and that the same was true of the entertainment which it afforded its members.

The rule was laid down in *Atty. Gen. v. Detroit*, 113 Mich. 388, 71 N. W. 632, that it is not enough, in order to exempt such an association as the Masonic Temple Association from taxation under a statute exempting from taxation buildings owned by library, benevolent, charitable, educational, and scientific institutions, while occupied solely for the purposes for which they were incorporated, that one of the direct or indirect purposes or results is benevolence, charity, education, or the promotion of science; but that the association must be organized chiefly, if not solely, for one or more of these objects.

R. E. H.

There can be no question as to the charitable character of the defendant lodge, nor of its disposition in that respect. While the property is used as the meeting place of the lodge where all its regular business is transacted, it also affords to the members and their families, free of cost, the most liberal facilities for social enjoyment and the entertainment of their guests, and to the unfortunate bachelor member and transient brother, for compensation, something like the culinary and table advantages of home. The surplus of its lodge funds, whatever that may be, together with large sums voluntarily contributed by its members, is dispensed, through the activities of the lodge organization, in the relief of the needy. Were the virtues of human sympathy and helpfulness grounds for the exemption of one's property from the common burden of taxation, the plaintiff would stand upon firm ground while urging its claim for relief. There are, however, others whom we have enjoyed the pleasant privilege of knowing, who might stand upon the same ground and urge a similar claim. For them the home has not only been the instrument and abiding place of their own personal comfort, but they have opened its doors to helpless and deserted or orphaned children whom they have nurtured and educated to be good and useful citizens of the state, and have spent their income, and in some cases more, in dispensing aid to the destitute and suffering. Perhaps one of the brightest virtues of these has been the instinctive patriotism evident in their willingness to share in the burden assumed by the government in protecting them in the life they have chosen and in educating their children.

It is evident that the constitutional exemption before us has no reference to the character and activities of the owner except in so far as those activities relate to the use of the property. For instance, the same sentence of the Constitution we are considering exempts from taxation property used exclusively for religious worship, yet it is evident one might have family worship in his own residence from morning until night, except at such times as he should step out for a few moments to evangelize his neighbors, without changing in the least the character of the property as his residence, or exempting it from taxation on the ground that it was used exclusively for religious worship. The worship would be an incident to the residence in the property of a pious, God-fearing man, given to the observance of such duties. If, on the other hand, the building were a church, devoted to public worship, and the owner should reside in it in the capacity of

pastor in charge and caretaker of the premises, the condition would be reversed; for the occupation would be an incident to and a part of the religious use. This distinction is clearly illustrated and interestingly discussed in *State ex rel. Spillers v. Johnston*, supra, and cases cited therein at pages 663 et seq. of 214 Mo.

This house is used, as the plaintiff's secretary tells us in his testimony, for lodge and club purposes, and seems to be well and liberally calculated for that use. The constitutional exemption requires that the property be "exclusively" used for purposes "purely" charitable. This "exclusive" use implies that all other uses be excluded. This exclusion naturally applies to vaudeville, boxing, dancing, billiards, and cards for the amusement of the owners. It might, under some circumstances, be said that all these things may be used to raise money for charitable purposes; but here the shoe is on the other foot. We are told in the testimony that these things are all free. No fee is charged for entrance to the shows, or to the dances, or for billiards or cards. These must be paid for out of the funds of the lodge, and consequently constitute uses not incidental, but paramount, to the charities. When the lodge has used the hall for a dance, and has paid the fiddler, then charity may come for the crumbs. The exempting use must also be "purely" charitable—charity which, according to Webster, is unmixed with any other element. Charity is not a promiscuous mixer. Here she modestly stands outside or goes her way and waits,—waits until the plaintiff has finished using the spacious and comfortable rooms for the pleasure of its members,—waits until the curtain has fallen upon the last scene of the vaudeville performance on the stage; until the dancers have tired and gone home; until the billiard rooms have been deserted to the markers; until the plaintiff has paid the cost of its own entertainment, and goes out and finds her, and hands her whatever it may have left in its pocket. She gets not the use of the premises, but what remains of income to the owners after they have used it in carrying out the injunction of their organic law, by promoting their own welfare, enhancing their own happiness, and cultivating their own good fellowship among themselves. Like the supreme court of Wisconsin in *Green Bay Lodge v. Green Bay*, 122 Wis. 452, 106 Am. St. Rep. 984, 100 N. W. 837, we do not find the maintaining of a clubhouse to be a purely charitable use. Were this true, as that court remarked in its opinion, "then any number of men may organize themselves into a corporate body

to provide these privileges and benefits for themselves and their guests, and claim the exemption of the statutes."

After what we have said, it is unnecessary to notice further the Utah case of *Salt Lake Lodge v. Groesbeck*, 40 Utah, 1, 120 Pac. 192, Ann. Cas. 1914C, 940, in which it was held that law exempting property of this character from taxation should be liberally construed. We are satisfied with our own rule in that respect.

The judgment of the Circuit Court for the City of St. Louis is affirmed.

Blair, C., concurs in result.

Per Curiam:

The foregoing opinion by **Brown, C.**, is adopted as the opinion of the court.

All concur, **Bond, J.**, in result.

NEW HAMPSHIRE SUPREME COURT.

HAMPTON BEACH IMPROVEMENT COMPANY

v.

TOWN OF HAMPTON.

(— N. H. —, 92 Atl. 549.)

Appeal — transfer of law question in advance of trial.

1. Important questions of law necessarily involved in an action for breach of cove-

Note. — Provision in lease of public property as to payment of taxes.

As to whether property leased by the public is subject of taxation, see notes to *Norfolk v. J. W. Perry Co.* 35 L.R.A.(N.S.) 167, and *San Pedro, L. A. & S. L. R. Co. v. Los Angeles*, 52 L.R.A.(N.S.) 991.

A search for authorities has disclosed no case similar in all respects to *HAMPTON BEACH IMPROV. Co. v. HAMPTON*, although in several decisions the construction or effect of provisions in a lease of public property with reference to taxes has been considered. The rule laid down in that case, that, in making a lease of its property containing a provision for payment of taxes, the town acted in a private capacity and was subject to the usual contract obligations, is supported by the case of *Boston Molasses Co. v. Com.* 193 Mass. 387, 79 N. E. 827, where, in a lease of state lands for a term of years at a fixed rental, there was a covenant by the lessee to pay the rent "and also water rates and all taxes which may be assessed upon any buildings, fixtures, or other property put upon said premises by the lessee." The court said that the commonwealth in making the lease was not acting in its political character as L.R.A.1915C.

nant may be transferred to the supreme court in advance of the trial.

Municipal corporation — lease of property — agreement to pay taxes — validity.

2. A provision in a lease of town land that the lessor will pay the taxes assessed on the property or permit them to be deducted from the rent is enforceable so as to permit a recovery of the taxes paid, although they are greater than the annual rental, and not invalid as an agreement to exempt the lessee from taxation.

(November 4, 1914.)

TRANSFER in advance of trial, by the Superior Court for Rockingham County for the determination by the Supreme Court of questions arising in an action brought to recover taxes paid by plaintiff on land leased by it from the defendant town. Case discharged.

The provision in question was as follows: "The said lessor covenants and agrees with the said lessee, its successors and assigns, that it shall not tax said lands or any part thereof during the term of this lease, or if it does tax the same, or any amount of it, the said tax shall be paid by the lessor, or if paid by the lessee, its successors or assigns, shall be deducted from the annual rent."

Further facts appear in the opinion.

Messrs. **Page, Bartlett, & Mitchell** for plaintiff.

Messrs. **Eastman, Scammon, & Gardner** for defendant.

sovereign, but merely as the owner of property as to which it was making a contract; that as to the contract it placed itself in the position of a private citizen, and that the lease must be construed as if it were made between individuals; also that the special provision in the lease that the lessee would pay certain specified taxes made clearer the intention of the parties that he should not be held liable for any others.

Accordingly, where, after the making of the lease, a statute was passed authorizing the taxation of lands of the commonwealth leased for business purposes in the same manner as they would be taxed to the lessee if he were the owner of the fee, it was held in *Boston Molasses Co. v. Com.* supra, that the lessee, who had paid city taxes other than those named in the lease, levied on the property and assessed to him under the statute, could recover the same from the commonwealth.

In *Norfolk v. J. W. Perry Co.* 108 Va. 28, 35 L.R.A.(N.S.) 167, 128 Am. St. Rep. 940, 61 S. E. 867, affirmed in 220 U. S. 472, 55 L. ed. 548, 31 Sup. Ct. Rep. 465, it was held that a city might tax land leased by it for a term of ninety-nine years, renewable forever, where the lessee covenanted to pay, in addition to the rent, the "public taxes

Peaslee, J., delivered the opinion of the court:

The case is properly transferred to this court, for determination, in advance of the trial, of important questions of law necessarily involved in the action for covenant broken. *Glover v. Baker*, 76 N. H. 261, 81 Atl. 1081. It is therefore unnecessary to consider whether the bill in equity for the construction of the lease can be maintained. See *Ross v. Church*, — N. H. —, 90 Atl. 174.

The town of Hampton owned the land in question as a corporation, rather than as a branch of the government. It taxed the land in the exercise of its governmental function and duty. As a corporation it contracted with the lessee that, if the municipality assessed and collected taxes on the land, the lessee might deduct the amount paid from the annual rent due to the corporation. In making the contract and in levying the tax the town acted in different capacities,—one public, and the other private. "When they act in a private capacity, they are subject to the same legal obligations as a private corporation." *Gates v. Milan*, 76 N. H. 135, 136, 35 L.R.A.(N.S.) 599, 80 Atl. 39, 40.

The argument that the covenant in the

which shall become due on said land," the contentions being overruled that the term "public taxes" had reference only to state taxes, and was not intended to include city taxes, because at the time of making the lease a municipal tax on land was unknown, and also that the city was thus taxing its own land, which it had no power to do.

It was also held in *Norfolk v. J. W. Perry Co.* supra, that neglect of the municipality in the past to levy a tax on the property did not constitute such an interpretation of the clause in the lease as to payment of taxes as would prevent it from levying a tax in the future.

Norfolk v. J. W. Perry Co. supra, was followed in *Norfolk v. White*, 108 Va. 35, 61 S. E. 870, where the facts were similar except that the covenant by the lessee was to pay "the public and other taxes" which should accrue on the land.

Where a city agreed to construct tramways and lease them to a company, a covenant by the lessee to keep the city "free from all expenses whatever in connection with the said tramway" was construed as requiring it to pay the landlord's assessments, rates, and taxes levied on the property. *Glasgow v. Glasgow Tramway & Omnibus Co.* [1898] A. C. 631, 14 Times L. R. 516.

And in *Canadian P. R. Co. v. Toronto* [1905] A. C. 33, where a city entered into a contract to lease a large tract of land to a railway company for a term of fifty years, renewable forever, at a rent to be increased on each renewal, it was held that a covenant by the lessee to pay the taxes should be inserted in the lease, partly because this was a "usual" covenant in such

lease amounts to an agreement to exempt the lessee from the burden of taxation which it was bound to bear is not well founded. An exemption from taxation is in the nature of a gratuity, while the agreement here is a part of the consideration for the payment of a certain rental. It is merely a matter of contract between the lessor and the lessee. *Morrison v. Manchester*, 58 N. H. 538, 556. What the town lost in taxes as a municipality it gained in rent as a lessor. Such a provision is not infrequently found in leases between individuals. In making it the town acted in a private capacity, and is therefore subject to the usual private obligation. It was making a contract touching the price to be paid for the use of the land. If tax free, it was worth a rent as much larger as the probable annual tax. It must be assumed that the rent agreed upon included the amount of this probable burden which was assumed by the lessor. The substance of the transaction is not a tax exemption, but a contract by the town, as a private corporation, that for an agreed price it will (among other things) pay the tax on this land.

The lease provides that if the land is taxed the lessor shall pay the tax, or the les-

leases, and partly because of statutory provisions exempting municipal property from taxation only when occupied for municipal purposes, and providing that taxes might be recovered from the owner, or from the tenant or occupier of land, who might deduct them from his rent if the same could have been recovered from the owner, unless there was a special agreement between the owner and the occupant to the contrary.

Although, at the time of the execution of the lease by a town, the leased property was by statute exempt from taxation, because devoted to charitable or religious uses, it was held in *Hart v. Cornwall*, 14 Conn. 228, that after the repeal of the statute the town might collect taxes on the land, where the lease was for a term of 999 years, and conveyed the land free and clear of encumbrances, "except all rates or public taxes that may or shall arise thereon, to be paid and satisfied" by the lessee.

And the fact that for eighteen years after the repeal of the statute no taxes had been levied on the land was held in *Hart v. Cornwall*, supra, not to be such evidence of a practical construction of the lease by the parties as to relieve the lessee from liability for taxes, where nearly seventy years had elapsed between the execution of the lease and the repeal of the statute.

Generally, as to construction and effect of covenants in lease, sublease, or assignment of lease, as to payment of taxes and assessments, see note to *J. L. Hammett Co. v. Alfred Peats Co.* L.R.A. 1915A, 334.

R. E. H.

see may deduct it from the rent. In the present case the lessee has paid the tax and seeks to recover it back from the town. The reason for this seems to be that the tax is now greater than the annual rental. The defendant insists that, even if a deduction from the rent might be stipulated for, yet a money judgment against the town cannot be obtained upon a claim like this. The basis alleged for this position is that money can be taken from the town treasury only in certain specified ways and for purposes which are defined in the statutes. But, as the statute provides for raising money "for all necessary charges arising within the town" (P. S. chap. 40, § 4), it is manifest that the argument begs the question. If this is a legal claim against the town, its payment is a necessary town charge. If the town made a bad bargain, it can escape the consequences only as an individual could.

It is conceded that the covenant is one that would be binding between individuals, and that the town had power to act in its private capacity in this matter. But it is urged that when acting in its private capacity a town cannot impair its governmental functions. The limitation is not peculiar to the agreements of municipalities acting privately. No other private citizen can contract to vary the course of government. But a private citizen can, as between him and his obligee, contract to save another harmless from governmental burdens, and this is what the present covenant amounts to. The provision that the town shall not tax the land can be stricken out, and the covenant remains complete. A declaration alleging as a breach of the covenant that the town had laid tax on land would be bad in law; for the covenant plainly implies that it is likely that taxes will be laid, and it provides what shall be done in that event. The seeming inconsistency between the rule that the municipality cannot contract to vary the uniform rule of taxation on one hand, and the course here pursued, which is said to amount in the end to depriving the town of the tax on this property, results solely from the fact that the same entity is at one and the same time a public and a private corporation. That this theory may at times produce illogical results is perhaps true. Even if this is so, it is not a sufficient reason for the judicial abandonment of a long established and frequently approved rule of law. "The theory of their dual character is too firmly embedded in the common law to be removed except by the lawmaking power." *Rhobidas v. Concord*, 70 N. H. 90, 114, L.R.A.1915C.

51 L.R.A. 381, 85 Am. St. Rep. 604, 47 Atl. 82, 86.

Case discharged.

Young, J., did not sit. The others concur.

PENNSYLVANIA SUPREME COURT.

HOWARD SMELTZER, Appt.,

v.
BOROUGH OF FORD CITY et al.

(246 Pa. 560, 92 Atl. 702.)

Water — embankment against flood — right of municipality.

A municipal corporation situated on the lowlands along a stream may erect an embankment to prevent flood water from the stream overflowing and injuring property within its limits, although the result is to cause the water to rise somewhat higher on the property on the opposite side of the stream than it otherwise would have done.

(October 26, 1914.)

APPEAL by plaintiff from a decree of the Court of Common Pleas for Armstrong County, refusing an injunction to restrain defendants from building a dike to prevent flood water from overflowing and injuring property within its limits. Affirmed.

The facts are stated in the opinion.

Messrs. H. A. Hilleman and R. L. Ralston, for appellant:

The defendant borough cannot erect a dike beyond the borough limits to prevent the flood waters of a river and run from entering said borough, and a court of equity has the right to restrain the erection of said dike by injunction.

Bentz v. Armstrong, 8 Watts & S. 40, 42 Am. Dec. 265; *McMahon v. Thornton*, 5 Pa. Super. Ct. 495; *Crawford v. Rambo*, 44 Ohio St. 281, 7 N. E. 429; *Pittsburg, Ft. W. & C. R. Co. v. Gilleland*, 56 Pa. 445, 94 Am.

Note. — The general question as to the right of a riparian owner as against other riparian owners to confine flood waters within banks of a stream is treated in the note to *Jefferson v. Hicks*, 24 L.R.A.(N.S.) 214. The question as to the liability of a municipality for confining flood water within the banks of a stream to the injury of a riparian owner is treated in the note to *Walters v. Marshalltown*, 26 L.R.A.(N.S.) 199; and the question whether the casting of water upon the opposite bank by raising the bank of a stream amounts to a taking or damaging of property within constitutional provisions is considered in the note to *Ft. Worth Improv. Dist. v. Ft. Worth*, 48 L.R.A.(N.S.) 994.

Dec. 98; *Brown v. Pine Creek R. Co.* 183 Pa. 38, 38 Atl. 401; *McCoy v. Danley*, 20 Pa. 85, 57 Am. Dec. 680; *Barden v. Portage*, 79 Wis. 126, 48 N. W. 210; *Martin v. Riddle*, 26 Pa. 415; *Kauffman v. Griesemer*, 26 Pa. 407; *Com. v. Pittsburgh & C. R. Co.* 24 Pa. 169, 62 Am. Dec. 372; *Walters v. McElroy*, 151 Pa. 549, 25 Atl. 125; *Sullivan v. Jones & L. Steel Co.* 208 Pa. 540, 66 L.R.A. 712, 57 Atl. 1065; *Dennis v. Eckhardt*, 3 Grant Cas. 390; *Howell v. M'Coy*, 3 Rawle, 256; *Hutchinson v. Schimmelfeder*, 40 Pa. 396, 80 Am. Dec. 582; *Pennsylvania Lead Co's Appeal*, 96 Pa. 116, 42 Am. Rep. 534, 11 Mor. Min. Rep. 84; *Bigler v. Pennsylvania Canal Co.* 177 Pa. 29, 35 Atl. 112; *Betham v. Philadelphia*, 196 Pa. 302, 46 Atl. 448.

Messrs. William Watson Smith, J. H. Painter, and Floy C. Jones for appellees.

Potter, J., delivered the opinion of the court:

Through this bill in equity, filed by the plaintiff, he sought to restrain the defendants from building a dike to prevent the waters of the Allegheny river, at times of unusual flood, from overflowing portions of the borough of Ford City. The facts are not in dispute, and, in so far as they are material, are substantially as follows: The borough of Ford City, having some 5,000 inhabitants, and containing from 800 to 1,000 buildings, and certain large manufacturing establishments, one of which is the plant of the Pittsburgh Plate Glass Company, is situated on the east bank of the Allegheny river, and stands for the most part upon low-lying bottom land. To the north of the borough is located the small village of McCain, and between it and Ford City flows a small stream known as Ft. Run, which empties into the Allegheny river through two small culverts under the embankment of the Pennsylvania Railroad, which skirts the river. The plaintiff owns a house and lot in the village of McCain. At a point opposite to this property, the embankment of the railroad is about 793 feet above sea level, while at the lower end of Ford City the embankment is at an elevation of about 788 feet. It affords protection to the borough against flood water from the river, except as against that which comes through the culverts at McCain. The bottom land upon which Ford City is built slopes gradually southward along the valley of the river. At flood stages the water from the river backs through the conduits into Ft. Run, and spreads over the low ground in the village of McCain, and over what is known as the Graff plan of lots lying to the north of Ford City, until it reaches a depth which will carry it down through the borough to a L.R.A.1915C.

point where it empties into the river at the southern end of the town. It is averred in the bill that at flood stages of the river and of Ft. Run the water rises to the level of plaintiff's land, but that, by reason of the water being able to spread out over the Graff land, and its passage through the borough of Ford City, the flood water in McCain does not rise as high as it would if this outlet were closed. It is averred that the defendants are about to erect a dike for the purpose of holding the water back, and preventing it from going through Ford City. It is alleged that the result will be to turn the water upon plaintiff's lot and damage it. The trial court found as facts, among other things, that the Graff property is urban; that plaintiff could, by expending about \$750, raise his house and lot beyond the reach of flood water, in so far as it would be affected by the dike; that during the last flood, in 1913, one of the defendants alone, the Pittsburgh Plate Glass Company, suffered a loss therefrom of \$257,000; that the Graff field is not a water course; that the proposed dike would protect the borough of Ford City from any flood not greater than those that have occurred during a period of more than thirty years past; and that it would, at most, not cause the water to rise more than 4 feet higher on plaintiff's property, at the time of the greatest flood. The court below dismissed the bill, and plaintiff has appealed.

It must be noted that this case does not involve the question of obstructing a natural water course, or the mere turning aside of surface water. It concerns the protection of a large area of property from the advance of flood water, and that of an extraordinary character. It is only at infrequent intervals that the waters of the streams at the point in question leave their channels and flow over the adjoining low lands of the river bottoms. The principal damage is from the flood waters of the Allegheny river, a navigable stream. The property which it is sought to protect is urban. The proposed dike is to be erected, not upon the banks of Ft. Run, but some 300 feet away from it. We are satisfied that the sound and reasonable rule in such a case as this is to permit the owners of lower ground along or near a river to guard themselves against flood water, even though the effect may be to temporarily increase the depth of the water upon other ground, leaving it to other owners to protect themselves in like manner, against what must be regarded as the common enemy. The overflow of the water in these times of tremendous flood is so disastrous that the protection of life and property calls for the exercise of the same right which is recognized in fighting against

the onset of the sea, which is to be resisted without liability to any other owner of land for damages resulting therefrom.

The learned judge of the court below, in a very carefully considered opinion, has analyzed the situation, and has shown the imperative need for the adoption of some such method as is proposed for the protection of the property of the citizens of Ford City and the vicinity from the periodical ravages of floods. As he well says, it would be unreasonable to prevent the owners of low lands, such as that of the plaintiff and the Graff field and parts of Ford City, from elevating their property for protecting it from the injury and damage caused by extraordinary floods. It would doom the citizens of the river valleys in this part of the state to dwell in constant danger of overflow. To adopt the view for which counsel for appellant contends would be, as the trial judge says, to prevent the owners of this land, or of the like land, from filling it in with earth and bringing it to a safe grade. It would prevent the use of the land for manufacturing purposes. "The inhabitants of lower lands in a city or town could not, on the same principle, protect themselves and their properties from overflow; even this plaintiff, if such were the law, would be obliged to permit his property to remain on the natural surface, subject to frequent and serious overflow and inundations, without power to raise it out of reach of the flood waters."

Between the method of raising the level of individual lots and the building of a dike which will protect the entire area concerned from the threatened danger we can see no essential difference in principle. While each owner may, of course, act for himself, yet it is manifestly to the interest of all to combine and share the expense of constructing a dike by which many properties may be protected. The plaintiff and his immediate neighbors can employ the same method of defense against flood waters, if they see fit to do so. If they will do nothing to protect themselves, we can see no sound principle of law which justifies them in standing in the way of others whose necessities compel them to act.

We agree with the conclusion reached by the court below that low lands such as the Graff tract and the parts of Ford City here involved, having become urban property, and lying along the Allegheny river, a navigable stream, owe no servitude to other adjoining lands lying upstream, but equally as low, or lower, to carry off, without interference, extraordinary flood waters resulting from rainfall or the melting of snows, which occasionally and at infrequent intervals only leave the main channels of the river, and at L.R.A.1915C.

such times flow over the low, or bottom, lands. Such an overflow of the waters is properly to be regarded as the advance of a common enemy, to be resisted by each proprietor as best he may.

The assignments of error are overruled, and the decree of the court below is affirmed. This appeal is dismissed, at the cost of the appellant.

ARKANSAS SUPREME COURT.

THOMAS W. BUTLER, Appt.,
v.
CHARLES L. CABE.

(— Ark. —, 171 S. W. 1190.)

Negligence — last clear chance — avoiding injury to driver of frightened mule.

1. Negligence, if any, in driving upon the highway with a mule known to be afraid of automobiles, will not preclude one from holding the driver of an automobile liable for injury due to the fright of the mule, if he might, after discovering the danger of the driver, have prevented the injury by the exercise of ordinary care.

Highway — negligence in driving animal known to be afraid of automobiles.

2. Driving upon the highway with a mule known to be afraid of automobiles is not negligence if there was no reason to anticipate that the driver would not have time to take precautions to protect himself from injury when an automobile approached.

(December 14, 1914.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Lafayette County in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

Statement by Kirby, J.:

Thomas W. Butler brought this suit against the defendant, Cabe, for damages for personal injury to his buggy and harness alleged to have been caused by the negligence of the defendant in frightening his mule and causing it to run away by the operation of his automobile at a rapid and dangerous rate of speed upon the public road along which plaintiff was driving, and in failing to stop after plaintiff's sig-

Note. — The subject of contributory negligence of driver of horse encountering automobile on highway is covered in the note to Dreier v. McDermott, 50 L.R.A.(N.S.) 566.

nal and his discovery that the mule driven by plaintiff was becoming unmanageable from fright.

It appears from the testimony that appellant was driving towards his home on the public country road, and that when he came near a sharp curve around which he could not see, that defendant approached in his automobile from beyond the curve at a high rate of speed, and made no effort to stop his car or slacken the speed of it after plaintiff's signal, and he discovered that the mule driven by plaintiff was greatly frightened and becoming unmanageable. The mule bolted, ran into the woods, struck the buggy against a tree, and threw the occupants out, breaking plaintiff's wrist and otherwise severely injuring him, and breaking up the harness and buggy to some extent. There was testimony tending to show the speed of the automobile, and that the mule driven by plaintiff was not gentle and was not safe to drive where automobiles were passing, and was always greatly frightened by them, although the plaintiff said that the mule was gentle, and had never been regarded unsafe to drive nor greatly frightened at automobiles until after this occurrence. The court instructed the jury, giving, among others, over appellant's objection, instruction No. 4, as follows: "If you find from the evidence that the mule driven by the plaintiff was afraid of an automobile, and would become frightened and probably unmanageable on meeting one upon the public highway, and this fact was known to plaintiff, and, notwithstanding this knowledge, plaintiff drove said mule on the public highway, where he would probably meet automobiles, and that his conduct in so doing was not that of a reasonable and prudent man under similar circumstances, then you should find for the defendant."

The jury returned a verdict for the defendant, and from the judgment thereon plaintiff prosecutes this appeal.

Mr. D. L. King for appellant.
Messrs. Searcy & Parks for appellee.

Kirby, J., delivered the opinion of the court:

Appellant contends that the court erred in giving said instruction No. 4, and we agree with this contention. All persons have equal right to use the public streets and highways for purposes of travel by proper means, with due regard to the corresponding rights of others, and it is unquestioned that an automobile is a proper means of conveyance on the public highways; neither can it be disputed that driving a mule to a buggy is a like proper

means of conveyance. Certainly a citizen is not to be deprived of his right to use any means of conveyance within his control because, forsooth, the animal he must drive is unaccustomed to the sight of automobiles and becomes frightened upon meeting or coming near them. Public highways are established for the benefit of all who find it necessary or desirable to travel thereon, adopting any means of conveyance not prohibited by law.

In *Millsaps v. Brogdon*, 97 Ark. 469, 32 L.R.A.(N.S.) 1177, 134 S. W. 632, the court said: "The beggar on his crutches has the same right to the use of the streets of the city as has the rich man in his automobile. Each is bound to the exercise of ordinary care for his own safety and the prevention of injury to others in the use thereof."

In *Minor v. Mapes*, 102 Ark. 354, 39 L.R.A.(N.S.) 214, 144 S. W. 219, the court said: "Automobilists and the drivers of other vehicles have the right to share the street with pedestrians, but they must anticipate the presence of the latter, and exercise reasonable care to avoid injuring them. Care must be exercised commensurate with the danger reasonably to be anticipated."

All travelers upon the public highways are bound to the exercise of ordinary care in the use thereof, both for their own protection and the safety of others, and ordinary care, as indicated in the quotation from *Minor v. Mapes*, may require greater care exercised on the part of the automobilist and others driving vehicles of high power and great speed, that make fearsome noises calculated to frighten unsophisticated country horses and mules, not city broke and accustomed to seeing them, than that required of other users of the highway. In some jurisdictions automobilists are prohibited the use of certain streets and highways, and our own statutes restrict their operation as to the rate of speed that may be maintained. Said instruction allowed the jury to find against the plaintiff, who was unquestionably seriously injured by the frightening of his mule and the overturning of his buggy, if the jury found that he knew the animal driven by him was afraid of an automobile, and might become frightened and unmanageable upon meeting one upon a public highway, if his conduct in driving the animal upon a public highway, where he would probably meet automobiles, was not that of a reasonable and prudent man under the circumstances, taking away from the jury altogether the right to find for the plaintiff notwithstanding any negligence on his part, if it can be held that the driving of an animal upon a public highway where an automobile might be met, not accustomed

to the sight thereof, was negligence, if the defendant, after discovering his perilous position, failed to exercise ordinary care to prevent the injury. Our courts have invariably held railway companies responsible for damages caused by the frightening of animals ridden or driven along public highways near their tracks and at crossings, for failing to use the proper care to prevent injury by them after it becomes apparent that injury may result from the fright.

This instruction, in effect, told the jury that the plaintiff was not entitled to recover for an injury caused by his team becoming frightened at the approach of an automobile and running away and injuring him, if he knew that the animal was liable to become frightened upon meeting an automobile, and a prudent person would not have driven an animal of that kind upon the public highway where automobiles might be met. This is not the law. Plaintiff had the right to drive his mule on the public highway, being bound, of course, to the exercise of ordinary care while doing so, and there was no reason to think that he could or would not have time upon the approach of an automobile to take such measures as would protect himself from danger on account of the fright of the animal by either leaving the road if opportunity offered, or by getting out of the buggy and holding the animal until the danger was past.

The court erred in giving this instruction, and the judgment must be reversed, and the cause remanded for a new trial.

ARKANSAS SUPREME COURT.

J. H. HALL, Appt.,

v.

VINCE GAGE.

(— Ark. —, 172 S. W. 833.)

Negligence — fall of fire wall — effect.

1. The fall of a wall left standing for more than a month after a fire has destroyed

Note. — Liability of landowner for fall of wall or building left standing after fire.

Generally as to individual liability for falling walls, see note to *Ryder v. Kinsey*, 34 L.R.A. 557.

The cases which have considered the liability of a municipality for damages from falling walls left standing after a fire will be found in note to *Adler v. Pruitt*, 32 L.R.A.(N.S.) 892, and so have not been repeated here.

The question as to the liability of the L.R.A.1915C.

the building of which it was a part, without any attempt to protect it or prop it up, to the injury of adjoining property, is prima facie evidence of negligence.

Trial — instruction — modification — absence of evidence.

2. A modification which there is no evidence to support should not be made to a requested instruction.

Appeal — rendition of judgment on reversal.

3. Judgment cannot be rendered for plaintiff upon reversal of a judgment for defendant if the abstract does not show that the evidence tending to support the amount claimed is undisputed.

(December 21, 1914.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Garland County in defendant's favor in an action brought to recover damages for the alleged negligence of defendant in allowing a wall on his premises to fall on plaintiff's building. Reversed.

The facts are stated in the opinion.

Messrs. Davies & Ledgerwood and R. G. Davies, for appellant:

Defendant was guilty of negligence, and is liable for the injury.

Carter v. Chambers, 79 Ala. 223; *St. Louis, I. M. & S. R. Co. v. Hopkins*, 54 Ark. 209, 12 L.R.A. 189, 15 S. W. 610; *Southern Exp. Co. v. Texarkana Water Co.*, 54 Ark. 131, 15 S. W. 361; *Lafin & R. Powder Co. v. Tearney*, 131 Ill. 322, 7 L.R.A. 262, 19 Am. St. Rep. 34, 23 N. E. 389; *Hay v. Cohoes Co.* 2 N. Y. 159, 51 Am. Dec. 279; *Heeg v. Licht*, 80 N. Y. 579, 36 Am. Rep. 654, 11 Mor. Min. Rep. 74; *Clifford v. Dam*, 81 N. Y. 52; *Bohan v. Port Jervis Gaslight Co.* 122 N. Y. 18, 9 L.R.A. 711, 25 N. E. 246. *Pottstown Gas Co. v. Murphy*, 39 Pa. 257; *Cork v. Blossom*, 162 Mass. 330, 26 L.R.A. 256, 44 Am. St. Rep. 362, 38 N. E. 495; *Gray v. Harris*, 107 Mass. 492, 9 Am. Rep. 61; *Ainsworth v. Mt. Moriah Lodge*, A. F. & A. M. 172 Mass. 257, 52 N. E. 81; *Beidler v. King*, 209 Ill. 302, 101 Am. St. Rep. 246, 70 N. E. 763; *Ainsworth v. Lakin*, 180 Mass.

owner of the premises, as affected by the fact that the property was in possession of a tenant or independent contractor, and the question as to the liability of the tenant or contractor as such, considered as distinctive questions, are not within the scope of the present note, as they depend upon general principles and rules not distinctive of the subject now under consideration.

As to liability of landlord to third persons for condition of premises in possession of tenant, see note to *Knight v. Foster*, 50 L.R.A.(N.S.) 286. For other aspects of the subject of landlord's liability for condi-

397, 57 L.R.A. 135, 91 Am. St. Rep. 314, 62 N. E. 746; Church of Ascension v. Buckhart, 3 Hill, 193; McConnell v. Lemley, 48 La. Ann. 1433, 34 L.R.A. 609, 55 Am. St. Rep. 319, 20 So. 887; Cuddy v. People's Ice Co. 153 Mass. 366, 26 N. E. 869; Thomp. Neg. 1056, note 407.

Mr. C. Floyd Huff, for appellee:

The instructions as a whole, as given for defendants, are supported by the case of Factors & T. Ins. Co. v. Werlein, 42 La. Ann. 1046, 11 L.R.A. 361, 8 So. 435.

Hart, J., delivered the opinion of the court:

J. H. Hall sued Vince Gage to recover damages on account of the alleged negligence of the latter in allowing his wall to

fall on the former's building. The facts, so far as are necessary to determine the issues raised by the appeal, briefly stated, are as follows: Hall and Gage owned adjacent lots in the city of Hot Springs upon which they had buildings. On September 5, 1913, the buildings on both of these lots were destroyed by fire. On the lot of Gage a wall was left standing about 24 feet high, and 1½ inches of this wall was on Hall's land. Almost immediately after the fire, Hall cleared away the *débris* from his lot and proceeded with the erection of a concrete building. The wall of his new building was 16 feet high, and in making the concrete wall he used the brick wall of Gage as a part of the form. After the erection of Hall's new building, the wall

tion of premises, see Index to L.R.A. Notes, "Landlord and Tenant," §§ 58-73.

As to owner's responsibility as affected by the fact that the property is in possession or control of an independent contractor, see Index to L.R.A. Notes, "Master and Servant," IV. b, "For acts of independent contractors."

As to validity of ordinance declaring any portion of building left standing after a fire to be a nuisance, see Evansville v. Miller, 38 L.R.A. 161, and note attached thereto.

The decision in HALL v. GAGE, that a landowner whose building is destroyed by fire owes a duty to an adjacent owner to use all reasonable precautions to protect him from danger from falling walls, has the unanimous support of the authorities.

The principles governing liability for damages from falling walls have been accurately stated by Judge Thompson in Vol. 1, of his work on Negligence, at § 1055, where he says: "The liability of the owner of buildings for damages caused by the falling of their walls may arise in three different relations: 1. Where the damage happens to a traveler on the adjoining street or sidewalk; here the governing principle is that the wall of a building abutting a public highway which is so unsafe that it is liable to fall upon the highway, injuring persons lawfully there, is a public nuisance. Such being the case, the extent to which the question of the negligence or diligence of the proprietor in inspecting and supporting the wall and preventing the catastrophe comes into play is more doubtful than in other relations. 2. Where the damage happens to a coterminous landowner; here the governing principle is that, while the proprietor whose wall is allowed to become unsafe is not an insurer in respect of its safety, yet he is bound to exercise reasonable care and skill to the end of inspecting it with the view of ascertaining whether or not it is dangerous, and to the end of repairing it if it is found to be so. 3. Where the injury received from the falling of the wall is visited upon some third person while upon the grounds of the proprietor whose wall it is; in this relation the principles al-

ready considered govern: If such person is a trespasser or bare licensee, then, according to the prevailing opinion, he takes the premises as he finds them—the owner owes no special duty to him—he accepts the risk—and the owner is not liable to him in damages. But if he comes upon the premises by the invitation, express or implied, of the owner, to do business with him, or to be his guest, then the law puts the owner under the duty of exercising reasonable care and skill to the end that the person so coming upon his premises is not injured by reason of their defective condition. And, of course, there is no difference in theory of law in this respect between an injury received from a dangerous hole or other mantrap, such as we have already considered, and an injury received by a dangerous wall."

Wall falling on adjoining property.

Generally as to the liability for injuries from matter precipitated upon adjoining property, see note to Bishop v. Readsboro Chair Mfg. Co. 36 L.R.A. (N.S.) 1171.

The owner of walls left standing after a fire, which cannot be used for rebuilding, owes adjoining owners the duty, after a reasonable time for investigation, of exercising such care in the maintenance of walls likely to fall on their property as will absolutely prevent injury except from causes over which he would have no control, such as *vis major*, acts of public enemies, or wrongful acts of third persons which human foresight could not reasonably be expected to anticipate and prevent. Ainsworth v. Lakin, 180 Mass. 397, 57 L.R.A. 132, 91 Am. St. Rep. 314, 62 N. E. 746.

So, the owner of a building which is burned is liable for damages to another building, caused by the falling of one of its walls which he had negligently left standing. Anderson v. East, 117 Ind. 126, 2 L.R.A. 712, 10 Am. St. Rep. 35, 19 N. E. 726; Seasengut v. Posey, 67 Ind. 408, 33 Am. Rep. 98; Dixon v. Wachenheimer, 9 Ohio C. C. 401, 6 Ohio C. D. 380, 3 Ohio S. & C. P. Dec. 1; Glover v. Mersman, 4 Mo. App. 90.

of Gage's building fell over on it and materially injured it. The break in Gage's building was 1½ feet above the wall of Hall, and the undisputed testimony shows that the wall left standing on Gage's land after the fire was not in any way undermined by the erection of the building of Hall, but, as a matter of fact, was strengthened by it. The fall of the wall on Hall's building occurred on the 18th day of October, 1913. Gage resided in Hot Springs, and knew that the wall was standing there, and had taken no steps to remove it or to make it safe. There is some testimony from which it might be inferred that a rain, accompanied by wind, occurred in the city of Hot Springs on the day the wall fell; but the extent or violence of the wind is not

shown by the record. After the fire, Hall, in erecting his building, used "reinforced concrete with iron," and at that time there was a city ordinance which required that a building be constructed of stone, brick, or iron.

The plaintiff requested the court to give instruction No. 1, as follows: "The court instructs the jury that the collapse of a building or falling of a wall is *prima facie* evidence of negligence, and imposes a burden upon the owner to show that the accident happened without his negligence."

The court, over the objection of the plaintiff, modified the instruction by adding thereto the words: "Unless such presumption has been sufficiently explained or rebutted by other proof shifting such burden."

And in *Beidler v. King*, 209 Ill. 302, 101 Am. St. Rep. 246, 70 N. E. 763, one who had built a party wall under an agreement that the adjoining landowner could use the wall as needed, paying for such part used, and who had negligently permitted the wall to stand after the destruction of the inside of his building by fire, was held liable for damages sustained by such adjoining landowner by reason of the fall of a portion of the wall not used by the latter.

So, also, the owner of a wall left standing after a fire will be responsible for damages occasioned by its fall on adjacent property, although blown down by a high wind, where, although he knows of its dangerous condition, he neglects to take any precautions at all to secure or support the wall, or to take it down so as to prevent it falling and injuring his neighbors, but allows the wall to remain in this dangerous state for several days until it is blown down and falls on a house situated on adjacent property. *Nordheimer v. Alexander*, 19 Can. S. C. 248.

But the owner of walls left standing after the destruction of a building by fire is under no obligation to adjoining property owners to remove or protect the walls until he has had a reasonable time to make necessary investigation and take such precautions as are required. *Ainsworth v. Lakin*, *supra*.

So, while it is the duty of every owner of land to keep the buildings constructed thereon in such a condition that they shall not, by falling or otherwise, cause injury to property or persons lawfully upon adjoining land, yet, when he has been guilty of no negligence, and the condition of the structures has been changed so as to render them injurious or dangerous by *vis major* or the act of a third person, which the owner had no reason to anticipate, he cannot be held liable for the injury, or bound to make the structures safe, until he has had a reasonable time after they have so become dangerous to take the necessary precautions. *Mahoney v. Libbey*, 123 Mass. 20, 25 Am. Rep. 6.

Therefore, where, after a fire which de-

stroyed two buildings situated on adjoining lots, two walls were left standing, one on each lot, and only an inch apart, with rubbish heaped up to the top of each, recovery cannot be had for personal injuries due to the fall of one wall after the other wall had been removed, in the process of clearing up some six months after the fire, in the absence of evidence that the wall was dangerous or could have fallen while both the buildings stood, or while both walls remained in the condition in which they were left by the fire, or that the owner had notice or was bound to know that the wall on the adjoining property had been or was about to be removed. *Ibid*.

An owner of a wall left standing after a fire is not liable for its fall on adjoining property if he took every means to ascertain its safety that an ordinarily prudent man would have taken in similar circumstances, and so believed it to be safe. *Orr v. Bradley*, 126 Mo. App. 146, 103 S. W. 1149.

And according to the decision in *Schell v. Second Nat. Bank*, 14 Minn. 43, Gil. 34, the owner of walls left standing after a fire will not be liable if they fall on adjoining property, resulting in personal injuries and damages to property, if ordinary care has been exercised to make the walls safe, and after such care the owner believed them to be safe.

But he is not relieved on Sundays from the duty to exercise ordinary care to protect adjacent property from danger from its fall. *Dixon v. Wachenheimer*, 9 Ohio C. C. 401, 6 Ohio C. D. 380, 3 Ohio S. & C. P. Dec. 1.

A peremptory instruction that an owner of a wall left standing after a fire will not be liable for damages sustained by its falling on adjoining property if he was advised by city officials and architects that the wall was safe, and he believed it to be so, is improper, that being a question for the jury. *Orr v. Bradley*, *supra*.

Wall falling into adjoining street.

Generally as to liability of municipality for injuries to travelers from overhanging

The plaintiff also asked the court to give instruction No. 2, which is as follows: "It is the duty of an owner of a building to take reasonable care that it shall not fall and injure others; and therefore the mere fact of the fall of a building, whereby a person lawfully on adjoining premises is injured, raises a presumption that the owner of the building has been negligent."

The court, over the objection of the plaintiff, modified in the same manner as in instruction No. 1.

The plaintiff requested instruction No. 4, as follows: "The jury are instructed that the fact, if shown by the evidence, that Hall was erecting a building on his property in violation of a city ordinance, is no defense to this action, and, if true, will

not permit the owner from recovering for his injuries if otherwise entitled thereto."

The court modified this instruction by adding thereto the words: "Unless such violation of the city ordinance was the proximate and contributing cause of his injury."

The court, over the objection of the plaintiff, also gave at the request of the defendant instruction No. 1, as follows: "The court instructs the jury that, before you can find for the plaintiff, you must find from the evidence that the injury to the property of plaintiff was caused by the negligence of the defendant, unless you find that the falling of said wall was negligence within itself, and unless the plaintiff has established the negligence of the defend-

and falling objects, see Index to L.R.A. Notes, "Highways," §§ 68 and 83.

Generally as to liability for dangerous condition of private grounds lying open beside highway or frequented path, see Index to L.R.A. Notes, "Negligence," § 17.

An owner of a building who is negligent in not repairing a wall injured by fire, or in not protecting the public, is liable for injuries to a pedestrian on the street, occasioned by the fall of such wall or a portion thereof. *Howe v. New Orleans*, 12 La. Ann. 481; *Lauer v. Palms*, 129 Mich. 671, 58 L.R.A. 67, 89 N. W. 694; *Hughes v. Harbor & S. Bldg. & Sav. Assn.* 131 App. Div. 185, 115 N. Y. Supp. 320.

So, also, action for the injury lies against a religious corporation where the walls of a church edifice belonging to it were negligently permitted to stand after the rest of the building had been destroyed by fire, and a part of the wall afterwards fell upon a person while passing along the street. *Church of Ascension v. Buckhart*, 3 Hill, 193.

And in *Simmons v. Everson*, 124 N. Y. 319, 21 Am. St. Rep. 676, 26 N. E. 911, it was held that where the neglect of each owner of adjoining buildings to remove or support walls adjacent to the street, left standing after a fire, unites and is the cause of the walls falling, such owners are jointly liable for injuries to a pedestrian lawfully on the street, although no part of the wall of one owner touched such pedestrian, the ground of such joint liability being that, by their conduct, they created a public nuisance.

The owner of walls left standing by a fire in such proximity to the street as to endanger persons thereon is not relieved from liability from injuries to such persons by their fall by the fact that he had told competent architects and builders to do what was necessary to render the walls safe. *Lauer v. Palms*, 129 Mich. 671, 58 L.R.A. 67, 89 N. W. 694.

Nor is he relieved from liability by the fact that his tenant interfered with builders sent to make the necessary repairs, and the assignee of the tenant's goods threatened L.R.A.1915C.

an injunction if the work was continued. *Ibid.*

But an owner of a wall abutting a street, left standing after a fire, will not be liable for the death of a pedestrian, caused by the fall of the wall, if, not knowing whether or not the wall was safe, he, in good faith, for the purpose of ascertaining its condition, with a view of removing it if found unsafe, employed a competent and skilful mechanic to examine the wall, and such person examined it and reported it safe, and if in so doing the owner acted as a reasonably prudent person under the circumstances would have acted. *Freeman v. Carter*, 28 Tex. Civ. App. 571, 67 S. W. 527.

Liability to one on premises.

Generally as to liability to trespassers and licensees for dangerous premises, see Index to L.R.A. Notes, "Negligence," §§ 20, 21. And as to liability to tenant, see references at beginning of note.

Where the life of a building has been destroyed by fire and the walls are no longer used in supporting it, but such walls constitute merely a part of the ruins of the building, to maintain it after the expiration of a reasonable time for investigation and for its removal is not a reasonable and proper use of one's property. And a failure on the part of the owner to remove a wall of this character is still less reasonable or proper when its dangerous condition is known or ought to be known to the owner unless he takes reasonable precautions to give warning of the existence of the danger to persons coming into the vicinity at his invitation, express or implied. *Haack v. Brooklyn Labor Lyceum Assn.* 93 App. Div. 491, 87 N. Y. Supp. 814.

And where a child, while in a private alleyway for the purpose of picking up tickets from the ruins of a burned building, the walls of which were left standing, was injured by the fall of the wall adjoining the alleyway, the question whether the owner had discharged the duty owing to the child was for the jury where such owner conducted a saloon in the rear of the burned

ant, and the injury was the result of such negligence, by a fair preponderance of the evidence, then you will find for the defendant."

The jury returned a verdict for the defendant, and the plaintiff has appealed.

In the case of *Ainsworth v. Lakin*, 180 Mass. 397, 57 L.R.A. 132, 91 Am. St. Rep. 314, 62 N. E. 746, the supreme court of Massachusetts held: "The owner of walls left standing by a fire, which cannot be used for rebuilding, owes adjoining owners the duty, after a reasonable time for investigation, to exercise such care in the maintenance of walls likely to fall on their property as will absolutely prevent injuries except from causes over which he would have no control, such as *vis major*, acts of public enemies, or wrongful acts of third persons which human foresight could not reasonably be expected to anticipate and prevent."

In the case of *Earl v. Reid*, 21 Ont. L. Rep. 545, 18 Ann. Cas. 1, Teetzel, J., said: "I think it is the plain duty of every owner of land to keep the buildings or structures thereon in such a condition that they shall not, by falling or otherwise, cause injury to persons lawfully upon adjoining lands. In other words, every owner of a building is under a legal obligation to take reason-

able care that his building shall not fall in the street or upon his neighbor's land and injure persons lawfully there. While the owner cannot be charged for injuries caused by inevitable accident, the result of *vis major* or of the wilful act or negligence of someone for whom he is not responsible, he is liable for injuries caused by the failure on his part to exercise reasonable care."

The fact that the wall fell is *prima facie* evidence of negligence, in conformity with the maxim, *Res ipsa loquitur*. Thompson's Commentaries on the Law of Negligence, vol. 1, ¶ 1213. See also ¶ 1060 of the same volume. To the same effect, see *Earl v. Reid*, *supra*.

It follows from these principles of law that the court erred in modifying instructions No. 1 and No. 2, asked by plaintiff, and in giving instruction No. 1, asked by defendant.

Moreover, in the present case the undisputed evidence shows that there was left standing on the defendant's land after the fire, which occurred on September 5, 1913, a wall 24 feet high, and that the upper part of this wall could not be used should the defendant decide to rebuild on his lots. The defendant saw the wall standing there

building, access to which was through the alleyway, which was wholly on his premises, and which the public were invited to use. Ibid.

Effect of advice or assurance as to safety.

As to liability as affected by fact that property is in possession of tenant or independent contractor, see references at beginning of note.

The promise of a city officer to take charge of, and if necessary take down, a wall of a burned building, does not relieve the owner of the premises from liability for damages caused by the fall when he has negligently left it standing. *Anderson v. East*, 117 Ind. 126, 2 L.R.A. 712, 10 Am. St. Rep. 35, 19 N. E. 726.

Also in *Knoop v. Alter*, 47 La. Ann. 570, 17 So. 139, where a wall left standing after a fire fell, carrying with it a party wall, resulting in injuries to one in the adjoining building, the landowner was held liable, although the building was in the hands of the insurance company for repairs.

And an owner is not relieved of the duty of exercising ordinary care to see that a wall is safe because of the fact that the city fire department has examined it and found it safe. *Dixon v. Wachenheimer*, 9 Ohio C. C. 401, 6 Ohio C. D. 380, 3 Ohio S. & C. P. Dec. 1. L.R.A.1915C.

So, also, in holding that the fact that the owner of a wall left standing after a fire was advised and believed that the wall was secure and safe enough to be left standing is not sufficient to relieve him from liability for consequences resulting from his mistake, the court said in *Teepen v. Taylor*, 141 Mo. App. 282, 124 S. W. 1062: "An owner of property, of course, has a right to erect a building upon it, but he must so use his own as not to injure his neighbor. He is not an insurer of his neighbor, and therefore is not liable for hidden defects in his structure that examination, care, and prudence would not disclose. So, if, as in this case, he leaves standing a wall remaining from his burnt building, intending to use it as part of a new structure, though it may have been a part of a thoroughly secure building, yet he must see to it that in its less supported condition and its probable injury, more or less, from the fire, it is safe. He must use every endeavor to see that it is safe, or that it is made safe, that a prudent and careful man would use in a like situation, having in view all the time the dangerous character of such a structure unless it is made secure. It is therefore apparent that the belief or good faith of the owner, or his reliance upon what others told him, is not the sole criterion by which the question shall be decided. The standard is, what would a careful and prudent man,

after the fire, and it was patent and obvious to him that the upper portion of it could not be used by him again in rebuilding upon his property. He permitted it to stand there without any effort to remove it or to prop it up so it would not injure the property of persons on the adjoining land. It was his duty not to suffer such a wall to remain on his land, where its fall would injure his neighbor, without using such care in the maintenance of it as would absolutely prevent injuries, except from causes over which he had no control. According to the undisputed evidence, he permitted it to remain there in this dangerous condition from September 5th until October 18th without any effort whatever to remove it or to prop up the upper portion of it. There was therefore no testimony in the case upon which to predicate the modifications to instructions No. 1 and No. 2 asked by the plaintiff.

We are also of the opinion that the court erred in modifying instruction No. 4 asked by plaintiff by adding the words: "Unless such violation of the city ordinance was the proximate and contributing cause of his injury."

There was no testimony upon which to base this qualification of the instruction. According to the undisputed testimony,

plaintiff, in erecting his building, did nothing whatever to undermine or cause to fall the wall of the defendant. If he had erected his building of stone, brick, or iron, the falling of the wall would have injured it just the same. There is no testimony in the record tending to show that plaintiff's erecting a concrete building in any way caused the injury to his property.

The plaintiff insists that the judgment should be reversed and a judgment entered here in his favor, because, he says, the cause had been fully developed, and the undisputed evidence shows the amount of damages suffered by him. He states in his abstract that his damages amounted to \$1,700. But he does not abstract his testimony on this point, and we are not required to explore the record to see whether the testimony on this point is undisputed. Counsel for the defendant deny that it is undisputed, and aver that the damage sustained by the plaintiff, as shown by the record, amounts to only about half the amount claimed by plaintiff.

For the errors indicated, the judgment will be reversed, and the cause remanded for a new trial.

Petition for rehearing denied.

in such situation, in charge of such a dangerous agency, have done?"

But where owners of a burned building, having no special knowledge of these matters, in good faith act upon the advice and assurance of an architect, and particularly upon the advice and assurance of the chief building inspector of the city, that the walls are safe, they have satisfied the onus put upon them to show that they have taken reasonable precautions, and escape liability for damage to adjacent property by the falling of the walls. *McNerney v. Forrester*, 19 West. L. Rep. (Can.) 32.

And in *Olsen v. Meyer*, 46 Neb. 240, 64 N. W. 954, an action to recover for personal injuries caused by the fall of a wall left standing after a fire, the court said that it could not say that the jury was not warranted in finding for the defendant upon the issue of negligence where the evidence was that on the day succeeding the fire defendant consulted a competent and experienced architect with regard to the repairing of the building mentioned, and was advised by the latter, after an examination of the walls, that they were not damaged, that they might be used for the purpose of rebuilding, and that they were perfectly safe as they then stood; that the architect was instructed to prepare plans and specifications for necessary repairs, in which he was employed at the time of the accident; and L.R.A.1915C.

that the defendant, according to his own testimony, acted in good faith, relying upon the advice thus promptly sought and given, in which he was fully corroborated by the architect.

Application of *res ipsa loquitur*.

Generally as to *res ipsa loquitur* in action for injury on highway, including injury by falling walls, see note in 43 L.R.A. (N.S.) 595.

The fact that a wall left standing after a fire falls upon adjoining property raises the presumption that it was unsafe, and the burden is upon the owner to exculpate himself. *Teepen v. Taylor*, *supra*.

And where a brick falls from a wall which has been injured by fire, the rule *res ipsa loquitur* applies. *Hughes v. Harbor & S. Bldg. & Sav. Asso.* 131 App. Div. 185, 115 N. Y. Supp. 320.

So, also, if, after the lapse of a reasonable time to repair or brace the walls of a burned building, the building falls, the fact of its falling is sufficient evidence of its negligent bracing or repair to cast upon the owner the onus of showing that he took all reasonable precautions to prevent the building from falling. *McNerney v. Forrester*, 19 West. L. Rep. (Can.) 32.

J. H. B.

**NEW JERSEY COURT OF ERRORS
AND APPEALS.**

DOMINICK SORIERO, by Next Friend,
Rept.,
v.

PENNSYLVANIA RAILROAD COMPANY,
Appt.

RAFIELE SORIERO, Resp.,
v.

SAME, Appt.,

(86 N. J. L. 642, 92 Atl. 604.)

Negligence — wall adjoining street — loose stones.

1. Where an infant eight or nine years of age, while playing upon a pile of railroad ties, resting against a railroad wall, upon a public street, was injured by the falling of a stone from the wall, and there was testimony from which it was inferable that the stones in the wall were loose and the wall in need of repair, held, that the defendant was prima facie guilty of negligence in maintaining the wall in a dangerous condition to persons lawfully upon the street.

Same — contributory — proximate cause.

2. The fact that the infant was playing upon the ties did not charge it with contributory negligence, since the ties were upon a public street, and the fall of the stone, and not the act of playing upon the ties, was the proximate cause of the injury, and, under the testimony, in no wise connected therewith, as a causal factor in the accident.

(December 1, 1914.)

A PPEAL by defendant from a judgment of the Hudson County Circuit of the Supreme Court in favor of plaintiffs in actions brought to recover damages for personal injuries to the infant plaintiff, alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Vredenburg, Wall, & Carey
for appellant.

Mr. Charles M. Egan for respondents.

Minturn, J., delivered the opinion of the court:

An infant son and his father are plaintiffs, respectively, in two suits against the defendant, seeking damages for injury to

Headnotes by MINTURN, J.

Note. — The applicability of the maxim *Res ipsa loquitur* in an action for injury on a highway, including cases where the injury is caused by the fall of a wall or portion of a structure, is treated in the note to *Corbin v. Benton*, 43 L.R.A. (N.S.) 591.

Generally as to liability for fall of wall, see note to *Hall v. Gage*, ante, 704, and other notes there referred to.
L.R.A.1915C.

the infant. While playing upon some railroad ties, placed against defendant's wall abutting Railroad avenue in Jersey City, Dominick Soriero, the infant plaintiff, eight or nine years old, was injured by the falling of a stone from the wall. There was testimony that the stones in the wall had been loose, and were loose at the time of the accident; but no actual notice or knowledge of that fact was brought home to the defendant, and upon the existence of that fact defendant based its motion to nonsuit, as well as its motion for a direction of a verdict at the close of the case. The trial resulted in a verdict for both plaintiffs.

The motions to nonsuit and to direct a verdict present the defense interposed by defendant, as a question of law, upon substantially undisputed facts, as to the manner and conditions in which the accident occurred. We think it indisputable that the ties upon which the infant plaintiff was playing were upon the public street, and that the infant was not a trespasser upon the defendant's premises or property at the time of the accident, as was the case in *Friedman v. Snare & T. Co.* 71 N. J. L. 605, 70 L.R.A. 147, 108 Am. St. Rep. 764, 61 Atl. 401, 2 Ann. Cas. 497. The falling of the stone was not caused by the fact that the ties were stored upon the street, or that the infant was playing upon them when the stone fell. Those were mere conditions incident to the situation, and were in no wise connected as primal or causal factors of the injury.

The gravamen of the allegation imposing liability is that the plaintiff was lawfully upon the public highway when a stone, due to defendant's carelessness in maintenance, fell, causing the injury complained of. That situation brings the case within the familiar principle which attributes negligence to an abutting owner of property who so negligently manages the same that a passerby lawfully upon the highway is injured. Addison states the principle thus: "Every occupier of a house adjoining a highway is responsible for injuries to passengers, arising from things falling from the house into the streets, unless he can show that the fall arose from storm or tempest, or some inevitable accident." 1 Addison on Torts, 253, and cases cited.

In 29 Cyc. 593, it is stated that "the doctrine under consideration has been applied in cases of materials or articles falling from buildings or other structures onto passers-by on a public street; and the unexplained falling of a building or other structure creates a presumption of negligence."

So Chief Baron Pollock, applying the principle to the case of a passer-by injured

on the highway by the falling of a barrel of flour from the upper window of an abutting warehouse, said: "I think that such a case would, beyond all doubt, afford prima facie evidence of negligence. A barrel could not roll out of a warehouse without some negligence, and to say that a plaintiff who is injured by it must call witnesses from the warehouse to prove negligence seems to me preposterous. So in the building or repairing a house, or putting pots on the chimneys, if a person passing along the road is injured by something falling upon him, I think the accident alone would be prima facie evidence of negligence." *Byrne v. Boadle*, 2 Hurlst. & C. 722.

A case substantially similar in principle to that at bar was *Kearney v. London, B. & S. C. R. Co.* L. R. 5 Q. B. 411, where a railroad bridge had been built three years, and while the plaintiff was passing under it on a public highway a brick fell and injured him. A motion to direct a nonsuit was made, upon the ground that the mere falling of the brick indicated no negligence with which the defendant could legally be charged. The court of Queen's bench held that the case was one for the application of the doctrine of *res ipsa loquitur*; or, in other words, the falling of the brick was prima facie evidence of negligence. Upon appeal to the exchequer chamber (L. R. 6 Q. B. 761, 40 L. J. Q. B. N. S. 285, 24 L. T. N. S. 913, 20 Week. Rep. 24, 19 Eng. Rul. Cas. 1) this doctrine was unanimously affirmed.

The cases elucidating the application of this principle in the concrete are numerous, and a reference to a few of the most notable of them must suffice for the purposes of this case. In *Church of Ascension v. Buckhart*, 3 Hill, 193, it was held that it is the duty of an owner of a ruinous building to prevent its walls from falling. In *Mullen v. St. John*, 57 N. Y. 569, 15 Am. Rep. 530, Commissioner Dwight reviews at length the authorities supporting the principle, and the conclusion there reached was that the owner of a building adjoining a street or highway is bound to take reasonable care that it be kept in proper condition, so that it shall not fall into the street or highway and injure persons lawfully there, and the happening of such an accident was held to be prima facie evidence of negligence. This adjudication has been followed by that court in *Seybolt v. New York, L. E. & W. R. Co.* 95 N. Y. 562, 47 Am. Rep. 75, in *Edwards v. New York & H. R. Co.* 98 N. Y. 261, 50 Am. Rep. 659, and in *Volkmar v. Manhattan R. Co.* 134 N. Y. 418, 30 Am. Rep. 678, 31 N. E. 870, where an iron bolt fell from defend-

ant's elevated structure upon a passer-by, causing damage. In Canada the same doctrine was applied in *Earl v. Reid*, 21 Ont. L. Rep. 545, reported with annotations in 18 Ann. Cas. 1.

The doctrine has also been applied in many cases where the contest has arisen over the respective liabilities of landlord and tenant for the damage resulting from the accident; but in every instance the principle of liability is conceded, whether applied to one or the other, as the facts might warrant. The fundamental requirement of duty upon the part of the defendant is similar, whether applied to an adult passer-by upon the street, or to an infant playing there, who invokes the benefit of the legal status comprehended in the claim of *non sui juris*. *McAlpin v. Powell*, 70 N. Y. 126, 26 Am. Rep. 555; *Hoberg v. Collins, L. & Co.* 80 N. J. L. 425, 31 L.R.A. (N.S.) 1064, 78 Atl. 166, 1 N. C. C. A. 792. That requirement of legal duty has been determined by this court to be to exercise reasonable care and foresight for harm. *Kingsley v. Delaware, L. & W. R. Co.* 81 N. J. L. 536, 35 L.R.A. (N.S.) 338, 80 Atl. 327; *Munroe v. Pennsylvania R. Co.* 85 N. J. L. 691, 90 Atl. 254.

There was evidence in the case at bar that the stones in the wall where the accident happened were loose, and were about to fall, and that this particular stone fell and injured the infant plaintiff. Under the cases referred to, this proof presented a prima facie case, from which, in the absence of satisfactory exculpatory evidence upon the part of the defendant, the jury might properly infer negligence.

The charge of the learned trial court, however, is open to a criticism which necessitates the reversal of this judgment. Speaking of the degree of care which the law imposed upon this defendant under the circumstances, the court charged that the defendant was required to use "that degree and amount of care which is within the range of human precaution and foresight, to keep the wall in such condition as not to cause injury to a person upon the public highway." This language manifestly misconceives the limitations of the rule of legal duty applicable to a landowner in a situation such as is presented here. That rule is circumscribed by the limitation of reasonable care to protect the public against defective construction or disrepair of property adjoining the public highway, and is coequal only with the care required of the ordinarily prudent man under similar circumstances. *Blyth v. Birmingham Waterworks Co.* 11 Exch. 781, 25 L. J. Exch. N. S. 212, 2 Jur. N. S. 333, 18 Eng. Rul. Cas. 621; *Daniel v. Metropolitan R.*

Co. L. R. 5 H. L. 45, 40 L. J. C. P. N. S. 121, 24 L. T. N. S. 815, 20 Week. Rep. 37, 18 Eng. Rul. Cas. 659; Hill v. Winsor, 118 Mass. 251; Com. v. Pierce, 138 Mass. 176, 52 Am. Rep. 264, 5 Am. Crim. Rep. 391; Kingsley v. Delaware, L. & W. R. Co. 81 N. J. L. 536, 35 L.R.A.(N.S.) 338, 80 Atl. 327.

The judgment must therefore be reversed, and a venire de novo is ordered.

CALIFORNIA SUPREME COURT.
(In banc.)

MAMIE R. P. COPELIN et al., Respts.,
v.
BERLIN DYE WORKS & LAUNDRY COM-
PANY, Appt.

(— Cal. —, 144 Pac. 961.)

Bailment — cleaner of clothing — Liability for articles left in pockets.

1. One engaged in the business of clean-

Note. — Liability of bailee for articles which accidentally come into his possession with subject of bailment.

A diligent search shows dearth of authority on the precise question presented in COPELIN v. BERLIN DYE WORKS & LAUNDRY Co. and indicated in the title of this note, i. e., the liability of a bailee with respect to articles accompanying the subject of the bailment such as may be left in clothes sent to a cleaner or repairer, as distinguished from the subject of the bailment itself.

The field of analogous cases has been covered in the following notes:

As to rights and liabilities of finder of property, see notes in 37 L.R.A. 116; 8 L.R.A.(N.S.) 95; and 35 L.R.A.(N.S.) 979. As to larceny of property found, see note in 30 L.R.A.(N.S.) 339.

Generally as to duty and liability of bailee, see Index to L.R.A. Notes, under title, "Bailment."

As to liability of keeper of bath house for loss of guests' valuables, see note to Walpert v. Bohan, 6 L.R.A.(N.S.) 828.

As to liability of storekeeper for property stolen from customer, see note to Wamser v. Browning, K. & Co. 10 L.R.A.(N.S.) 314.

It is stated in Halsbury's Laws of England, vol. 1, page 529, that if a bailee intrusted with a chattel for a specific purpose, such as its reparation or alteration, finds concealed therein some property the presence of which therein was unknown to the true owner at the time when he delivered the chattel over, such property belongs to the owner of the chattels and not to the bailee. And if the bailee commit some act in regard to the concealed property not warranted by the purpose for L.R.A.1915C.

ing clothing does not assume the liability of insurer for articles left in clothing sent him to be cleaned, from the fact that he employs a servant to search the clothing for such articles.

Master and servant — theft by employee — liability of master.

2. A cleaner of clothing is not rendered liable for articles stolen from pockets by his employees, by a statute making employers liable for wrongful acts committed by their agents in and as a part of the transaction of their business; since the stealing of the articles is not within the scope of the employee's duties even though he is required to search the clothing.

Bailment — involuntary — valuables left in clothing sent to cleaner.

3. One who negligently leaves valuables in the pockets of clothing when sending it to a cleaner cannot hold the latter liable for its loss as an involuntary bailee, who by statute is one in whose possession property is accidentally left without negligence on the part of the owner.

(December 2, 1914.)

which the chattel was delivered to him, such unwarranted act amounts to a conversion.

And it was stated by Lord Eldon in Cartwright v. Green, 2 Leach, C. L. 952, 8 Ves. Jr. 405, 7 Revised Rep. 99, if a pocketbook containing bank notes was left in the pocket of a coat sent to be mended, and the tailor took the pocketbook out of the pocket and the notes out of the pocketbook, there is not the least doubt that that is a felony.

In Cartwright v. Green, supra, it was held larceny for one to whom a bureau was sent for repairs to break open a secret drawer therein, which it was not necessary to touch in order to make the required repairs, and to take money therefrom with the intent of appropriating it to his own use. It appeared in this case that the money had been placed in the secret drawer by a person since deceased, and that its presence was not known to the present owner, who sent the bureau to be repaired.

In a similar case, Merry v. Green, 7 Mees. & W. 623, 10 L. J. Mag. Cas. N. S. 154, although not arising under bailment, where the purchaser of a bureau discovered money in a secret drawer which he appropriated to his own use, it was held that the buyer in appropriating the money was guilty of larceny if he knew or had reason to believe that the bureau alone, without the contents, was sold to him. If, however, he had reason to believe that he purchased the bureau with the contents he had a colorable right to the property, and it was not larceny.

The two cases above mentioned, together with others closely analogous, have heretofore been discussed in note in 37 L.R.A. 126, mentioned supra, which treats generally of the rights and liabilities of finder of property.

J. D. C.

APPPEAL by defendant from an order of the Superior Court for Los Angeles County denying a motion for new trial after verdict in plaintiffs' favor, of an action brought to recover the value of a pair of earrings alleged to have been received by defendant and converted by it to its own use. Reversed.

The facts are stated in the opinion.

Messrs. **Harry L. Dearing and Goldberg & Melly**, for appellant:

The liability of the master has never been extended to embrace the wilful or malicious acts of a servant done while engaged in the master's service, but independent of that service and for his own benefit, not contemplated by the employer and containing no element of service in fact, even though the employment furnishes the means and the instruments by which the acts are accomplished.

31 Cyc. 585; Schouler, Bailm. §§ 19, 147; Cooley, Torts, p. 1020; Thomp. Corp. § 5431; Civil Code, §§ 2338, 2339; Walsh v. Hunt, 120 Cal. 47, 39 L.R.A. 697, 52 Pac. 113; Rahmel v. Lehndorff, 142 Cal. 681, 65 L.R.A. 88, 100 Am. St. Rep. 154, 76 Pac. 659, 16 Am. Neg. Rep. 7; Riordan v. Gas Consumers' Asso. 4 Cal. App. 643, 88 Pac. 809; Stephenson v. Southern P. Co. 93 Cal. 558, 15 L.R.A. 475, 27 Am. St. Rep. 223, 29 Pac. 234; Mott v. Consumers' Ice Co. 73 N. Y. 543; Cosgrove v. Ogden, 49 N. Y. 257, 10 Am. Rep. 361; Rounds v. Delaware, L. & W. R. Co. 64 N. Y. 129, 21 Am. Rep. 597, 8 Am. Neg. Cas. 536; Evers v. Krouse, 70 N. J. L. 653, 66 L.R.A. 592, 58 Atl. 181, 16 Am. Neg. Rep. 515; Brennan v. Merchant & Co. 205 Pa. 259, 54 Atl. 891, 13 Am. Neg. Rep. 672; Deihl v. Ottenville, 14 Lea, 191; Baker v. Kinsey, 38 Cal. 631, 99 Am. Dec. 438; Hopkins v. Western R. Co. 50 Cal. 190; Cobb v. Simon, 119 Wis. 597, 100 Am. St. Rep. 909, 97 N. W. 276; Jones v. St. Louis, N. & P. Packet Co. 43 Mo. App. 399; Evansville & C. R. Co. v. Baum, 26 Ind. 70, 8 Am. Neg. Cas. 201; Church v. Mansfield, 20 Conn. 284; Bowler v. O'Connell, 162 Mass. 319, 27 L.R.A. 173, 44 Am. St. Rep. 359, 38 N. E. 498; Union Biscuit Co. v. Springfield Grocer Co. 143 Mo. App. 300, 126 S. W. 996; Morier v. St. Paul, M. & M. R. Co. 31 Minn. 351, 47 Am. Rep. 793, 17 N. W. 952; Limpus v. London General Omnibus Co. 1 Hurlst & C. 526, 32 L. J. Exch. N. S. 34, 9 Jur. N. S. 333, 7 L. T. N. S. 641, 11 Week. Rep. 149, 17 Eng. Rul. Cas. 258.

The theft or malicious destruction of an article bailed by the bailee's servant creates no liability on the part of the master under the principle of *respondet superior* for the employee's torts. The master can in such case be held only for breach of contract to L.R.A.1915C.

use due care, on the principle of estoppel, or where there has been an express or implied warranty of the honesty or reliability of the servant.

Merchants' Nat. Bank v. Guilmartin, 88 Ga. 797, 17 L.R.A. 322, 15 S. E. 831; Scott v. National Bank, 72 Pa. 471, 13 Am. Rep. 711; Ray v. Bank of Kentucky, 10 Bush, 341; Schmidt v. Blood, 9 Wend. 268, 24 Am. Dec. 143; Jones v. Morgan, 90 N. Y. 4, 43 Am. Rep. 131; Deihl v. Ottenville, 14 Lea, 191; Giblin v. McMullen, L. R. 2 P. C. 317, 5 Moore, P. C. C. N. S. 434, 38 L. J. P. C. N. S. 25, 21 L. T. N. S. 214, 17 Week. Rep. 445, 3 Eng. Rul. Cas. 613; Cheshire v. Bailey [1905] 1 K. B. 237, 74 L. J. K. B. N. S. 176, 53 Week. Rep. 322, 92 L. T. N. S. 142, 21 Times L. R. 130, 1 Ann. Cas. 94; Foster v. Essex Bank, 17 Mass. 479, 9 Am. Dec. 168, 1 Am. Neg. Cas. 502; Glover v. Burbidge, 27 S. C. 305, 3 S. E. 471, 1 Am. Neg. Cas. 821; Comp v. Carlisle Deposit Bank, 94 Pa. 409, 1 Am. Neg. Cas. 562; First Nat. Bank v. Rex, 89 Pa. 308, 33 Am. Rep. 767; Finucane v. Small, 1 Esp. 315; Firemen's Fund Ins. Co. v. Schreiber, 150 Wis. 42, 45 L.R.A.(N.S.) 314, 135 N. W. 507, Ann. Cas. 1913E, 823.

The amount recoverable by the plaintiff must be limited to what the defendant would ordinarily expect to find in wearing apparel sent to it for cleaning purposes.

Cussen v. Southern California Sav. Bank, 133 Cal. 534, 85 Am. St. Rep. 221, 65 Pac. 1099; Hunter v. Reed, 12 Pa. Super. Ct. 112.

Mr. **George L. Greer** also for appellant.

Messrs. **Charles Lantz and Davis, Lantz, & Wood**, for respondents:

It was the duty of both the employer and of the employee to take charge of the valuables which came into their hands in the conduct of the business, and to preserve them for the owner; and no act of the plaintiffs would justify the misappropriation of the property by defendant or its representatives.

Jessen v. Peterson, N. & Co. 18 Cal. App. 350, 123 Pac. 219; Chamberlain v. Southern California Edison Co. 167 Cal. 503, 140 Pac. 25.

The wilful, malicious, and even criminal act of the servant is imputable to the master if it is within the scope of the employment.

Bank of California v. Western U. Teleg. Co. 52 Cal. 280; Mitchell v. Finnell, 101 Cal. 615, 36 Pac. 123; Thomp. Corp. § 543; First Nat. Bank v. Graham, 100 U. S. 699, 25 L. ed. 750, 1 Am. Neg. Cas. 588; Schouler, Bailm. & Carr. 3d ed. § 52; Grand Pacific Hotel Co. v. Rowland, 88 Ill. App. 519; Southern R. Co. v. Chambers, 126 Ga. 404, 7 L.R.A.(N.S.) 926, 55 S. E.

37; Land Mortg. Invest. Agency Co. v. Preston, 119 Ala. 290, 24 So. 707; Rhombert v. Avenarius, 135 Iowa, 176, 112 N. W. 548; Thomas v. Arthurs, 8 Kan. App. 126, 34 Pac. 694; Reynolds v. Witte, 13 S. C. 5, 36 Am. Rep. 678; Donnell v. Lewis County Sav. Bank, 80 Mo. 165; Hyre v. Central Bank, 48 Mo. App. 434; Johnson v. Donnell, 90 N. Y. 1; Briggs v. Jones, 8 Misc. 261, 28 N. Y. Supp. 709; First Nat. Bank v. Graham, 100 U. S. 699, 25 L. ed. 750, 1 Am. Neg. Cas. 588; Duggins v. Watson, 15 Ark. 127, 60 Am. Dec. 560; Evansville & T. H. R. Co. v. McKee, 99 Ind. 521, 50 Am. Rep. 102; Cole v. Atlanta & W. P. R. Co. 102 Ga. 474, 31 S. E. 107; F'chengreen v. Louisville & N. R. Co. 96 Tenn. 229, 31 L.R.A. 702, 54 Am. St. Rep. 833, 34 S. W. 219; Trabing v. California Nav. & Improv. Co. 121 Cal. 141, 53 Pac. 644; Planters' Rice-Mill Co. v. Merchants' Nat. Bank, 78 Ga. 574, 3 S. E. 327; Field v. Kane, 99 Ill. App. 1; Pennsylvania Iron Works Co. v. Henry Vogt Mach. Co. 139 Ky. 497, 8 L.R.A.(N.S.) 1023, 96 S. W. 551; Bank of Commerce v. Hoeber, 88 Mo. 37, 57 Am. Rep. 309; Dupre v. Childs, 52 App. Div. 306, 65 N. Y. Supp. 179; Blumenthal v. Shaw, 23 C. C. A. 590, 39 U. S. App. 490, 77 Fed. 954.

Mr. W. J. Wood also for respondents.

Melvin, J., delivered the opinion of the court:

This is an appeal from the order denying defendant's motion for a new trial.

The action was one for \$900, the value of a pair of earrings alleged to have been received by the defendant and converted by it to its own use. Defendant is engaged in the business of cleaning and dyeing clothes. Mrs. Copelin, one of the plaintiffs, sent a suit of clothes belonging to her husband, the other plaintiff, to the establishment of the defendant, for the purpose of having the garments cleaned. The suit was delivered to the driver of one of defendant's wagons. Next morning Mrs. Copelin telephoned to the defendant's office to learn if some bank books, which she believed she had forgotten to remove from one of the pockets of the suit, had been discovered. She was informed that the books had been found. Later, on the same day, she was called on the telephone by one of defendant's employees and asked if she had missed any jewelry. After consultation with her husband she remembered that he had pinned in the watch pocket of the trousers which she had sent to the cleaners, a small bag containing some of her rings and a pair of earrings worth \$900. Both plaintiffs testified to Mr. Copelin's custom of carrying his wife's jewelry in this way. Both

also testified that the defendant had returned to them the bag and the rings, but that they had never received the earrings.

Defendant introduced as witnesses the employees through whose hands the clothes had passed. The driver testified that he had received the clothes and delivered them at the laundry without examining the garments or taking anything from the pockets. The young woman who had searched for and found the bank books swore that she had found nothing else. She passed the suit to another young woman, who marked the garments for identification. The latter said she had neither searched for nor found anything in the pockets, but that she had passed the clothes to Mr. Gray, whose special duty it was to examine all clothing received by defendant, so that articles likely to damage the cloth during the process of cleaning might be removed. According to his testimony, Mr. Gray found the finger rings and nothing else. They were in a small bag, which was loose in the watch pocket of the trousers, not pinned in that pocket as plaintiffs testified it had been. There was a discrepancy in the testimony regarding the number of rings found. Gray said there were three, and plaintiffs insisted that there were four, but this variance is entirely immaterial on appeal, because plaintiffs admitted that all of the rings which had been left in the pocket had been returned to them.

The defendant insists that the evidence was insufficient to sustain the findings of the trial court. Respondents, on the other hand, are of the opinion that the facts of the case bring it within the principles announced by § 2338 of the Civil Code. It appears from the testimony that because frequently articles were left in the pockets of clothes sent to defendant's establishment to be cleaned, dyed, or repaired, defendant employed a man whose special duty it was to search for such articles. Section 2338 of the Civil Code is as follows:

"Unless required by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business, and for his wilful omission to fulfil the obligations of the principal."

It is argued that according to the testimony of plaintiffs the bag containing the earrings was securely tied when it was sent to the cleaners; that, as Mr. Gray testified, it was securely tied when he took it from the pocket; that it had been constantly in the possession of the servants of defendant since leaving that of Mrs. Copelin;

that even admitting the absence of liability for the loss of anything which might have dropped from the pockets and been so lost in the ordinary handling of the clothes prior to the search for the articles, the fact that the bag was tied precluded such theory; and that therefore the court was justified in assuming the abstraction to have been by one of the agents of the defendant in the transaction of his business and as a part of such transaction. The trouble with this theory is that a search of the clothing of customers and the preservation of articles carelessly left in pockets was no part of the contract between the customer and the cleaner. The defendant (whose duty was merely to clean the clothes of Mr. Copelin and to take slight care in preserving articles which might be left therein) had not assumed the functions of an insurer merely because it had, out of an abundance of caution, appointed a searcher for lost articles.

The defendant was not a voluntary bailee of the jewelry of the plaintiffs which came into custody of its servants without its consent or knowledge. Because one of those servants was charged with the duty of searching clothing, it cannot be said that defendant must pay for property left in the pocket of Mr. Copelin's garment and stolen by somebody.

There was no jury, and the learned judge of the trial court did not find that any particular employee of defendant stole the earrings. In his written opinion he used the following language: "I am satisfied that someone in the employ of the defendant must have taken the earrings." To sustain the judgment, therefore, we would be compelled to hold that if any person intrusted with the handling of the suit of clothing stole the property left in a pocket, the defendant would be liable. The allegation of the complaint was that defendant, "being in the possession of the said earrings, unlawfully converted and disposed of the same to its own use," and the finding was that the allegations contained in the complaint were true. But it was not shown that the defendant ever personally, or by any of its officers, knew of the presence of the valuables in Mr. Copelin's clothing. Unless, therefore, the wrong of the servant was committed within the scope of his employment, the corporation was not bound.

Respondents cite such cases as *Chamberlain v. Southern California Edison Co.* 167 Cal. 503, 140 Pac. 26, where department 2 of this court adopted with approval the following statement of the rule as contained in 10 Cyc. 1205: "Under the rule of *respondet superior* a corporation is civil-

ly liable for torts committed by its agent or servant while acting within the scope of his employment, although the corporation neither authorized the doing of the particular act nor ratified it after it was done."

Unquestionably that is the general rule, and we pointed out the additional facts in the *Chamberlain* Case that the servant who caused the injury was operating the motor car under authority of his principal, and that the defendant ratified his act by repairing, for a consideration, the automobile which the servant was engaged in "towing" to its shop. In that case and in similar ones, there was no doubt about the offending servant acting within the scope of his authority. It is the duty of a servant to drive an automobile on the public street safely, and his negligence is imputable to his principal, who is bound to employ a skilled man for such work. But when a servant whose duty it is to collect, mark, or even search clothes steals valuables left therein without the wish or consent of his principal, he is not acting within the scope of his occupation. The liability of the master does not extend to wilful or malicious acts of the servant done while engaged in the master's service, but independent of that service and for the servant's own benefit. And this is true even where the employment furnishes the opportunity for the wrongdoing.

In *Walsh v. Hunt*, 120 Cal. 47, 39 L.R.A. 697, 52 Pac. 115, this court was considering the act of an agent to whom an executed note and mortgage had been left for delivery. The agent altered the figures evidencing the principal sum and the rate of interest. It was held that while the forger was admittedly the agent of the defendant for certain purposes, he had no implied or ostensible authority conferred upon him to commit a forgery. So, here, the agency of the employees of the Berlin Dyeworks & Laundry Company in no instance extended permission to steal jewelry on behalf of that corporation. In *Rahmel v. Lehnendorff*, 142 Cal. 683, 65 L.R.A. 88, 100 Am. St. Rep. 154, 76 Pac. 660, 16 Am. Neg. Rep. 7, it was held that an innkeeper was not liable for an assault and battery committed by a waiter in his dining room upon one of his guests. In the opinion, written by the late Chief Justice Beatty, the rule is thus stated: "By the general law of master and servant, the master is not liable for the malicious torts of the servant committed outside of the scope of his employment. The wrongful act must be one which the servant is empowered under some circumstances to do. It must be something which his employment contemplated, as, for instance, the ejection of a passenger or

intruder from a railroad car. Conductors and brakemen have authority to eject disorderly passengers, or persons who refuse to pay their fare, and it is left to their discretion when such authority shall be exercised. In a proper case they may eject a passenger without incurring any liability themselves or imposing any liability upon their employer, but if they eject him wrongfully and maliciously, the carrier is liable upon the general ground that the act is one which, if lawfully done, could be done in the employer's name, and justified by his authorization. The law on this point is very clearly stated in *Cooley on Torts* ("§535 et seq."), and in none of the decisions of this court has a stricter rule been enforced than as above stated. Under that rule, the defendant cannot be held liable, because there is no finding and no reason to presume that defendant ever authorized his servants to assault his guests, or any other person, under any circumstances."

In *Stephenson v. Southern P. Co.* 93 Cal. 560, 15 L.R.A. 475, 27 Am. St. Rep. 223, 29 Pac. 234, it was held that defendant's engineer who, to frighten passengers on a street car which was in close proximity to defendant's track, backed his engine towards said street car, was not acting within the scope of his employment, and that defendant was not liable for the injury sustained by a passenger who leaped from the street car to avoid the apparent peril. Familiar examples of nonliability of a person for the torts of his servant committed outside of the scope of the latter's duty are found in the so-called "joy ride" cases, wherein owners of automobiles have been held not liable for injuries inflicted by their servants while using the masters' motor cars without authority. We had occasion to cite the leading cases on this subject in *Chamberlain v. Southern California Edison Co.* 167 Cal. 503, 140 Pac. 25. The same principle is applicable to the facts of this case.

The defendant was not chargeable as an involuntary bailee. At common law one could not be made a bailee without his consent. 9 Am. & Eng. Enc. Law, 2d ed. 283. The Civil Code, §§ 1815, 1816, modifies this rule by providing that "an involuntary deposit is made by the accidental leaving or placing of personal property in the possession of any person, without negligence on the part of its owner," and that the involuntary depositary is bound to take charge of the property if able to do so. But the plaintiff, Mrs. Copelin was clearly negligent, and there was no evidence that defendant's servants were authorized or directed to accept, on behalf of their master, the care and custody of property left

in the clothing which they might handle in the course of their employment. Even if we should concede the correctness of respondent's contention that defendant occupied the position of a gratuitous bailee, we should be compelled to hold that the corporation could not be held for the theft. The relation of master and servant does not appertain to the wrongful acts of the latter committed outside the scope of his employment, upon the articles so bailed. In *Merchants' Nat. Bank v. Guilmartin*, 88 Ga. 798, 17 L.R.A. 322, 15 S. E. 831, it was held that a bank is not liable for the theft by its cashier of valuable securities received from one of its customers as a special deposit to be kept simply for the depositor's accommodation, and to be returned to him on demand. It was said by the court, Mr. Justice Lumpkin delivering the opinion, that the cashier had nothing to do with the special deposit except to suffer it to remain in a safe place, and that consequently, in taking it to himself, he was stepping aside from his employment to do an act for personal gain. "Such an act [to quote directly from the opinion] is lacking both in the rendition of and in the intent to render any service to the employer."

To the same effect are *Scott v. National Bank*, 72 Pa. 477, 13 Am. Rep. 711; *First Nat. Bank v. Rex*, 89 Pa. 312, 33 Am. Rep. 767; *Comp v. Carlisle Deposit Bank*, 94 Pa. 409, 1 Am. Neg. Cas. 562; *Foster v. Essex Bank*, 17 Mass. 496, 9 Am. Dec. 168, 1 Am. Neg. Cas. 502; *Glover v. Burbidge*, 27 S. C. 306, 3 S. E. 471, 1 Am. Neg. Cas. 821; and *Deihl v. Ottenville*, 14 Lea, 191.

It follows that the order denying defendant's motion for a new trial must be reversed; and it is so ordered.

We concur: **Sullivan, Ch. J.; Henshaw, J.; Lorigan, J.**

GEORGIA SUPREME COURT.

J. W. GRIFFIN
v.

STATE OF GEORGIA.

(142 Ga. 636, 83 S. E. 540.)

Bank — insolvency — statutory presumption of fraud — constitutionality.

1. Properly construed, Penal Code 1910, § 204, which provides for raising a presumption of fraud against the president and directors of an insolvent bank chartered in this state, is not violative of the 14th

Headnotes by LUMPKIN, J.

Amendment of the Constitution of the United States, on the ground that it abridges the privileges and immunities of citizens of the United States, or deprives the president and directors of an insolvent bank of the equal protection of the laws, or deprives them of life, liberty, or property without due process of law, on the ground that similar provisions have not been made in regard to the president and directors of other corporations than banks.

(a) That section is not violative of the 14th Amendment of the Constitution of the United States for any of the reasons set out in the first question by the court of appeals.

Constitutional law — 5th Amendment — effect.

2. The 5th Amendment of the Constitution of the United States is not a limitation upon the power of the states, but operates upon the national government only. Accordingly, § 204 of the Penal Code of

1910 is not invalid, as being violative of that Amendment.

Same — due process — statutory presumption.

3. Penal Code 1910, § 204, is not violative of article 1, § 1, ¶ 3, of the state Constitution, which declares that "no person shall be deprived of life, liberty, or property, except by due process of law."

Insolvency — what constitutes.

4. Within the meaning of Penal Code 1910, § 204, the "insolvency" of a bank is that condition in which its entire property and assets are insufficient to pay all of its debts.

(a) If the entire property and assets of a bank are sufficient to discharge its liabilities, it is not insolvent, within the meaning of the Penal Code 1910, § 204, although it may not be able to pay its debts immediately as they become due, or to pay its depositors on demand.

(b) Civ. Code 1910, § 2306, which pro-

Note. — Power of legislature to enact prima facie rule of evidence for criminal cases.

- I. Introductory, 717.
- II. Particular constitutional questions.
 - a. Due process of law, 719.
 - b. Equal protection of the laws, 723.
 - c. Trial by jury, 724.
 - d. Right to be confronted with witnesses, 725.
 - e. Involuntary servitude, 725.
 - f. The question of assumption of judicial functions by the legislature, 727.
- III. Particular subjects or facts.
 - a. Gaming, 727.
 - b. Dealing in futures, 728.
 - c. Liquor laws.
 1. In general, 729.
 2. United States license as prima facie evidence, 731.
 - d. Failure of bank, 732.
 - e. Frauds on employers, 733.
 - f. Frauds on hotels, etc., 733.
 - g. Bastardy, 733.
 - h. Possession of marked bottles, etc., 734.
 - i. Possession of stolen property, 734.
 - j. Reputation or repute as evidence, 734.
 - k. Miscellaneous statutes, 736.
- IV. Miscellaneous, 736.

I. Introductory.

This note is confined to criminal statutes. For power of legislature to make injury prima facie evidence of negligence, see the note to Mobile, J. & K. C. R. Co. v. Turnipseed, 32 L.R.A.(N.S.) 226. For the earlier cases on legislative power to make possession of a certain amount of intoxicating liquor evidence of an intent to violate the law against illegal sales, see the note to State v. Barrett, 1 L.R.A.(N.S.) 626. For burden of proof as to license or permit in prosecution for sale of intoxicating liquor L.R.A.1915C.

without a license, see the note to Bell v. State, 36 L.R.A.(N.S.) 98. See also upon the general subject the note to Banks v. State, 2 L.R.A.(N.S.) 1007.

The reader will, of course, understand that some of the matters in subdiv. II. infra, classified separately from "Due process of law," might properly be covered by that general designation. This is particularly so where some right is not expressed in terms in a Constitution.

The statute under consideration in GRIFFIN v. STATE was also sustained in Youmans v. State, 7 Ga. App. 101, 66 S. E. 383. For further proceedings in the Georgia court of appeals in the GRIFFIN CASE subsequently to the decision of the supreme court, see 83 S. E. 891.

The reader will, of course, distinguish between the matter of making a fact prima facie evidence of an offense, and the matter of creating a substantive offense. Thus, to make the drawing of the curtains of a saloon prima facie evidence of the unlawful sale of liquor is a different thing from making the drawing of such curtains an offense. This note is not concerned with the question of the power to create substantive offenses.

"Prima facie evidence."

"Prima facie evidence is sufficient evidence to outweigh the presumption of innocence, and if not met by opposing evidence, to support a verdict of guilty. 'It is such as, in judgment of law, is sufficient to establish the fact; and, if not rebutted, remains sufficient for the purpose.' Kelly v. Jackson, 6 Pet. 632, 8 L. ed. 526." Bailey v. Alabama, 219 U. S. 219, 55 L. ed. 191, 31 Sup. Ct. Rep. 145, reversing 161 Ala. 75, 49 So. 886.

Limitations of legislative power to make rules of evidence.

The limitations upon the power of the legislature in making certain facts prima

vides for the winding up of a bank by the state bank examiner under certain circumstances therein declared, does not furnish a definition of insolvency to be applied in construing Penal Code 1910, § 204.

(November 11, 1914.)

CERTIFICATION by the Court of Appeals for the opinion of the Supreme Court of questions arising upon trial of an information charging defendant with accepting a deposit knowing the bank was insolvent. Negative answers returned.

The questions certified by the court of appeals to the supreme court were as follows:

"(1) Is § 204 of the Penal Code of Georgia of 1910 violative of the provisions of

facie evidence of the main fact in question are that the evidentiary fact should have a fair and reasonable relation to the main fact and a tendency to prove it, and that the defendant should not be deprived of proper opportunity to submit all the facts bearing upon the issue. See authorities in next paragraph; see also *infra*, II. a.

Judicial explanations of the doctrine.

In *People v. Cannon*, 139 N. Y. 32, 36 Am. St. Rep. 668, 34 N. E. 759, *infra*, III. h, the court said: "It cannot be disputed that the courts of this and other states are committed to the general principle that even in criminal prosecutions the legislature may, with some limitations, enact that when certain facts have been proved they shall be *prima facie* evidence of the existence of the main fact in question. . . . The limitations are that the fact upon which the presumption is to rest must have some fair relation to, or natural connection with, the main fact. The inference of the existence of the main fact because of the existence of the fact actually proved must not be merely and purely arbitrary, or wholly unreasonable, unnatural, or extraordinary, and the accused must have in each case a fair opportunity to make his defense, and to submit the whole case to the jury, to be decided by it after it has weighed all the evidence, and given such weight to the presumption as to it shall seem proper. A provision of this kind does not take away or impair the right of trial by jury. It does not in reality and finally change the burden of proof. The people must at all times sustain the burden of proving the guilt of the accused beyond a reasonable doubt. It, in substance, enacts that, certain facts being proved, the jury may regard them, if believed, as sufficient to convict, in the absence of explanation or contradiction. Even in that case, the court could not legally direct a conviction. It cannot do so in any criminal case. That is solely for the jury, and it could have the right, after a survey of the whole case, to refuse to convict unless satisfied by L.R.A.1915C.

the 14th Amendment of the Constitution of the United States, that 'no state shall make of enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' for the reason that the provision of this section of the Code that every insolvency of a chartered bank shall be deemed fraudulent, and the president and directors shall be severally punished by imprisonment and labor in the penitentiary, abridges the privileges and immunities of citizens of the United States, or deprives the president and directors of such a bank of equal protection of the laws

yond a reasonable doubt of the guilt of the accused, even though the statutory *prima facie* evidence were uncontradicted." See also *Board of Excise v. Merchant*, 103 N. Y. 143, 57 Am. Rep. 705, 8 N. E. 484, *infra*, II. a, and III. c, 1.

In *Bailey v. Alabama*, 219 U. S. 219, 55 L. ed. 191, 31 Sup. Ct. Rep. 145, *infra*, II. e, the court said: "This court has frequently recognized the general power of every legislature to prescribe the evidence which shall be received and the effect of that evidence, in the courts of its own government. *Fong Yue Ting v. United States*, 149 U. S. 698, 749, 37 L. ed. 905, 13 Sup. Ct. Rep. 1016. In the exercise of this power numerous statutes have been enacted providing that proof of one fact shall be *prima facie* evidence of the main fact in issue; and where the inference is not purely arbitrary, and there is a rational relation between the two facts, and the accused is not deprived of a proper opportunity to submit all the facts bearing upon the issue, it has been held that such statutes do not violate the requirements of due process of law. *Adams v. New York*, 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372; *Mobile, J. & K. C. R. Co. v. Turnipseed*, 219 U. S. 35, 55 L. ed. 78, 32 L.R.A.(N.S.) 226, 31 Sup. Ct. Rep. 136, 2 N. C. C. A. 243, Ann. Cas. 1912A, 463. The latest expression upon this point is found in the case last cited, where the court, by Mr. Justice Lurton, said: 'That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law, or a denial of the equal protection of the law, it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed. If a legislative provision not unreasonable in itself, prescribing a rule of evidence, in either criminal or civil cases,

with like officers of other corporations, as to whom there is no law providing that insolvency of the corporation shall be deemed fraudulent, and that the president and directors or other officers shall be severally punishable by imprisonment and labor in the penitentiary on proof of insolvency of the corporation, or for the reason that this provision of the Code destroys or abridges the presumption of innocence which the law raises as evidence in behalf of everyone charged with crime, or for the reason that it deprives the president and directors of an insolvent chartered bank of the right of presenting their defense to the charge of fraudulent intent, especially since, under the law of this state, the defendant is deprived of the right of testifying in his own

behalf, or for the reason that this section of the Code declares insolvency of a chartered bank to be fraudulent and provides that the president and directors of the bank shall be punished, even though they had nothing to do with the management of the bank, and though the insolvency was not brought about by their conduct or with their knowledge, or for any other reason suggested by the defendant's demurrer?

"(2) Is § 204 of the Penal Code, for any of the reasons stated in the foregoing question, violative of the provision of the 5th Amendment of the Constitution of the United States that 'no person shall . . . be deprived of life, liberty, or property, without due process of law'?"

"(3) Is § 204 of the Penal Code, for any

does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him."

These observations of Mr. Justice Lurton were also quoted in *Ex parte Woodward*, 181 Ala. 97, 61 So. 295, *infra*, III. c. 1.

Compare in general the views of Selden, J., in *Wynchamper v. People*, 13 N. Y. 446, *infra*, II. a.

The evidentiary facts and conditions should be relative to the inquiry and tend to prove the fact in issue. *State v. Dowdy*, 145 N. C. 432, 58 S. E. 1002, *infra*, III. c. 2.

See also *GRIFFIN v. STATE*.

In *State v. Potello*, 40 Utah, 56, 119 Pac. 1023, *infra*, III. i, the court referred to the note to *Banks v. State*, 2 L.R.A.(N.S.) as follows: "As correctly stated in *Notes to Cases*, 2 L.R.A.(N.S.) 1009: 'Most of the statutory rules of evidence that have been upheld are in the form of a declaration that certain facts shall be prima facie evidence of another fact, and the distinction generally observed by the courts is that between declaring certain facts conclusive evidence of another fact, and declaring them prima facie or presumptive evidence of another fact.'"

In *Diamond v. State*, 123 Tenn. 348, 131 S. W. 666, *infra*, III. c. 2, the court, in sustaining the constitutionality of a statute providing that the procuring of a United States revenue license must be taken as prima facie evidence that the person so procuring it is engaged in the liquor business, said: "A statute making the possession of an internal revenue license or other fact indicated by the legislature prima facie evidence of the carrying on of a prohibited business does not make it obligatory upon the jury to convict after the presentation of such evidence, but shifts upon the accused the duty to explain. The rule is that statutes which undertake to make evidence of certain facts absolute or conclusive proof of guilt are unconstitutional." L.R.A.1915C.

tional. Those, however, which merely declare statutory presumptions affecting the burden of proof, are valid."

In this connection reference may be made to *State v. Donato*, 127 La. 393, 53 So. 662, where a statute was sustained providing that a certificate of the internal revenue collector showing that an internal revenue license or permit was issued within one year preceding the finding of the indictment or the filing of the bill, which covered the period within which the licensee was charged with keeping a grog and tippling shop or retailing spirituous or intoxicating liquors, was prima facie evidence that the licensee was guilty of keeping a grog or tippling shop or retailing spirituous or intoxicating liquors in violation of law. The court stated that if the legislature leaves the door open to defendant to show that the record offered against him is not correct, and that he did not as a matter of fact take out the license, the constitutional guaranties of a fair trial and of not condemning without a hearing are not infringed.

II. Particular constitutional questions.

a. Due process of law.

As heretofore stated the reader will, of course, understand that some of the matters classified separately from "Due process of law" might properly be covered by that general designation.

Generally speaking, a statute declaring a prima facie rule of evidence is not violative of due process of law.

Thus, a person is not deprived of the right of due process of law by a statute providing that the finding of gambling implements in a house shall be prima facie evidence that such house is kept for the purpose of gambling (*Wooten v. State*, 24 Fla. 335, 1 L.R.A. 819, 5 So. 39, *infra*, III. a.); nor by a statute providing that it shall be sufficient to show the character of a house by repute (*State v. Weston*, 3 Ohio S. & C. P. Dec. 15, *infra*, III. j).

So, there is no infringement of the con-

of the reasons stated above, violative of the provision of article 1, § 1, ¶ 3, of the Constitution of the state of Georgia, that 'no person shall be deprived of life, liberty, or property, except by due process of law?'

"(4) Is a bank insolvent, within the meaning of § 204 of the Penal Code, if the entire property and assets of the bank are sufficient to discharge its liabilities by process of liquidation, even though it may not be able to pay its debts immediately as they become due, or to pay its depositors on demand? In what respect, if any, is the meaning of the term 'insolvency,' as applied to a chartered bank, differentiated from the meaning of that term as applied to the financial condition of an individual? Are §§ 2306 of the Civil Code and 204 of the

Penal Code to be construed together, and is the test of insolvency indicated in the former section to be applied in construing the latter?"

Penal Code 1916, § 204 to which reference is made in the preceding questions reads, is as follows: "Every insolvency of a chartered bank, or refusal or failure to redeem its bills on demand, either with specie or current bank bills passing at par value, shall be deemed fraudulent, and the president and directors shall be severally punished by imprisonment and labor in the penitentiary for not less than one year nor longer than ten years: Provided, that the defendant may repel the presumption of fraud, by showing that the affairs of the bank have been fairly

stitutional guaranty of due process of law by a statute punishing bankers who receive deposits when insolvent which are afterward lost to the depositor, and providing that failure within thirty days after receiving such a deposit shall be prima facie evidence of an intent to defraud. *Meadowcroft v. People*, 163 Ill. 56, 35 L.R.A. 176, 54 Am. St. Rep. 447, 45 N. E. 991.

A statute is not unconstitutional as a deprivation of a person's liberty without due process of law, which provides that proof of establishing an office where are posted, from information received, the fluctuating prices of cotton, grain, etc., shall constitute prima facie evidence of guilt of the offense prohibited by an act prohibiting dealings in futures. *Logan v. Postal Tele. & Cable Co.* 157 Fed. 570, *infra*, III. b.

In *Board of Excise v. Merchant*, 103 N. Y. 143, 57 Am. Rep. 705, 8 N. E. 484, *infra*, III. c, 1, the court of appeals, in sustaining a statute making the act of drinking in a place licensed for wholesale sales, but not for drinking, prima facie evidence of a sale with the intent that the liquor "should be drank therein," said: "The learned counsel for the appellant claims that this provision of the statute is unconstitutional, on the ground that it violates the constitutional guaranties of due process of law and trial by jury. We think the claim unfounded. The general power of the legislature to prescribe rules of evidence and methods of proof is undoubted. While the power has its constitutional limitations, it is not easy to define precisely what they are. A law which would practically shut out the evidence of a party, and thus deny him the opportunity for a trial, would substantially deprive him of due process of law. It would not be possible to uphold a law which made an act prima facie evidence of crime, over which the party charged had no control and with which he had no connection, or which made that prima facie evidence of crime which had no relation to a criminal act, and no tendency whatever by itself to prove a criminal act. But so long as the legislature, in prescribing

ing rules of evidence, in either civil or criminal cases, leaves a party a fair opportunity to make his defense, and to submit all the facts to the jury to be weighed by them, upon evidence legitimately bearing upon them, it is difficult to perceive how its acts can be assailed upon constitutional grounds." But the court in the *Auburn Case* also decided that the result in the case did not depend upon the statute.

The same statute had been held invalid in *People v. Lyon*, 27 Hun, 180, on the ground that the jury, and not the legislature, ought to determine the guilt.

In *Adams v. New York*, 192 U. S. 585, 48 L. ed. 595, 24 Sup. Ct. Rep. 372, affirming 176 N. Y. 351, 63 L.R.A. 406, 98 Am. St. Rep. 675, 68 N. E. 636, in response to the argument that the statute making the possession of policy slips, etc., presumptive evidence of "possession thereof knowingly," in violation of a provision making such "possession knowingly" a crime, violated the 14th Amendment to the United States Constitution, the court said: "We fail to perceive any force in this argument. The policy slips are property of an unusual character, and not likely, particularly in large quantities, to be found in the possession of innocent parties. Like other gambling paraphernalia, their possession indicates their use or intended use, and may well raise some inference against their possessor, in the absence of explanation. Such is the effect of this statute. Innocent persons would have no trouble in explaining the possession of these tickets, and in any event the possession is only prima facie evidence, and the party is permitted to produce such testimony as will show the truth concerning the possession of the slips. Furthermore, it is within the established power of the state to prescribe the evidence which is to be received in the courts of its own government. *Fong Yue Ting v. United States*, 149 U. S. 698-729, 37 L. ed. 905-918, 13 Sup. Ct. Rep. 1016."

See also *supra*, I., "Judicial explanations," and *State v. Griffin*, 154 N. C. 611, 70 S. E. 292, *infra*, II. e.

L.R.A.1915C.

pp. 721-23

...e been proved, they shall, even in a criminal case, be prima facie evidence of the guilt of the accused, and shift the burden of proof. On this power there are limitations, the principal one of which is that the facts and circumstances which will raise the presumption that the burden of proof must have a fair relation to, or material connection with, the main fact as to which the presumption is raised. The inference or presumption from the facts proved must not be merely arbitrary, or wholly unreasonable, unnatural, or extraordinary, but must bear some reasonable relation to the facts proved. To illustrate: If the legislature should declare that every man found wearing a straw hat in September should be presumed to have committed any forg-

That every man is presumed innocent until proved guilty, and that the burden is on the state to overcome the presumption of innocence by preponderance of the evidence, is not a valid objection to a statute punishing bankers who receive deposits from insolvent, which are afterward lost to depositor, and providing that "the failure, suspension, or involuntary liquidation of the banker, broker, banking company or incorporated bank, within thirty days from the time of receiving such deposit, shall be prima facie evidence of an intent to defraud on the part of such banker, broker, or officer of such banking company or incorporated bank." *Meadowcroft v. People*, 163 Ill. 50, 35 L.R.A. 176, 54 Am. St. Rep. 447, 45 N. E. 991; *State v. Beach*, 147 Ind. 74, 36 L.R.A. 179, 43 N. E. 949.

In *Com. v. Minor*, 88 Ky. 422, 11 S. W. 472, also *infra*, III. c. 1, the court said: "In all statutory crimes it is competent for the legislature to say that certain acts proven by the commonwealth shall be sufficient to make out a presumptive case against the accused, and cast the burden of proof upon him, provided the burden is not cast upon him to prove his innocence without first requiring the commonwealth to prove some material fact or circumstance conducing to prove the guilt of the accused. For instance, where it has been proven that a faro bank or other table mentioned in the statute has been set up in any of the houses mentioned in the statute, the statute makes such proof presumptive evidence that the faro bank or other table was set up by the permission of the person occupying or controlling the house, etc. The constitutionality of this provision has never been questioned. In the case of *Burford v. Com.* 14 B. Mon. 24, the right of the commonwealth to convict on such testimony was sanctioned."

In *Durfee v. State*, 53 Neb. 214, 73 N. W. 676, where the court sustained a statute making it unlawful for any person to keep for the purpose of sale, without a license, any spirituous, etc., liquor, and declaring that possession of the liquor shall be pre-

held that in a statute prohibiting the employment of workmen on public works for more than eight hours a day, the provision that working more than eight hours in any one day shall be prima facie evidence of the violation of the statute is contrary to fundamental principles of criminal law, as the statute already provided that in cases where a Saturday half holiday is given, employees may work more than eight hours on other days of the week, and that such cases would be common and in all of them work for a longer time than eight hours on any other day would not indicate a probability of violation of the law; and thus the evidence has no tendency to establish guilt.

See also *Com. v. Anselvich*, 186 Mass. 376, 104 Am. St. Rep. 590, 71 N. E. 790, *infra*, II. b.

Interference with the presumption of innocence.

It is not a valid objection to statutory prima facie rules of evidence that they interfere with the presumption of innocence. *Meadowcroft v. People*, 163 Ill. 56, 35 L.R.A. 176, 54 Am. St. Rep. 447, 45 N. E. 991; *State v. Beach*, 147 Ind. 74, 36 L.R.A. 179, 43 N. E. 949; *Com. v. Minor*, 88 Ky. 422, 11 S. W. 472; *Durfee v. State*, 53 Neb. 214, 73 N. W. 676; *State v. Kline*, 50 Or. 426, 93 Pac. 237; *State v. Kyle*, 14 Wash. 550, 45 Pac. 147, *infra*, III. c. See also *Lincoln v. Smith*, *infra*. L.R.A.1915C.

ery which took place in that month, such an act would be invalid, because there is no rational connection between forgery and wearing a straw hat, and the presumption would be purely arbitrary. But if the legislature should declare that one found in possession of stolen goods shortly after a larceny should be prima facie presumed to be the thief, and that the burden of rebutting the presumption should rest on him, this would be valid; the presumption not being purely arbitrary, but there being a reasonable connection between the possession of the stolen goods and the commission of the larceny. Moreover, the presumption so raised must not be final; but the accused must be allowed a fair opportunity to make his defense, and show

sumptive evidence of guilt "unless after examination he shall satisfactorily account for and explain the possession thereof, and that it was not kept for an unlawful purpose," the court, in overruling an objection that an instruction following the statute was erroneous as shifting the burden of proof from the state to the accused, stated that the presumption was not conclusive, but that the effect of the statute was to cast the burden upon the person having intoxicating liquors in his possession to establish that they were kept not for sale in violation of law.

In *State v. Kline*, 50 Or. 426, 93 Pac. 237, *infra*, III. c. 1, the court said: "The rule which imposes upon a defendant the burden of proof in a prosecution for statutory crime does not violate any vested right which he possesses. 12 Cyc. 380."

In *Lincoln v. Smith*, 27 Vt. 328, an action for trespass against officers, etc., who seized liquors, the court, in discussing the statute under which they acted, stated that the return of the officer upon the warrant was at least prima facie evidence of his proceedings under it, and said that there was no constitutional objection to the passage of a law that the presumption of innocence "should be overcome by a presumption founded upon the experience of human conduct; and it was competent for the legislature to enact what evidence should be sufficient to overcome such a presumption."

In *State v. Yardley*, 95 Tenn. 546, 34 L.R.A. 656, 32 S. W. 481, *see infra*, II. c. it was stated that under a statute declaring a prima facie rule of evidence an accused is allowed the presumption of innocence as fully as in any other case.

The reason is sometimes given that the prima facie evidence is easily rebutted by the innocent.

Thus, it has been said that the information upon which rests the right of a Chinaman to remain in this country is peculiarly in his possession (*Re Sing Lee*, 54 Fed. 334); and that innocent persons would have no difficulty in explaining the possession of policy tickets (*Adams v. New York*, 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. L.R.A.1915C.

all of the facts bearing on the issue, and to have the whole case submitted to the jury for decision, after considering all of the evidence, as well as the prima facie presumption, if the facts from which it arises have been proved to exist. *Banks v. State*, 2 L.R.A.(N.S.) 1007, and note (24 Ga. 15, 52 S. E. 74); *Vance v. State*, 128 Ga. 661, 57 S. E. 889; *Wilson v. State*, 138 Ga. 489, 493, 75 S. E. 619; 2 *Jones*, Ev. § 196; *Mobile, J. & K. C. R. Co. v. Turnipseed*, 219 U. S. 35, 31 Sup. Ct. Rep. 136, 2 N. C. C. A. 24, 55 L. ed. 78, 32 L.R.A.(N.S.) 226, Ann. Cas. 1912A, 463, and note; *State v. Thomas*, 6 Ann. Cas. 744, 746, and note (144 Ala. 77, 2 L.R.A.(N.S.) 1011, 113 Am. St. Rep. 17, 40 So. 271); 3 *Enc. Ev.* 291; 14 *Enc. Ev.* 110.

372, affirming 176 N. Y. 351, 63 L.R.A. 406, 98 Am. St. Rep. 675, 68 N. E. 636, *supra*, I.). See also the note to *Bell v. State*, 36 L.R.A.(N.S.) 98.

But in *People v. Cannon*, 139 N. Y. 32, 36 Am. St. Rep. 668, 34 N. E. 759, *infra*, III. h, the court considered that the power of the legislature to pass statutes as to the prima facie effect of certain facts was not to be confined to cases where the explanation of the fact from which the presumption was to arise was peculiarly within the knowledge of the accused.

—contrary doctrine.

In *Wynehamer v. People*, 13 N. Y. 446, *Selden, J.*, who agreed with the majority of the court in the result, the other members not apparently discussing the question of presumption, said: "Precisely how far the legislature may go in changing the modes and forms of judicial proceeding, I shall not attempt to define; but I have no hesitation in saying that they cannot subvert that fundamental rule of justice which holds that every man shall be presumed innocent until he is proved guilty. This rule will be found specifically incorporated into many of our state Constitutions, and is one of those rules which in our Constitution, are compressed into the brief but significant phrase, 'due process of law.' Can § 17 be reconciled with this rule? It provides that upon every prosecution under the act, proof of a sale of liquor shall sustain an averment of an unlawful sale, and proof of delivery shall be prima facie evidence of a sale. It is plain that at common law the legal presumption would be directly the reverse of that declared by the act. Where the common law would presume innocence, this act presumes guilt. Either the guaranty of a judicial trial, according to the course of the common law, is a nullity, or this provision is void. But I am prepared to go further, and to hold that all those fundamental rules of evidence which, in England and in this country, have been generally deemed essential to the due administration of justice, and which

The exercise of this power by the legislature in relation to chartered banks, so as to raise a *prima facie* presumption of fraud against the president and directors upon proof of the insolvency of the bank, is not violative of the 14th Amendment of the Constitution of the United States on the ground that it deals with chartered banks, and not with other corporations. Legitimate classification in such cases does not deprive persons within the class of the equal protection of the laws. If banks cannot be legitimately classified, without including all other corporations in the legislation applicable to them, then all the banking laws of the country, national and state, would have to be declared invalid. If the business of banking furnishes a

legitimate basis for classification in many respects, is the presumption raised by Penal Code 1910, § 204, an arbitrary presumption without legitimate basis? That section does not provide punishment for mere insolvency, but contemplates fraudulent insolvency of banks. The president and directors have duties to discharge in regard to the management of the bank and its affairs. The causes which bring about the insolvency of a bank are much more within the knowledge of its managing officials than of persons not connected with it. To impose on the state, in a prosecution for a fraudulent insolvency, the onus of proving all of the transactions of the bank and the acts of its officials, would place upon it a heavy burden. It is much easier for the

have been acted upon and enforced by every court of common law for centuries, are placed by the Constitution beyond the reach of legislation. They are but the rules which reason applies to the investigation of truth, and are, of course, in their nature unchangeable. If it does not follow that to determine what they are, as applicable to judicial proceedings, is a judicial, and not a legislative, power, still they must necessarily be included in the phrase, 'due process of law.' If this be not the true interpretation of the Constitution; if the legislature, in addition to declaring what acts and what intentions shall be criminal, can also dictate to courts and juries the evidence, and change the legal presumptions upon which they shall convict or acquit,—there is no barrier to legislative despotism; and the separation of the legislative and judicial departments of the government, the guaranty of trial by jury, and of a trial according to the course of the common law, have all failed to afford any substantial security to individual rights."

See also *State v. Beswick*, 13 R. I. 211, 43 Am. Rep. 26, *infra*, III. j; *State v. Kartz*, 13 R. I. 528, *infra*, III. j; and *Hammond v. State*, 78 Ohio St. 15, 15 L.R.A. (N.S.) 906, 125 Am. St. Rep. 684, 84 N. E. 416, 14 Ann. Cas. 732, *infra*, II. d.

It may be noted also that in *Re Wong Hane*, 108 Cal. 680, 49 Am. St. Rep. 138, 41 Pac. 493, *infra*, III. a, the court held invalid an ordinance making it unlawful for a person to have in his possession any lottery ticket, etc., unless it was shown that such possession was innocent or for a lawful purpose, as a person accused is entitled to the presumption of innocence.

b. Equal protection of the laws.

Statutory *prima facie* rules of evidence in general do not deny the equal protection of the laws. See *Lurton, J., in Mobile, J. & K. C. R. Co. v. Turnipseed*, 219 U. S. 35, 55 L. ed. 78, 32 L.R.A. (N.S.) 226, 31 Sup. Ct. Rep. 136, 2 N. C. C. A. 243, Ann. Cas. 1912A, 463, quoted in *Bailey v. Alabama*, L.R.A.1915C.

219 U. S. 219, 55 L. ed. 191, 31 Sup. Ct. Rep. 145, *supra*, I; also *GRIFFIN v. STATE*.

The equal protection of the laws is not infringed by a clause excepting public officers from a provision making the possession of policy slips, etc., presumptive evidence of possession thereof knowingly, in a statute making such "possession knowingly" a crime. *Adams v. New York*, 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372, affirming 176 N. Y. 351, 63 L.R.A. 406, 98 Am. St. Rep. 675, 68 N. E. 636.

In *Vance v. State*, 128 Ga. 661, 57 S. E. 889, cited in the opinion in *GRIFFIN v. STATE*, the court held that the Georgia statute referred to *infra*, II. e, did not deny the equal protection of the law because the person contracted with, and for whom the services are to be rendered, is permitted to testify to a state of facts declared to be sufficient to carry the presumption of fraudulent intent, whereas the accused is not permitted to testify, and has no opportunity or means equal to those afforded to the person contracted with, of proving that no fraudulent intent existed, the act laying down no measure of proof by which such presumption may be overcome. The court stated that to say that the equal protection of the law was denied because the prosecutor can testify, and the person accused of the crime cannot, would upset the practice in criminal procedure for centuries back. Further it was held that the act was not unconstitutional because on its face it did not declare the exact amount of proof which would overcome a disputable presumption raised by law from a given state of facts, nor was it unconstitutional as relating to contracts of a certain class, as this was a reasonable classification. And the court followed the decision in *Banks v. State*, 124 Ga. 15, 2 L.R.A. (N.S.) 1007, 52 S. E. 74, that the act was not an assumption of judicial functions by the legislature.

A statute against the selling, buying, use, etc., of registered bottles, except where there has been a purchase from the owner, etc., is not unconstitutional by reason of a clause in the statute providing that possession by an agent or dealer without the

managing officials of the bank to show that the insolvency was not fraudulent, but arose from other causes. The facts are peculiarly accessible to them, if they properly discharge their duties. The suggestion that the president and directors frequently take little or no part in managing a bank can have but little weight. It is the duty of directors to direct, though they may commit certain ministerial duties to authorized officers. We have recently had occasion, in regard to trading corporations generally, to declare that, while such directors may commit the active management of the business to authorized officers, this will not relieve them from the duty of reasonable supervision, and it was said: "Unfortunately some directors appear to think

that they have fully discharged their duties by acting as figureheads and dummies." *McEwen v. Kelly*, 140 Ga. 720, 79 S. E. 777.

It is not meant that carelessness will necessarily import guilt; but duties rest upon the president and directors of a chartered bank in regard to the management of its affairs, which furnish a legitimate basis for a legislative act raising a presumption that they have been guilty of fraudulent mismanagement when the bank becomes insolvent. Giving the statute a reasonable construction, the presumption was not intended to be conclusive. The argument that the expression, "shall be deemed fraudulent," meant that it should be finally adjudged fraudulent, is unsound. The latter part of the section provides for repelling

written consent of, or purchase from, the owner, is *prima facie* evidence of a violation of the statute, for this clause is not unconstitutional as class legislation, nor can it be said that the conditions referred to in this statute are so far from probable guilt as to furnish no justification for the legislative enactment that they shall be deemed *prima facie* evidence of guilt. *Com. v. Anselvich*, 186 Mass. 376, 104 Am. St. Rep. 590, 71 N. E. 790. The court referred, as not in harmony, to *Gillespie v. People*, 188 Ill. 176, 52 L.R.A. 283, 80 Am. St. Rep. 176, 58 N. E. 1007, and *Horwich v. Walker-Gordon Laboratory Co.* 205 Ill. 497, 98 Am. St. Rep. 254, 68 N. E. 938, *infra*, III. h. But the *Gillespie* Case does not seem to pass upon rules of evidence.

c. Trial by jury.

Statutory *prima facie* rules of evidence do not infringe the right of trial by jury. They do not take from the jury the right to determine the weight of evidence.

A statute does not take from the jury the right to determine the weight of evidence, which declares that the failure of a banker shall be *prima facie* evidence of insolvency at the earlier time of receiving a deposit. *State v. Buck*, 120 Mo. 479, 25 S. W. 573 (conviction reversed on other grounds), followed in *State v. Sattley*, 131 Mo. 464, 33 S. W. 41.

See also *infra*, III. d.

A fortiori the right of trial by jury is not infringed by a statute declaring that the failure of a banker within thirty days after receiving a deposit shall be *prima facie* evidence of an intent to defraud. *Meadowcroft v. People*, 163 Ill. 56, 35 L.R.A. 176, 54 Am. St. Rep. 447, 45 N. E. 991.

A statute is not in derogation of the constitutional right that the jury determine both the law and the facts in a criminal cause, which provides that "it shall be sufficient evidence that any building or other place was rented for the purpose of gaming, if such gaming was actually carried on, and the owner or lessor thereof knew or had

good reason to believe that the lessee suffered any gaming therein, and such owner or lessor took no sufficient means to prevent or restrain the same." *Morgan v. State*, 117 Ind. 569, 19 N. E. 154, *infra*, III. a, followed in *Voght v. State*, 124 Ind. 358, 24 N. E. 680.

The right of trial by jury is not taken away by a statute providing that the possession by any junk dealer or dealers in second-hand bottles, of certain kinds of marked bottles or kegs without the written consent of the owner of such marks, shall be presumptive evidence of the unlawful use, purchase, and traffic in such bottles. *People v. Cannon*, 139 N. Y. 32, 36 Am. St. Rep. 668, 34 N. E. 759, *supra*, I., *infra*, III. h.

See also *Board of Excise v. Merchant*, 103 N. Y. 143, 57 Am. Rep. 705, 8 N. E. 484, *supra*, II. a, and *infra*, III. c, 1, and *State v. Weston*, 3 Ohio S. & C. P. Dec. 15, *infra*, III. j.

In *State v. Yardley*, 95 Tenn. 546, 34 L.R.A. 656, 32 S. W. 481, the court upheld the constitutionality of the statute which, in punishing frauds on hotel and boarding-house keepers, provided: "Proof that lodging, food, or other accommodation, was obtained by false pretense, or by false or fictitious show or pretense of baggage, or that the party refused to pay for such food, lodging or accommodation on demand, or that he absconded without paying or offering to pay, for such food, lodging, or other accommodation; or that he surreptitiously removed, or attempted to remove, his or her baggage, shall be *prima facie* proof of the fraudulent intent mentioned in § 1 of this act." The court said: "The 2d section of the act does not impair the right of trial by an impartial jury, as guaranteed by §§ 6, 8, and 9, art. 1, of the Constitution. It simply provides that proof of certain things therein enumerated shall be '*prima facie*' evidence of fraudulent intent. The language used indicates no purpose to abridge the right of trial by jury; nor can it be held, by any proper construction, to have that effect. A person arraigned under the 1st section of the act

"the presumption of fraud;" and the fair construction of the entire section is that the presumption raised is only *prima facie*, and subject to be rebutted. The raising of such a presumption upon proof of the fact that the bank was one chartered in this state, that the defendant was its president or director, and that it had become insolvent, is not so arbitrary or irrational that it can be declared that the legislature had no legitimate foundation upon which to rest the presumption, or to provide for a change in the burden of proof. Properly construed, the section does not authorize the punishment of the president and directors, "even though they had nothing to do with the management of the bank, and though the insolvency was not brought

about by their conduct, or with their knowledge." The affirmative declaration that the defendant may repel the presumption of fraud by showing that the affairs of the bank have been fairly and legally administered, and generally with the same care and diligence that agents receiving a commission for their services are required and bound by law to observe, and that upon such showing "the jury shall acquit the prisoner," does not exclude the president or a director of a chartered bank which has become insolvent from disproving by any legitimate evidence the presumption of fraudulent mismanagement which may have been raised against him. The fact that in this state the defendant cannot testify, but may make his statement not un-

is left to his trial by an impartial jury, and is allowed the presumption of innocence as fully as in any other case. That right and that presumption are in no degree affected by the 2d section. Neither can be impaired by a mere provision that proof of certain facts shall be taken as *prima facie* evidence of a fraudulent intent; and yet that is the sum total of the 2d section."

d. Right to be confronted with witnesses.

A statute making a document *prima facie* evidence of a fact is not unconstitutional as infringing the right of an accused to be confronted with the witnesses against him.

In *Runde v. Com.* 108 Va. 873, 61 S. E. 792, it was held that the statutes providing that possession of a United States license should be evidence of selling and *prima facie* evidence of sale do not contravene the provisions of the Constitution of Virginia guarantying the right of the accused in all criminal prosecutions to be confronted with the accusers and the witnesses, as this rule has never been applied to documentary evidence.

In *Johns v. State*, 55 Md. 362, the court sustained the statute under which the defendant was indicted as a defaulting tax collector, which provided that the certificate of the comptroller of the state showing the accused to be a defaulter shall in every prosecution under the act be received as *prima facie* evidence of such defalcation. The defendant had contended that by the Declaration of Rights he was entitled to be confronted with the witnesses against him, and that, even if the evidence could have been made admissible, it was incompetent for the legislature to declare that such certificate should be received as *prima facie* evidence of defalcation.

Effect of statute authorizing evidence of repute or reputation.

In *State v. Waldron*, 16 R. I. 191, 14 Atl. 847, it was held that a person accused L.R.A.1915C.

may not complain that he is deprived of his right to be confronted with the witnesses against him, where, under a statute making the notorious character of a place evidence that it is a nuisance, evidence was received of the reputation of the place, his claim being that this was admitting what third persons said about the place.

But in *Hammond v. State*, 78 Ohio St. 15, 15 L.R.A.(N.S.) 906, 125 Am. St. Rep. 684, 84 N. E. 416, 14 Ann. Cas. 732, the court considered void as violative of the clause in the United States Constitution that no person shall be deprived of life, liberty, or property without due process of law, the provision of the Ohio anti-trust act which provided that "the character of the trust or combination alleged may be established by proof of its general reputation as such." The court said that this provision "is invalid in that it not only permits the conviction of a defendant upon purely hearsay evidence, but it, in effect, deprives him of the benefit of the presumption of innocence as to a vital and essential fact which the state is bound to affirmatively establish by competent evidence, by substituting for proof of such fact proof merely of general reputation as to its existence." The court said also that "the legislature may not arbitrarily create a conclusive presumption of guilt against the accused, as to any element of the crime charged, by giving artificial and evidential force and effect to certain facts which otherwise would be wholly irrelevant and inconclusive."

The same statute was held to be void in *Hughes v. State*, 29 Ohio C. C. 237.

For other cases upon reputation or repute as evidence, see *infra*, III. j.

e. Involuntary servitude.

Statutes creating *prima facie* rules of evidence of fraud on the part of an employee against his employer have been attacked, and in some cases overthrown, as contrary to the 13th Amendment to the

der oath, which the jury may believe in preference to the sworn evidence, does not render the act invalid, as held in the cases of *Vance v. State*, 128 Ga. 661, 57 S. E. 889, and *Wilson v. State*, 138 Ga. 489, 493, 75 S. E. 619.

We think that a fair and reasonable construction of the section of the Penal Code under consideration is that, upon proof of certain specified facts, a presumption of fraudulent mismanagement would be raised against the president and directors of an insolvent chartered bank; that if such management as is mentioned in the proviso should be shown, the jury would be required to acquit the prisoner or prisoners; but that this would not prevent the accused from rebutting the presumption by proof of oth-

er facts, such as that the insolvency was caused by an unexpected panic in the country, or by the speculation of some officer or agent for which the accused was in no way responsible, or by other evidence rebutting the presumption of fraudulent conduct on his part. See, in this connection, *Youmans v. State*, 7 Ga. App. 101, 66 S. E. 383; *Robertson v. People*, 20 Colo. 279, 38 Pac. 326, 9 Am. Crim. Rep. 284; *Meadowcroft v. People*, 163 Ill. 56, 67, 35 L.R.A. 176, 54 Am. St. Rep. 447, 45 N. E. 991; *State v. Beach*, 147 Ind. 74, 78, 36 L.R.A. 179, 43 N. E. 949; *State v. Sattley*, 131 Mo. 464, 33 S. W. 41.

It follows, from what has been said, that the prima facie presumption raised against the president and directors of a chartered

United States Constitution, prohibiting involuntary servitude except as a punishment for crime, whereof the party shall have been duly convicted.

The 13th Amendment to the Constitution of the United States, prohibiting slavery and involuntary servitude except as a punishment for crime, and the statutes of the United States enacted in pursuance of such Amendment, were held to be infringed by a statute of Alabama making certain acts hereafter specified prima facie evidence of intent, there being a rule of evidence in Alabama that the accused, for the purpose of rebutting the statutory presumption, shall not be allowed to testify as to his uncommunicated motives, purposes, or intention. *Bailey v. Alabama*, 219 U. S. 219, 55 L. ed. 191, 31 Sup. Ct. Rep. 145, reversing 161 Ala. 75, 49 So. 886. The statute in question provided that "any person who, with intent to injure or defraud his employer, enters into a contract in writing for the performance of any act of service, and thereby obtains money or other personal property from such employer and with like intent, and without just cause, and without refunding such money, or paying for such property, refuses or fails to perform such act or service, must on conviction be punished. . . . And the refusal or failure of any person, who enters into such contract, to perform such act or service, . . . or refund such money, or pay for such property, without just cause, shall be prima facie evidence of the intent to injure his employer . . . or defraud him." The court said: "What the state may not do directly, it may not do indirectly. If it cannot punish the servant as a criminal for the mere failure or refusal to serve without paying his debt, it is not permitted to accomplish the same result by creating a statutory presumption which, upon proof of no other fact, exposes him to conviction and punishment."

Substantially the same statute so far as the act of an employee was concerned had been sustained in *State v. Thomas*, 144 Ala. 97, 2 L.R.A.(N.S.) 1011, 113 Am. St. Rep. 17, 40 So. 271, 6 Ann. Cas. 744. See also L.R.A.1915C.

State v. Vann, 150 Ala. 66, 43 So. 357, 14 Ann. Cas. 1058.

In *State v. Griffin*, 154 N. C. 611, 70 S. E. 292, the court followed the Supreme Court of the United States in *Bailey v. Alabama*, 219 U. S. 219, 55 L. ed. 191, 31 Sup. Ct. Rep. 145, under a somewhat similar statute providing that "if any person with intent to cheat and defraud another shall obtain any money, etc., from any other person or corporation, upon and by color of any promise or agreement that the person making the same will begin any work, etc., and shall unlawfully and wilfully fail to commence or complete said work according to the contract, without a lawful excuse, he shall be guilty of a misdemeanor." . . . "And evidence of such promise or agreement to work, the obtaining of such advances thereon and the failure to comply with such promise or agreement shall be presumptive evidence of the intent to cheat and defraud at the time of obtaining such advances and making such promise or agreement, subject to be rebutted by other testimony which may be introduced by the defendant." The court considered that the statute violated the principle of due process of law and offended against the 13th Amendment, and said: "It is a part of the organic law of this state that there shall be no imprisonment for debt except in case of fraud. The bald fact that a person contracted a debt and promised to pay it in work, standing alone, does not justify a presumption of fraud in contracting the original debt, any more than it would if he had promised to pay it in money. It is beyond the power of the legislature to create such a rule of evidence and enforce it in the state's own courts. It is but an arbitrary mandate, there being no rational connection tending to prove fraud, between the fact proved and the ultimate fact presumed. Such an arbitrary rule of evidence takes away from the defendant his constitutional rights, and interferes with his guaranteed equality before the law, and, as the Supreme Court of the United States says, 'violates those fundamental rights and immutable prin-

bank upon proof of its insolvency, that they have been guilty of fraudulent mismanagement, is not arbitrary, unreasonable, unnatural, or extraordinary, and that the Code section under consideration does not attempt to deprive those officers of the right to be heard on the existence of the fact in issue or their connection therewith, or to rebut the presumption against them by any legitimate evidence. So construed, the act is not unconstitutional for any of the reasons mentioned in the first question propounded by the court of appeals; and that question is answered in the negative.

2. It is well settled that the 5th Amendment of the Constitution of the United States is not a limitation upon the powers of the states, but operates on the national

government only. *Wilburn v. State*, 141 Ga. 510 (2), and citations, 81 S. E. 444. Accordingly, Penal Code 1910, § 204, is not unconstitutional as being violative of that Amendment.

3. What has already been said in the first division of this opinion in regard to the 14th Amendment of the Constitution of the United States applies also to the provision of the state Constitution that "no person shall be deprived of life, liberty, or property, except by due process of law;" and § 204 of the Penal Code is not violative of that clause of the Constitution.

4. The authorities are not in accord in defining insolvency. The underlying idea involved is an inability to pay debts. The general and popular meaning of the word

ciples of justice which are embraced within the conception of due process of law."

For constitutionality of statute providing for imprisonment for breach of contract of labor or rental, see the note to *Ex parte Hollman*, 21 L.R.A.(N.S.) 242.

The Georgia courts have sustained the constitutionality of a Georgia statute of a similar character. *Banks v. State*, 124 Ga. 15, 2 L.R.A.(N.S.) 1007, 52 S. E. 74 (as not an assumption of judicial power by the legislature); *Vance v. State*, 128 Ga. 661, 57 S. E. 889 (particularly as not infringing the right of equal protection of the law, the court also discussing other questions; see *supra*, b); *Wilson v. State*, *infra*. See also *Lamar v. State*, 120 Ga. 312, 47 S. E. 958; *Townsend v. State*, 124 Ga. 69; and note in 21 L.R.A.(N.S.) 242. See also *infra*, III. e.

In *Wilson v. State*, 138 Ga. 489, 75 S. E. 619, the court discusses the case at length with reference to the decision under a similar Alabama statute in *Bailey v. Alabama*, 219 U. S. 219, 55 L. ed. 191, 31 Sup. Ct. Rep. 145, and distinguishes that case on the ground that, while in Georgia the defendant might not testify, he might make a statement as to his intent to the court and the jury, and also upon the ground that there were some material differences in the two statutes. The differences pointed out do not seem to be very material, as will be seen by reference to the Georgia statute, which provides that "if any person shall contract with another to perform for him services of any kind, with intent to procure money or other thing of value thereby, and not to perform the service contracted for, to the loss and damage of the hirer, or, after having so contracted, shall procure from the hirer money, or other thing of value, with intent not to perform such service, to the loss and damage of the hirer, he shall be deemed a common cheat and swindler, and upon conviction shall be punished. . . . Satisfactory proof of the contract, the procuring thereon of money or other thing of value, the failure to perform the service so contracted for, or failure to return the

money so advanced, with interest thereon at the time said labor was to be performed, without good and sufficient cause, and loss or damage to the hirer," shall be presumptive evidence of the intent.

It may be noted that in *Ex parte Woodward*, 181 Ala. 97, 61 So. 295, *infra*, III. c, 1, the court, in sustaining the statute as to prima facie evidence under the liquor law, particularly discussed the case with reference to the decision of the Supreme Court of the United States in *Bailey v. Alabama*, 219 U. S. 219, 228, 55 L. ed. 191, 196, 31 Sup. Ct. Rep. 145, and with reference to the criticism of that decision upon the rule of evidence in Alabama, that a person may not testify as to his uncommunicated motives, purposes, or intention, and held that the decision in the *Bailey Case* was with reference to the peculiar situation of an individual whose rights as to contracts for personal service and the punishment for his disregard of such contract were concerned.

f. *The question of assumption of judicial functions by the legislature.*

See generally cases cited *supra*, particularly *Vance v. State*, 128 Ga. 661, 57 S. E. 889, *supra*, II. b, where the court followed on this question the decision under the same statute in *Banks v. State*, 124 Ga. 15, 2 L.R.A.(N.S.) 1007, 52 S. E. 74.

The legislature does not encroach upon the prerogatives of the judiciary by a statute which, after defining larceny, provides that "possession of property recently stolen, when the party in possession fails to make a satisfactory explanation, shall be deemed prima facie evidence of guilt." *State v. Potello*, 40 Utah, 56, 119 Pac. 1023.

See also *State v. Mitchell*, 3 S. D. 227, 52 N. W. 1052, *infra*, IV.

III. *Particular subjects or facts.*

a. *Gaming.*

In *Wooten v. State*, 24 Fla. 335, 1 L.R.A.

is that condition in which a person has not sufficient assets to pay his debts. *Cohen v. Parish*, 100 Ga. 335, 28 S. E. 122. In connection with bankruptcy and insolvency acts another definition has arisen as applicable to traders, which is the inability of a person to pay his debts as they become due in the ordinary course of business. And, as a bank was engaged in a business of a certain character, this definition came to be applied to the insolvency of banks. *Clarke v. Ingram*, 107 Ga. 565, 582, 33 S. E. 802; *Black's Law Dict.*, *Anderson, Law Dict.*, and *Bouvier's Law Dict.*, word "Insolvency;" 4 Words & Phrases, 3647, 3648, 3654. Nevertheless, as general deposits were held to be loans to the bank, payable on demand, and it was a matter

of common knowledge that the business of banking involved lending out a large part of these deposits, and not merely holding them ready to pay every depositor if he should make demand therefor, various modifying expressions have been employed to show that, while a bank is ordinarily expected to pay depositors on demand in the usual course of business, sudden panics or emergencies may arise which would cause a temporary suspension of payments without conclusively showing insolvency. Thus, one writer says that a number of courts now uphold what he declares to be the more reasonable rule, that "a bank is solvent when it possesses sufficient solvent and marketable assets to meet all of its obligations within a reasonable time." Ma-

819, 5 So. 39, the court sustained the constitutionality of a statute which provided "that if any of the implements, devices or apparatus commonly used in games of chance usually played in gambling houses, or by gamblers, are found in any house, room, booth, shelter or other place, it shall be prima facie evidence that the said house, room or place where the same are found is kept for the purpose of gambling," and the contention that the statute deprived the citizen of due process of law was denied.

See also the *obiter* remarks of the court in *Com. v. Minor*, 88 Ky. 422, 11 S. W. 472, *supra*, II. a.

In the obscurely reported case of *Com. v. Smith*, 166 Mass. 370, 44 N. E. 503, it seems to have been held upon a prosecution for the offense of being present where gaming implements were found in a place unlawfully used as a common gaming house, that a statute was constitutional which provided that implements of gaming were prima facie evidence of an unlawful game, and that the possession of any gaming implements by the defendant was prima facie evidence of their use by him.

The Supreme Court of the United States sustained, as not in violation of due process of law, a statute providing that the possession of policy slips, etc., is prima facie evidence of "possession thereof knowingly," in *Adams v. New York*, 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372, affirming 176 N. Y. 351, 63 L.R.A. 406, 98 Am. St. Rep. 675, 68 N. E. 636, *supra*, I. and II. a, holding also that the exception of public officers from the provision in question did not make the act unconstitutional.

But it may be noted here that in *Re Wong Hane*, 108 Cal. 680, 49 Am. St. Rep. 138, 41 Pac. 493, the court held invalid an ordinance making it unlawful for a person to have in his possession, unless it be shown that such possession was innocent or for a lawful purpose, any lottery ticket, etc., on the ground that if there were any circumstances under which the possession of a lottery ticket might be innocent or L.R.A.1916C.

lawful, the defendant who was charged with the offense of having such ticket in his possession is entitled to the presumption of innocence, and cannot be compelled to establish his innocence by affirmative proof. To the extent that the defendant was required to establish his innocence, it was held that the provisions of the ordinance violated his constitutional rights, the court stating that by the very terms of the ordinance it was assumed that the possession of the ticket might be lawful or innocent.

In *Morgan v. State*, 117 Ind. 569, 19 N. E. 154, the court held that a statute was not in derogation of the constitutional right that the jury determine both the law and the facts in a criminal cause, which provided that "it shall be sufficient evidence that any building or other place was rented for the purpose of gaming, if such gaming was actually carried on, and the owner or lessor thereof knew or had good reason to believe that the lessee suffered any gaming therein, and such owner or lessor took no sufficient means to prevent or restrain the same." This case was followed and the same statute upheld in *Voght v. State*, 124 Ind. 358, 24 N. E. 680.

In *Buford v. Com.* 14 B. Mon. 24, the court sustained a conviction for permitting a faro bank to be set up in a house over which the defendant had control, where the law declared that after proof of setting it up it shall be presumed to have been with the permission of the person controlling or occupying the house; but the court did not discuss the constitutionality of this feature of the statute.

b. Dealing in futures.

In *Logan v. Postal Teleg. & Cable Co.* 157 Fed. 570, it was held that the act of 1907 of Arkansas prohibiting dealings in futures was not unconstitutional as a deprivation of a person's liberty without due process of law, in that it provided "that proof that any person, association of persons, or corporation, either as principal or agent, has established an office or place where

gee, Banks & Bkg. 604. This definition has the defect of using the word "solvent" as a part of the definition of the same word. For other efforts to formulate a satisfactory definition of insolvency as applied to banks, see Tiffany, Banks & Bkg. 346; Michie, Banks & Bkg. § 73, p. 496; Zane, Banks & Bkg. 603, 604; 5 Cyc. 559, 560.

We are not now concerned, however, with announcing a precise definition of insolvency as applied to banks relative to bankruptcy or insolvency laws, but are endeavoring to show that two meanings have been given to the word "insolvency," and to determine which of them was intended in the act now being considered. The two meanings of the word "insolvency" were thus stated by Mr. Justice Field in *Toof v.*

Martin, 13 Wall. 46, 47, 20 L. ed. 482, 483: "The term 'insolvency' is not always used in the same sense. It is also sometimes used to denote the insufficiency of the entire property and assets of an individual to pay his debts. This is its general and popular meaning. But it is also used in a more restricted sense, to express the inability of a party to pay his debts as they become due in the ordinary course of business. It is in this latter sense that the term is used when traders and merchants are said to be insolvent, and as applied to them it is the sense intended by the act of Congress."

The act of Congress mentioned was the bankrupt act of March 2, 1867, chap. 176, 14 Stat. at L. 517. The bankrupt act of July 1, 1898, chap. 541, 30 Stat. at L. 544,

are posted or published from information received the fluctuating prices of cotton, grain, provisions, stocks, bonds, or other commodity or thing of value, or either of them, shall constitute prima facie evidence of guilt of the offense or offenses prohibited by this act."

In *Gatewood v. North Carolina*, 203 U. S. 531, 51 L. ed. 305, 27 Sup. Ct. Rep. 167, affirming 138 N. C. 749, 51 S. E. 53, the court, in affirming a conviction for carrying on a bucket shop business, considers that any question as to the provision in the act providing what should be presumptive evidence of carrying on such business was not open from the record.

c. Liquor laws.

1. In general.

Many of the cases have arisen under various rules of evidence provided in the liquor laws.

For burden of proof as to license in personal prosecution for sale of intoxicating liquor without a license, see the note to *Bell v. State*, 36 L.R.A.(N.S.) 98. See also the note to *State v. Barrett*, 1 L.R.A.(N.S.) 626, for the earlier cases on legislative power to make possession of a certain amount of intoxicating liquor evidence of an intent to violate the law against illegal sales.

For liquor statutes creating offenses which depend upon the repute or reputation of a house, see *infra*, III. j.

Possession as prima facie evidence.

It has been held in a number of cases that statutes are valid making the possession of intoxicating liquor prima facie evidence of an intent to violate the law against illegal sales. *State v. Barrett*, 1 L.R.A.(N.S.) 626, and note; *State v. Cunningham*, 25 Conn. 195 (but conviction reversed for error in charge, see *infra*); *Durfee v. State*, 53 Neb. 214, 73 N. W. 676, *supra*, II. a; *State v. Wilkerson*, 164 N. C. 431, 79 S. E. 888 (but reversed for error L.R.A.1915C.

in charge, see *infra*); *State v. Russell*, 164 N. C. 482, 80 S. E. 66.

Thus, in *Santo v. State*, 2 Iowa, 165, 63 Am. Dec. 487, the court affirmed the power of the legislature to make the keeping of spirits in certain circumstances, or in any but certain circumstances, presumptive evidence of keeping with intent to sell.

So, in *Ex parte Woodward*, 181 Ala. 97, 61 So. 295, reversing 5 Ala. App. 202, 59 So. 688, the court sustained the constitutionality of the section of the Alabama statute which provided that "the keeping of liquors or beverages that are prohibited by the law of the state to be manufactured, sold or otherwise disposed of in any building not used exclusively for a dwelling shall be prima facie evidence that they are kept for sale or with the intent to sell the same, contrary to law."

Similarly, in *Fitzpatrick v. State*, 160 Ala. 1, 53 So. 1021, the court sustained an act providing that the storing of any of the prohibited liquors in any building not used exclusively as a dwelling house shall be prima facie evidence that they were kept for an unlawful purpose.

See also *Toole v. State*, 170 Ala. 41, 54 So. 195, where, however, the statute was not necessary to the result.

In *State v. Higgins*, 13 R. I. 330, the court sustained the constitutionality of a statute that provided that, in a prosecution for the keeping of a grog shop, etc., used for the illegal sale and keeping of intoxicating liquors, evidence of the sale or keeping of intoxicating liquors for sale in any building, place, or tenement shall be prima facie evidence that the sale or keeping is illegal.

The words "prima facie" in the statute considered in *State v. Higgins* seem to have afterward been stricken out, and the court said, in sustaining the amended statute, that the striking out of the words "prima facie" had no other effect than to leave the jury free to decide for or against the state according as they considered the evidence convincing or not. *State v. Mellor*, 13 R. I. 666.

In *Gillespie v. State*, 96 Miss. 856, 51

Comp. Stat. 1913, § 9585, expressly defines the word as there used, and makes the definition conform closely to what has been declared to be the general and popular meaning. In determining whether the word is to be construed as having one meaning or the other, as employed in Penal Code, § 204, there are several considerations which may aid us. In construing statutes the general rule is that the ordinary signification is to be applied to words, except words of art or those connected with a particular trade or subject-matter, unless there is something in the context to show that the legislature intended to use the word in a different sense. Civ. Code 1910, § 4. Again, bankruptcy and insolvency laws are civil laws, dealing with civil proceedings

in certain cases, and looking to the protection of the creditors, and the taking charge of and the properly handling and distributing of estates of persons within their scope; the bankrupt law also providing for the discharge of the debtor. Such laws are to be construed in the light of their purpose and object. On the other hand, the law now before us is a penal law, which may subject the president and directors of a bank to imprisonment in the penitentiary upon conviction; and it raises a presumption of guilt from the insolvency of the bank. The rule of strict construction is usually applicable in criminal law. This act was a part of the Penal Code of 1833 (§ 153), and has been in force ever since. The legislature declared that

So. 811, 926, the court sustained, as within the constitutional power of the legislature, a statute providing that the fact that any person has in his possession appliances adapted to retailing liquors shall be presumptive evidence that the person owning or controlling the appliances is engaged in selling or bartering intoxicating liquors in violation of the law. *People v. Cannon*, 139 N. Y. 32, 36 Am. St. Rep. 668, 34 N. E. 759, *infra*, III. h, *supra*, I.

In *State v. Cunningham*, 25 Conn. 195, *supra*, the court sustained the constitutionality of a statute providing that proof of the finding of the liquor in the defendant's possession (except in certain places) "shall be received and acted upon by the court as presumptive evidence that such liquor was kept or held for sale, contrary to the provisions of the act." But the conviction was reversed on the ground apparently that the jury perhaps understood that the question of intent was withdrawn from them by the charge, which was that the law made the finding sufficient evidence of the intent of the prisoner to sell the same in violation of the statute, unless such evidence is rebutted by evidence going to show a different intent, and in the absence of any explanations of the purpose for which the same was so kept in said store, the jury may lawfully find a conviction thereon.

In *State v. Wilkerson*, 164 N. C. 431, 79 S. E. 888, *supra*, the court sustained the constitutionality of a statute making possession of more than 1 gallon of spirituous liquor at any one time, whether in one or more places, *prima facie* evidence that it was kept for sale in violation of an act making it unlawful for any person, firm, association, or corporation, other than druggists or medical depositaries duly licensed, "to have or keep in his, their, or its possession for the purpose of sale, any spirituous, vinous, or malt liquors;" but a conviction was reversed because the court, having instructed the jury that the fact of his having in his possession more than 1 gallon of the liquor made out a *prima facie* case against the defendant, further L.R.A.1915C.

charged them that it was then the duty of the defendant "to go forward and satisfy the jury, by the greater weight of the evidence, that he did not have the liquor in his possession for the purpose of sale." And this error was not cured by the subsequent charge that, if the jury had a reasonable doubt about the facts recited by the court, being those which the defendant must prove by the greater weight of the evidence, they should acquit.

Delivery as *prima facie* evidence of sale.

In *State v. Day*, 37 Me. 244, and in *State v. Hurley*, 54 Me. 562, the court upheld the validity of a statute providing, as to intoxicating liquors, that "whenever an unlawful sale is alleged and a delivery is proved, it shall not be necessary to prove a payment, but such delivery shall be sufficient evidence of sale."

A statute making delivery of intoxicating liquor elsewhere than in a dwelling house *prima facie* evidence of a sale is not unconstitutional; it does not infringe the right of trial by jury. *Com. v. Williams*, 6 Gray, 1, followed in *Com. v. Wallace*, 7 Gray, 222, and *Com. v. Pillsbury*, 12 Gray, 127.

But in *Wynehamer v. People*, 13 N. Y. 446, *supra*, II. a, *Selden, J.*, took a different view of a statute providing that proof of a sale shall sustain an averment of an unlawful sale, and that proof of delivery shall be *prima facie* evidence of a sale.

Miscellaneous.

In *Board of Excise v. Merchant*, 103 N. Y. 143, 57 Am. Rep. 705, 8 N. E. 484, *supra*, II. a, the court sustained, as not violative of due process of law and trial by jury, a statute making the act of drinking in a place licensed for wholesale sales, but not for drinking, *prima facie* evidence of a sale with the intent that the liquor "should be drank therein." but the court held that the result in the case did not depend upon the statute. The same statute had, in *People v. Lyon*, 27 Hun, 180, been held invalid on the ground that the

"every insolvency of a chartered bank, or refusal or failure to redeem its bills on demand, either with specie or current bank bills passing at par value, shall be deemed fraudulent," etc.

This created two contingencies, either one of which would serve to raise a presumption of fraud. One was insolvency; the other, failure or refusal of a bank of issue to redeem its bills. Insolvency under the act was not the same as failure or refusal to redeem. It was used in the ordinary and general sense of the word. Several states have statutes which make it penal for the officers of a bank knowingly to receive deposits when the bank is insolvent or in failing circumstances. In 37 Central Law Journal, 147, a writer dis-

cussed the meaning of the word "insolvent" as used in such a statute, and criticized a decision which had been rendered by the supreme court of Iowa. Among other things it was said: "While the foregoing are undoubtedly the popular and general meanings of solvency and insolvency, the courts, in administering the bankruptcy and insolvency laws and laws regulating assignments for the benefit of creditors, have given the words limited and restricted meanings. Under those acts insolvency means inability to pay one's debts in the ordinary course of business; also under insolvent acts where it was necessary to protect the creditors and compel an equal distribution of the insolvent's estate. The main purpose of the bankrupt act was to

jury, and not the legislature, ought to determine the guilt.

In *State v. Gerhardt*, 145 Ind. 439, 33 L.R.A. 313, 44 N. E. 469, the court sustained the validity of a statute providing that the fact that any person or persons other than the proprietor or his family were permitted to be in or go in or out of a room where intoxicating liquors are sold by virtue of a license, upon any day or hour when the sales of such liquors are prohibited by law, shall be prima facie evidence of guilt in the proprietor of such room of violating the law in the sale of such liquors upon such days or hours.

In *Com. v. Minor*, 88 Ky. 422, 11 S. W. 472, the court sustained a statute forbidding a physician to sign a prescription for whisky unless the person for whom it is prescribed is actually sick, etc., and providing in substance that proof of the giving of the prescription casts the burden upon the physician to show that the whisky was needed as a medicine by the person for whom it was prescribed.

In *State v. Kline*, 50 Or. 426, 93 Pac. 237, the court sustained an Oregon statute providing that the order of the county court declaring the result of a local option election "shall be held to be prima facie evidence that all the provisions of the law have been complied with in giving notice of and holding such election, and in counting and returning the votes and declaring the results thereof." The court stated that the provision of the law quoted cast upon a party to a criminal action who was charged with violating the terms of the local option enactment the burden of overthrowing such prima facie proof by introducing in evidence the writings which constitute the alleged irregularities of the proceedings, etc.

In *Rose v. State*, 171 Ind. 662, 87 N. E. 103, 17 Ann. Cas. 228, the court, in sustaining a judgment for the seizure and destruction of intoxicating liquors, referred to the statute in regard to what should be prima facie evidence of certain facts, and stated that it "is settled in this state that the legislature has power to make certain

acts or facts prima facie evidence of other facts necessary to be established in a legal proceeding;" but the court did not state what the provisions of the statute were in this respect.

See also *Lincoln v. Smith*, 27 Vt. 328, supra, II. a.

2. United States license as prima facie evidence.

A statute is valid which provides in effect that the issuance of a United States license to sell intoxicating liquor shall be prima facie evidence of sales of such liquor by the person to whom such license was issued. *State v. Donato*, 127 La. 393, 53 So. 662, supra, I; *Diamond v. State*, 123 Tenn. 348, 131 S. W. 666, supra, I; *Runde v. Com.* 108 Va. 873, 61 S. E. 792; *People v. McBride*, 234 Ill. 146, 123 Am. St. Rep. 82, 84 N. E. 865, 14 Ann. Cas. 994 (where the question was not necessary to the decision). See also *Hestand v. Com.* 28 Ky. L. Rep. 1315, 92 S. W. 12, where the court affirmed a conviction resting to some extent upon such a statute, but did not discuss in detail the constitutional question.

The statute was mentioned in *Guy v. State*, 90 Md. 29, 44 Atl. 997, but it was not necessary to the decision.

In *State v. Dowdy*, 145 N. C. 432, 58 S. E. 1002, the court sustained the validity of a statute making the issuance of a United States license evidence that the person to whom the license was issued was guilty of doing the act permitted by the license viz., selling liquors, etc.

There are a number of other cases where the courts have apparently sustained the validity of such statutes while reversing convictions on other grounds.

Thus, in *Winton v. State*, 77 Ark. 143, 91 S. W. 7, the court, in reversing a judgment on other grounds, apparently sustained the constitutionality of an act providing that when a party charged with selling liquor unlawfully is proved to have had a United States license for selling liquor in his house or building, such license "shall be

compel a debtor to distribute his property equitably among all his creditors. . . . By the terms of the act [the bankrupt act of 1867] the creditor could not procure a preference if he knew of the failure of his debtor to meet obligations when due. The rule was applied particularly to traders, merchants, and bankers. And this limited meaning of insolvency was first applied under the bankrupt act, and for the above reason and no other. By what line of reasoning, then, can the restricted meaning be applied to the word when used in the penal statutes under discussion? Clearly no purpose is intended to be served by these statutes kindred to the purpose of the bankrupt acts. The objects of the two are entirely dissimilar. The penal statutes are sup-

posed to prevent fraudulent banking. They are not intended to force all banks to keep all deposits in the vault ready for the depositor upon call. Statutes regulating banking expressly permit the loaning of deposits by requiring the bank to keep on hand a reserve of only 15 to 20 per cent of their deposits. Does the legislature permit banks to loan 80 to 90 per cent of deposits, and at the same time fix a heavy penalty for not always having the same money on hand to pay out on demand?"

This line of reasoning has been followed in some cases. *Ellis v. State*, 138 Wis. 513, 20 L.R.A. (N.S.) 444, 131 Am. St. Rep. 1022, 119 N. W. 1110; *Fleming v. State*, 62 Tex. Crim. Rep. 653, 139 S. W. 598. In *Parrish v. Com.* 136 Ky. 77, 123 S. W. 339,

prima facie evidence of the guilt of the party owning or controlling the house."

In *State v. Intoxicating Liquors*, 80 Me. 57, 12 Atl. 794, 7 Am. Crim. Rep. 291, which the court said must be considered as a criminal case, it evidently considered valid the clause in the statute that payment of the United States special tax as a liquor seller shall be held to be prima facie evidence that the one paying the tax is a common seller of intoxicating liquors, but it reversed the judgment on the ground that the court had charged the jury that they must find that defendant was such a common seller if he had paid the United States tax. The court said that the statute meant that such evidence was competent and sufficient to justify a jury in finding a defendant guilty, provided it does in fact satisfy them of his guilt beyond a reasonable doubt, and not otherwise. The case here seems to have been simply against the liquor.

This case was followed in *State v. O'Connell*, 82 Me. 30, 19 Atl. 86. These cases were referred to in *State v. Morin*, 102 Me. 290, 66 Atl. 650, where a conviction was reversed because the court did not permit the defendant to testify as to why he paid the special government tax, the court holding that he had a right to make an explanation.

In *State v. Momberg*, 14 N. D. 291, 103 N. W. 566, the court reversed a conviction for keeping a liquor nuisance on the ground that the following instruction to the jury made the presumption conclusive: "I charge you that the finding of a United States license for the sale of malt liquors on these premises and in the possession of these defendants is prima facie evidence of their guilt, if you find proof, to your satisfaction beyond a reasonable doubt, as to that and as to the other material allegations. By prima facie evidence is meant evidence which you must receive as conclusive unless the same is explained by the defendants by other evidence produced before you in the case." The statute provided that a United States license should be prima facie evidence of keeping for sale

and selling intoxicating liquors, contrary to law.

A constitutional provision that the accused has the right to be confronted with the witnesses against him is not contravened by statutes making a United States license evidence of sale. *Runde v. Com.* 108 Va. 873, 61 S. E. 792.

Construction of statute.

In *Guy v. State*, 96 Md. 692, 54 Atl. 879, it was held that the statute making the payment of the United States internal revenue tax prima facie evidence that the party so paying was engaged in the sale of intoxicating liquors within the limits of the county showed that a person having a United States license was responsible for his employees, but did not prove or tend to prove that he or his agent made the sale charged in the indictment; but the court did not discuss the constitutionality of the statute.

d. Failure of bank.

The legislature may provide in a criminal statute that the failure of a banker shall be prima facie evidence of his knowledge of insolvency at the earlier time of receiving a deposit. *State v. Buck*, 120 Mo. 479, 25 S. W. 573 (as not taking from the jury the right to determine the weight of evidence; conviction reversed on other grounds), followed in *State v. Sattley*, 131 Mo. 464, 33 S. W. 41; *Robertson v. People*, 20 Colo. 279, 38 Pac. 326, 9 Am. Crim. Rep. 284 (where the statute made the fact of failure within thirty days after receiving a deposit presumptive evidence of knowledge of insolvency).

Similarly, statutes have been sustained which declared that the failure of a banker within thirty days after receiving a deposit which is lost to the depositor shall be prima facie evidence of fraud. *State v. Beach*, 147 Ind. 74, 36 L.R.A. 179, 43 N. E. 949 (as not unconstitutional as depriving the accused of the presumption of innocence, where he had an opportunity to present his defense); *Meadowcroft v. People*,

the same definition was adopted in a criminal case; but the majority of the court held that, under a statute declaring that a reversal should only be granted for errors of law where the court was satisfied that the substantial rights of the defendant had been violated, the difference in the two definitions was not so material as to require a reversal, in view of the evidence and argument. Hobson, J., dissented from this position. See also in this connection, *Youmans v. State*, 7 Ga. App. 101, 66 S. E. 383, *supra*. In *State v. Stevens*, 16 S. D. 309, 92 N. W. 420, the definition of insolvency applicable to bankruptcy or insolvency proceedings was adopted. In California the same insolvency act was held to include both meanings of the word, ac-

cording as the proceeding was voluntary or involuntary. *Ruggles v. Canedy*, 127 Cal. 290, 46 L.R.A. 371, 53 Pac. 911, 916, 59 Pac. 827. We are not now discussing whether a failure or refusal to pay on demand might be proved as having evidential value on the subject of insolvency.

Civ. Code, 1910, § 2306, does not furnish a test of insolvency as that word is used in Penal Code, § 204. The section first cited forms a part of the law relating to the bank bureau, enacted in 1907. It provides for a preliminary report of insolvency by the bank examiner, derived from certain data, a seizure of the bank's assets under order of the governor, and a thorough examination into its affairs; and that whenever the examiner shall "become satisfied

163 Ill. 56, 35 L.R.A. 176, 54 Am. St. Rep. 447, 45 N. E. 991 (the same, and also as not infringing the rights of due process of law and trial by jury).

So, a statute declaring the insolvency of a chartered bank presumptively fraudulent was upheld in *Youmans v. State*, 7 Ga. App. 101, 66 S. E. 383, being the same statute now sustained in *GRIFFIN v. STATE*.

For further proceedings in the Georgia court of appeals in the *GRIFFIN CASE*, see 83 S. E. 891.

e. Frauds on employers.

Several cases have considered the validity of statutes punishing frauds on employers, and declaring what shall be prima facie or presumptive evidence of fraudulent intent.

Statutes of Alabama and of North Carolina of this character have been held unconstitutional as infringing the 13th Amendment to the United States Constitution; see *supra*, II. e.

The Georgia courts have in several cases upheld the Georgia statute making it illegal to procure money, etc., on a contract to perform services with intent to defraud, and declaring what shall be presumptive evidence of intent. (See *supra*, II. e, for form of statute.) *Lamar v. State*, 120 Ga. 312, 47 S. E. 958 (as not affecting imprisonment for debt, the court not referring directly to the question of the statutory rule of evidence); *Banks v. State*, 124 Ga. 15, 2 L.R.A.(N.S.) 1007, 52 S. E. 74 (as not an assumption of judicial powers by the legislature); *Vance v. State*, 128 Ga. 661, 57 S. E. 889 (holding the same, and also holding that the statute was not unconstitutional as denying equal protection of the laws, or as making an unreasonable classification, or as failing to declare the exact amount of proof required to overcome the presumption); *Wilson v. State*, 138 Ga. 489, 75 S. E. 619 (as not contrary to the 13th Amendment of the United States Constitution). See also *Townsend v. State*, 124 Ga. 69, 52 S. E. 293.

L.R.A.1915C.

f. Frauds on hotels, etc.

In *Re Milecke*, 52 Wash. 312, 21 L.R.A. (N.S.) 259, 132 Am. St. Rep. 968, 100 Pac. 743, the court upheld the constitutionality of a statute which provided that "departing from a hotel or boarding house, or removing or surreptitiously attempting to remove baggage therefrom, without paying for accommodations, is prima facie evidence of intent to defraud."

A somewhat similar statute was sustained in *State v. Yardley*, 95 Tenn. 546, 34 L.R.A. 656, 32 S. W. 481, *supra*, II. c, as not impairing the constitutional right of trial by an impartial jury.

In *State v. Kingsley*, 108 Mo. 135, 18 S. W. 994, the statute was essentially one prohibiting the evidential fact. Thus, the court said that the crime consisted in obtaining board or lodging by a trick, etc., and failing to pay therefor, where the statute provided that "every person who shall obtain board or lodging in any hotel or boarding house by means of any trick or deception, or false or fraudulent representation, or statement or pretense, and shall fail or refuse to pay therefor, shall be held to have obtained the same with the intent to cheat and defraud such hotel or boarding-house keeper, and shall be deemed guilty of a misdemeanor."

g. Bastardy.

It was held in a number of cases in North Carolina that a bastardy statute is not invalid which provides that the written examination of the woman is presumptive evidence that the defendant is the father of the child, and that a bastardy proceeding was a criminal proceeding. *State v. Burton*, 113 N. C. 655, 18 S. E. 657; *State v. Mitchell*, 119 N. C. 784, 25 S. E. 783, 1020; *State v. Rogers*, 119 N. C. 793, 26 S. E. 142. But the proceeding is no longer considered a criminal one in North Carolina. *State v. McDonald*, 152 N. C. 802, 67 S. E. 762.

that such bank cannot resume business or liquidate its indebtedness to the satisfaction of all creditors, including its shareholders, he shall report the fact of its insolvency to the governor," who shall thereupon instruct the attorney general to institute proper proceedings. It is evident that the language of this section cannot be literally imported into § 204 of the Penal Code. The two examinations, and the becoming satisfied that the bank "cannot resume business or liquidate its indebtedness to the satisfaction of all creditors, including its shareholders," do not furnish a test of insolvency under the criminal statute. The one is a remedial proceeding by the state for the winding up of a bank under certain circumstances and in a specified manner. The other is a penal law for the punishment of fraudulent mismanagement by a president or directors in con-

nection with the insolvency of a chartered bank.

It follows, from what has been said, that within the meaning of Penal Code 1910, § 204, a bank is not insolvent if its entire property and assets are sufficient to discharge its liabilities by process of liquidation, even though it may not be able to pay its debts immediately as they become due, or to pay its depositors on demand, and that in this statute there is no difference in the meaning of the word "insolvency" as applied to a chartered bank and the meaning of the word as applied to the financial condition of an individual. Of course, we understand the process of liquidation mentioned in the question of the court of appeals to mean prompt liquidation duly carried out, and not after indefinite holding with the hope of appreciation in values.

All the Justices concur.

h. Possession of marked bottles, etc.

In *People v. Cannon*, 139 N. Y. 32, 36 Am. St. Rep. 668, 34 N. E. 759 (see *supra*, I.), the court sustained a statute providing that the possession by any junk dealer or dealers in second-hand articles, of certain kinds of marked bottles or kegs without the written consent of the owner of such marks, shall be presumptive evidence of the unlawful use, purchase, and traffic in such bottles, etc. A similar statute was sustained in *Com. v. Anselvich*, 186 Mass. 376, 104 Am. St. Rep. 590, 71 N. E. 790, *supra*, II. b.

In the civil case of *Horwich v. Walker-Gordon Laboratory Co.* 205 Ill. 497, 98 Am. St. Rep. 254, 68 N. E. 938, a somewhat similar statute was declared unconstitutional as giving special privileges to the owners of the marks in question. The court considered that the statute in question was materially different from that construed in the *Cannon Case*, and stated also that "the points that the statute there under consideration granted any special or exclusive privileges or immunities, and that such statute was invalid because it made unjust discriminations between members of the same class in the community, were neither made nor considered."

i. Possession of stolen property.

In *State v. Potello*, 40 Utah, 56, 119 Pac. 1023, it was considered that the legislature did not encroach upon the prerogatives of the judiciary by a statute which, after defining larceny, provided that "possession of property recently stolen, when the party in possession fails to make a satisfactory explanation, shall be deemed prima facie evidence of guilt." The court construed the statute as meaning that it was necessary for the state to invoke it to show the possession and the failure of the party to make a satisfactory explanation, and that L.R.A.1915C.

the expression "prima facie" in the statute did not require the jury on such proven facts, although unrebutted or not discredited by circumstances, to convict, but that they might do so; but the court reversed the conviction on the ground of the insufficiency of the evidence.

In *State v. Kyle*, 14 Wash. 550, 45 Pac. 147, where the defendant contended that the statute was unconstitutional as casting the burden of proof upon the defendant, the court upheld the constitutionality of the statute, which provided that where an animal alleged to have been stolen was permitted by its owner to run on the range, proof of possession of the animal by the person accused of stealing the same should be prima facie evidence that the accused acquired possession thereof recently, and should have the effect of throwing on the accused person the burden of explaining such possession, as this was but an extension of the rule which had long prevailed that the possession of property recently stolen was sufficient proof that the possessor was guilty of the crime to call upon him to explain his possession.

j. Reputation or repute as evidence.

Some of the statutes provide that the repute of a house shall be evidence of its character.

In *State v. Weston*, 3 Ohio S. & C. P. Dec. 15, the court held that the constitutional guaranties of due process of law and trial by jury were not infringed by the so-called Winn law, which punished the sale, etc., of intoxicating liquors in a house of ill fame, and which provided that "it shall not be necessary to prove any overt act of prostitution in the building or place alleged to be a house of ill fame, but that it shall be sufficient to show that it is generally reputed in its neighborhood to be a place where persons of the opposite sex meet for purposes of prostitution." The

court considered that this provision left the option with the jury as to how they should decide.

This case was followed in *State v. Allen*, 6 Ohio S. & C. P. Dec. 43.

The validity of the Winn law in regard to the evidence of the general reputation of the place kept by the defendant was also upheld as not unconstitutional in *State v. Altoffor*, 2 Ohio N. P. 97, 3 Ohio S. & C. P. Dec. 288.

In *State v. Morgan*, 40 Conn. 44, the court sustained a statute which provided that "every person who shall keep a house, store, shop, saloon or other place in which it is reputed that spirituous or intoxicating liquors, ale or lager beer, are kept for sale, without having a license therefor," etc., should be punished, etc., holding that the court correctly charged the jury "that the reputation must be an honest one, founded on the honest opinion of the neighborhood," and that this was a substantial compliance with the defendant's request that he charge the jury "that the reputation of the place kept by the accused must be well founded in fact."

In *State v. Anderson*, 82 Conn. 111, 72 Atl. 648, the court, while reversing a conviction on other grounds, apparently considered that it was proper for the legislature to pass a statute to the effect that evidence that a house was reputed to be a house of ill fame, or was reputed to be resorted to for the purpose of prostitution or lewdness, was evidence of the real character of the place sufficient to establish prima facie its real character, so that upon such proof of reputation, in the absence of any other evidence of the true character of the place, the jury might convict the accused of keeping a house or place which was in fact of the character that it was reputed to be. See also further proceedings in the same case, 83 Conn. 55, 75 Atl. 81.

But in *State v. Beswick*, 13 R. I. 211, 43 Am. Rep. 26, it was held that a statute was unconstitutional which provided that it should not be necessary to prove an actual sale of liquors in any buildings, etc., in order to establish the fact that any of said liquors are there kept for sale, but "the notorious character of any such premises, or the notoriously bad or intemperate character of persons frequenting the same, or the keeping of the implements or appurtenances usually appertaining to grog shops, tippling shops, or places where such liquors are sold, shall be prima facie evidence that said liquors are kept on such premises for the purposes of sale within this state." The court considered that under the statute it would be the duty of the jury to convict upon proof of the facts mentioned, unless the presumption was rebutted by other evidence, and held that this virtually strips the accused of the protection of the common-law maxim that every person is to be presumed innocent until he is proved guilty, and said: "We think it is repugnant to the constitutional L.R.A.1915C.

provision that the accused shall not 'be deprived of life, liberty, or property unless by the judgment of his peers or the law of the land.' . . . Suppose that the general assembly were to enact that if any person were generally reputed to be guilty of a murder, it should be prima facie evidence that he was guilty, and that some citizen were convicted and sentenced to death or imprisonment on such evidence, because in the absence of rebutting evidence the jury had no option to acquit him. Could it be said that his life or liberty had been taken from him by the judgment of his peers? We think not."

And in *State v. Kartz*, 13 R. I. 528, the court held unconstitutional a statute providing that "every person who shall keep a place in which it is reputed that intoxicating liquors are kept for sale, without having a license therefor, except as provided," etc., "shall be fined," etc., as contrary to due process of law. The court distinguished the Connecticut cases on a similar statute, and in particular declined to hold that "reputed" meant "truly reputed."

But in *State v. Wilson*, 15 R. I. 180, 1 Atl. 415, the court sustained the validity of the statute providing that "it shall not be necessary to prove an actual sale of intoxicating liquors in any building, place or tenement, in order to establish the character of such premises as a common nuisance, but the notorious character of any such premises shall be evidence that such premises are nuisances." The court said: "The fault of the provision condemned in *State v. Kartz* was that it made mere reputation criminal, and so exposed a man to punishment as a criminal for what other people said about him. The fault of the provision condemned in *State v. Beswick* was that it made reputation prima facie evidence, and thus made it the duty of the jury to convict on such evidence, if unrebutted, whether satisfied by it of the guilt of the accused or not. Section 3, as we interpret it, simply makes the reputation of a place evidence of its character, but it leaves the jury free to find the accused guilty or not, according as they are satisfied of his guilt or not by the evidence. We see no reason to think that such an enactment is unconstitutional."

In *State v. Waldron*, 16 R. I. 191, 14 Atl. 847, the statute sustained in *State v. Wilson*, supra, was attacked on the ground that evidence was received of reputation in reply to questions as to the knowledge of the witnesses of the notorious character of the place kept by the defendant, it being claimed that this was simply evidence of what a third person said about the facts, and to receive it was to exclude from the defendant his right to be confronted with the witnesses against him, and to convict him on hearsay; but this was overruled by the court and the statute sustained.

But in *Hammond v. State*, 78 Ohio St. 15, 15 L.R.A.(N.S.) 906, 125 Am. St. Rep. 684, 84 N. E. 416, 14 Ann. Cas. 732, supra, II. d, the court considered void the pro-

vision of the Ohio anti-trust act providing that the character of the trust or combination may be established by proof of its general reputation as such. See also *Hughes v. State*, 29 Ohio C. C. 237, holding the same statute void.

k. Miscellaneous statutes.

A statute making the certificate of the comptroller showing a tax collector to be a defaulter, prima facie evidence of such defalcation, was sustained as not infringing the right of an accused to be confronted with the witnesses against him. *Johns v. State*, 55 Md. 362.

In *State v. Lawson*, 40 Wash. 455, 82 Pac. 750, the court upheld the constitutionality of a statute making the records of the county clerk's office prima facie evidence of the existence or nonexistence of a license to practise medicine, which was attacked on the ground that the statute declared an arbitrary and illogical rule of evidence, and was therefore unconstitutional. Cited in *State v. Dodson*, 54 Wash. 31, 102 Pac. 872.

In *Faith v. State*, 32 Tex. 373, the court upheld the constitutionality of a statute which provided "that upon the sale, alienation or transfer of certain animals therein named, the purchaser shall take a written conveyance descriptive of the animal so purchased or transferred, and upon the trial of any person so charged with the theft of any animal of this character, the absence of this written conveyance shall be deemed prima facie evidence of 'illegal possession.'" The court considered that, if anything, the statute mitigated the common-law rule, and stated further "but this circumstance (absence of the written conveyance), resulting from the omission of a plain statutory duty, it seems, might have been given in evidence even without the act under review."

In *State v. Anderson*, 5 Wash. 350, 31 Pac. 969, where the court did not consider that the decision of the question was necessary to the result, it was of the opinion that the legislature did not exceed its power in providing that in burglary the presumption of criminal intent should follow the proof of unlawful entry. Cited in *State v. Wilson*, 9 Wash. 218, 37 Pac. 424.

For an opinion holding invalid a statute making working more than eight hours in any one day prima facie evidence of the violation of the statute, see *Opinion of Justices*, 208 Mass. 619, 34 L.R.A.(N.S.) 771, 94 N. E. 1044, *supra*, II. a.

—Chinamen.

It may be noted that it is held as to the statute of 1892, in *Fong Yue Ting v. United States*, 149 U. S. 698, 37 L. ed. 905, 13 Sup. Ct. Rep. 1016, that Congress had power to enact that the residence of a Chinaman should be shown by one credible white witness, the court considering, however, that an order for his deportation did not deprive him of life, liberty, or property, without due process of law. L.R.A.1915C.

The act of Congress of 1892, excluding Chinese laborers, and providing in effect that the presumption is against such a laborer and that he must affirmatively show his right to remain, is a proper rule of evidence. *Re Sing Lee*, 54 Fed. 334, where the court stated that the information was peculiarly in the possession of the accused.

But in *United States v. Long Hop*, 55 Fed. 58 (decided it seems under the Chinese exclusion act of 1888), the court does not refer to the terms of the statute, but simply states that due process of law requires that the government should show that the defendant is unlawfully in the United States, and not that he should show a right to be here.

IV. Miscellaneous.

In *State v. Mitchell*, 3 S. D. 227, 52 N. W. 1052, it was held that a statute providing that the affidavits upon which an attachment for contempt issues shall make a prima facie case for the state is not unconstitutional as an encroachment upon the judicial power, but the court considered that contempt proceedings, while criminal in their nature, were not in themselves criminal actions or prosecutions.

In *Paducah v. Ragdale*, 122 Ky. 425, 92 S. W. 13, the court considered that an ordinance prohibiting the running of cattle at large in the city meant that the finding of an animal at large upon the street under such circumstances as the ordinance penalized would make a prima facie case of guilt against the owner, and that there was no invalidity in that.

In a statute punishing a common seller of intoxicating liquors, the provision that "three several sales of spirituous or intoxicating liquors, either to different persons or to the same person, shall be sufficient evidence of a violation of this section," is not beyond the power of the legislature, as it amounts to a definition that three sales shall satisfy the phrase "common seller" within the meaning of the act, and is equivalent to saying that whoever is guilty of making three sales shall be punished in the same manner as a common seller. *Com. v. Burns*, 9 Gray, 132. B. B. B.

IOWA SUPREME COURT.

RE ESTATE OF JOHANNA MILLER,
Deceased.

D. H. SLEICHTER, Admr., etc., of Johanna Miller, Deceased,
v.

DOROTHEA KROGER et al., Appts.,
and
ANNA KROEGER et al.

(— Iowa, —, 149 N. W. 227.)

Executor and administrator — fraudulent settlement of claim — objections to account.

Next of kin may raise the question of

collusion by the administrator in the establishment of a claim against the estate by filing objections to his account.

(November 5, 1914.)

APPEAL by certain of the objectors from an order of the District Court for Washington County sustaining the motion of the administrator to strike out and overrule all objections to his report on account of an alleged controversy over certain moneys and credits, and all claims against him regarding property of the estate. Reversed.

Statement by Evans, J.:

Appeal from an order of the district court, sitting in probate. The order com-

Note. — Manner of raising question, to charge executor or administrator personally, of collusion in establishing claim against estate.

In general.

Where those interested are seeking to attack a claim already established against the estate so as to defeat the claimant, clearly the question must be raised in some manner that will bring the creditor into a court that has jurisdiction not only as to the subject-matter in dispute, but as to the record of the prior adjudication; so the court in RE MILLER makes a sound distinction between that class of cases and the case before it, where the object was to charge the administrator personally, without affecting the rights of the creditor or attacking his judgment. Only cases where the object was merely to charge the representative personally are included in this note.

It is here submitted that collusively and fraudulently permitting a claim to be established against the estate is a devastavit on the part of the representative. One of the many definitions of a devastavit is "a violation of duty by the executor or administrator such as renders him personally responsible for mischievous consequences." *Steel v. Holladay*, 20 Or. 70, 10 L.R.A. 670, 25 Pac. 69. The personal liability of the representative is here assumed, as this note deals only with the manner of raising the question.

By objection to account.

The question of the jurisdiction of the probate court to try the issue where the representative is charged with collusion in the establishment of a claim against the estate would seem to be the important question. The jurisdiction of the probate or surrogate court is statutory, and therefore limited to matters over which jurisdiction is expressly conferred. (See 11 Cyc. 791.) However, statutes confer jurisdiction to L.R.A.1915C.

plained of struck from the record certain objections made by the appellants to the final report of the administrator of the estate of Johanna Miller. Such objections charged the administrator with fraud and collusion with a claimant against the estate, and asked that he be required to account and pay nevertheless to the beneficiaries of the estate the amount awarded to such fraudulent claimant.

Messrs. Edmund D. Morrison and George F. Morrison, for appellants:

On accounting, the administrator must be charged with assets of the estate lost through his negligence or collusion.

Meyerling v. Wendt, 86 Iowa, 465; *Loomis v. Armstrong*, 49 Mich. 521, 14 N. W. 505; *Re Holderbaum*, 82 Iowa, 69, 47 N.

settle estates, in general terms; and probate courts, therefore, have power to try questions "which arise incidentally in a cause over which such courts have jurisdiction, and the determination of which are necessary to a lawful exercise of the powers expressly conferred in arriving at a decision." 11 Cyc. 793. This rule would seem to be sufficiently broad to cover the issue raised by the representative's devastavit where all the parties to be affected are before the court.

Although the jurisdiction of the probate court is purely statutory, it has generally been held to have power and authority to determine the question where a devastavit is alleged if the result will affect only the personal representative or those interested in the estate. *Graffam v. Ray*, 91 Me. 234, 39 Atl. 569 (no action at law can be maintained); *Edmundson v. Roberts*, 2 How. (Miss.) 822; *Steel v. Holladay*, supra. The cases here cited did not involve collusion by the executor or administrator, but did involve the issue of his devastavit in other forms. They are not strictly within the scope of the note and the list is not exhaustive.

Conceding that the probate court has jurisdiction to try the issue raised by an allegation that the representative colluded in the establishment of a claim against the estate, there would seem to be no valid objection to the question's being raised by objection to the items of his account in which he seeks credit for the claim, which practice was approved in RE MILLER. Even where the jurisdiction of the court is limited (as it was limited in *Deer Lodge County v. Kohrs*, 2 Mont. 66), so that it cannot enter a judgment against the representative, but can make a finding in case of an alleged devastavit, that will serve as a basis for a civil suit, there could be no objection to raising the question in this way. If the jurisdiction of the court is conceded, the question at once becomes one of practice.

In *Dobbs v. Cockerham*, 2 Port. (Ala.) 328, where the administrator claimed cer-

W. 898; Re Ring, 132 Iowa, 216, 109 N. W. 710; Conger v. Cook, 56 Iowa, 121, 8 N. W. 782; Woerner, Administration, § 538; Schouler, Wills, § 540, p. 585; Re Brown, 113 Iowa, 351, 85 N. W. 617; McLeary v. Doran, 79 Iowa, 210, 44 N. W. 360; Corrington v. Corrington, 124 Ill. 363, 16 N. E. 252; Re Hall, 70 Vt. 458, 41 Atl. 508.

Distributees have no right of action against an administrator or his bond, for their distributive shares, until the amounts due them have been determined on the final report hearing, and ordered paid, and the administrator fails to pay the same.

Cummings v. Cummings, 143 Mass. 340, 9 N. E. 734; Conger v. Cook, 56 Iowa, 121, 8 N. W. 782; 2 Am. & Eng. Enc. Law, 899; 18 Cyc. 1280-1284; Nickals v. Stanley, 146 Cal. 724, 81 Pac. 117; Hudson v. Barratt, 62 Kan. 137, 61 Pac. 737; Reed v. Hume, 25 Utah, 248, 70 Pac. 998; Wallber v. Wilmanns, 116 Wis. 246, 93 N. W. 47; O'Brien v. Strang, 42 Iowa, 643; Hart v. Jewett, 17 Iowa, 234; Weber v. Noth, 51 Iowa, 375, 1 N. W. 652; Pennington v. Newman, 36 Okla. 594, 129 Pac. 693.

As between heirs and the administrator, the latter is bound to act with diligence,

prudence, and good faith; and unless he does so, he renders himself personally liable for any loss occasioned by his negligence or bad faith in prosecuting or defending actions in his representative capacity.

18 Cyc. 1101; Pearson v. Darrington, 32 Ala. 227; Skrine v. Simmons, 11 Ga. 401; Russell v. Russell, 4 Dana, 40; Hutchcraft v. Tilford, 5 Dana, 353; Smith v. Cuyler, 78 Ga. 654, 3 S. E. 406; Parsons v. Mills, 1 Mass. 431; O'Connor v. Gifford, 117 N. Y. 275, 22 N. E. 1036; Pickle v. Pickle, 10 N. J. L. J. 207; Harrington v. Keteltas, 92 N. Y. 40; Milan v. Ragland, 19 Ala. 85.

Even if the objections filed raised issues not triable in probate, it was error to strike and summarily overrule them. If not triable in probate, the issues presented were triable either at law or in equity, and the motion should have been to transfer to the proper docket.

Code, § 3432; Ashlock v. Sherman, 56 Iowa, 311, 9 N. W. 242; Re Douglas, 140 Iowa, 605, 117 N. W. 982; Re Cummings, 120 Iowa, 421, 94 N. W. 1117; Re Manning, 134 Iowa, 165, 111 N. W. 409.

Heirs and distributees are not estopped by a judgment rendered against an admin-

tain personal property which had belonged to decedent, and had failed to include it in the inventory, it was held that, upon objection by the heirs, the orphans' court had jurisdiction to try the issue by a jury and order the accountant to include the property after the verdict had been rendered against him.

In the cases cited supra there was no prior judgment, but the fact that there is a prior judgment would appear to be immaterial when no attack is made upon it. A judgment against an estate is, of course, prima facie evidence of the administrator's right to pay it out of the estate, but is it conclusive? Suppose he has ample evidence in his possession to successfully maintain an action to set it aside for fraud. In such case it would hardly be contended that the judgment was conclusive evidence of his right to pay it out of the estate, or that it would be any more conclusive if he had colluded in perpetrating the fraud upon which the judgment was recovered. The judgment remains in full force, if it has not been paid, after the administrator has been surcharged with the amount thereof.

But it should be observed that the general statements supra are quite restrictive. The great majority of cases involve facts or issues that take them out of the principles stated supra, so that they are not in point here. If the result will affect parties who are not properly before the probate court, or subject-matter not within its jurisdiction, of course, the issue must be raised in some other manner or in some other forum.
L.R.A.1915C.

By an action on the bond.

In some jurisdictions an action on the bond cannot be maintained against the representative and his sureties unless the liability of the former is fixed by prior proceedings. (See 18 Cyc. 1282.) In such jurisdictions, clearly, an action on the bond could not take the place of, but would be an appropriate form of action to follow, a successful attempt to surcharge the administrator's account in the probate court. See statement in regard to action on the bond in RE MILLER.

But in other jurisdictions, funds misappropriated by the personal representative are held to be fully administered (on this theory no representative of the estate, such as an administrator *de bonis non*, can call his predecessor to account for a devastavit), so that those entitled to a share in the estate, either as creditors or as distributees, may sue the administrator or executor and his sureties upon the bond, alleging a devastavit. Stose v. People, 25 Ill. 600; Hanifan v. Needles, 108 Ill. 403; Re Campbell, 58 Ill. App. 91 (merely a statement, without an application of the principle); Hagthorp v. Hook, 1 Gill & J. 270; Whitfield v. Evans, 56 Miss. 488. These cases, as to facts involved, are not within the scope of the present note, as they do not involve collusion on the part of the personal representative in the establishment of a judgment. They are cited as indicating the practice in respect to a devastavit. No effort has been made to make the list exhaustive.
J. W. M.

istrator, to object to the approval of the administrator's final report on the ground of the administrator's gross negligence, fraud, and collusion in allowing such judgment to be obtained against him and the estate.

Nichols v. Day, 32 N. H. 133, 64 Am. Dec. 358; Gold v. Bailey, 44 Ill. 491, 92 Am. Dec. 190; Conger v. Cook, 56 Iowa, 121, 8 N. W. 782; McLeary v. Doran, 79 Iowa, 210, 44 N. W. 360.

Mr. W. M. Keeley, for appellee Sleich-ter:

The proceeding is *res judicata* as to the distributees of the personal property of Johanna Miller, through privity with the administrator.

Morris v. Murphey, 95 Ga. 307, 51 Am. St. Rep. 81, 22 S. E. 635; Harsh v. Griffin, 72 Iowa, 608, 34 N. W. 441; Ryan v. Hutchinson, 161 Iowa, 575, 143 N. W. 433.

The cause of action, if any existed, to claim and secure the property given to Anna Kroeger, was in the administrator, and not in the distributees or heirs.

Ritchie v. Barnes, 114 Iowa, 67, 86 N. W. 48; Re Acken, 144 Iowa, 519, 123 N. W. 187, Ann. Cas. 1912A, 1166; Rhodes v. Stout, 26 Iowa, 313; 18 Cyc. 944.

A party or privy to a judgment is not permitted to impeach it collaterally on the ground that it was obtained by means of collusion between the other parties to the action.

23 Cyc. 1099b.

Where the administrator, as pretended creditor of the estate, filed a claim and procured its allowance, and the distributees filed exceptions to his report, in which he showed payment to himself of the claims so allowed, the court would not, on trial of such exceptions, set aside the claim or its allowance, and if it is to be assailed on the ground that it was fraudulently obtained, it should be done in an action brought for that purpose, with the proper averments and parties.

Ashton v. Miles, 49 Iowa, 564.

Where the special administrator had approved the allowance of the claim of the administrator against the estate, and distributees filed objections to the final report of the administrator, showing such claim as allowed, the allowance of the claim could not be attacked by exceptions to the final report.

Ibid.; Re Pennock, 122 Iowa, 622, 98 N. W. 480.

Mr. C. A. Dewey for appellee Brown.

Evans, J., delivered the opinion of the court:

In June, 1911, Johanna Miller died intestate, survived by three sisters and a

brother as her only heirs at law. Two sisters and the brother are the appellants herein. They are residents of Germany. The other sister, Anna Kroeger, is a resident of this country, and was such at the time of the death of Johanna Miller, but was a nonresident of Iowa. She was called to the bedside of Johanna shortly before she died. Prior to such time Johanna had been the owner of certain moneys and credits amounting to about \$9,000. After her death, the surviving sister, Anna, was in possession of said property, claiming to have acquired the same by gift. The present administrator was appointed upon the petition of Anna. She brought an action in the district court against the administrator and the other heirs of Johanna, the appellants herein, asking, in effect, that she be adjudged to be the absolute owner of such property. Notice was served upon these appellants by publication only. The administrator appeared and made at least a formal defense, though without the assistance of counsel. A decree was entered for the plaintiff. Thereafter and within two years these appellants appeared in such suit and filed a motion that the judgment be set aside, and that they be permitted to defend on the ground that they were served by publication only. This motion was sustained. Thereafter, and before any further trial was had, the plaintiff dismissed her suit against the appellants. The apparent purpose of such dismissal was to avoid a retrial. No retrial was ever had, nor was any further order made in such suit. The administrator filed his final report, ignoring therein all reference to the assets involved in the suit referred to. The appellants, as beneficiaries of the estate, appeared and filed objections. The administrator amended his report and set up the judgment in favor of Anna Kroeger as an adjudication binding upon him, and as excusing his failure to list such securities as property of the estate. The objections filed by the appellants charged in effect that the administrator fraudulently and collusively aided the claimant Anna in obtaining the adjudication against him as administrator. To such objections was appended the following prayer: "Wherefore, the undersigned ask that said report and accounting on file be disapproved and rejected; that said administrator be required and ordered to account for and to pay into court, in addition to the assets accounted for in said report, the further sum of \$9,000; that each of the items of credit by him claimed to which objection is hereinbefore made be rejected, and that he be allowed no credit therefor, and that the said assets of said estate, to wit, \$9,000, be divided

among these objectors as provided by the statutes of Iowa, to wit."

The administrator moved the court to strike such objections on the ground that the issues thereby tendered could only be heard and tried in a direct proceeding, and that they could not be tried in the form of mere objections to the administrator's report. This motion was sustained, and from such order was the appeal taken.

The definite question presented is whether it is competent for the beneficiary of an estate to include in his objections to a final report of the administrator a charge of fraud and collusion against the administrator in the establishment of a claim against the estate, and to ask that the amount thus fraudulently established shall be nevertheless charged against the administrator in his final report. On principle, such method of procedure would seem to be quite free from objection. Such a method of procedure would seem also to conform to the spirit of the statute, giving full power of review to the probate court at any time before the final discharge of the administrator. Code, § 3398.

The opposing contention is based upon the opinions of this court in *Ashton v. Miles*, 49 Iowa, 564, and *Re Pennock*, 122 Iowa, 622, 98 N. W. 480. In each of those cases the administrator himself had been a claimant against the estate. As to such claim a special administrator had been appointed to investigate and defend. The claim was regularly established. For the amount so established and allowed by the special administrator, the administrator took credit in his final report. The beneficiaries filed objection, charging fraud in the establishment of the same. It was said by this court that such question could not be thus tried, but that a direct attack should be made upon the adjudication.

It will be noted that in the establishment of such claim in his own behalf, the claimant, though administrator of the estate, was not acting as such. As to his own claim, he could not act as such. In the prosecution of such claim, therefore, he sustained no relation of trust to the estate. He stood toward the estate precisely as any other third party who was making a claim against it. The claim being once established, it could only be reopened for further trial by appropriate proceedings directed against the claimant himself.

In each of the cited cases, the court found as a fact that there was no fraud. There was therefore no discussion of the point now under consideration. Nor is the state of the record with reference to such point very clear.

Assuming in the case before us that the L.R.A.1915C.

adjudication in favor of Anna Kroeger could not be set aside, as to her, by this method of procedure, it does not follow that the administrator might not be required to stand the loss, if the established claim was in fact fraudulent to his knowledge, and if he fraudulently and collusively aided in its establishment. That is all that is asked by the objectors.

In *McLeary v. Doran*, 79 Iowa, 210, 44 N. W. 360, it was held that the beneficiaries could have recourse against the administrator in such case.

In response to this case it is urged by appellee that the recourse here intended was an action on the bond. But the chief purpose of an action on the bond would be to charge the surety for the defaults of his principal. We apprehend if the final report of the administrator were approved, and if he made distribution according to its call, there would be no basis left for an action on the bond.

In *Ryan v. Hutchinson*, 161 Iowa, 575, 143 N. W. 433, the right of an objector to tender an issue of fraud and collusion on the part of the administrator is implied.

Re *Douglas*, 140 Iowa, 605, 117 N. W. 982, is a case wherein such right is distinctly recognized. To the same effect is *Rabbett v. Connolly*, 153 Iowa, 607, 133 N. W. 1060.

In the last two named cases it is held that a motion to set aside the allowance of a claim is a direct attack upon it. This holding may be a slight modification of what was said in the *Ashton* and *Pennock* Cases. In the case before us, the objectors appended to their objections the prayer which we have above set forth. Such prayer contains all the essential requisites of a motion based upon the ground set forth in the objections. To the extent of the relief prayed for, therefore, it is a direct attack even though it asks less than the setting aside of the adjudication.

We reach the unavoidable conclusion, therefore, that it was open to the beneficiaries in this manner to tender the issue of fraud and collusion, and that they were entitled to a hearing upon it. The striking of their allegations necessarily denied them such hearing.

2. It will be noted from the foregoing that we have dealt only with the allegations of fraud and collusion as a ground for denying credit to the administrator for the payment of the alleged fraudulent claim. The objectors did also allege that such fraudulent claim was allowed through the negligence of the administrator. Whether the objectors would be entitled to relief against the adjudication by a show-

ing of mere negligence without bad faith on the part of the administrator is a question which has not been argued. We are not disposed to make any pronouncement upon that feature of the case without the aid of argument.

Though an administrator could be held liable for fraud and collusion, it would not necessarily follow that mere negligence would charge him with the same liability. Justice often finds its mark even though the litigant be negligent. It is doubtless true, also, that some degree of negligence enters into most litigation, and that skill and diligence are not necessarily determinative.

3. It will be noted, also, that in our discussion in division 1 hereof we have assumed that the adjudication in favor of Anna Kroeger has never been set aside. In so doing we have conformed to the theory of the argument.

In view of the fact that the suit of Anna Kroeger was brought not only against the administrator, but also against all the beneficiaries of the estate, and her adjudication was had against all, and in view of the fact that the beneficiaries of the estate appeared within the statutory time and moved that the adjudication be set aside, and that such adjudication was set aside we are not prepared to say affirmatively that there was any adjudication left even as against the administrator. *Bowman v. Parks*, — Iowa, —, 147 N. W. 850. He was only a representative of the beneficiaries. The problem presented is whether the beneficiaries could win and their representative lose. We have formed no opinion on this question. But as it is liable to arise at any future stage of the proceedings, we only take the precaution to confine our present holding to the single question argued before us.

The order of the trial court must be reversed.

Ladd, Ch. J., and Weaver and Preston, JJ., concurring.

Petition for rehearing denied.

GEORGIA SUPREME COURT.

MAYOR & ALDERMEN OF THE CITY
OF SAVANNAH, Plff. in Err.,
v.

T. B. JORDAN.

(142 Ga. 409, 83 S. E. 109.)

Municipal corporations — failure to
clean street — liability.

1. The duty of keeping the streets of a

Headnotes by HILL, J.
L.R.A.1915C.

municipality free from matter which, if allowed to remain, would affect the health of the public, is a governmental function, the exercise of which would exempt the municipality from liability to a suit for damages to an employee without fault, who is injured by reason of a defective cart in which he is hauling "the sweepings of the streets" of such municipality, and which has been furnished him for that purpose by the agents of the municipality.

(a) This court will take judicial cognizance that the "sweepings of the streets" of a municipality contain matter which, if allowed to remain in the streets, will injuriously affect the health of the citizens of such municipality.

(b) And this is so notwithstanding petition describes "the sweepings of the streets" as "dirt and trash."

Pleading — sufficiency.

2. The petition was subject to general demurrer, and should have been dismissed.

(September 19, 1914.)

ERROR to the Superior Court for Chatham County to review an order overruling a demurrer to a petition filed to recover damages for personal injuries for which defendant was alleged to be responsible. Reversed.

Statement by HILL, J.:

This action was brought against the city of Savannah by T. B. Jordan, who was an employee of the city engaged at the time of the injury in driving a street cart. It was

Note. — Street cleaning as a governmental function.

The liability of a municipal corporation for the negligence or torts of its agents or servants in connection with the cleaning of its streets depends upon the question whether street cleaning is a private or corporate, or a public or governmental, function of the municipality, it being liable if in the exercise of a function of the former class, but not liable if in the exercise of one of the latter.

"This class of functions [governmental] includes all those which are usually performed by the state in rural communities under general laws, and were so performed within the municipal boundaries before the organization of the corporation, and which the state would resume on disincorporation." But "whether the function of caring for . . . the public highways within the municipality is governmental or municipal has been . . . diversely decided." 28 Cyc. 267, 268.

So, as stated in *SAVANNAH v. JORDAN*, there is a diversity of opinion as to whether or not the cleaning of streets by a municipality is a governmental duty, in the performance of which it is not liable for the negligence or torts of its officers or agents.

alleged that he was engaged in duties "under the street and lane department of the city," and that at the time of the injury he was "hauling the sweepings of the street." While driving the cart he noticed that the axle was not exactly straight, and, not being a mechanic, and knowing nothing about the durability of metals, he called the attention of Mr. Doolan, under whom he was working, to the condition of the axle, who told him to report the matter to the "inspector of carts and mules." The axle was worn, the point where it broke being thinner than the other part, and this made it too weak to stand the weight of the "dirt and trash" in the cart. The inspector who made an examination of the axle pronounced it safe, told the plain-

tiff to continue using it, and assured him that it would not break. At the point where it broke, it was cracked and too weak to stand the weight of the "dirt and trash in the cart," which was unknown to the plaintiff, but was known to the defendant, or could and should have been known if proper inspection had been made. On April 10, 1911, plaintiff was driving the cart on Farm street, which is a rock-paved street; and, while on the cart in the discharge of his duties, the axle broke and he was violently thrown to the pavement. This severely injured his elbow and caused a rupture, from which hernia resulted, etc. He was entirely free from fault, did not consent or contribute to his injury, and relied upon the assurance of safety given

And this diversity arises not only from the difference of opinion upon the more general question as to whether or not the function of caring for the street is a governmental one, but may also arise from the further difference of opinion upon the question whether the cleaning of the streets is a duty primarily connected with the care of the streets, or is a duty primarily pertaining to the preservation of the public health,—the latter class of duties being clearly governmental in character.

Thus, the flushing of the streets of a city for the promotion of the health, comfort, and safety of the general public is a governmental function of the city. *Kippes v. Louisville*, 140 Ky. 423, 30 L.R.A.(N.S.) 1161, 131 S. W. 184.

And in *Love v. Atlanta*, 95 Ga. 129, 51 Am. St. Rep. 64, 22 S. E. 29, it was held that the cleaning of the streets of the city of Atlanta was a governmental function, so that the city was not liable for an injury to a private citizen by the negligence of one engaged in such work. This holding, however, as indicated by the syllabus by the court, quoted in the opinion in *SAVANNAH v. JORDAN*, seems to have been based in part upon the fact that, under the charter of the city of Atlanta, the duty of keeping the streets clear of putrid and other substances offensive to the sense of smell and which tend to imperil the public health devolved upon the board of health of that city; and that the functions of this department of the city government were governmental, and not purely administrative, in their character, although the court observes "that in order to exempt a city from liability, it is not sufficient to show that the particular work, from the negligent performance of which by the servants of the city a citizen was injured, was being performed under the direction of the health authorities; but it must be shown that the particular work so being done was connected with or had reference to the preservation of the public health." And "if the health department were engaged in clearing away or removing obstructions from the street which in no way endangered the public health, the

responsibility of the city then would rest upon the rule of liability for work connected with repairing and keeping in order the public highways."

In *Bruhne v. LaCrosse*, 155 Wis. 485, 50 L.R.A.(N.S.) 1147, 144 N. W. 1100, it was held that the municipality, in the care and maintenance of its highways, was exercising a public governmental duty imposed by law upon it, not for its own advantage or gain, but as an administrative agency of the state, so that it was not responsible for negligence on the part of the driver of a dump wagon used by it for street cleaning purposes.

And it has been held that the cleaning of the streets of a city is an exercise by it of a discretionary power of a public or legislative character, conferred on it for the public good, so that the rule *respondet superior* does not apply as between the employees and instrumentalities engaged in the work and the municipality, and the latter is not liable to any private individual for the manner in which this discretionary duty is performed. *Cassidy v. St. Joseph*, 247 Mo. 197, 152 S. W. 306. The court said: "Neither the state nor those quasi corporations consisting of political subdivisions, which, like counties and townships, are formed for the sole purpose of exercising purely governmental powers, are, in the absence of some express statute to that effect, liable in an action for damages either for the nonexercise of such powers, or for their improper exercise, by those charged with their execution. This applies alike to the acts of all persons exercising these governmental functions, whether they be public officers whose duties are directly imposed by statute, or employees whose duties are imposed by officers and agents having general authority to do so. The same rule applies to municipal corporations in the exercise of similar powers, which are called discretionary powers of a public or legislative character (4 Dill. Mun. Corp. 5th ed. § 2026), because they primarily rest in the discretion of the legislative authority of the municipal government, although their execution, like the execution

him by "the defendant's mechanic." The axle was not manifestly dangerous. The injury was due directly and proximately to the negligence of the defendant, its servants, and employees, in furnishing plaintiff an unsafe appliance with which to work, and in assuring him that the appliance was safe. A general and special demurrer to the petition were overruled, and the defendant excepted.

Messrs. John Rourke, Jr., and D. S. Atkinson, for plaintiff in error:

If, in the exercise of governmental functions and in the discharge of the duties devolving upon the board of health, thereunder, a private citizen is injured by the

negligence of one of its servants in and about such work, no right of action arises against the city.

Love v. Atlanta, 95 Ga. 129, 51 Am. St. Rep. 64, 22 S. E. 29; Nisbet v. Atlanta, 97 Ga. 650, 25 S. E. 173; Wyatt v. Rome, 105 Ga. 312, 42 L.R.A. 180, 70 Am. St. Rep. 41, 31 S. E. 188; Augusta v. Owens, 111 Ga. 477, 36 S. E. 830, 8 Am. Neg. Rep. 222; Dalton v. Wilson, 118 Ga. 100, 98 Am. St. Rep. 101, 44 S. E. 830; Watson v. Atlanta, 136 Ga. 370, 71 S. E. 664; Hurst v. Warner, 102 Mich. 238, 26 L.R.A. 484, 47 Am. St. Rep. 525, 60 N. W. 440; Bryant v. St. Paul, 33 Minn. 289, 53 Am. Rep. 31, 23 N. W. 220; Ogg v. Lansing, 35 Iowa, 495, 14 Am. Rep. 499; Hill v. Charlotte, 72 N. C. 55, 21 Am. Rep. 451; Forbes v. Board

of the general powers of the state government, may be intrusted to such officers and other agencies as the legislative authority may lawfully designate. When the exercise of these powers ceases to be discretionary, when it no longer depends upon the will of the municipal legislature, but upon the paramount will of the charter-making body, then only does the neglect of the municipality subject it to an action for damages."

In Louisville v. Carter, 142 Ky. 443, 32 L.R.A.(N.S.) 637, 134 S. W. 468, the non-liability of the municipality for an injury to a pedestrian caused by his being negligently run over by a wagon used for the purpose of clearing the streets of the city and removing the waste and refuse matter therefrom, seems to have been based on the holding that the wagon was employed in a use that was for the general public good, and the function which the municipality exercised in its use was a governmental function.

And in McFadden v. Jewell, 119 Iowa, 321, 60 L.R.A. 401, 97 Am. St. Rep. 321, 93 N. W. 302, it was held that, in clearing an alley of weeds, a city exercises its police power, so that it is not liable for negligence in the performance of the work by one whom it has employed for that purpose, which results in the injury of a child attracted there by his operations.

On the other hand, in Young v. Metropolitan Street R. Co. 126 Mo. App. 1, 103 S. W. 135, where a pedestrian had been injured through the negligence of a municipal employee engaged in carting away piles of dirt and rubbish which had been gathered along a street, it was held that the city, through its employee, was not acting in a governmental capacity for the general public good, in protecting the health of the community, although the act might be helpful to the general health, or might in some remote degree be referable to governmental regulation; but that the servant was merely engaged in removing piles of dirt which, if left remaining, would have rendered the city liable if damage had been caused by them, and the other features of the case L.R.A.1915C.

should be considered more as incidental than as the sole purpose.

This case, however, was expressly disapproved by the supreme court of Missouri in the case of Cassidy v. St. Joseph, supra, in so far as it might conflict with the opinion in the latter case.

But in Denver v. Maurer, 47 Colo. 209, 135 Am. St. Rep. 210, 106 Pac. 875, it was held that the flushing of a storm sewer constructed by a city to carry away the surface water which came upon the streets, though done solely to preserve health and comfort, was not done primarily in the performance of the governmental duty relating to the preservation of health, but was done in the discharge of the general duty of caring for the streets. The court said: "To the ordinary mind this storm sewer formed a part of the improvement of the street, and pertained primarily to the care of the street. Obviously as the water flowed into the catch-basin, it would carry with it refuse from the street, some of which would remain. At other times refuse would be blown, or otherwise forced, through the opening into the basin. This refuse would remain to breed disease and noxious odors, if not removed. One more act was necessary to keep the street in a reasonably fit and suitable condition for use, and that act was the flushing of the storm sewer to remove this menace to the health and comfort of the people. How in reason can the act of flushing that sewer, under these circumstances, be anything more than a detail in the performance of the general duty of the city to care for its streets? How can it be said that the city, in its private corporate character, could create a condition that was a menace to the public health, and when it proceeded to remove that condition, it acted in its public governmental character in the performance of a public duty cast upon it by the sovereign state? The state had nothing to do with that storm sewer. It belonged exclusively to the city of Denver. When the city, acting in its private corporate character, by means of that sewer, created on its streets a condition that menaced the health and

of Health, 28 Fla. 26, 13 L.R.A. 549, 9 So. 862; White v. Marshfield, 48 Vt. 20; Lynde v. Rockland, 66 Me. 309; Barbour v. Ellsworth, 67 Me. 294; Mitchell v. Rockland, 41 Me. 363, 66 Am. Dec. 252; James v. Harrodsburg, 85 Ky. 191, 7 Am. St. Rep. 589, 3 S. W. 135; Haley v. Boston, 191 Mass. 291, 5 L.R.A.(N.S.) 1005, 77 N. E. 888; Kuehn v. Milwaukee, 92 Wis. 263, 65 N. W. 1030; Condict v. Jersey City, 46 N. J. L. 167; Johnson v. Somerville, 195 Mass. 370, 10 L.R.A.(N.S.) 715, 81 N. E. 268; Louisville v. Carter, 142 Ky. 443, 32 L.R.A.(N.S.) 637, 134 S. W. 468; Harrington v. Worcester, 186 Mass. 594, 72 N. E. 326; Ft. Worth v. Crawford, 64 Tex. 202, 53 Am. Rep. 753; Bishop v. New York, 21 Misc. 598, 48 N. Y. Supp. 141; Davidson v. New York, 24 Misc. 560, 54 N. Y. Supp. 51; Kippis v. Louisville, 140 Ky. 423, 30 L.R.A.(N.S.) 1161, 131 S. W. 184; Long v. Birmingham, 161 Ala. 427, 49 So. 881, 18 Ann. Cas. 507; Lynch v. North Yakima, 37 Wash. 657, 12 L.R.A.(N. S.) 261, 80 Pac. 79; Wright v. Augusta, 78 Ga. 241, 6 Am. St. Rep. 256.

Messrs. Twiggs & Gazan, for defendant in error:

Hauling away the sweepings from the streets by the use of a cart operated by the streets and lanes department of a city is not the exercise of a governmental function, and the city is liable.

Quill v. New York, 36 App. Div. 476, 55 N. Y. Supp. 889, 5 Am. Neg. Rep. 423;

Missano v. New York, 160 N. Y. 123, 54 N. E. 744, 6 Am. Neg. Rep. 652; Pass Christian v. Fernandez, 100 Miss. 76, 39 L.R.A.(N.S.) 649, 56 So. 329; Barnes v. District of Columbia, 91 U. S. 540, 23 L. ed. 440; Barney Dumping-Boat Co. v. New York, 40 Fed. 50; Denver v. Porter, 61 C. C. A. 168, 126 Fed. 288; 5 Thomp. Neg. § 5792; 4 Dill. Mun. Corp. 5th ed. § 1662.

Even if the work which Jordan was doing was that of a governmental function, and the city would not be liable for any negligence which he might be guilty of to third persons, yet as between himself and the city, the city owed him the same duty that every other master owes to a servant, regardless of what department of the municipality he may be engaged in.

Condon v. Chicago, 249 Ill. 596, 94 N. E. 977; 4 Labatt, Mast. & S. § 1615; Galveston v. Hemmis, 72 Tex. 558, 13 Am. St. Rep. 828, 11 S. W. 29; Turner v. Indianapolis, 96 Ind. 51; Brabon v. Seattle, 29 Wash. 6, 69 Pac. 365; Kansas City v. McDonald, 45 L.R.A. 429, 57 Pac. 123, 6 Am. Neg. Rep. 67; Coots v. Detroit, 75 Mich. 628, 5 L.R.A. 315, 43 N. W. 17; Farley v. New York, 152 N. Y. 222, 57 Am. St. Rep. 511, 46 N. E. 506, 1 Am. Neg. Rep. 341; Williams, Mun. Liability for Tort, 57; Rhobidas v. Concord, 70 N. H. 90, 51 L.R.A. 387, 85 Am. St. Rep. 604, 47 Atl. 82; Augusta v. Owens, 111 Ga. 464, 36 S. E. 830, 8 Am. Neg. Rep. 222; Kennedy v. Savannah, 9 Ga. App. 760, 72 S. E. 160; Huey v. Atlanta, 8 Ga. App. 597, 70 S. E. 71;

comfort of the community, no authorities need be cited to show that it was its private corporate duty to remove that condition from its streets."

In *Barney Dumping-Boat Co. v. New York*, 40 Fed. 50, and *Engle v. Mayor*, cited therein, and set out in a note by the editor in 40 Fed. 51, but otherwise unreported, it was held that the duty delegated by law to the commissioner of street cleaning of the city of New York, as the head of the department of street cleaning, to keep the streets cleaned and remove refuse as often as the public health and the use of the streets might require, was not a governmental or public duty, but was such as primarily devolved upon the city, as a municipal or corporate obligation, so that the commissioner and his subordinates were the agents of the city, rather than of the general public, and the city was liable for the negligence of some of them in charge of a steam tug belonging to the city, while engaged in removing refuse from the streets. The United States circuit court said: "His duties, unlike those of the officers of the departments of health, charities, fire, and police, although performed incidentally in the interest of the public health, are more immediately performed in the interest of the corporation itself, which is charged with L.R.A.1916C.

the obligation of maintaining its streets in fit and suitable condition for the use of those who resort to them."

So, in *Missano v. New York*, 160 N. Y. 123, 54 N. E. 744, 6 Am. Neg. Rep. 652, it was held (Gray, J., dissenting) that the city of New York, whose duty it was to see that its streets were thoroughly cleaned and kept clean at all times, and to remove the sweepings, etc., as often as the public health and use of the streets required it to be done, was acting, in the ordinary and usual care of its streets, both as to repairs and cleanliness, in the discharge of a special power granted to it by the legislature, in the exercise of which it was a legal individual, as distinguished from its governmental functions when it acted as a sovereign; and that the fact that the discharge of this duty might incidentally benefit the public health did not make the acts of the commissioner of street cleaning a public function.

And in *Quill v. New York*, 36 App. Div. 476, 55 N. Y. Supp. 889, 5 Am. Neg. Rep. 423, and *Bishop v. New York*, 21 Misc. 598, 48 N. Y. Supp. 141, it is stated, *obiter*, or recognized, that the duty imposed by law upon the city of New York, or the street-cleaning department thereof, to remove the dirt accumulating on, and to clean, the

Augusta v. Mackey, 113 Ga. 64, 38 S. E. 339.

Hill, J., delivered the opinion of the court:

Exception is taken to the overruling of the demurrer to the petition as amended. The amendment sufficiently met the special demurrer. Is the petition as amended sufficient to withstand a general demurrer? This depends on the answer to the question whether the act of hauling the sweepings from the streets of Savannah by the use of a cart, operated under the direction of the department of streets and lanes in that municipality, was the exercise of a governmental function, or was the exercise of a ministerial function. It seems to be well settled that where the municipality undertakes to perform for the state duties which the state itself might perform, but which have been delegated to the municipality,—such, for instance, as devolve upon the board of health of a city under its charter, for the protection of life and health and comfort of the community,—and in the exercise of such function under the department a private citizen is injured by the negligence of the servants of the department while engaged in such work, no cause of action arises against such municipality. *Love v. Atlanta*, 95 Ga. 129, 51 Am. St. Rep. 64, 22 S. E. 29; *Cook v. Macon*, 54 Ga. 468; *Gray v. Griffin*, 111 Ga. 361, 368, 51 L.R.A. 131, 36 S. E. 792; *Dalton v. Wilson*, 118 Ga. 100, 101, 98 Am. St. Rep. 101,

44 S. E. 830; 4 Labatt, Mast. & S. 2d ed. § 1615, p. 4928; 5 Thomp. Neg. § 5789. On the other hand, a municipality is civilly liable for damages arising “for neglect to perform, or for improper or unskillful performance of, their duties” (Civil Code 1910, § 897), or for acts which are thus performed in its private character for business purposes, and for its own advantage or profit, although such act may inure to the ultimate benefit of the citizen. 5 Thomp. Neg. § 5789; 4 Labatt, Mast. & S. 2d ed. § 1615; Dill. Mun. Corp. 5th ed. § 1662, p. 2899. See *Huey v. Atlanta*, 8 Ga. App. 597, 70 S. E. 71; *Savannah v. Spears*, 66 Ga. 304; *Smith v. Atlanta*, 75 Ga. 110; *Greensboro v. McGibbony*, 93 Ga. 672, 20 S. E. 37. There is a diversity of opinion in outside jurisdictions as to the liability of municipalities, while engaged in cleaning streets, for torts committed by its officers or agents. In some jurisdictions these duties are held to be governmental in their character, and the right to recover damages for torts thus committed is denied. See 4 Dill. Mun. Corp. 2899, and cases cited. In other jurisdictions municipalities have been held impliedly liable for the negligence of employees engaged in street cleaning. *Ibid.* *Missano v. New York*, 160 N. Y. 123, 54 N. E. 744, 6 Am. Neg. Rep. 652; *Quill v. New York*, 36 App. Div. 476, 55 N. Y. Supp. 889, 5 Am. Neg. Rep. 423; *Barney Dumping-Boat Co. v. New York (C. C.)* 40 Fed. 50. A clear distinction between the governmental and ministerial functions of a mu-

streets of the city, is not a governmental duty, but is a corporate duty beneficial to the corporation.

And in *Ostrom v. San Antonio*, 94 Tex. 523, 62 S. W. 909, holding that the cleaning of the streets of the defendant city was a function conferred upon it for the peculiar advantage of its own inhabitants, and a duty of a purely corporate character, for which the corporation was liable, the court said: “In what sense can it be said that the cleaning of the streets of San Antonio was a duty that primarily rested upon the state of Texas? We know of no principle of law upon which such duty can be based, nor any case which has so held, nor any instance in which such power has been exercised by the state for the benefit of the general public; and we must conclude that it does not fall within that class of cases which are specified as being powers to be exercised for the good of the general public imposed upon a municipal corporation for enforcement within its limits. The law imposed the duty of cleaning the streets upon the city of San Antonio within its own limits primarily and especially for the benefit of its own people. It is strictly a corporate function for the abuse of which by its agents in the course of their regular employment the city must be held liable.” L.R.A.1915C.

As to the liability of a municipal corporation for injuries inflicted by the negligence of employees engaged in the repair or construction of highways, see notes to *Barree v. Cape Girardeau*, 6 L.R.A.(N.S.) 1090, and *Kippes v. Louisville*, 30 L.R.A.(N.S.) 1161.

As to the liability of a municipal corporation for fire set by sparks from a steam roller engaged in repairing a street, see note to *Alberts v. Muskegon*, 6 L.R.A.(N.S.) 1094.

As to the liability of a municipality for injury by an employee engaged in removing refuse, see notes to *Haley v. Boston*, 5 L.R.A.(N.S.) 1005, and *Pass Christian v. Fernandez*, 39 L.R.A.(N.S.) 649.

As to the liability of a municipality for injuries resulting from its use of a dumping ground, see note to *Denver v. Davis*, 6 L.R.A.(N.S.) 1013.

Many other phases of the distinction between the public or governmental and private or corporate function of municipalities are treated in notes cited in the Index to L.R.A. Notes, under the title, “Municipal Corporations,” subdivision “Liability for Damages,” dealing with the liability of a municipal corporation for damages incident to various branches of its activities.

A. C. W.

municipal corporation is drawn in the case of *Jones v. Williamsburg*, 97 Va. 722, 47 L.R.A. 294, 34 S. E. 883, where Rieley, J., says: "A municipal corporation has a dual character, the one public and the other private, and exercises correspondingly two-fold functions, the one governmental and legislative, and the other private and ministerial. In its public character, it acts as an agency of the state to enable it the better to govern that portion of its people residing within the municipality, and to this end there is granted to or imposed upon it by the charter of its creation powers and duties to be exercised and performed exclusively for public, governmental purposes. These powers are legislative and discretionary, and the municipality is exempt from liability for an injury resulting from the failure to exercise them or from their improper or negligent exercise. In its corporate and private character there is granted unto it privileges and powers to be exercised for its private advantage, which are for public purposes in no other sense than that the public derives a common benefit from the proper discharge of the duties imposed as assumed in consideration of the privileges and powers conferred. This latter class of powers and duties are not discretionary, but ministerial and absolute; and for an injury resulting from negligence in their exercise or performance, the municipality is liable in a civil action for damages in the same manner as an individual or a private corporation. The line of distinction . . . is clearly drawn by the courts and text-writers, and the exemption of the municipality from liability in the one case, and its liability in the other for an injury resulting from negligence, firmly established."

Where a municipality is exercising an administrative function at the time an employee is injured, it owes its employee the duty of furnishing a safe place to work; and for a failure to do so, and where by reason of such failure an employee is injured without fault on his part the corporation would be liable, under the same circumstances that a private individual or corporation would be. 4 Labatt, Mast. & S. § 1615; *Condon v. Chicago*, 249 Ill. 596, 94 N. E. 976. See *Collins v. Greenfield*, 172 Mass. 78, 51 N. E. 454; *Houigan v. Norwich*, 77 Conn. 358, 59 Atl. 487, 17 Am. Neg. Rep. 445; *Bruhne v. La Crosse*, 155 Wis. 485, 50 L.R.A.(N.S.) 1148, 144 N. W. 1100. The authorities undoubtedly make a distinction between cases where injuries are occasioned by the agents of municipalities while engaged in the performance of governmental functions, or in private enter-

prises. Between the municipality and the public the question of liability depends upon whether at the time of the injury the municipality is engaged in a governmental or ministerial duty. The relation of a municipal corporation to its servants is the same as it is between any other master and servant, provided it is engaged in the performance of ministerial functions.

The question has been settled so far as this state is concerned, and the only difficulty is in applying the rulings made to a particular case. In *Love v. Atlanta*, 95 Ga. 129, 51 Am. St. Rep. 64, 22 S. E. 29, it was held that "the duty of keeping the streets clear of putrid and other substances offensive to the sense of smell and which tend to imperil the public health devolves under the charter of the city of Atlanta, upon the board of health of that city; and, the functions of this department of the city government being governmental, and not purely administrative in their character, it follows that if, in the exercise of such functions and in the discharge of the duties devolving upon this department thereunder, a private citizen is injured by the negligence of one of its servants in and about such work, no right of action arises against the city."

And see, to the same effect, *Watson v. Atlanta*, 136 Ga. 370, 71 S. E. 664. In the body of the opinion in the *Love Case*, Justice Atkinson said: "With respect to matters concerning the public health, however, there is no serious conflict of reason, opinion, or authority upon the correctness of the proposition that the preservation of the public health is one of the duties that devolves upon the state as a sovereign power. It is such a duty as, upon proper occasion, justifies the exercise of the right of eminent domain and the demolition of structures which endanger or imperil the public health. In the discharge of such duties as pertain to the health department of the state, the state is acting strictly in the discharge of one of the functions of government. If the state delegate to a municipal corporation, either by general law or by particular statute, this power, and impose upon it within its limits the duty of taking such steps and such measures as may be necessary to the preservation of the public health, the municipal corporation likewise, in the discharge of such duty, is in the exercise of a purely governmental function, affecting the welfare not only of the citizens resident within its corporation, but of the citizens of the commonwealth generally, all of whom have an interest in the prevention of infectious or contagious diseases at any point within the state, and in the exercise of such powers is entitled

to the same immunity against suit as the state itself enjoys. Such a duty would stand upon the same footing as its duty to preserve the public peace, and its liability or nonliability would depend upon the same principle which relieves the city from liability for the misfeasance of a police officer in the discharge of his duty. It will be observed, however, that in order to exempt a city from liability, it is not sufficient to show that the particular work, from the negligent performance of which by the servants of the city a citizen was injured, was being performed under the direction of the health authorities; but it must be shown that the particular work so being done was connected with or had reference to the preservation of the public health."

It is a matter of common knowledge that the sweepings of the streets contain matter other than dirt and trash, which is offensive to the sense of smell, and which, if allowed to remain, will tend to affect not only the comfort, but the health of the community as well. Even the English sparrows take cognizance of this, and act as scavengers in removing it. And it matters not that the duty of removing this cause of discomfort, inconvenience, and ill health to the community is delegated to the "streets and lanes department" of a city. It is not the character or name of the agent who executes the duty of removing the cause of discomfort and ill health to the public which fixes the character of the duty performed, but it is the act itself which determines whether it be governmental or ministerial. It is immaterial whether the work is done under the supervision of the board of health of a municipality, or by the "director of public works," or under the "streets and lanes department." The duty is the same, and that is to remove from the streets all the sweepings and garbage and whatever would contaminate the atmosphere and breed pestilence and disease; and such a duty is a governmental, and not a ministerial, function. It is one that the entire public living within or without the municipality is concerned in, the enforcement of laws for the preservation of the comfort and health of the citizen. The allegation that the cart was too weak to stand the weight of "the dirt and trash" in the cart cannot change the character of the contents of the cart. The petition also alleged that the plaintiff was hauling "the sweepings of the street." Counsel for both plaintiff and defendant cite the ordinances of the city of Savannah as throwing light on the question at issue; but the court cannot take judicial cognizance of the existence of the ordinances of L.R.A.1915C.

a municipality, on demurrer, where such ordinances are not pleaded and set out. What is said in *Collins v. Russell*, 107 Ga. 423, 432, 33 S. E. 444, as to judicial cognizance of ordinances of the city of Savannah has no application to a case like the present. But, without reference to the ordinances of the city of Savannah, which we cannot consider under the present record, we hold that the allegation in the plaintiff's petition that the cart contained the sweepings of the streets, which he was hauling at the time of his injury, means that the plaintiff, as an employee of the city, was in the exercise of a governmental function; and, this being so, he cannot recover of the municipality. The court erred in overruling the general demurrer to the petition.

Judgment reversed.

All the Justices concur.

KENTUCKY COURT OF APPEALS.

CITY OF LOUISVILLE, Appt.,

v.

LULIA B. HEHEMANN et al.

(161 Ky. 523, 171 S. W. 165.)

Municipal corporation — disposal of garbage — liability.

1. A municipal corporation is not liable for the negligence of its agent in disposing of garbage, since it is a discharge of a governmental function.

Eminent domain — nuisance — injury — compensation.

2. A city is liable in damages for depreciation in value of adjoining property in permitting a city dump to become a nuisance, under a constitutional provision requiring compensation for property taken, injured, or destroyed for public use.

Evidence — sickness — value of property.

3. Upon the question of diminution in value of adjoining property by the maintenance of a nuisance, evidence is admissible of sickness and annoyance suffered by the owner because thereof.

Note. — Nuisance: throwing garbage on surface.

The present note is supplementary to the notes to *Denver v. Davis*, 6 L.R.A.(N.S.) 1013, and *Cumberland Grocery Co. v. Baugh*, 43 L.R.A.(N.S.) 1037.

As to injunction by municipality against nuisance by deposit of garbage, see note in 41 L.R.A. 324.

As to municipal power over transportation of garbage in street, see note in 39 L.R.A. 653.

As to liability of a municipality for injuries inflicted by servants while engaged

Evidence — Interest of witness.

4. A plaintiff in an action for damages for a nuisance maintained by a city may, in case the city asks his witness if he has a suit for the same cause pending show that the suit was settled, to repel the idea of interest in the witness.

Appeal — objectionable argument — absence from record.

5. Error in argument is not available on appeal in the absence of anything in the record to show that it was made or the court's ruling upon an objection to it.

(December 10, 1914.)

APPEAL by defendant from a judgment of the Common Pleas Branch, First Division, of the Circuit Court for Jefferson County in plaintiffs' favor in an action brought to recover damages for diminution in value of property alleged to have been caused by defendant's maintenance of a nuisance. Affirmed.

The facts are stated in the opinion.

Messrs. W. J. O'Connor and Pendleton Beckley for appellant.

in gathering or removing garbage or ashes, see notes to *Haley v. Boston*, 5 L.R.A. (N.S.) 1005; *Pass Christian v. Fernandez*, 39 L.R.A. (N.S.) 649; and *Savannah v. Jordan*, ante, 741.

As to power of municipal corporation to grant exclusive right or create monopoly for removal of garbage, see notes to *Smiley v. MacDonald*, 27 L.R.A. 540, and *Landberg v. Chicago*, 21 L.R.A. (N.S.) 830.

As shown in the notes in 5 L.R.A. (N.S.) 1005; 6 L.R.A. (N.S.) 1013, and 43 L.R.A. (N.S.) 1039, the courts differ upon the proposition as to whether the disposition or removal of garbage and refuse constitutes a governmental function within the rule that in the performance of a governmental function a municipality is not liable for the negligence of its officers and employees.

LOUISVILLE V. HEHEMANN is a case of unusual importance in this connection, holding that notwithstanding a municipality is not liable for the negligence of its agent in disposing of garbage, upon the ground that it is a discharge of a governmental function, the municipality is liable in damage for depreciation in value of adjoining property in permitting its dumping ground to become a nuisance, as such act constitutes a taking or damaging of property within the purview of a constitutional provision requiring compensation for property taken, injured, or destroyed for public use.

To the same effect is *Georgetown v. Ammerman*, 143 Ky. 209, 136 S. W. 202, where it was alleged that the continual dumping of garbage and refuse matter by the city greatly depreciated the value of adjoining property and made it impossible to use the

Messrs. Gilbert Burnett, Burnett & Burnett, and Benjamin F. Gardner, for appellees:

The allegations and proof show that the city created a nuisance.

21 Am. & Eng. Enc. Law, 692; 29 Cyc. 1185; *New Albany v. Slider*, 21 Ind. App. 392, 52 N. E. 626.

Where a municipality wrongfully invades the property of the citizen for a purpose lawful in itself, and within its charter powers, which the municipality might have lawfully condemned or purchased, it cannot escape liability for the resulting damage on the plea that the right or act was governmental.

Kemper v. Louisville, 14 Bush, 93; *Keasy v. Louisville*, 4 Dana, 154, 29 Am. Dec. 395; 28 Cyc. 1293; 20 Am. & Eng. Law, 1209; 21 Am. & Eng. Enc. Law, 728; *Haag v. Vanderburgh County*, 60 Ind. 511, 28 Am. Rep. 654; *Herr v. Central Kentucky Lunatic Asylum*, 97 Ky. 461, 28 L.R.A. 394, 53 Am. St. Rep. 414, 30 S. W. 971, 110 Ky. 282, 61 S. W. 283; *Henderson v. McClain*, 102 Ky. 403, 39 L.R.A. 349, 43 S. W. 700; *Clayton v. Henderson*, 103 Ky.

plaintiff's house as a residence; and it was held on demurrer to the answer (which averred that the city was not responsible upon the ground that it performed a governmental duty) that the maintenance of the dumping ground under the circumstances amounted to a taking or damaging of the adjoining property for which compensation should be made as provided by the Constitution.

In *Hines v. Rocky Mount*, post, 751, it was held that a city while exercising its charter powers in ordering a general cleaning up of the city was acting in its governmental capacity when it directed its agents and employees to deposit rubbish and garbage in a large hole in a street, for the purpose of disposing of the rubbish and also with a view of filling up the hole to improve the street, and was not liable in damages to an adjoining landowner for sickness caused by foul and unhealthful odors arising from the refuse deposited near his dwelling, though the city was liable for damages caused to the property by diminishing its value by establishing and maintaining the nuisance, as such damage is regarded as a taking or appropriation of the property for a public use, for which compensation must be made. It was accordingly held error to allow the jury to consider the testimony as to sickness of various members of the plaintiff's family as a direct element in estimating the damages. The court said: "In affording damages for wrongs of this character, injuries caused by a nuisance wrongfully created in the exercise of governmental functions, our decisions hold as the correct deduction from the above principle that the damages are

228, 44 L.R.A. 474, 44 S. W. 667; *Hauns v. Central Kentucky Lunatic Asylum*, 103 Ky. 562, 45 S. W. 890; *Paducah v. Allen*, 111 Ky. 361, 98 Am. St. Rep. 422, 63 S. W. 981; *Leavell v. Western Kentucky Asylum*, 122 Ky. 213, 4 L.R.A.(N.S.) 269, 91 S. W. 671, 12 Ann. Cas. 827; *Twyman v. Frankfort*, 117 Ky. 523, 64 L.R.A. 572, 78 S. W. 446, 4 Ann. Cas. 622; *Georgetown v. Ammerman*, 143 Ky. 209, 136 S. W. 202; *Madisonville v. Hardman*, 29 Ky. L. Rep. 253, 92 S. W. 930.

Nunn, J., delivered the opinion of the court:

In 1909 and 1910 Cabel street was used as a city dump. Appellees recovered a judgment for \$500 against the city of Louisville, for the injury this dump caused to their property, and damage in their use of it. They owned and lived in a little two-room house on Pocahontas alley in the "Point." The property reached back 150 feet to Cabel street. In 1909, when the city began to create the nuisance complained of, these two rooms sheltered the appellees and their eight children. The ter-

ritory of the Point is low and flat and subject to periodical overflows. The city desired to raise the grade of Cabel street, and was encouraged in this move by petition of the residents adjacent to the street, including appellees. The proposed fill extended through the Point for about 2,000 feet.

During the summer months of 1909, this work of filling became in reality a city dump, and especially was this so in the vicinity of the Hehemann home. All sorts of decaying animal and vegetable matter were brought there and dumped day after day. Witnesses tell of seeing on the dump, not only back-door refuse and vegetable garbage, but dead rats, cats, dogs, chickens, and barrels of spoiled fish. This became a putrifying mass from which constantly arose unmentionable odors and such a flock of flies and vermin as commonly come with carrion, all going to make human existence terrible in that vicinity. Some excuse is offered in behalf of the city by evidence that dead fish, fowls, and animals were brought there by individuals, not the city, and without the knowledge of the city's responsible officials. But responsi-

confined to the diminished value of the property affected, and that sickness attributable to such nuisance may not be properly considered as a direct element of damage. . . . The evidence, or some of it, may be relevant on the question of the diminished value of the property, and might, in given instances, present a case for injunctive relief, but may not be made the basis for a direct estimate and award of uncertain and unrestrained damages."

It was also said in the last cited case: "It does not appear what was the nature of plaintiff's tenure, whether as owner or otherwise, but, whether as owner or renter, he is entitled to recover for wrongful injury, causing damage to his proprietary rights."

In *Flannagan v. Bloomington*, 156 Ill App. 162, it is held that a city which causes to be deposited on land garbage and decaying vegetable matter in such manner as to greatly annoy an adjoining owner by foul and offensive odors, and to interfere with the comfortable use and enjoyment of his residence, is liable in damages for the injuries occasioned thereby.

The fact that the city may have employed an independent contractor to remove the garbage and refuse from the streets, and that he, under his contract, used the place as a dumping ground without authority or direction from the city so to do, does not affect the liability of the city for his action in causing damage to adjoining property in carrying out a contract with the city in the execution of the power given the city to remove and dispose of garbage and refuse matter, where it appears that the city officers knew that the place was used for a dumping ground, and were in-
L.R.A.1915C.

formed of the conditions which existed. *Ibid*.

The fact that the city passed an ordinance prohibiting the use of property within the corporate limits of the city as a dumping ground does not relieve the city from liability for the negligent and wrongful acts of its servants and employees who were permitted to violate the provisions of the ordinance. *Ibid*.

In *Newcastle v. Harvey*, 54 Ind. App. 243, 102 N. E. 878, it is held that a city is liable if it negligently permits garbage and offal to be washed away from its dumping grounds upon the property of another to his damage. It was said that while the city had authority, and was within the bounds of its governmental functions when it provided a suitable place for the deposit of its garbage, it may not deposit garbage at such place in a careless and negligent manner, causing a nuisance; nor may it negligently permit the garbage and offal, properly deposited, to escape upon the lands of another to his damage,—that a municipal corporation has no more right to maintain a nuisance than an individual, and for a nuisance maintained upon its property, the same liability attaches against a city as to an individual.

A city which maintains a dumping ground for the collection of great quantities of miscellaneous garbage, and uses and operates it in the disposition of the garbage in such manner as to cause unhealthful and offensive odors to the injury of persons living in the vicinity, may be enjoined against the maintenance of the same at the instance of a property owner suffering special injury therefrom. *Bell v. Savannah*, 139 Ga. 298, 77 S. E. 165. A. L. R.

bility cannot be escaped when it is shown that the city kept there every day during working hours a dump boss, who was in a position to control the situation, and when there is abundant evidence to show that the offensive material was so disposed of with his knowledge and direction, and many of these carcasses were dumped from city garbage wagons.

Such conflict as there is in the evidence relates to conditions at different places on the fill. They were not at all bad. For instance, toward the corner of Cabel and Fulton, where the street commissioner lived, and also at a place where another city officer lived, the material was cinders and dirt taken from excavations in and about the city.

All of appellees' children were taken down with sickness, which continued from three weeks to a year. Two of them died of meningitis. Their illness began with dysentery and went into typhoid. The attending physician testified that in all probability all the sickness was directly traceable to the unsanitary dump we have described.

In the collection and disposition of garbage, undoubtedly the city acts for the public health and discharges a governmental function. In this regard, it is an agent or arm of the commonwealth, and for that reason is absolved from liability for the negligence of its employees.

But there is an element of wrong complained of in this case, which goes beyond that. Conceding that a city dump is necessary for the public good, and that Cabel street was the proper place for it, still the city has no right to take or injure adjacent private property or the occupants in the use thereof without making compensation.

Section 242 of the Constitution requires that municipal and other corporations invested with the privilege of taking private property for public use shall make just compensation for the property taken, injured, or destroyed by them. *Paducah v. Allen*, 111 Ky. 361, 98 Am. St. Rep. 422, 63 S. W. 981; *Clayton v. Henderson*, 103 Ky. 228, 44 L.R.A. 474, 44 S. W. 667. In applying this section, the court makes a distinction between injuries to person from negligence on the part of agents or servants of municipal corporations, committed when in the discharge of some public duty, and injuries done to property rights, although likewise in the performance of public duties. The case of *Park Comrs. v. Prinz*, 127 Ky. 460, 105 S. W. 948, makes the distinction clear, and cites the leading cases on the proposition.

In *Madisonville v. Hardman*, 29 Ky. L. Rep. 253, 92 S. W. 930, the city maintained L.R.A.1915C.

an open drain or sewer, which caused disagreeable odors and served as a breeding place for flies and insects and injury to the health of Hardman's family. And we said: "Cities, in the exercise of their governmental functions, may construct sewers, streets, and other similar improvements, but they have no right to build a sewer in such a manner that it will discharge, at the very door of a citizen, the accumulated filth of livery stables, . . . and, when guilty of such wanton disregard of the rights of others, they must respond in damages."

See also *Georgetown v. Ammerman*, 143 Ky. 209, 136 S. W. 202.

In all such cases it is competent to prove sickness and annoyance suffered by the property owner or his family, as these impair his enjoyment, and depreciate the usable value of his property.

The instructions limited the recovery to "such sums in damages as you may believe from the evidence will fairly and reasonably compensate them for any diminution, if any, in the value of the use of their property." We cannot agree with appellant's contention that the only damage recoverable under the pleadings is for diminution of the market value. The instructions given by the court substantially conform to the claim set up in the petition as amended, and, in our opinion, state the proper measure of damage. Appellant complains that the instructions were materially changed, or that one was not given until after argument of its counsel was completed. But these facts are not shown by the record.

Appellant complains that the court refused to discharge the jury in view of an incompetent and prejudicial question asked of a witness by appellees' counsel. It seems that other residents of this vicinity had suits of like character against the city, and some of them were offered as witnesses by appellee. On cross-examination appellant asked one of them, "You have a suit against the city?" to which he responded, "No, I did have." On redirect examination, appellees' counsel asked the witness, "You had a suit against the city and got a judgment and verdict against the city?" If the witness answered, the record does not show it, but appellant immediately objected to the question; and the court, in sustaining the objection, cautioned counsel to refrain from this line of examination, and admonished the jury not to be influenced in making up their verdict by the improper question. It will be seen that the objectionable question, if indeed it was so, was brought out by the question which appellant's counsel propounded on cross-examination. Of course, the city's liability to

appellees could not be fixed or enhanced by the fact that it had satisfied or compromised other claims of a similar character, but, if appellant's inquiry tended to show the testimony was affected by interest of the witness, it was competent for appellee to show that he was not interested in order to repel that idea.

Appellant complains of prejudicial misconduct of appellees' counsel in his argument to the jury. By an affidavit which is copied into the bill of exceptions, it appears that counsel for appellees called attention to sanitary precautions on the Isthmus of Panama, and the steps taken in other cities to destroy garbage, with comparisons adverse to Louisville. The court merely certifies that the affidavit was filed. It does not appear from the bill of exceptions that such argument was made. Neither is there anything in the affidavit or the record to indicate the ruling of the court on appellant's objection to the argument. In the absence of such information, we cannot tell whether there was error.

The judgment is affirmed.

NORTH CAROLINA SUPREME COURT.

WATSON HINES

v.

CITY OF ROCKY MOUNT, Appt.

(102 N. C. 409, 78 S. E. 510.)

Municipal corporation — creation of nuisance — liability.

1. A municipal corporation which, acting under its charter authority to dispose of rubbish accumulated within its limits, uses it to fill an excavation in a highway, and thereby creates a nuisance, is liable for injury thereby caused to neighboring property, but not for sickness among the occupants thereof.

Note. — As to liability of municipality for nuisance caused by deposit of garbage, see note to Louisville v. Hehemann, ante, 747, which supplements the earlier notes to Denver v. Davis, 6 L.R.A.(N.S.) 1013, and Cumberland Grocery Co. v. Baugh, 43 L.R.A.(N.S.) 1037.

As to liability of municipality for injury by employee engaged in removing refuse, see notes to Haley v. Boston, 5 L.R.A.(N.S.) 1005; Pass Christian v. Fernandez, 39 L.R.A.(N.S.) 649; and Savannah v. Jordan, ante, 741.

As to liability of municipality for death or sickness caused by sewerage or drainage, see note to Metz v. Asheville, 22 L.R.A.(N.S.) 940.
L.R.A.1915C.

Damages — nuisances — municipal corporation — illness.

2. Illness caused by a nuisance created by a city in the performance of governmental functions is not a proper element of damages to be allowed against it.

(Walker and Allen, JJ., dissent.)

(May 28, 1913.)

APPEAL by defendant from a judgment of the Superior Court for Edgecombe County in plaintiff's favor in an action brought to recover damages for an alleged nuisance. Reversed.

Statement by Hoke, J.:

On the trial, it was made to appear that in 1910 plaintiff and his family were occupying a house and lot in Rocky Mount, when the town authorities, professing to act under powers conferred by the charter, etc., and for sanity purposes, etc., organized and directed a general cleaning up of the town; that plaintiff's house was built on a street which had been laid out by a land company, the street being through an old brickyard, and in which there was a hole 15 feet long by 12 feet wide and 2 or 3 feet in depth; and the agents and employees of the town in carrying out the purpose, and acting under instructions, threw the trash, rubbish, etc., into this hole, partly to put the same out of the way and also with a view of filling the hole that it might the better be used for the streets. The testimony on part of plaintiff tended to show that in filling this hole the employees threw garbage, refuse, etc., and caused foul stench and odors, resulting in great annoyance and inconvenience to plaintiff and his family, and rendering several of them sick with fever, causing outlay for expense, loss of time, etc. There was evidence on part of defendant tending to show that no nuisance had been created, and that there were other sources of infection on or near the premises entirely

For cases as to injury to health by defective sewer as an element of damages when accompanied by injury to property, see note to Georgetown v. Com. 61 L.R.A. 713.

As to liability of municipality for death caused by negligence in performance of a governmental function, see note to Smith v. Sewerage Comrs. 38 L.R.A.(N.S.) 151.

Generally as to distinction between public and private functions of a municipality as affecting liability for negligence, see notes to Barron v. Detroit, 19 L.R.A. 452, and Dickinson v. Boston, 1 L.R.A.(N.S.) 664.

sufficient to account for the alleged sickness and much more likely to cause it.

On issues submitted, the jury rendered the following verdict:

"(1) Did the defendant maintain or cause to exist on Holly street a public nuisance by reason of filling up the hole in front of plaintiff's house, as alleged in the complaint? Answer: Yes.

"(2) Was the plaintiff damaged thereby? Answer: Yes.

"(3) If so, what damage did he sustain? Answer: \$890."

Judgment on the verdict for plaintiff, and defendant excepted and appealed, assigning for error: (1) The refusal of the court to nonsuit plaintiff; (2) allowing as a direct element of damages the sickness in plaintiff's family and costs incident to same, etc.

Messrs. T. T. Thorne and L. V. Bassett, for appellant:

Except in those cases in which a right of action is given by statute, a municipal corporation cannot be made to answer in damages to individuals injured by it in the exercise of its governmental functions.

Harrington v. Greenville, 159 N. C. 634, 75 S. E. 849; Moffitt v. Asheville, 103 N. C. 237, 14 Am. St. Rep. 810, 9 S. E. 695; Love v. Raleigh, 116 N. C. 296, 28 L.R.A. 192, 21 S. E. 503; McIlhenney v. Wilmington, 127 N. C. 146, 50 L.R.A. 470, 37 S. E. 187; Levin v. Burlington, 129 N. C. 184, 55 L.R.A. 396, 39 S. E. 822; Williams v. Greenville, 130 N. C. 93, 57 L.R.A. 207, 89 Am. St. Rep. 860, 40 S. E. 977; Hull v. Roxboro, 142 N. C. 453, 12 L.R.A. (N.S.) 638, 55 S. E. 351; Metz v. Asheville, 150 N. C. 748, 22 L.R.A. (N.S.) 940, 64 S. E. 881.

The maintenance of public highways is a governmental function.

Hill v. Boston, 122 Mass. 344, 23 Am. Rep. 332; Colwell v. Waterbury, 74 Conn. 568, 57 L.R.A. 218, 51 Atl. 530; McFadden v. Jewell, 119 Iowa, 321, 60 L.R.A. 401, 97 Am. St. Rep. 321, 93 N. W. 302; Corning v. Saginaw, 116 Mich. 74, 40 L.R.A. 526, 74 N. W. 307; Bisbing v. Asbury Park, 80 N. J. L. 416, 33 L.R.A. (N.S.) 523, 78 Atl. 196; Gibson v. Huntington, 22 L.R.A. 561, note.

And the disposition of trash is a governmental function.

Haley v. Boston, 191 Mass. 291, 5 L.R.A. (N.S.) 1005, 77 N. E. 888.

Messrs. J. W. Keel and W. O. Howard, for appellee:

A city is not absolved, as a governmental agency, from liability or a nuisance caused in cleaning streets by dumping unhealthy refuse near plaintiff's house, on the theory L.R.A.1915C.

that a street cleaning is a duty, and a public benefit in which plaintiff shared.

New Albany v. Slider, 21 Ind. App. 392, 52 N. E. 626.

A city acting in its individual, and not governmental, capacity, in depositing of garbage, is liable as an individual irrespective of negligence.

Paris v. Jenkins, 57 Tex. Civ. App. 383, 122 S. W. 411; Coleman v. Price, 54 Tex. Civ. App. 39, 117 S. W. 905; Haskell v. Webb, — Tex. Civ. App. —, 140 S. W. 127; Dalton v. Wilson, 118 Ga. 100, 98 Am. St. Rep. 101, 44 S. E. 830; Frick v. Kansas City, 117 Mo. App. 488, 93 S. W. 351; Lloyd v. New York, 5 N. Y. 369, 55 Am. Dec. 347.

An individual who sustains an injury peculiar to himself may have relief against a public nuisance, and is entitled to proceed in equity for the abatement of or injunction against the nuisance, or to maintain action at law for damages on account of the special injury which he has received.

29 Cyc. 1209, 1210; Reyburn v. Sawyer, 135 N. C. 328, 65 L.R.A. 930, 102 Am. St. Rep. 555, 47 S. E. 761; Abbott v. Mills, 3 Vt. 521, 23 Am. Dec. 222; Stetson v. Faxton, 19 Pick. 147, 31 Am. Dec. 123; Hardy v. Brooklyn, 90 N. Y. 435, 43 Am. Rep. 182; Dwinel v. Veazie, 44 Me. 167, 69 Am. Dec. 94.

A municipal corporation has no more right than an individual to erect or maintain a nuisance, and is liable to one specially injured thereby.

Downs v. High Point, 115 N. C. 182, 20 S. E. 385; Valparaiso v. Moffitt, 12 Ind. App. 250, 54 Am. St. Rep. 522, 39 N. E. 909; Harper v. Milwaukee, 30 Wis. 365; Haskell v. Webb, — Tex. Civ. App. —, 140 S. W. 127; Clayton v. Henderson, 103 Ky. 228, 44 L.R.A. 474, 44 S. W. 667; Hart v. Union County, 57 N. J. L. 90, 29 Atl. 490; Bolton v. New Rochelle, 84 Hun, 281, 32 N. Y. Supp. 442; Ft. Worth v. Crawford, 74 Tex. 404, 15 Am. St. Rep. 840, 12 S. W. 52; Briegel v. Philadelphia, 135 Pa. 451, 20 Am. St. Rep. 885, 19 Atl. 1038; Zanesville v. Fannan, 53 Ohio St. 605, 53 Am. St. Rep. 664, 42 N. E. 703; Winchell v. Waukesha, 110 Wis. 101, 84 Am. St. Rep. 902, 85 N. W. 668; Pierce v. Gibson County, 107 Tenn. 224, 89 Am. St. Rep. 946, 55 L.R.A. 477, 89 Am. St. Rep. 946, 64 S. W. 33.

Hoke, J., delivered the opinion of the court:

The charter of the city of Rocky Mount. Priv. Laws 1907, chap. 209, § 40, subsec. 21, provides in general terms, that the board of aldermen shall have power to make proper regulations for the conserva-

tion of the public health, and may create and appoint a board of health to exercise and carry out such powers under the supervision and control of the first-mentioned board. The acts complained of were chiefly in the exercise, or attempted exercise, of the powers there conferred, and should be considered governmental in character. *Springfield, F. & M. Ins. Co. v. Keeseville*, 148 N. Y. 46, 30 L.R.A. 660, 51 Am. St. Rep. 667, 42 N. E. 405; *Love v. Atlanta*, 95 Ga. 129, 51 Am. St. Rep. 64, 22 S. E. 29; 1 *Abbott, Mun. Corp.* p. 304, § 147.

This being the correct position, our decisions hold the general rule to be, and they are in accord with well-considered authority elsewhere, that "unless a right of action is given by statute, municipal corporations may not be held civilly liable to individuals for 'neglect to perform, or negligence in performing, duties which are governmental in their nature,' and including generally all duties existent or imposed upon them by law solely for the public benefit." *Harrington v. Greenville*, 159 N. C. 634, 75 S. E. 849, citing and referring, among other cases, to *Hull v. Roxboro*, 142 N. C. 453, 12 L.R.A. (N.S.) 638, 55 S. E. 351; *Peterson v. Wilmington*, 130 N. C. 76, 56 L.R.A. 959, 40 S. E. 853, 11 Am. Neg. Rep. 332; *McIlhenney v. Wilmington*, 127 N. C. 146, 50 L.R.A. 470, 37 S. E. 187; *Moffitt v. Asheville*, 103 N. C. 237, 14 Am. St. Rep. 810, 9 S. E. 695. See also *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332; *Com. v. Kidder*, 107 Mass. 188; *Smith, Mun. Corp.* § 780.

This general principle is subject to the limitation that neither a municipal corporation nor other governmental agency is allowed to establish and maintain a nuisance causing appreciable damage to the property of a private owner without being liable for it. To the extent of the damage done to such property, it is regarded and dealt with as a taking or appropriation of the property, and it is well understood that such an interference with the rights of ownership may not be made or authorized except on compensation first made pursuant to the law of the land. *Little v. Lenoir*, 151 N. C. 415, 66 S. E. 337; *Nevins v. Peoria*, 41 Ill. 502, 89 Am. Dec. 392; *Winchell v. Waukesha*, 110 Wis. 101, 84 Am. St. Rep. 902, 85 N. W. 668; *Eaton v. Boston, C. & M. R. Co.* 51 N. H. 504, 12 Am. Rep. 147; *Bohan v. Port Jervis Gaslight Co.* 122 N. Y. 18, 9 L.R.A. 711, 25 N. E. 246; *Joplin Consol. Min. Co. v. Joplin*, 124 Mo. 129, 27 S. W. 406; *Susquehanna Fertilizer Co. v. Malone*, 73 Md. 268, 9 L.R.A. 737, 25 Am. St. Rep. 595, 20 Atl. 900; *Franklin Wharf Co. v. Portland*, 67 Me. 46, 24 Am. Rep. 1; *Dwight v. Hayes*, L.R.A.1915C.

150 Ill. 273, 41 Am. St. Rep. 367, 37 N. E. 218; *Langley v. Augusta*, 118 Ga. 590, 98 Am. St. Rep. 133, 45 S. E. 486; 3 *Abbott, Mun. Corp.* § 961; 1 *Lewis, Em. Dom.* 3d ed. § 65.

In affording redress for wrongs of this character, injuries caused by a nuisance wrongfully created in the exercise of governmental functions, our decisions hold, as the correct deduction from the above principle, that the damages are confined to the diminished value of the property affected, and that sickness attributable to such nuisance may not be properly considered as a direct element of damage (*Metz v. Asheville*, 150 N. C. 748, 22 L.R.A. (N.S.) 940, 64 S. E. 881; *Williams v. Greenville*, 130 N. C. 93, 57 L.R.A. 207, 89 Am. St. Rep. 860, 40 S. E. 977), a position which finds support in decisions of other courts of recognized authority (*Hughes v. Auburn* 161 N. Y. 96, 46 L.R.A. 636, 55 N. E. 389, 7 Am. Neg. Rep. 139; *Folk v. Milwaukee*, 108 Wis. 359, 84 N. W. 420, 9 Am. Neg. Rep. 207). The evidence, or some of it, may be relevant on the question of the diminished value of the property, and might, in given instances, present a case for injunctive relief, but may not be made the basis for a direct estimate and award of uncertain and unrestrained damages.

Speaking to some of the underlying reasons for the position, O'Brien, Judge, delivering the opinion in the *Hughes Case*, among other things, said: "If an individual injured by disease produced by the acts or neglect of a city, such as are stated in the complaint, can recover damages at all, it must be upon some principle of the common law; and, had it been suggested half a century ago that such a principle existed, the assertion would have been received with some surprise. In the form in which this case comes here there is ample room to urge in argument elements of individual hardship, well calculated to disturb the mind and divert it from the questions of law that underlie the action. On the principle that there can be no wrong without a remedy, courts are sometimes astute to discover grounds for relief in cases of this character, that, when applied as general principles to like cases, are found to be exceedingly inconvenient, if not untenable, and hence very frequently have to be distinguished, modified, or entirely abandoned. The principle upon which the judgment in this case rests is that an individual who has suffered from disease, caused by the neglect of a city to observe sanitary laws with reference to its sewer system, may recover damages from the city. This principle, if sanctioned and applied generally to all cases coming within its scope, can-

not fail to produce evils much more intolerable than any that can possibly arise from such acts of omission or commission as the plaintiff states as the basis of this action. It must necessarily become the prolific parent of a vast mass of litigation which the municipality can respond to only by taxation, imposed alike upon the innocent and the guilty,"—and, further: "In the construction and maintenance of a sewer or drainage system a municipal corporation exercises a part of the governmental powers of the state for the customary local convenience and benefit of all the people, and in the exercise of these discretionary functions the municipality cannot be required to respond in damages to individuals for injury to health resulting either from omissions to act or the mode of exercising the power conferred on it for public purposes, to be used at discretion for the public good. I have attempted to state some of the reasons that underlie this principle and their application to this case, with the evil results that must follow any departure from it."

Applying the doctrine as it obtains with us, we must hold that there was error in allowing the jury to consider the testimony as to sickness of various members of the plaintiff's family as a direct element in estimating the damages. The motion to nonsuit was properly overruled because there were facts in evidence tending to show the existence of an actionable nuisance, causing damage to the proprietary rights of the plaintiff, and entitling him in any event to a recovery for nominal damages. It does not appear what was the nature of plaintiff's tenure, whether as owner or otherwise; but, whether as owner or renter, he is entitled to recover for wrongful injury causing damage to his proprietary rights. *Smith v. Sedalia*, 182 Mo. 1, 81 S. W. 165; *Grantham v. Gibson*, 41 Wash. 125, 3 L.R.A.(N.S.) 447, 111 Am. St. Rep. 1003, 83 Pac. 14.

The case of *Downs v. High Point*, 115 N. C. 182, 20 S. E. 385, chiefly concerned the framing and sufficiency of the issues, and the mind of the court was not directly addressed to the question presented here. To the extent, however, that the *Downs* Case sanctions the principle that damages for specific cases of sickness can be recovered at the suit of an individual citizen by reason of an injury occurring from the exercise of governmental functions, the case has been disapproved both in *Metz v. Asheville* and *Williams v. Greenville*, supra, and is no longer authoritative on that position.

And the cases of *Durham v. Eno Cotton Mills*, 141 N. C. 615, 7 L.R.A.(N.S.) 321, 54 S. E. 453, and *Vickers v. Durham*, 132 N. L.R.A.1915C.

C. 880, 44 S. E. 685, are addressed to the position of restraining the discharge of sewage by reason of apprehended injury, and the amount of damages for injuries committed and the proper rules which should prevail on such an issue were not directly presented or determined.

For the error indicated, defendant is entitled to a new trial, and it is so ordered.

Walker, J., dissenting:

While I agree with the majority of the court that the defendant is liable for damage to the property of plaintiff, it is my opinion that it is also responsible for sickness caused by its tortious act. It may be that the cases supporting the opposite view, which is now taken by this court, may be numerically larger than those favoring my position, though I have not counted them, but I do not think it can safely be said that the weight of authority, or the greater force of reasoning, is on that side. It is held in numerous well-considered decisions that a city is not absolved, even as a governmental agency, from liability for a nuisance caused in repairing or cleaning streets by dumping unhealthy refuse or rubbish near a plaintiff's house, on the theory that street cleaning is a duty and a public benefit in which the plaintiff shared; and even a prompt abatement by the city of the nuisance does not prevent a recovery for damages arising during its continuance. *Haag v. Vanderburgh County*, 80 Ind. 511, 28 Am. Rep. 654; *New Albany v. Slider*, 21 Ind. App. 392, 52 N. E. 626.

In 28 Cyc. 1293, and note 42 et seq., will be found many cases sustaining the principle upon which the proposition just stated rests, and which also supports this text, under the title, "Nuisance Created or Permitted by Corporation." "If in the exercise of its corporate powers a municipal corporation creates or permits a nuisance by nonfeasance or misfeasance, it is guilty of tort, and like a private corporation or individual, and to the same extent, is liable to damages in a civil action to any person suffering special injury therefrom. So, a municipal corporation has no more right to erect and maintain a nuisance on its own land than a private individual would have to maintain such a nuisance on his land; it is entitled to exercise the same rights in respect to the use of its property as an individual, and any lawful use thereof, or the doing of those things which the law authorizes, cannot, it is held, amount to a nuisance in itself, although the execution of the power may be in such a manner as to result in an actionable nuisance." The cases thus collected were de-

cided by courts entitled to the highest respect and the greatest consideration because of their admitted ability and learning. The case of *Downs v. High Point*, supra, is cited in the note to 28 Cyc. 1293, as sustaining the doctrine, and we think it does. It is said that the only question presented there related to the framing of the issues, but I think not. The judge charged the jury as follows: "The plaintiff alleges that his special damage consists in the fact that proximity to alleged nuisances caused illness of a serious nature to himself and family, much expense on account of such illness, and that the other parts of his neighborhood were not so affected. If this be true, it is special damage within the meaning of the law,"—and in that immediate connection, the court, in its opinion by Justice Avery, said: "We think that there was no error in refusing to instruct the jury upon the evidence that plaintiff could not recover. The instruction given was warranted by the evidence, and embodied the principle laid down by leading text writers. Wood, Nuisances, §§ 561-574."

I do not think that *Asbury v. Albemarle*, 162 N. C. 247, 44 L.R.A.(N.S.) 1189, 78 S. E. 146, and *Shute Sewerage Co. v. Monroe*, 162 N. C. 275, 78 S. E. 151, have any direct bearing or decisive effect upon the question. The decisions in those cases may well be sustained upon grounds and for reasons not applicable to this case, and the same may be said of the cases cited in the opinion of the court, such as *Hull v. Roxboro*, 142 N. C. 453, 12 L.R.A.(N.S.) 638, 55 S. E. 351; *Peterson v. Wilmington*, 130 N. C. 76, 56 L.R.A. 959, 40 S. E. 853, 11 Am. Neg. Rep. 332; *Metz v. Asheville*, 150 N. C. 748, 22 L.R.A.(N.S.) 940, 64 S. E. 881.

It is said in 2 Wood on Nuisances, 3d ed. § 561, p. 756, that "the right to have the air float over one's premises free from all unnatural or artificial impurities is a right as absolute as the right to the soil itself." We have held in *Fitzgerald v. Concord*, 140 N. C. 110, 52 S. E. 309; *Brown v. Durham*, 141 N. C. 253, 53 S. E. 513; *Brewster v. Elizabeth City*, 142 N. C. 11, 54 S. E. 784; *Kinsey v. Kinston*, 145 N. C. 108, 58 S. E. 912; *Revis v. Raleigh*, 150 N. C. 352, 63 S. E. 1049; and quite recently in *Bailey v. Winston*, 157 N. C. 252, 72 S. E. 966, and *Smith v. Winston*, 162 N. C. 50, 77 S. E. 1093,—that a municipality is under a positive duty to keep its streets in reasonably passable condition, and for any defects thereon, due to the neglect of its corporate duty or to its negligence, it is liable in damages to persons injured thereby. Where it permits an excavation

or hole in the street to remain open and unguarded, after notice of its existence, it has been held liable to a person falling therein and breaking his limb, with consequent injury to his health. I can perceive no substantial difference in law, or in fact, between an injury to health caused by digging a hole and the same general kind of injury caused by filling it up. The ground of action is the wrong to the citizen in the enjoyment of his health and property. It can make little or no difference to him whether his health is wrecked as the result of falling in a hole or by inhaling noxious odors and contaminated air thrown off from rubbish or refuse deposited in the hole for the purpose of closing it, and there can be no difference in principle between the two cases.

It is argued that it would produce a multiplicity of suits, "or become the parent of a vast mass of litigation," if a city was held liable in such a case as this one, and that taxation to pay the judgments would be "imposed alike upon the innocent and guilty." The last reason would apply whether we hold the city liable for injury to health or only for injury to property, and the former would apply to a case for a defect in the streets by which numerous persons may be injured in body and health, or where there are numerous defects in streets causing like injury. The reasons are therefore inadequate to overthrow the common-law principle that "where there is a wrong, there is also a remedy." The duty of the municipality to keep its streets in good condition and proper repair is statutory. It is enjoined by the law, also, that it shall take such measures as are appropriate to prevent or abate nuisances and to preserve and safeguard the health of its citizens. The corporate authorities of a town are not only required to keep its streets in good condition and repair, but are indictable for not doing so (*State v. Fayetteville*, 6 N. C. (2 Murph.) 371), and are equally liable, civilly or criminally, for maintaining a nuisance upon its land within the corporate limits (2 Wood, Nuisances, § 748, p. 1004).

In a well-considered case it was held to be a "well-recognized rule that municipal corporations are liable for torts in certain classes of cases, including nuisances, in the same manner as natural persons." *Haag v. Vanderburgh County*, 60 Ind. 511, 28 Am. Rep. 654, citing several text writers, among other authorities, and quoting this passage from 2 Addison on Torts, Dudley & B. ed. p. 1315: "A municipal corporation has no more right to maintain a nuisance than an individual would have, and for a nuisance maintained upon its prop-

erty the same liability attaches against a city as to an individual." In the *Haag* Case defendant was charged with injuring the health of plaintiff's family, causing the death of her son by the erection of a pest-house for the detention and treatment of smallpox patients. This elementary principle was applied in *Harper v. Milwaukee*, 30 Wis. 365, and thus stated: "The general rule of law is that a municipal corporation has no more right to erect and maintain a nuisance than a private individual possesses, and an action may be maintained against such corporation for injuries occasioned by a nuisance for which it is responsible, in any case in which, under like circumstances, an action could be maintained against an individual. *Pittsburgh v. Grier*, 22 Pa. 54, 60 Am. Dec. 65; *Brower v. New York*, 3 Barb. 254; *Young v. Leedom*, 67 Pa. 351, and *Delmonico v. New York*, 1 Sandf. 222, are a few of the numerous cases which assert or recognize this principle." See also *Kolb v. Knoxville*, 111 Tenn. 311, 76 S. W. 823; *Stoddard v. Saratoga Springs*, 127 N. Y. 261, 27 N. E. 1030; *Ft. Worth v. Crawford*, 74 Tex. 404, 15 Am. St. Rep. 840, 12 S. W. 52; *Clayton v. Henderson*, 103 Ky. 228, 44 L.R.A. 474, 44 S. W. 667; *Valparaiso v. Moffitt*, 12 Ind. App. 250, 54 Am. St. Rep. 522, 39 N. E. 909.

I may remark here that not only does the case of *Harper v. Milwaukee*, *supra*, decide the very question before us, but it has been expressly recognized and approved by this court as stating the law correctly in *Jones v. North Wilkesboro*, 150 N. C. 646, 64 S. E. 866. Justice Connor says in that case: "It is manifest that a municipal corporation has no legal right to establish and maintain a condition which creates a public nuisance *per se*; that is, a condition which seriously endangers the health and lives of the people. *Harper v. Milwaukee*, *supra*." A municipal corporation is not exempt from responsibility when the injury is accomplished by a corporate act, which is in the nature of a trespass upon the rights of another, and it cannot, by any means, or in any manner, create with impunity a public or private nuisance, nor has it any more immunity from legal liability for causing or maintaining the same than an individual has under the law. *Noonan v. Albany*, 79 N. Y. 470, 35 Am. Rep. 540; *Seifert v. Brooklyn*, 101 N. Y. 136, 54 Am. Rep. 664, 4 N. E. 321. The court said in the case last cited, at p. 142, that "municipal corporations have quite invariably been held liable for damages occasioned by acts resulting in the creation of public or private nuisances, or for an unlawful entry upon the premises of an-

other, whereby injury to his property had been occasioned." And, again, at p. 144, speaking more directly to the question here involved, the court said in that case: "The immunity which extends to the consequences following the exercise of judicial or discretionary power by a municipal body or other functionary presupposes that such consequences are lawful in their character, and that the act performed might in some manner be lawfully authorized. When such power can be exercised so as not to create a nuisance, and does not require the appropriation of private property to effectuate it, the power to make such an appropriation or create such nuisance will not be inferred from the grant." It was further decided in that case, with reference to the liability of the corporation for an act done under authority of its charter: "The rule that a municipal corporation acting under the authority of a statute cannot be subjected to a liability for damages arising from the exercise by it of the authority so conferred is confined to such consequences as are the necessary and usual result of the proper exercise of the authority. It does not shield the corporation where injury results solely from the defective manner in which the authority was originally exercised and from continuance in wrong after notice of the injury." These principles are also approved in *Bolton v. New Rochelle*, 84 Hun, 281, 32 N. Y. Supp. 442. There is a distinction made in *Seifert's Case* between the judicial and ministerial duties of a municipal corporation with reference to its streets, which it will be well to state here in the words of that court: "It was held [in *Hines v. Lockport*, 50 N. Y. 236] that the duty resting upon the corporation of building, opening, and grading streets, sidewalks, sewers, etc., was judicial, but that after they were constructed the duty of keeping them in repair was ministerial, and from an omission to perform that duty liability arose." This harmonizes with our decisions upon the subject. We hold such corporations liable for injuries from defects in their streets, as we have already seen, whether the defect causes a broken limb or produces broken and shattered health directly, or as a consequence of some preceding injury to the body or limbs. It is a very shadowy distinction to make between an injury to the body and one to the health. I do not think that it can properly be said that the placing of rubbish or other noxious or deleterious substances in a street, even to fill a hole, is the exercise of a judicial duty or a governmental function.

These ideas find strong support in what is said by a recent text-writer, not only

in regard to the right of a person who incurs special damage from a tort to sue, but to recover, in such a case, against a municipal corporation when he has sustained injury to his health. "While municipal corporations have no more right than a private person to create or maintain a common nuisance, nevertheless, so long as the injury suffered by each individual is the same in kind as that suffered by every other individual in the community, or section of the community, affected by such nuisance, none of them can maintain a private action against the corporate body. The only remedy available in such a case is by indictment. But if, even though the nuisance be a public one, a person can show that he has suffered therefrom some special and peculiar damage, differing in kind from that suffered by him in common with the rest of the community, he is entitled to recover in a civil action compensation therefor from the municipality that created or maintained such nuisance. . . . Speaking generally, municipal corporations stand, in regard to the creation and maintenance of private nuisances, on substantially the same footing as private corporations and natural persons. Their rights are no greater; their civil responsibility is generally no less. As a rule, therefore, they are liable in a private action to any individual who suffers damage by reason of a private nuisance created and continued by them." Williams, *Municipal Liability for Tort*, pp. 305, 306. He supports his text by the citation of many cases, to a few of which I will refer specially, and to some striking passages showing the ground and extent of the decision. "These and other facts well warranted the conclusion of the trial court that the act of the defendant, in thus emptying its sewers, constituted an offensive and dangerous nuisance. Moreover, the plaintiff is found to have sustained a special injury to his health and property from the same cause, and we find no reason to doubt that he is entitled not only to compensation for damages thereby occasioned, but also to such a judgment as will prevent the further perpetration of the wrong complained of. *Goldsmid v. Tunbridge Wells Improv. Comrs.* L. R. 1 Eq. 161, 13 L. T. N. S. 352, 14 Week. Rep. 92, L. R. 1 Ch. 349, 35 L. J. Ch. N. S. 382, 12 Jur. N. S. 208, 14 L. T. N. S. 154, 14 Week. Rep. 562." *Chapman v. Rochester*, 110 N. Y. 273, 1 L.R.A. 296, 6 Am. St. Rep. 366, 18 N. E. 88. "My neighbor has not the right to excavate his soil in such manner as to create a stagnant and offensive pond, so near my premises as to be a private nuisance by rendering my house unhealthy. He cannot use his property for a purpose

that will prevent my enjoyment of mine. 3 Bl. Com. 217. The same law that protects my right of property against invasion by private individuals must protect it from similar aggression on the part of municipal corporations. A city may elevate or depress its streets as it thinks proper; but if, in so doing, it turns a stream of mud and water upon the grounds and into the cellars of one of its citizens, or creates in his neighborhood a stagnant pond that brings disease upon his household, upon what ground of reason can it be insisted that the city should be excused from paying for the injuries it has directly wrought?" *Nevins v. Peoria*, 41 Ill. 502, 89 Am. Dec. 392. It was held in *Jacksonville v. Doan*, 145 Ill. 23, 33 N. E. 878, that the city should not be excused from paying for injuries to health which it has directly wrought, and which proceeded from a pond of stagnant water, caused by negligence in improving its streets. The case refers, with approval, to *Nevins v. Peoria*, supra, and cites other strong authorities.

It is against natural justice to allow the creation of a dangerous nuisance by a city, affecting the health of a citizen, and then hold the corporation immune from damages. There lurks in this principle of exemption the danger of arbitrary power, which may be oppressively exercised over the helpless and defenseless citizen. As well at once declare that no one can acquire any rights to his home which the municipal corporation is bound to respect, for if he cannot live in it with comfort to himself and family, of what value is it to him? Can the corporation drive him from it by foul and offensive odors and a poisoned atmosphere, and then restrict him to mere property damage? There is something more valuable to him, but for which the law, as now declared, allows him nothing. The power of a corporation should be regarded as subject to the just limitation that it is forbidden to be exercised in such manner as to create nuisances injurious to private rights, health as well as property, especially where such a consequence is not a necessary result of properly exerting its power, and this I believe to be the common law of this country. *Edmondson v. Moberly*, 98 Mo. 523, 11 S. W. 900; *Hannibal v. Richards*, 82 Mo. 330.

The charter of this corporation (Acts 1907, chap. 209, § 39) confers upon it the power to abate nuisances, not to create them, and requires the corporation to provide for the proper maintenance, repair, and regulation of the streets. It certainly cannot be argued from these provisions that the unnecessary creation of a nuisance is a legitimate exercise of any func-

tion of government possessed by the corporation. If it is negligent in the performance of its ministerial duties, such as repairing its streets, and injury results to others of whatsoever kind, we have held repeatedly that it commits a legal wrong, for which it must respond in damages.

Allen, J., dissenting:

The case of *Asbury v. Albemarle*, 162 N. C. 247, 44 L.R.A.(N.S.) 1189, 78 S. E. 146, decided at this term, and the one now being considered, illustrate the difficulty of marking the line between the ministerial duties of a municipal corporation, in the performance of which it acts as a private corporation, and its governmental powers. In the *Albemarle Case* the court said: "It is well settled that local conveniences and public utilities, like water and lights, are not provided by municipal corporations in their political or governmental capacity, but in that quasi private capacity in which they act for the benefit of their citizens exclusively,"—and upon this principle held an act of the legislature unconstitutional because it interfered with the discretion of the municipal corporation in the establishment of a system of waterworks, this being done in its private capacity; while in this case it is held that throwing garbage in a hole in the street is governmental. I do not agree to the decision in either case. I think the act in the *Albemarle Case* constitutional, and that it is just and wise, as it simply requires a municipal corporation, when it has induced another corporation to establish a private system of waterworks within its limits, to buy or condemn such system, paying only what it is worth, before it constructs a system of its own, and thereby confiscates property, devoted to a use within the corporation, by its consent. In the present case the court admits that the defendant is liable, but restricts the recovery to damages to property, and denies the right to recover for sickness of the plaintiff or his family, or for expenses incurred in restoring them to health. I admit that there is authority in favor of the opinion of the court, but to my mind no good reason has been shown for the distinction, or for departing from the principle, well-nigh universal, that one who does a wrong is liable for all the damages caused naturally and proximately thereby. The rule adopted by the court is, as it appears to me, illogical, and has been arbitrarily established because of the fear that if recoveries are allowed for sickness, municipal corporations may become bankrupt, and also because of the growing tendency to sacrifice the rights of the individual to some idea of public policy. We are L.R.A.1915C.

warned that "public policy is a dangerous guide in the discussion of a legal proposition," and that those who follow it far are apt "to bring back the means of error and delusion;" but, if it should be considered at all, I think it wiser and better for a loss to be distributed among all the citizens of a municipality than to leave it, where the municipality has placed it, on the shoulders of one man, and that the best public policy includes justice to the individual.

I cannot believe it is in accordance with law or justice that a municipal corporation may throw garbage, sewage, etc., on the land of a citizen, against his will, and bring death and sickness to his wife and children, and that the citizen may recover damages for injury to his land, but can recover nothing for injury to his wife and children.

MAINE SUPREME JUDICIAL COURT.

WILL A. GILMAN, Admr., etc., of George E. Gilman, Deceased,

v.

COMMONWEALTH INSURANCE COMPANY OF NEW YORK.

(112 Me. 528, 92 Atl. 721.)

Insurance — mortgagee clause — cancellation without consent of mortgagee.

1. A provision in a standard fire insurance policy containing a mortgagee clause, that it may be canceled at any time at the request of the insured, does not permit cancellation without notice to the mortgagee, where another clause provides that no act or default of any person other than the mortgagee or his agent shall affect his right to recover in case of loss.

Same — alteration — increase of risk.

2. Continuing work after the expiration of a building permit does not avoid an insurance policy which provides that it shall become invalid if, without the consent of the company, the situation or circumstances affecting the risk shall by, or with, the knowledge, advice, agency, or consent of the insured be so altered as to cause an increase of such risk, unless such continuance increases the risk.

(Cornish and Spear, JJ., dissent.)

(December 31, 1914.)

Note. — Effect of breach of policy of insurance by mortgagor on rights of mortgagee.

The earlier cases upon this question are covered in the notes to *Brecht v. Law Union & Crown Ins. Co.* 18 L.R.A.(N.S.) 197; *Bacot v. Phenix Ins. Co.* 25 L.R.A.(N.S.)

MOTION by defendant for new trial of an action brought in the Supreme Judicial Court for Cumberland County to recover the amount alleged to be due on a fire insurance policy which resulted in a verdict for plaintiff. Overruled.

The facts are stated in the opinion.

Mr. Harry L. Cram, for defendant:

Alterations were made which were not permitted and about which the defendant had no knowledge.

Brunswick Sav. Inst. v. Commercial Union Ins. Co. 68 Me. 314, 28 Am. Rep. 56; Dolliver v. Granite State F. Ins. Co. 111 Me. 275, 50 L.R.A.(N.S.) 1106, 89 Atl. 8.

The evidence clearly shows a cancellation of the policy by insured which the company was bound to recognize.

Crown Point Iron Co. v. Aetna Ins. Co. 127 N. Y. 608, 14 L.R.A. 147, 28 N. E. 653; Stone v. Franklin F. Ins. Co. 105 N. Y. 543, 12 N. E. 45; Roberta Mfg. Co. v. Royal Exch. Assur. Co. 161 N. C. 88, 76 S. E.

1226; and People's Sav. Bank v. Retail Merchants' Mut. F. Ins. Asso. 31 L.R.A.(N.S.) 455.

As to necessity of giving mortgagee notice of intention to cancel policy, see note to Rawl v. American Cent. Ins. Co. 45 L.R.A.(N.S.) 463.

Loss payable clause.

Supplementing note in 18 L.R.A.(N.S.) 199.

In Roper v. National F. Ins. Co. 161 N. C. 151, 76 S. E. 869, a mortgagee to whom a policy was made payable as his interest should appear was held to acquire no greater rights than the mortgagor; the court holding that the expression was merely a designation of the person to whom the loss was to be paid, and that where the mortgagor had violated conditions of the policy which avoid it as to him it was also avoided as to the mortgagee.

In McDowell v. St. Paul F. & M. Ins. Co. 207 N. Y. 482, 101 N. E. 457, where the only provision written upon or attached to the policy was an indorsement of loss payable to the mortgagee, as his interest might appear, it was laid down that under the provision of the New York standard policy reading, "if, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinafore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto,"—the earlier provisions of the policy, relative to avoidance for breach of conditions, which would invalidate the policy as to the owner, would also avoid it as to the mortgagee. L.R.A.1915C.

865; Birnstein v. Stuyvesant Ins. Co. 83 App. Div. 436, 82 N. Y. Supp. 140, reversing 40 Misc. 808, 81 N. Y. Supp. 306; Insurance Comr. v. People's F. Ins. Co. 68 N. H. 51, 44 Atl. 82; Rawl v. American Cent. Ins. Co. 94 S. C. 299, 45 L.R.A.(N.S.) 463, 77 S. E. 1013, Ann. Cas. 1915A, 1231; McDowell v. St. Paul F. & M. Ins. Co. 207 N. Y. 482, 101 N. E. 457; Grosvenor v. Atlantic F. Ins. Co. 17 N. Y. 391; Bidwell v. Northwestern Ins. Co. 19 N. Y. 179; Perry v. Lorillard F. Ins. Co. 61 N. Y. 214, 19 Am. Rep. 272; Weed v. London & L. F. Ins. Co. 116 N. Y. 100, 22 N. E. 229.

Messrs. Foster & Foster, John B. Thomes, and Frank H. Purinton, for plaintiff:

No alteration would avoid the policy unless it created an increase of risk, which question was decided upon by the jury.

Lyman v. State Mut. F. Ins. Co. 14 Allen, 329; Luce v. Dorchester Mut. F. Ins. Co. 105 Mass. 297, 7 Am. Rep. 522.

But it was held in that case that the fact that the mortgagor refused to make proof of loss upon request by the mortgagee would not prevent a recovery by the latter, where he made proof within the time limited, although there was no mortgage clause attached to the policy, but merely the indorsement referred to; the court holding that under the provisions of the policy the mortgagee was entitled to make proofs of loss. Ibid.

Union mortgage clause.

Supplementing note in 18 L.R.A.(N.S.) 204.

It was stated in Heilbrunn v. German Alliance Ins. Co. 140 App. Div. 557, 125 N. Y. Supp. 374, affirmed in 202 N. Y. 610, 95 N. E. 823, that the mortgagee clause of the New York standard policy in substance providing that the insurance as to the interest of the mortgagee shall not be invalidated by any act or neglect of the mortgagor or owner creates a new and distinct contract, which places the mortgagee upon a different footing from that of a mere assignee or appointee to receive the loss, and removes him beyond the control or effect of any act or negligence of the owner of the property, and renders such mortgagee a party who has a distinct interest separate from the owner, embraced in another and separate contract. The question decided in that case was as to the necessity of alleging, in an action on a policy for the benefit of an assignee of a mortgagee, that the mortgagor or mortgagee had made proofs of loss.

And in Reed v. Firemen's Ins. Co. 81 N. J. L. 523, 35 L.R.A.(N.S.) 343, 80 Atl. 402, it was held that the standard mortgagee clause creates an independent contract of insurance for the benefit of the mortgagee, ingrafted upon the main contract of insur-

The mortgagor and insurance company could not legally cancel the policy without the knowledge or consent of the mortgagee or notice to him.

Lewis v. London & L. F. Ins. Co. 78 Misc. 176, 137 N. Y. Supp. 887; *Union Inst. for Sav. v. Phoenix Ins. Co.* 196 Mass. 230, 14 L.R.A.(N.S.) 459, 81 N. E. 994, 13 Ann. Cas. 433; *Nickerson v. Nickerson*, 80 Me. 100, 12 Atl. 880; *Eddy v. London Assur. Corp.* 143 N. Y. 311, 25 L.R.A. 686, 38 N. E. 307; *Hastings v. Westchester F. Ins. Co.* 73 N. Y. 141; *Motley v. Manufacturers' Ins. Co.* 29 Me. 337, 50 Am. Dec. 591; *Palmer Sav. Bank v. Insurance Co. of N. A.* 166 Mass. 189, 32 L.R.A. 615, 44 N. E. 211; *Hardy v. Lancashire Ins. Co.* 166 Mass. 210, 33 L.R.A. 241, 55 Am. St. Rep. 395, 44 N. E. 209.

Haley, J., delivered the opinion of the court:

An action of assumpsit, upon a policy of insurance, of the Maine standard form, is-

ance contained in the policy itself, and to be rendered certain and understood by reference to the policy.

And in *Flint v. Westchester F. Ins. Co.* 207 Mass. 337, 93 N. E. 646, where a policy, payable to a mortgagee as its interest might appear, provided that if it was made payable to a mortgagee of the insured no act or default of any person other than the mortgagee or his agents or those claiming under him should affect the mortgagee's right to recover, it was recognized that the policy was valid as to the mortgagee's interest, although the insured's rights were forfeited because of a sale of the premises. The insurer in this case paid the mortgagee the amount due on the mortgage, and took an assignment of it as it was authorized to do by a provision of the policy, and the question considered was as to the insured's right in equity against the insurer.

As stated in the note in 25 L.R.A.(N.S.) 206, there is a difference of opinion as to the effect of a union mortgage clause where the act of the insured which is relied on to avoid the policy was one which occurred at the time of the issuance of the policy.

In *Liverpool & L. & G. Ins. Co. v. Agricultural Sav. & Loan Co.* 33 Can. S. C. 94, a provision that the insurance as to the interest of the mortgagees should not be invalidated by any act or neglect of the mortgagor or owner of the property was held to apply only to subsequent acts of the insured, and it was held that the concealment of material facts by him at the inception of the policy prevented a recovery by the mortgagee.

But in *Reed v. Firemen's Ins. Co.* supra, it was held that a policy of fire insurance in the standard form which was void, *ab initio*, as to the insured owner because of his breach of warranty that his interest was not other than unconditional and sole own-

sued by the defendant to Frank T. Spear October 15, 1909, whereby the defendant insured the 1½ story dwelling house situated in Scarborough for the term of three years, against loss or damage by fire to the amount of \$800. There was an indorsement upon the policy as follows:

Payable in case of loss to George F. Gilman, mortgagee, as his interest may appear.

When the policy was issued, Mr. Spear was in possession of the insured premises, and remained in possession for about 1½ years, when George F. Gilman, who held a mortgage of the premises to secure a debt of \$900, took possession as mortgagee and evicted Mr. Spear. On April 11th Mr. Spear requested the insurance company to cancel the policy. On April 15th of that year they gave him written notice that they had canceled the policy, as requested. September 26, 1911, the buildings were destroyed by fire. Soon after the fire, Mr.

ership, might nevertheless be valid as to a mortgagee when the mortgage clause in the usual form was attached to the policy.

It was also held in that case that an appropriation by the owner of the proceeds of the sale of the *débris* after total loss, to his own use, was an act of ownership, but that it did not invalidate the insurance of the mortgagee, or cast upon the latter the burden of proving the amount realized from the sale.

In *Towle v. Dirigo Mut. F. Ins. Co.* 107 Me. 317, 78 Atl. 374, it was held that a mortgagee could not claim protection from a forfeiture, on account of the insured's default, by reason of a provision that if the policy should be made payable to a mortgagee of the insured no act or default of any person other than such mortgagee or his agents should affect the mortgagee's right of recovery, where the policy was not made payable to him as mortgagee under the two mortgages by virtue of which he claimed in an action on the policy, but under an entirely distinct mortgage, to which the indorsement was limited.

In *Roper v. National F. Ins. Co.* 161 N. C. 151, 76 S. E. 869, under the New York and New Jersey standard mortgage clause in effect providing that the right of the mortgagee should not be affected by any acts or negligence of the insured, although the insured had violated conditions of the policy which precluded his recovery, it was held incumbent upon the insurer to show some act of the mortgagee, in order to avoid the policy as to him, and his involuntary adjudication as a bankrupt was held not to avoid the policy.

See also *People's Sav. Bank v. Retail Merchants' Mut. F. Ins. Co.* set out in note in 25 L.R.A.(N.S.) 1227, and the reference to this case in note in 31 L.R.A.(N.S.) 455.

J. T. W.

Gilman learned that Mr. Spear and the insurance company claimed to have canceled the policy without his (Gilman's) consent. Mr. Spear neglected to furnish the insurance company a proof of loss, as called for by the policy, and October 19, 1911, Mr. Gilman sent to the defendant a proof of loss. Afterwards he served notice upon the defendant in writing that he desired to have the amount of the loss settled by arbitration. The defendant paid no attention to either the proof of loss or the request for arbitration.

Shortly after the request to the insurance company to submit the question to arbitration, Mr. Gilman died, and the plaintiff was appointed administrator of his estate and brought this suit upon the policy. The case was tried at the January term in Cumberland county, the verdict was for the plaintiff for the sum of \$900.93, and the case is before this court on a motion for a new trial as against law and evidence.

The defendant urges two reasons in support of its motion:

First, because the policy had, before the loss, been canceled at the request of Mr. Spear.

Second, because the risk was increased by changes and alterations made to the buildings without the consent of the defendant.

First. The form of the Maine standard insurance policy, now contained in § 4, chap. 49, Revised Statutes, was prescribed by the legislature of 1895, before which it was held that an indorsement upon the policy of words making it payable in case of loss to a mortgagee, as his interest might appear, was not an insurance of the mortgagee's interest in the property, or an assignment of the policy to the mortgagee; that it was merely a contingent order, a stipulation assented to by the insurance company for the payment of the loss to the assured, if any, to the mortgagee; that it gave the mortgagee the same right to recover that the insured would have had if no such clause had been inserted in the policy; that any violation of the stipulations of the policy which would defeat the right of the insured to recover upon it would defeat the right of the mortgagee; that it was simply an order of the company to pay the amount of the loss to the mortgagee; that the insurance was upon the property of the mortgagor, and not upon the interest of the mortgagee. *Brunswick Sav. Inst. v. Commercial Union Ins. Co.* 68 Me. 313, 28 Am. St. Rep. 56; *Biddeford Sav. Bank v. Dwell-ing-House Ins. Co.* 81 Me. 570, 18 Atl. 298.

The policy in suit is of the Maine standard form and contains the agreements specified by chapter 49 to be inserted in a fire insurance policy, among which are the fol-

lowing, spoken of in the opinions as the "mortgagee clause," the "union clause," and the "loss payable clause:"

"If this policy shall be made payable to a mortgagee of the insured real estate, no act or default of any person other than such mortgagee or his agents, or those claiming under him, shall affect such mortgagee's right to recover in case of loss on such real estate; provided, that the mortgagee shall, on demand, pay according to the established scale of rates for any increase of risk not paid for by the insured; and whenever this company shall be liable to the mortgagee for any sum for loss under this policy, for which no liability exists as to the mortgagor, or owner, and this company shall elect by itself or with others to pay the mortgagee the full amount secured by such mortgage, then the mortgagee shall assign and transfer to the companies interested upon such payment, the said mortgage, together with the note and debt thereby secured."

It is further provided in the policy that "this policy may be canceled at any time at the request of the insured, who shall thereupon be entitled to the return of the portion of the above premium remaining, after deducting the customary monthly short rates for the insured for the time this policy shall have been in force. The company also reserves the right, after giving written notice to the insured, and to any mortgagee to whom this policy is made payable, and tendering to the insured a ratable proportion of the premium, to cancel this policy as to all risks subsequent to the expiration of ten days from such notice, and no mortgagee shall then have the right to recover as to such risks."

The above mortgage clause is the same as the mortgage clause in the Massachusetts standard insurance policy, and the same as was set forth in the policy in the case of *Whiting v. Burkhardt*, 178 Mass. 535, 52 L.R.A. 788, 86 Am. St. Rep. 503, 60 N. E. 1, which also contains the usual provisions that it should be void "if, without the assent of the company in writing or print, the said property shall be sold, or the policy assigned." One of the owners of the property conveyed his interest before the fire, and the suit was brought upon the policy by the mortgagee, and the court say (page 539): "The conveyance by Guptill of his interest in the building insured did not affect the right of the plaintiff to recover in case of loss; it is provided in the policy that, 'if this policy shall be made payable to a mortgagee of the insured real estate, no act or default of any person other than such mortgagee or his agents, or those claiming under him, shall affect such mort-

gagee's right to recover in case of loss on such real estate."

The court held that, although the conveyance by the owner of his interest would defeat his right to recover, it was no defense to a suit by the mortgagee named in the policy, because the policy contained a mortgage clause the same as the mortgage clause in the policy in suit.

In *Amory v. Reliance Ins. Co.* 208 Mass. 378, 94 N. E. 677, the court held: "Because of the foreclosure of a later mortgage covering both estates, which worked a change in the title, all the policies became void in the hands of the original insurer, and the claim of the plaintiffs, as mortgagees under their earlier mortgages, rests upon the clause in each policy, under our Massachusetts standard form, which protects the rights of the mortgagee in such cases."

The court held that the mortgagees could recover.

In *Hardy v. Lancashire Ins. Co.* 166 Mass. 210, 33 L.R.A. 241, 55 Am. St. Rep. 395, 44 N. E. 209, the court say: "The history of the provisions in the standard policy in favor of a mortgagee is well known. These provisions in their present form are intended to afford to the mortgagee full indemnity to the extent of the insurance" under "his interest in the property, unless the policy is avoided by some act of his, or of his agents, or of those claiming under him, and the mortgagee in certain events comes under obligation to the insurance company to pay for any increase of risk, and to assign to it his mortgage. . . . The policy of the commonwealth that such insurance shall not be avoided so as to affect the mortgagee's interest by the acts of the mortgagor is shown by the adoption of a standard form containing such a provision, and this is the form which mortgagees usually demand."

In *Eliot Five Cents Sav. Bank v. Commercial Assur. Co.* 142 Mass. 142, 7 N. E. 550, the policy contained the same clause that is contained in the policy in suit; and the insured conveyed the property before the fire, without the assent of the company, and the court said: "If we assume, as contended by the defendant, that the conveyance by George B. Taylor to Abby E. Taylor, without the assent of the company, avoided the policy as to them, yet, under the first clause [mortgage clause] above cited, it would not affect the right of a mortgagee to recover."

In *Union Inst. for Sav. v. Phoenix Ins. Co.* 196 Mass. 230, 14 L.R.A. (N.S.) 459, 81 N. E. 994, 13 Ann. Cas. 433, the mortgagor obtained insurance upon building, and there were endorsements making the loss payable to the mortgagee as his interest might appear. L.R.A.1915C.

The policy was in the standard form, as the policy in this case. The mortgagee did not know of the insurance until after the fire, and the court say: "The first question is whether the plaintiff can avail itself of the contract thus made for its benefit. We think it plain that this question should be answered in the affirmative. Surbridge acted in part for himself and in part as an agent and representative of the plaintiff in procuring the policy. He must be held to have acted in the same double capacity in receiving and holding it. This policy contained a contract between the defendant and Surbridge, and a somewhat different contract between the defendant and the plaintiff. Both the mortgagor and the mortgagee were protected in their rights under their several contracts contained in a single paper signed by . . . [it]." *Palmer Sav. Bank v. Insurance Co. of N. A.* 166 Mass. 194, 32 L.R.A. 615, 55 Am. St. Rep. 389, 44 N. E. 211; *Hastings v. Westchester F. Ins. Co.* 73 N. Y. 141; *Hartford F. Ins. Co. v. Olcott*, 97 Ill. 439.

In *Eddy v. London Assur. Corp.* 143 N. Y. 311, 25 L.R.A. 686, 38 N. E. 307, *Peckham, J.*, says: "The effect of the mortgagee clause hereinbefore set forth is to make an entirely separate insurance of the mortgagee's interest, and he takes the same benefit from his insurance as if he had received a separate policy from the company, free from the conditions imposed upon the owners. . . . The plain and obvious meaning of the language is that the insurance of the mortgagee should not be affected or in any wise impaired or lessened by any act or neglect of the owner, although contained in the same policy issued to the owner, yet the insurer and the mortgagee were . . . entering into a perfectly separate contract of insurance, by which the mortgagee's interest alone was to be insured, and it would be most natural to provide that no act or neglect of the owner should invalidate, that is, impair any portion of the insurance thus separately secured."

In *Hartford F. Ins. Co. v. Williams*, 11 C. C. A. 503, 27 U. S. App. 493, 63 Fed. 925, it was held that, under the provision in the mortgage clause of a fire policy that the insurance as to the interest of the mortgagee should not be invalidated by any act or neglect of the mortgagor or owner, voluntary destruction by the owner would not prevent a recovery by the mortgagee.

In *Phenix Ins. Co. v. Omaha Loan & T. Co.* 41 Neb. 834, 25 L.R.A. 679, 60 N. W. 133, the policy contained the following clause: "If the property be sold or transferred in whole or in part without written

permission in this policy, then, and in every such case, this policy is void."

It is also provided, in substance, as the Maine standard form, as follows: "It is hereby agreed that this insurance, as to the interest of the mortgagee only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured."

The insured conveyed his interest in the property, and the court held that the mortgagee was entitled to recover upon the policy; that the contract with the trust company (mortgagee) was a separate and independent contract, and the right of the mortgagee to enforce it did not depend upon whether the owner had kept his engagements with the insurance company or not.

The case also cites several opinions holding the same doctrine.

In *Bacot v. Phoenix Ins. Co.* 96 Miss. 223, 25 L.R.A.(N.S.) 1226, 50 So. 729, Ann. Cas. 1912B, 262, it was held that, where a husband insured property as the owner when it was in fact owned by his wife, the policy as to him or his wife was void, but also held that, by reason of the mortgage clause attached to the insurance policy, under a statute providing that the insurance of the mortgage interest should not be invalidated by any act or neglect of the owner of the property, the mortgagee could recover upon the policy.

In the note to the case of *Brecht v. Law Union & Crown Ins. Co.* reported in 18 L.R.A.(N.S.) 197, the editor, after reviewing many cases, states that the principle that, under such a clause as is contained in the policy in suit, the rights of a mortgagee cannot be affected by any act or neglect of the owner, the mortgagor, occurring after the issuing of the policy, and cites many cases to support it, and concludes by stating (page 206): "The only difference of opinion which arises as to the effect of such a clause occurs when the act of the mortgagor which is relied upon to avoid the policy as to the mortgagee is some misrepresentation or concealment at the time of the issuance of the policy. The weight of authority, however, would seem to support the conclusion that the rule is the same under such circumstances."

An examination of the cases where the policies contained an indorsement making them payable in case of loss to the mortgagees, as their interests might appear, clearly shows that the rule of law declared in cases before the adoption of the Maine standard form of policy does not apply to that form of policy, and that the policy in suit, by reason of the mortgage clause and by being made "payable in case of loss to L.R.A.1915C.

George S. Gilman, mortgagee, as his interest may appear," contained in addition to the contract with Frank T. Spear a separate and an independent contract whereby the mortgagee's interest was insured, and the defendant had no right to cancel the policy except by mutual consent of the insured, Mr. Spear, and the mortgagee, or by giving to the insured and the mortgagee ten days' notice in writing, as specified in the policy, and that the mortgagee's right to recover for the loss was not affected by the act of the insured and the defendant in their attempted cancellation of the policy.

Second. That changes and alterations were made in and upon the building which were not permitted, and about which the defendant had no notice. Attached to the policy is a mechanics' permit, dated October 15, 1909, giving permission for mechanics to work in and about the premises for two months from date, to make alterations and additions, or repairs. It was shown by the testimony that Mr. Gilman, the mortgagee, did work on the house after the time specified in the permit. He laid new floors, changed the stairs, put up studding in the second floor, etc.

The defendant relies upon *Imperial F. Ins. Co. v. Coös County*, 151 U. S. 452, 38 L. ed. 231, 14 Sup. Ct. Rep. 379, which held that, if mechanics were employed in building, altering, or repairing the premises without a building permit, the insurer was relieved from responsibility, although the fire did not occur in consequence of the alterations or repairs. The policy in that case provided that "this policy shall be void and of no effect if, without notice to this company and permission therefor in writing indorsed hereon, . . . the premises shall be used or occupied so as to increase the risk, . . . or the risk be increased . . . by any means within the knowledge or control of the assured, . . . or if mechanics are employed in building, altering, or repairing premises named herein, except in dwelling houses, where not exceeding five days in one year are allowed for repairs."

The court says: "The condition that the policy should be void and of no effect, if 'mechanics are employed in building, altering, or repairing the premises named herein,' without notice to or permission of the insurance company, being a separate and valid stipulation of the parties, its violation by the assured terminated the contract of the insurer, and it could not be thereafter made liable on the contract, without having waived that condition, merely because in the opinion of the court and the

jury the alterations and repairs of the building did not, in fact, increase the risk."

The policy in suit does not contain the clause contained in the above-mentioned policy that the policy should be void and of no effect if mechanics are employed in the building, altering, or repairing the premises named herein; but it does provide that "the policy shall be void if, without the assent of the insurer, the property shall be removed, except that if such removal shall be necessary for the preservation of the property from fire, this policy shall be valid without such assent after five days thereafter, or if, without such assent, the situation or circumstances affecting the risk shall, by or with the knowledge, advice, agency, or consent of the insured be so altered as to cause an increase of such risk."

The attaching to the policy of the permit above referred to gave to the assured the right to employ mechanics in and upon the premises as specified in the permit for the period named in the permit without increasing the risk to the extent that would avoid the policy, and the making of the changes and alterations testified to after the time limited in the mechanics' permit, without the assent of the insurance company, left it a question of fact for the jury whether the changes and alterations constituted such a change of the situation or circumstances affecting the risk as to so alter the premises as to cause an increase of such risk. If it did not cause an increase of such risk, then it was not a forfeiture of the policy, and whether it was an increase of risk under the circumstances was a question of fact for the jury, and they were expressly instructed upon that branch of the case, and no exceptions were taken to such instruction, and we cannot say, from an examination of the evidence on this branch of the case, that they were not justified in finding that the alterations and repairs made by the mortgagee did not create an increase of the risk, but that they were such repairs and alterations as would ordinarily be expected to be made upon such premises, and that the insurance company so considered it when it issued the policy of insurance.

Motion overruled.

Spear, J., dissents.

Cornish, J., dissenting:

I am unable to concur in this opinion so far as it relates to the question of cancellation. The precise question involved is this: Can a mortgagor who has taken out a policy of insurance upon his own property, in his own name, but payable, in case of loss, to a

mortgagee as his interest may appear, and who has paid the premium, cancel the policy upon request made to the company without the assent of the mortgagee? The opinion holds that he has not this power, and that notwithstanding his request the company has no right to cancel the policy without the consent of the mortgagee. This seems to me a forced construction of the plain and unambiguous words of a contract made by the parties, and sanctioned by the legislature.

The provision relating to cancellation, which has been a part of the statutes of our state since the adoption of the standard policy in 1895, reads as follows:

"This policy may be canceled at any time at the request of the insured, who shall thereupon be entitled to a return of the portion of the above premium remaining, after deducting the customary monthly short rates for the time said policy shall have been in force. The company also reserves the right, after giving written notice to the insured, and to any mortgagee to whom this policy is made payable, and tendering to the insured a ratable proportion of the premium, to cancel this policy as to all risks subsequent to the expiration of ten days from such notice, and no mortgagee shall then have the right to recover as to such risks." Rev. Stat. chap. 49, § 4, ¶ 7.

The first part of this provision covers voluntary cancellation by the insured; the second, voluntary cancellation by the company. We are concerned with the first part only. The words are direct and simple. The power of cancellation is given to "the insured." Who then is meant by "the insured," as the term is used in this contract? No room is left for conjecture. It is the party who effects the insurance and pays the premium which is the consideration of the contract; in this case Frank T. Spear, the mortgagor. The policy at its very inception so specifies:

"In consideration of \$12 to it paid by the insured hereinafter named, the receipt whereof is hereby acknowledged, does insure Frank T. Spear and his legal representatives," etc.

The policy itself therefore clearly defines the term, and wherever the words recur throughout the policy they have the same meaning and refer to the same person. It is true, as the opinion holds, that the mortgagee has certain rights under the standard policy given him by another provision which we shall discuss later, and in a certain sense his interest may be deemed to be protected or insured, but he is not the party insured designated by the statute as having the right to cancel the policy at any time

at his own request. To make him such, or to place him beside "the insured" and say that the policy cannot be canceled without his assent, is in effect to give to the statutes an interpretation antagonistic to its express language, and to couple with the visible and expressed mortgagor an invisible and unexpressed mortgagee. Such a result may be equitable and desirable, and therefore a matter for the consideration of the lawmaking branch of the government; but it requires a severe wrenching of the statute to accomplish such a result without legislative amendment.

Further study of this cancellation section confirms our view. "The insured" is the party designated as entitled to a return of the unearned premium reckoned in the manner prescribed. To "return" is to give back to the party making the original payment. That party is entitled to the return, and can sue the company and recover if the company should decline to pay. The statute gives him that right, and makes the unearned premium a debt which he and he alone can recover. What rights has the mortgagee in that unearned premium? He has paid no part of it. Can he maintain an action for it? Certainly not. What stumbling block can he put in the way of the mortgagor who seeks to recover it? None whatever, because the contract says the insured is "entitled" to it. But if the mortgagee can prevent the cancellation by withholding his assent, he most effectually debars the mortgagor from receiving what is his legal due; for it scarcely could be contended that the mortgagor could receive his premium which was the consideration of the policy, and yet the policy would remain alive and valid as to the mortgagee. If so, at whose expense would it be running? Not at the mortgagor's, because his premium has been returned. Not at the mortgagee's, because it is not claimed that he is in any way liable therefor. We should then have the dilemma of a policy existing and in force at no one's expense. Such a situation is impossible. The power of cancellation and the right to the return of the unearned premium are inseparable, and they belong to one and the same person, and that person is he who effected the insurance.

That the legislature regarded "the insured" as distinct from the mortgagee, and used the term advisedly in designating him as the party having the power of cancellation, is also apparent from the second part of the cancellation provision, permitting cancellation by the company. Here the rights of the mortgagee are recognized and expressly reserved in contradistinction to those of the mortgagor, because the company can cancel only "after giving written

notice to the insured, and to any mortgagee to whom this policy is payable," etc. Here the distinction between the two is sharply drawn. "The insured" is the mortgagor, as distinct from the mortgagee. Written notice must be given to both, but in the next clause it is provided that the company must at the same time tender "to the insured a ratable proportion of the premium," etc. Notice must be given to both, but payment or tender made only to one. We cannot conceive how the English language could have been used with keener discrimination in specifying the rights of both the insured and the mortgagee, and yet the opinion holds that, while the contract provides that "the policy may be canceled at any time at the request of the insured," yet the company has no right to cancel it, notwithstanding this request, except by mutual consent of the insured and the mortgagee. The legislature might have so enacted, but clearly it did not. It recognized the rights of the mortgagee in cancellation by the company, but not in cancellation by the insured. The line of cleavage is well defined.

Passing now from the particular cancellation clause to the entire policy, and applying the familiar rule as to the force of the context, our construction is further confirmed. The words "the insured" occur 21 times in the policy, and confessedly in the other 20 instances they refer to the party effecting the insurance, the mortgagor. On what ground can it be made to apply to another and unnamed party, the mortgagee, in the twenty-first?

The Massachusetts court, in construing the words "the insured" in connection with the proofs of loss and the provisions for arbitration in a standard policy like our own, note the distinction between "the insured" and the mortgagee in these words: "It is quite certain that the party referred to as 'the insured' in these provisions is the mortgagor. The contract calls for but one such statement, and, if the duty of furnishing it is upon the mortgagee when the loss is payable to him, then there is no such duty upon the mortgagor. The paper must be 'signed and sworn to by the insured;' it must set forth 'the interest of the insured therein,' and various other stipulated facts which are peculiarly within the knowledge of the mortgagor, 'so far as known to the insured.' The mortgagee is referred to in the policy in contradistinction to the insured, in different parts of the policy. The mortgagee, to secure his rights in that capacity, must pay on demand 'for any increase of risks not paid for by the insured.' The company reserves the right to cancel the policy, 'after giving written notice to the insured and to any

mortgagee,' etc. In the clause reciting the consideration, the company 'does insure' . . . the mortgagor." Union Inst. for Sav. v. Phoenix Ins. Co. 196 Mass. 230-233, 14 L.R.A.(N.S.) 459, 81 N. E. 994, 995, 13 Ann. Cas. 433.

To the same effect is *Collinsville Sav. Soc. v. Boston Ins. Co.* 77 Conn. 676, 69 L.R.A. 924, 60 Atl. 647, where the court say: "On the other hand, it is not easy to discover upon what theory it can be reasonably claimed that a person who has not come into contractual relations with the insurer, who has obtained no insurance protection, and who is only an appointee of the owner as respects whatever may become due under the contract of insurance to which he is a stranger, acquires the right, even by indirection, to assume the title of 'the insured.' If we look for other provisions which may serve, by way of implication or otherwise, to give him a standing in the adjustment of a loss, we find only that the word 'insured' whenever used in the policy should be construed to include the legal representatives of the insured, and nothing more. It appears, therefore, that the right to participate in an adjustment of a loss under this policy and indorsement has by the parties to the contract been limited to the insurer, the property owner, and his legal representatives."

For the reasons thus set forth, I am of opinion that the language of the cancellation clause is unambiguous, and the rights thereby conferred upon the insured are not to be challenged unless we judicially amend it by inserting after the words "the insured" the words, "with the consent of the mortgagee," so that said clause as amended shall read, "This policy may be canceled at any time at the request of the insured with the consent of the mortgagee," etc. This I am reluctant to do.

The other section of the policy upon which the reasoning of the opinion rests, if I understand it correctly, is as follows:

"If this policy shall be made payable to a mortgagee of the insured real estate, no act or default of any person other than such mortgagee or his agents, or those claiming under him, shall affect such mortgagee's right to recover in case of loss on such real estate, provided that the mortgagee shall, on demand, pay according to the established scale of rates for any increase of risk not paid for by the insured," etc.

The rights of the mortgagee under this clause are protected, as the opinion holds, and no act or default of the mortgagor or of any other person than the mortgagee, either before or after the loss, can abridge or destroy them. That, however, does not refer to the cancellation of a policy which L.R.A.1915C.

is expressly permitted under another section. A canceled policy is one thing; a broken policy, quite another. The "act or default" intended by this provision concerns such acts or defaults as would work a breach of the policy as to the mortgagor. It may be some positive act, an act of commission on the part of the mortgagor, as the sale of the premises, or procuring additional insurance, or even the voluntary destruction of the property; or it may be his failure to do something, an act of omission on his part, as the neglect to furnish proof of loss after fire has occurred. All these and similar instances come within the scope of this "act or default" clause, and under one class or the other falls every case cited in the opinion. Thus the conveyance of the property by the mortgagor in *Eliot Five Cents Sav. Bank v. Commercial Union Assur. Co.* 142 Mass. 142, 7 N. E. 550; *Palmer Sav. Bank v. Insurance Co. of N. A.* 166 Mass. 189, 32 L.R.A. 615, 55 Am. St. Rep. 387, 44 N. E. 211; *Whiting v. Burkhardt*, 178 Mass. 535, 52 L.R.A. 788, 86 Am. St. Rep. 503, 60 N. E. 1; *Union Inst. for Sav. v. Phoenix Ins. Co.* 196 Mass. 230, 14 L.R.A.(N.S.) 459, 81 N. E. 994, 13 Ann. Cas. 433; and *Phoenix Ins. Co. v. Omaha Loan & T. Co.* 41 Neb. 834, 25 L.R.A. 679, 60 N. W. 133; the foreclosure of a later mortgage working a change in the title, *Amory v. Reliance Ins. Co.* 208 Mass. 378, 94 N. E. 677; the procuring of additional insurance by the mortgagor, *Hardy v. Lancashire Ins. Co.* 166 Mass. 210, 33 L.R.A. 241, 55 Am. St. Rep. 395, 44 N. E. 209; *Hastings v. Westchester F. Ins. Co.* 73 N. Y. 141; *Eddy v. London Assur. Corp.* 143 N. Y. 311, 25 L.R.A. 686, 38 N. E. 307; *Hartford F. Ins. Co. v. Olcott*, 97 Ill. 439; incorrect description of interest or misrepresentations, *Bacot v. Phoenix Ins. Co.* 96 Miss. 223, 25 L.R.A.(N.S.) 1226, 50 So. 729, Ann. Cas. 1912B, 262; the voluntary destruction of the premises by the mortgagor, *Hartford F. Ins. Co. v. Williams*, 11 C. C. A. 503, 27 U. S. App. 493, 63 Fed. 925, and his failure to furnish proof of loss, *Union Inst. for Sav. v. Phoenix Ins. Co.* 196 Mass. 230, 14 L.R.A.(N.S.) 459, 81 N. E. 994, 13 Ann. Cas. 433. This covers every citation in the opinion on this branch of the case except the editor's note to *Brecht v. Law Union & Crown Ins. Co.* 18 L.R.A.(N.S.) 197, and that, like the others, refers only to the "effect or breach of policy of insurance by mortgagor on rights of the mortgagee." From none of these decisions do we dissent; with all of them we agree; but we fail to see their application to the case at bar.

They all refer to the effect on the mortgagee of the breach of the conditions of

the policy by the mortgagor, not to the cancellation of a policy, and the gulf between the two is not bridged. The purpose of this "act or default" clause is apparent. Prior to its adoption the courts held that the clause, "payable in case of loss to a mortgagee as his interest may appear," merely constituted the mortgagee an appointee to receive the insurance in case of loss, and a violation of any of the terms of the policy by the mortgagor, such as transfer of title, procuring additional insurance, fraud in proof of loss, etc., avoided the policy not only as to the mortgagor, but also as to the mortgagee. The rights of the mortgagee fell with those of the mortgagor. This court had so held. *Brunswick Sav. Inst. v. Commercial Union Ins. Co.* 68 Me. 313, 28 Am. Rep. 56; *Biddeford Sav. Bank v. Dwelling-House Ins. Co.* 81 Me. 570, 18 Atl. 298. To prevent this result, and to remedy this apparent injustice, the "act or default" clause was inserted in the standard policy, and thereby the interest of the mortgagee is protected, notwithstanding the conduct of the mortgagor may have been such as to forfeit his own. No longer can the mortgagor's wrongdoing imperil the rights of the mortgagee. In this sense the mortgagee's interest is covered by the policy, but in no other, and all the cases cited in the opinion are but illustrations of the various phases in which this single question has been presented to the courts. In discussing the scope of this protection, the courts have sometimes used broad language, as the quotations in the opinion show; but in each instance it was used with reference to the "act or default" clause then under consideration, and in no way involved the rights of the parties under the independent clause governing cancellation. No cited case, and no other that we have been able to find, has declared the doctrine sought to be established in the opinion.

If the logic of the opinion on this branch of the case is that no act of the mortgagor can affect the mortgagee's right of recovery, and that the request for cancellation was such an act, the fallacy of the argument is obvious. The act of the mortgagor contemplated by the clause is, as we have seen, such as would constitute a breach of the contract on his part, a prohibited act, an unauthorized act. But the request for cancellation is a contract right, expressly reserved to the insured by another provision when the policy is issued. It is a statutory right, an authorized privilege of which he cannot be deprived. Under what rule of construction can an act expressly authorized under one provision of a contract be converted into a prohibited act under another provision? How can a contract-authorized L.R.A.1915C.

act be transformed into a contract-breaking act? Such a position is manifestly untenable.

Our conclusion, therefore, is that, however desirable it might be to couple the power of cancellation on the part of the mortgagor, with the consent of the mortgagee, the legislature, thus far, has failed to do so, but has left the power in the hands of the mortgagor alone, and his request for cancellation is a contract right which when exercised by him *ipso facto* works a cancellation of the policy. *Lipman v. Niagara F. Ins. Co.* 121 N. Y. 454, 8 L.R.A. 719, 24 N. E. 609; *Crown Point Iron Co. v. Etna Ins. Co.* 127 N. Y. 608, 14 L.R.A. 147, 28 N. E. 653; *Insurance Com'r v. People's F. Ins. Co.* 68 N. H. 51, 44 Atl. 82; *Parsons v. Northwestern Nat. Ins. Co.* 133 Iowa, 532, 110 N. W. 907; *Richards, Ins.* § 287.

MARYLAND COURT OF APPEALS.

DOROTHY C. BRANDAU et al., Appts.,

v.

HENRY C. McCURLEY, Trustee, et al.

(124 Md. 243, 92 Atl. 540.)

Husband and wife — property of wife — conveyance to husband in trust.

1. Under a statute permitting a married woman to convey her property by joint deed with her husband, she may by deed in which he joins convey her property to his as trustee.

Trust — execution by statute of uses — property of married woman.

2. The statute of uses does not execute the trust so as to vest in a married woman the fee simple estate where she and her husband join in a deed to him of her property in trust to permit her to enjoy and convey the property as if sole, all property undisposed of to become the absolute property of the trustee in case he survives her.

(November 13, 1914.)

Note. — Validity of conveyance of wife's real property to husband through himself as trustee or through a third person.

In general.

On the validity of direct conveyance of wife's real estate to her husband, see note to *Alexander v. Shalala*, 31 L.R.A. (N.S.) 844.

The principles of law involved in *BRANDAU v. McCURLEY* have an historical setting, in the light of which they must be considered to be clearly understood. An opinion written by Judge Story in *Durant v. Ritchie*, 4 Mason, 45, Fed. Cas. No. 4,190, construing the law of Massachusetts, contains an exposition of most of these prin-

A PPEAL by complainants from a decree of the Circuit Court, No. 2, of Baltimore City, dismissing a complaint filed for the construction of a deed of trust and the determination of title to the fee simple property described in the deed. Affirmed.

The facts are stated in the opinion.

Messrs. Israel B. Brodie and Edward L. Ward, for appellants:

Sophia McCurley died intestate, the deed in question being invalid and of no force and effect.

Harris v. Whiteley, 98 Md. 430, 56 Atl. 823; Beinbrink v. Fox, 121 Md. 112, 88 Atl. 106; Preston v. Fryer, 38 Md. 221; Greenholtz v. Haefter, 53 Md. 184; Connor v. Leach, 84 Md. 571, 36 Atl. 591; Grove v. Todd, 41 Md. 633, 20 Am. Rep. 76; Gebb

v. Rose, 40 Md. 387; 21 Cyc. 1292; Rico v. Brandenstein, 98 Cal. 465, 20 L.R.A. 702, 35 Am. St. Rep. 192, 33 Pac. 480; Riley v. Wilson, 86 Tex. 240, 24 S. W. 394; Wells v. Caywood, 3 Colo. 487; Savage v. Savage, 80 Me. 472, 15 Atl. 43.

As no duties were imposed upon the trustee under the deed, a passive trust was created, and the statute of uses at once executed the legal estate in Sophia McCurley, the *cestui que trust*.

Warner v. Sprigg, 62 Md. 15; Perry, Trustees, § 306; Rogers v. Sisters of Charity, 97 Md. 550, 55 Atl. 318; Combs v. Combs, 67 Md. 11, 1 Am. St. Rep. 359, 8 Atl. 757; Ware v. Richardson, 3 Md. 507, 56 Am. Dec. 762.

ciples in the light of their historical setting. A few statements based upon Judge Story's opinion will here serve as a basis for the consideration of the questions as limited by the scope of the present note: (1) At common law a feoffment or other grant by husband and wife of the wife's estate was not merely voidable, but void. (2) By fine or common recovery, in which mode of conveyance she is examined by the court as to the freedom of her assent, etc., she could join her husband in a deed to lead to or declare uses. (3) In the American Colonies fine and common recovery, as a means of conveying wife's estate, were never adopted, but usage sanctioned and made valid conveyance by deed in which her husband joined, and by this means she and her husband could declare a use in any case in which the use could have been declared by fine or common recovery. (4) A conveyance by husband and wife direct to the husband is not valid, but a conveyance by them to a third person to the use of the husband, or to the use of both and the survivor of them, is valid, since such conveyance by fine or common recovery would have been valid. (5) The statute of uses, 27 Hen. VIII., ordained that such as had the use of lands should, to all intents and purposes, be reported and taken to be absolutely seised and possessed of the soil itself, so that the interest of *cestui que use* was by this statute changed from an equitable into a legal estate, for the statute executed the use and possession, and made the *cestui que use* complete legal owner, to all intents and purposes, annihilating the intermediate estate of the feoffee. (6) Where husband and wife conveyed for a consideration her real estate to a third person, who was no relation to them, either by blood or marriage, in trust for themselves and the survivor, the statute of uses at once executed the use in them and the survivor, but this fact did not invalidate the deed by reason of the fact that in substance there was a direct conveyance of an undivided interest from the wife to the husband.

No attempt is here made to annotate the broad questions involved in Judge Story's L.R.A.1915C.

opinion, and it should be noted that it was based to some extent upon the Massachusetts decisions, especially Thatcher v. Omans, 3 Pick. 521, and that the opinion was written before the enactment of the many statutes which now govern the transfer of real estate belonging to married women. This note does not include cases where the conveyance of the wife's estate was by fine or common recovery.

The facts in the case before Judge Story differed from those before the court in BRANDAU v. MCCURLEY in several important particulars: (1) In the former case the trustee was a third party, the court pointing out the fact that he was no relation to the parties, either by blood or marriage, and that there was a valuable consideration moving from him to support the deed, while in the latter case the trustee was the husband. (2) The effect of the deed in the former case was to convert the wife's property into an estate in entirety, while the effect of the conveyance in the latter case was (if the statute of uses had been held to execute the uses) to convey to the husband an estate in remainder. But, as the court held that the statute of uses was not applicable, the question as to whether or not this would have been invalid as a direct conveyance to the husband was not decided, and the effect given to the deed was to enlarge the wife's power to dispose of her estate during her life, and to pass the fee to the husband at her death in case she had not exercised the power.

In construing a deed that differed from the one before the court in BRANDAU v. MCCURLEY only in the facts that a third person was named as trustee, and the remainder, in case of no disposition of the estate by the wife, was conveyed in trust for the husband, the court, in Dempsey v. Tylee, 3 Duer, 73, said: "Daniel E. Tylee, the husband, could not have taken a remainder in fee under the trust deed to Morris, even if it had contained proper and apt words to vest such an estate in him on her death, for the reason that the wife cannot convey directly to him." This statement, of course, was not necessary to the decision. It ex-

Messrs. George M. Brady and T. Howard Embert also for appellants.

Messrs. William H. Maltbie and Frank, Emory, & Becuwkes, for appellees:

A deed of trust for the sole and separate use of a married woman will not be executed by the statute of uses, where the married woman is not, at the time of the execution of the deed, *sui juris* as to her property.

1 Perry, Tr. 6th ed. § 310; Ware v. Richardson, 3 Md. 505, 56 Am. Dec. 762; Handy v. McKim, 64 Md. 560, 4 Atl. 125; Numsen v. Lyon, 87 Md. 31, 39 Atl. 533; Griffith v. Plummer, 32 Md. 74; Richardson v. Stodder, 100 Mass. 528; Dean v. Long, 122 Ill. 458, 14 N. E. 34; Carpenter v. Browning, 98 Ill. 282; Harris v. Whiteley, 98 Md.

430, 56 Atl. 823; Slingluff v. Hubner, 101 Md. 652, 61 Atl. 326.

The deed of trust is a deed of bargain and sale, and the statute of uses does not operate upon the uses declared therein, further, if at all, than to vest the legal estate in the bargainee, Henry C. McCurley, trustee.

Rogers v. Sisters of Charity, 97 Md. 550, 55 Atl. 318; Handy v. McKim, 64 Md. 569, 4 Atl. 125; Matthews v. Ward, 10 Gill & J. 443; Ware v. Richardson, 3 Md. 505, 56 Am. Dec. 762.

Even though the trusts declared in the deed of trust were executed by the statute of uses, the title to the property would not vest in the heirs at law of Sophia McCurley.

presses, however, in concise language, the conclusion that would logically result if the deed in BRANDAU v. McCURLEY had been construed to pass a remainder to the husband without passing title through a trustee.

In fee.

A married woman may convey her real estate to a third person, her husband joining in the deed, for the express purpose of a reconveyance to the husband individually, and when the reconveyance is accomplished a valid legal title will be vested in the husband, unless fraud, coercion, or undue influence was used to induce the wife to make the conveyance. Hannaford v. Dowdle, 75 Ark. 127, 86 S. W. 818 (courts will scrutinize the transaction carefully, but will not condemn the title or the transaction if no fraud or coercion is revealed); Johnson v. Austin, 86 Ark. 446, 111 S. W. 455; Johnson v. Rockwell, 12 Ind. 76; Leach v. Rains, 149 Ind. 152, 48 N. E. 858 (an incidental holding); Scarborough v. Watkins, 9 B. Mon. 540, 50 Am. Dec. 528; Todd v. Wickliffe, 18 B. Mon. 866 (love and affection are a sufficient consideration to support the deed where it is made to carry out an antenuptial contract); Willis v. Woodward, 2 Bush, 215; Kennedy v. Ten Broeck, 11 Bush, 241; Wicks v. Dean, 103 Ky. 69, 44 S. W. 397 (title to property before conveyance was in the joint names of the husband and wife); Dempsey v. Tylee, 3 Duer, 73; Jackson ex dem. Stevens v. Stevens, 16 Johns. 110; Meriam v. Harsen, 2 Barb. Ch. 232, affirming 4 Edw. Ch. 70 (a mere nominal consideration named in the deed is sufficient without proof that it was actually paid); Garvin v. Ingram, 10 Rich. Eq. 130; Riley v. Wilson, 86 Tex. 240, 24 S. W. 394; Shepperson v. Shepperson, 2 Gratt. 501.

But it has been held that a deed of a married woman in which her husband joins, transferring her separate property to a third person without substantial consideration, for the purpose of reconveyance to the husband, not as his individual property, but as community property, is void since it is merely an agreement to change the character of the estate. Kellett v. Trice, 95 Tex. 160, 66 S. W. 51; Shook v. Shook, — Tex. Civ. App. —, 125 S. W. 638.

presses, however, in concise language, the conclusion that would logically result if the deed in BRANDAU v. McCURLEY had been construed to pass a remainder to the husband without passing title through a trustee.

In Johnson v. Austin, 86 Ark. 446, 111 S. W. 455, a transfer of a married woman's real estate was made to her grantor for the purpose of making a correction in the deed by which she held, and at her request the new deed correcting the mistake was made to her and her husband. The court held that the transfer was valid; that the effect of the transaction was to vest in the two an estate in entirety by deed of gift.

In Gebb v. Rose, 40 Md. 387, there is *dictum* which would limit the operation of this rule to cases where the property is conveyed to the third person in trust for the husband. See quotation of this *dictum* and comments thereon in BRANDAU v. McCURLEY.

In the following cases conveyances of a married woman's real estate to her husband by passing title through a third person were held invalid on the ground that fraud was proved by those attacking the transaction: Douglass v. Douglass, 51 La. Ann. 1455, 26 So. 546; Boyd v. De La Montagnie, 73 N. Y. 498, 29 Am. Rep. 197 (an assignment of a lease); Darlington's Appeal, 86 Pa. 512, 27 Am. Rep. 726.

In Jasper v. Maxwell, 16 N. C. (1 Dev. Eq.) 357, in a bill filed by a husband as executor of his deceased wife to recover chattels of which she was *cestui que trust*, the answer alleged among other things that the plaintiff had by undue influence induced his wife, the *cestui que trust*, who had left heirs, to transfer her real estate to a third person who immediately reconveyed it to the husband. The court said: "It would give the court much satisfaction, if an equity could be raised on the other point made in the answer; and it is well worthy the consideration of the legislature. The truth is, that by an undue influence, which every husband, either by blandishment or harshness, can exercise over a wife, she may be induced, and most of them are induced, indirectly, to convey their estates to their husbands in the method practised here. But what can the court do? It is a legal con-

Cribb v. Rogers, 12 S. C. 564, 32 Am. Rep. 511; Dayton v. Stewart, 99 Md. 643, 59 Atl. 281; Escheator of St. Philip's & St. Michael's v. Smith, 4 M'Cord, L. 452; Benesch v. Clark, 49 Md. 497; Marden v. Leimbach, 115 Md. 206, 80 Atl. 958; Foos v. Scharf, 55 Md. 310; Combs v. Combs, 67 Md. 11, 1 Am. St. Rep. 359, 8 Atl. 757; Gambrill v. Mines, 71 Md. 30, 18 Atl. 43; Bentz v. Maryland Bible Soc. 86 Md. 102, 37 Atl. 708; Numsen v. Lyon, 87 Md. 31, 39 Atl. 533; Re Banks, 87 Md. 425, 40 Atl. 268; Scott v. Kane, 87 Md. 709, 42 L.R.A. 359, 40 Atl. 1070; Russell v. Werntz, 88 Md. 211, 44 Atl. 219; Mills v. Bailey, 88 Md. 320, 41 Atl. 780; Rogers v. Cobb, 89 Md. 165, 42 Atl. 935; Chew v. Tome, 93 Md. 244, 48 Atl. 701; Re Bauernschmidt, 97 Md. 51, 54 Atl. 637; Welsh v. Gist, 101 Md. 606, 61 Atl. 665; Roberts v. Roberts, 102 Md. 131, 1 L.R.A.(N.S.) 782, 111 Am. St. Rep. 344, 62 Atl. 161, 5 Ann. Cas. 805.

The McCurley deed is a deed from a married woman to a trustee, for the benefit of herself and husband, and is valid.

Hall v. Eccleston, 37 Md. 510; Warner v.

Sprigg, 62 Md. 14; Carson v. Phelps, 40 Md. 73; Phelps, Judicial Eq. p. 297; Preston v. Fryer, 38 Md. 221; Gebb v. Rose, 40 Md. 387.

Boyd, Ch. J., delivered the opinion of the court:

On the 14th of September, 1898, Sophia McCurley and her husband, Henry C. McCurley, executed a deed to said Henry C. McCurley, trustee, by which they undertook to convey certain lots of ground situated in Baltimore city on the following trusts: "In trust and confidence nevertheless to, for, and upon the uses and purposes and subject to the powers hereinafter expressed concerning the same—that is to say, in trust to suffer and permit the said Sophia McCurley, wife of the said Henry C. McCurley, for and during the term of her natural life, to hold and enjoy the above-mentioned property and premises, and to collect and receive the rents, issues, and income thereof, and the same to apply to her sole and separate use, without being subject to the power, disposal, or control of her present

veyance of a legal estate, supported by the statute. If not, let it be contested at law, and each party there make the most of his case. But if it be, where is the equity we can go on here? Both the husband and the children are volunteers; and the first in time is best off. Certainly, if the deed were defective, equity would not raise a finger to help it. But if it be valid in law, we are kept equally still; for there is no consideration to set us in motion. If the estate were a mere equity, we would gladly interpose; for our power would be exercised in the protection, and not in the restriction, of the wife."

A Georgia statute invalidates sales by a married woman to her husband of her separate estate, unless the sale is approved and sanctioned by the superior court of the county of the wife's domicile, but she may give her property to him without such approval or sanction by the court. Under this statute it has been held that a sale by a married woman to her husband without the approval of the court is void even though title passes through a third person. Gordon v. Harris, 141 Ga. 24, 80 S. E. 276. It was also held in this case that a deed made by a wife to a third party, of property the title to which was in her, although the husband had paid for it, to enable the husband to borrow thereon from the third party money with which to pay to her a claim for alimony, all in compliance with an agreement of separation, was invalid even as against a purchaser from the husband after the purchaser had assumed and paid off the debt to the third party, the wife having received the money, if the purchaser had knowledge of the facts when he bought the property. This transaction was held to be a sale of the property within the L.R.A.1915C.

meaning of the statute, notwithstanding the fact that it was declared in the agreement to be a gift.

In trust.

See general discussion, *supra*, "In general," as to principles involved where wife's real property is conveyed in trust. BRANDAU V. MCCURLEY appears to be the only case where the husband was both trustee and beneficiary.

It has been held that a deed by a married woman and her husband to a third person in trust for the husband is valid. Gebb v. Rose, 40 Md. 387. This was an indirect holding, as in fact the deed was declared void because the husband had not joined in it. See BRANDAU V. MCCURLEY, for interpretation of the case. And in Durant v. Ritchie, 4 Mason, 45, Fed. Cas. No. 4,190, it was held that a conveyance by a husband and wife of her real estate to a third party in trust for both of them, or the survivor of them, is a valid conveyance. But Dempsey v. Tylee, 3 Duer, 73, is directly opposed to this proposition on the ground that such conveyance is equivalent to a direct conveyance to the husband, where he alone was made *cestui que trust*.

Where husband does not join in the deed.

Of course, where a married woman has no capacity to transfer her property without the joinder of the husband, it would be necessary for him to join in the deed to the third party, otherwise the deed would be absolutely void.

In Gebb v. Rose, *supra*, it was held that a conveyance of the wife's real estate, other than her separate estate, to which the husband's marital rights do not attach, by her

husband, and without being bound for his debts, contracts, or agreements, with power to the said Sophia McCurley as if she were a *feme sole*, without the consent of her said trustee or successor, to sell, dispose of, and assign absolutely or otherwise the ground and premises above described, or to bequeath the same to such person or persons as she may think proper by last will and testament or writing in the nature thereof, and from and immediately after the death of the said Sophia McCurley, in case no sale or other disposition thereof shall have been made by her under the powers hereinbefore expressed, and in so far as no such disposition thereof shall have been made by her, then this trust to cease, and the lots of ground and premises hereinbefore described to become the absolute property of the said Henry C. McCurley, his heirs, personal representatives, and assigns, absolutely."

Sophia McCurley died without making any disposition of the two lots of ground involved in this case, which were held by her in fee simple. The appellants filed a

bill in equity, which, as amended, is against Henry C. McCurley, trustee, and Henry C. McCurley, individually, and against Sophia S. Hightman, a first cousin of Sophia McCurley, and the unknown heirs of other relatives named in the amended bill. The bill alleges that the property descended to the plaintiffs as the next of kin and the heirs at law of Sophia McCurley, subject to the dowerable interest therein of her husband, Henry C. McCurley, of one third for life as to said fee simple property. It further alleges that the deed of trust imposed no duties upon Henry C. McCurley, trustee, and the statute of uses at once executed the trust, and therefore Sophia McCurley took an absolute fee simple estate; that the legal estate and beneficial interest were both vested in her, and said property became immediately vested in her upon the execution of the deed; that the trust was a passive trust, there being no active duties for the trustee to perform, and therefore the deed is void, as the statute of uses immediately executed the legal estate in her, and she took an absolute fee simple title, and that

to her husband in trust, without her husband joining in the deed, is absolutely void. The only difference between the facts in this case and those in BRANDAU v. McCURLEY is that here the husband did not join in the deed, while in the McCURLEY CASE he did so join. See quotation of some *dicta* from this case in the McCURLEY CASE.

Where a married woman conveyed real estate to a third party, the husband not joining in the deed, the title to which was in her by deed absolute in form, and the third party conveyed to the husband, it was held in Moore v. Cottingham, 90 Ind. 239, that parol evidence was admissible to show that the wife held the property in trust for her husband, and that the conveyances fully executed the trust; that the deed of the wife without the husband joining would be void if she owned the beneficial interest in the land, but that she could legally convey without his joining in the deed in execution of a trust.

To pay husband's debts.

Where a married woman and her husband conveyed her separate estate to a third person in trust for themselves or the survivor of them, giving to the trustee power to lend money to the husband and charge the same as a lien upon the real estate so held by him, but directing that at any time when no such lien existed the trustee should, if notified by grantors or the survivor, convey the real estate back to them or the survivor, and the trustee upon notice by both husband and wife did convey the real estate to them "or the survivor of them," it was held in Kennedy v. Ten Broeck, 11 Bush, 241, that the conveyances were valid, and vested title after the wife's death in the husband.

L.R.A.1915C.

And it has been held that a conveyance by a husband and wife of the wife's real estate to the husband's creditor, and another conveyance from the creditor to the husband reserving a lien on the property for the overdue debt, are valid if executed in good faith without fraud or duress by the husband, and the conveyances will have the effect of transferring title from the wife to the husband subject to the creditor's lien. Hannaford v. Dowdle, 75 Ark. 127, 86 S. W. 818.

But it has been held that a statute incapacitating married women to become surety for another cannot be evaded, in respect to the wife's interest in real estate as a tenant in entirety, by transferring the property to a third person with a reconveyance back to the husband and then placing a mortgage upon the property to secure a debt of the husband existing previously, if the mortgagee knows the purpose of the transaction. Grzesek v. Hibberd, 149 Ind. 354, 48 N. E. 361; McCormick Harvesting Mach. Co. v. Scovell, 111 Ind. 551, 13 N. E. 58. And the mortgage is voidable by either the husband or wife where it was given to secure a loan to the husband. Abicht v. Searls, 154 Ind. 594, 57 N. E. 246.

Burden of proof when transfer is attacked.

There is some difference of opinion as to the burden of proof when a transfer from a wife to her husband through an intermediate person is attacked for fraud, coercion, or undue influence. Some courts hold that the relation of the parties is such that the rule governing the burden of proof of fair dealing where a contract between a fiduciary and his *cestui que trust* is attacked, i. e., that the burden is upon the

it cannot be considered a testamentary disposition of property. The bill prayed: (a) That the deed be construed; and (b) that the plaintiffs be declared the next of kin and heirs at law of Sophia McCurley, and as such entitled to the fee simple properties described, subject to the dowerable interest of Henry C. McCurley.

The question first to be considered is whether the deed was void because it was executed by the husband and wife to the husband in trust. As it was executed before Acts 1898, chap. 457, took effect (January 1, 1899), it must be construed with reference to the law as it existed prior to that time. Mrs. McCurley acquired the properties in controversy after the Code of 1860 was adopted. Article 45, § 2, of that Code, provided that property acquired or owned by a married woman according to § 1, "she shall hold for her separate use, with power of devising the same as fully as if she were a *feme sole*, or she may convey the same by a joint deed with her husband." Mrs. McCurley did acquire these properties according to the provisions of § 1. Then § 11 provided that "any married woman may convey her real or personal property, if her husband join in the conveyance," etc.

It was determined by this court that a married woman could not convey property so acquired to her husband by a deed made to him by her alone. In *Gebb v. Rose*, 40 Md. 387, it was said: "The property was not conveyed to the separate use of the grantee, but was conveyed to her generally, and consequently the marital rights of her husband attached. Holding the estate by

this title, Mrs. Wollet, while under the disability of coverture, on the 18th of October, 1871, attempted to convey the property directly to her husband, in trust, without his joinder in the grant. This, it is clear, she was incompetent to do by any conveyance executed by her alone."

In that opinion Judge Alvey made a statement upon which the appellants rely as conclusive of the question. He said: "The only mode by which a *feme covert* can convey her estate, not held to her separate use, to her husband, except in the execution of a power, is by means of a conveyance to a third person for his use, he joining with his wife in the deed. That this may be done has been expressly decided in *Thatcher v. Omans*, 3 Pick. 521."

If it was intended to apply that statement to a deed in which the property was conveyed to the husband as trustee, then what was said in the opinion just prior to that statement was useless. The inference to be drawn from what is said in the quotation first above made is that if the husband had united in the grant the deed would have been sufficient, for, after saying that the method prescribed for the conveyance of the property of a *feme covert* by article 45, § 11, is by joint deed of herself and husband, Judge Alvey went on to say: "And as the statutory mode of conveyance was not observed, the deed is void, and therefore without any effect whatever."

That was a deed to the husband in trust, and it was distinctly said it was void because the husband did not join in the grant. That was the real question before the court. The statement was not altogether accurate

fiduciary to prove that no advantage of the relation was taken, is applicable to this class of conveyances. *Boyd v. De La Montagnie*, 73 N. Y. 498, 29 Am. Rep. 197; *Darlington's Appeal*, 86 Pa. 512, 27 Am. Dec. 726.

But the Kentucky court holds that the burden of proving fraud, coercion, or undue influence is upon those who attack the validity of the transfer. *Scarborough v. Watkins*, 9 B. Mon. 540, 50 Am. Dec. 528; *Todd v. Wickliffe*, 18 B. Mon. 866; *Willis v. Woodward*, 2 Bush, 215; *Kennedy v. Ten Broeck*, 11 Bush, 241 (the officer who took the acknowledgment held incompetent to testify in contradiction to his certificate, to establish coercion by the husband); *Wicks v. Dean*, 103 Ky. 60, 44 S. W. 397.

In *Todd v. Wickliffe*, 18 B. Mon. 866, the court explained at some considerable length the reason for the rule that the burden of proving fraud, undue influence, or coercion is upon those who attack the validity of the transaction where a married woman's real estate has been conveyed to her husband by passing title through a third person, the reason being that the statutory mode by

which a married woman is enabled to convey her real estate takes the place of the English mode of fine and recovery under the direction of the court, and in providing the mode of transfer to take the place of the English mode the legislature has guarded against the undue influence or coercion of the husband in any case of transfer. Therefore, it would be unreasonable to place the burden of proof upon the grantee when the mode prescribed by statute has been followed, even though the grantee is the husband.

All the courts agree that the whole transaction will be closely scrutinized, and if evidence of fraud, coercion, or undue influence is found, the conveyances will be set aside, which would seem to indicate that while the burden of proof is upon those attacking the validity of the transfer, slight circumstances indicative of fraud, coercion, or undue influence will suffice to invalidate the deed unless full explanation, removing the suspicion, is made by those defending the legality of the transaction.

J. W. M.

where it said: "The only mode by which a *feme covert* can convey her estate, not held to her separate use, to her husband, except in the execution of a power, is by means of a conveyance to a third person for his use, he joining with his wife in the deed."

That is the mode which was adopted in *Thatcher v. Omans*, supra, referred to by Judge Alvey; but, as that case and some of our decisions have decided, they can convey to a third person for the express purpose of having the third person convey to the husband and wife, or to the husband alone, on terms agreed upon. If the object of a deed from a husband and wife be simply to convey her property absolutely to her husband in his individual capacity, then it might be objected to on the ground that the husband was both grantor and grantee; but an owner of property can, in his individual capacity, make a valid conveyance, in this state, to himself as trustee, as shown by *Carson v. Phelps*, 40 Md. 73, and other cases. It cannot be objected to on the theory that the husband might take advantage of the wife, for, as we have seen, they can convey to a third person with the understanding that the third person shall convey the property to the husband, or they can convey to a third person for the use of the husband. When the conveyance is to the husband as trustee, he takes in a different capacity from that in which he conveys. Two persons, each of whom is *sui juris*, can convey to themselves as trustees, and, as the statute authorized a wife to convey her property if her husband joined in the conveyance, it is difficult to understand why they cannot convey to the husband as trustee. There would seem to be as much reason for permitting a conveyance to a husband, in trust, who joins in a deed as grantor to enable the wife to convey her property, as there is to permit two other persons who own the property to convey it to themselves in trust.

Section 3, art. 45, of Code of 1860 (still continued in the Code of 1912), provided that it should not be necessary for a married woman to have a trustee to secure to her the sole and separate use of her property. It did not stop there, however, but added: "But if she desires it she may make a trustee by deed, . . . or she may apply to a court of equity and have a trustee appointed, in which appointment the uses and trusts for which the trustee holds the property shall be declared."

There is no suggestion that her husband cannot be made such trustee, and in many cases it was very desirable that he should be. Indeed, where it was necessary for a married woman to have a trustee in order

to invest her with sole and independent power, it was said in *Ware v. Richardson*, 3 Md. on page 505, 56 Am. Dec. 762: "It is now settled that where bequests or conveyances are made to married women for their separate use, without the nomination of trustees, the husbands in equity will be considered as trustees for their wives, and will be required to comply with the intention of the donor."

So, although, when she received these properties, it was unnecessary for her to have a trustee, she still could have one, and as she held these properties as her statutory estate, in order to be able to deal with them as a *feme sole*, it was necessary for her and her husband to so provide, and no more effective way could be adopted than by making a deed of trust, and we might add that no more appropriate person could be selected as trustee than the husband, if he was what a husband should be. Unless there is some necessity or good and valid reason for it, equity should not require circuitous routes to be adopted, when there is a straight course to the desired goal. Therefore, when it has been decided that a person *sui juris* can make a valid conveyance to himself as trustee, why should not a wife and her husband be permitted to convey to him as trustee, instead of doing, what it is conceded they could do, convey to a third person and the third person convey to him?

We are therefore of the opinion that Sophia McCurley could, by deed in which Henry C. McCurley, as her husband, united, convey the property to Henry C. McCurley as trustee. The terms of the trust were such as very materially enlarged her powers, for, in addition to the other rights reserved by her, it was conveyed "with power to the said Sophia McCurley as if she were a *feme sole*, without the consent of her said trustee or successor, to sell, dispose of, and assign absolutely or otherwise the ground and premises above described, or to bequeath the same to such person or persons as she may think proper by last will and testament or writing in the nature thereof."

Having determined that the deed in question was not invalid because made to the husband as trustee, the next question is whether the statute of uses executed the use or trust declared by the deed. If a third person had conveyed this property to a trustee upon the uses and purposes, and subject to the powers contained in this deed, it would be going very far to say that by the statute of uses the property was vested in Mrs. McCurley free from the trust. It would be manifested that it was not intended to give her more than a life

estate with the power of disposition, devising, etc. There are numerous cases in this state following the decision of *Benesch v. Clark*, 49 Md. 497, where it was said: "Where an estate is given to a person generally or indefinitely, with power of disposition, such gift carries the entire estate; and the devisee or legatee takes, not a simple power, but the property absolutely. But where the property is given, as in this case, to a person expressly for life, and there be annexed to such a gift a power of disposition of the reversion, there the rule is different, and the first taker, in such case, has but an estate for life, with the power annexed."

See *Welch v. Gist*, 101 Md. 606, 61 Atl. 665, *Roberts v. Roberts*, 102 Md. 131, 1 L.R.A.(N.S.) 782, 111 Am. St. Rep. 344, 62 Atl. 101, 5 Ann. Cas. 805, and *Marden v. Leimbach*, 115 Md. 206, 80 Atl. 958, which are among the later cases.

It would clearly have been in the teeth of the intention of the grantor or deviser to have so construed the terms of such an instrument as to vest a fee simple estate in Mrs. McCurley, and contrary to a long line of decisions in this state. At most the statute of uses, if conceded to be applicable, could only have vested in her a legal life estate. Can there be any different result because of the fact that she and her husband made the deed? Unquestionably not. Where, then, is the remainder? The deed answers that, as it expressly provides that it shall go to Henry C. McCurley if not disposed of under the power. It must be remembered that the deed did not provide for a life estate in Mrs. McCurley with remainder to her heirs, but the remainder was to go to the husband. The statute of uses could not thus enlarge the estate given her, and it does not deprive the remainderman of the estate given him in the event, which happened, that Mrs. McCurley did not dispose of it.

If it was necessary to discuss the application of the statute of uses, it might be interesting to consider what sort of an estate Mrs. McCurley had at her death, if the statute of uses applied,—whether it was the ordinary statutory estate of a married woman under the Code of 1860, or whether she could dispose of the property as a *feme sole*. It would be remarkable if a court of equity was compelled to hold that the deed by reason of the statute of uses vested in her a sole and separate estate, which she could deal with as a *feme sole*, but did not give the husband anything, although the wife did not dispose of it in her lifetime. On the other hand, if she would then take simply an ordinary statutory estate, the statute of uses would,

according to the appellants' contention, put the property back where it was before the deed was made, notwithstanding we are of the opinion that the deed was validly executed. But, without deeming it necessary to decide whether such a deed of trust as this could be executed by the statute of uses under such circumstances as are before us, we will, for the reasons given, affirm the decree, which dismissed the bill of complaint.

Decree affirmed; the appellants to pay the costs above and below.

MASSACHUSETTS SUPREME JUDICIAL COURT.

NELLIE M. DOANE

v.

ETHEL HOOPER GREW.

(220 Mass. 171, 107 N. E. 620.)

Slander — giving character to servant — repeating rumor.

1. The privilege of one who, in answering an inquiry as to the character of a servant, makes statements as of information received from others, does not depend upon his personal bona fide belief in the truth of the facts stated, or whether or not he ought to have believed them, or was reckless and careless in believing them.

Evidence — repetition of slander — malice.

2. Evidence of the repetition of a slander is admissible to show malice in an action to recover damages for its utterance, although made to agents delegated by the person slandered to procure the repetition.

Note. — For privilege as to communications made in response to inquiries by person defamed, see note to *Christopher v. Akin*, 46 L.R.A.(N.S.) 104. For repetition of privileged statement as evidence of malice, see note to *Hayden v. Hasbrouck*, 42 L.R.A.(N.S.) 1109.

Generally, as to liability growing out of the giving or refusing of information affecting the character or reputation of servant, see note to *Wabash R. Co. v. Young*, 4 L.R.A.(N.S.) 1091. See also subsequent cases in this series, *Sunley v. Metropolitan L. Ins. Co.* 12 L.R.A.(N.S.) 91, and *Christopher v. Akin*, supra.

For burden of proof as to malice where the defamatory communication is conditionally or qualifiedly privileged, see notes to *Denver Public Warehouse Co. v. Holloway*, 3 L.R.A.(N.S.) 696, and *Sunley v. Metropolitan L. Ins. Co.* supra; and see also later cases in this series, *Trimble v. Morrish*, 16 L.R.A.(N.S.) 1017; *Holmes v. Royal Fraternal Union*, 26 L.R.A.(N.S.) 1080; *Peterson v. Steenerson*, 31 L.R.A.(N.S.) 674; *Richardson v. Gunby*, 42 L.R.A.(N.S.) 520.

Same — refusal of position.

3. Evidence is not admissible in an action for slander in giving a character to a servant, that plaintiff was informed by persons whom she referred to defendant for information that her services were not wanted, without anything to show that defendant was the cause of such act.

Evidence — slander — malice — anger.

4. Upon the question of malice in giving an untruthful response to a request for information as to the character of a servant, evidence is admissible tending to show that defendant was angry because plaintiff left his service.

Same — burden of proof — malice.

5. One seeking damages for slander alleged to have been uttered on a privileged occasion has the burden of showing malice.

(January 20, 1915.)

EXCEPTIONS by defendant to rulings of the Superior Court for Suffolk County, made during the trial of an action brought to recover damages for a slander alleged to have been uttered on a privileged occasion, which resulted in a verdict for plaintiff. Sustained.

The facts are stated in the opinion.

Mr. Cleveland Bigelow, with Messrs. Warren, Garfield, Whiteside, & Lamson, for defendant.

Messrs. John H. Casey and Frederic J. Muldoon, for plaintiff:

Where a master has given a servant a bad character, the circumstances under which they parted, any expression of ill-will uttered by the master then or subsequently, the fact that the master never complained of the plaintiff's misconduct while she was in her service or when dismissing her, would not specify the reason for her dismissal, and give her an opportunity to defend herself, together with the circumstances under which the character was given, and its exaggerated language, are each and all evidence of malice.

Kelly v. Partington, 4 Barn. & Ald. 700, 2 Nev. & M. 460; Odgers, Libel & Slander, 5th ed. 362.

The jury were warranted in finding, on the evidence, that the defendant had exceeded her privilege.

Hupfer v. Rosenfeld, 162 Mass. 131, 38 N. E. 197; Brow v. Hathaway, 13 Allen, 239; National Cash Register Co. v. Salling, 97 C. C. A. 334, 173 Fed. 22; Odgers, Libel & Slander, 5th ed. 348-361; Robinson v. Van Auken, 190 Mass. 161, 76 N. E. 601.

Maliciously and without justifiable cause, to induce a third person to end his employment of the plaintiff, whether the inducement be false slanders or successful persuasion, is an actionable tort.

Moran v. Dunphy, 177 Mass. 485, 52 L.R.A.1915C.

L.R.A. 115, 83 Am. St. Rep. 289, 59 N. E. 125; McGurk v. Cronenwett, 199 Mass. 457, 19 L.R.A.(N.S.) 561, 85 N. E. 576.

Defendant's act was malicious.

Berry v. Donovan, 188 Mass. 353, 5 L.R.A. (N.S.) 899, 108 Am. St. Rep. 499, 74 N. E. 603, 3 Ann. Cas. 738; McGurk v. Cronenwett, supra.

Loring, J., delivered the opinion of the court:

1. The defendant's exceptions to the charge of the presiding judge raise questions as to a defendant's liability for false defamatory words spoken on a privileged occasion.

If the occasion on which slanderous words are spoken is a privileged one and the defendant (in saying what he said) was acting under the privilege created by the occasion, a defense is made out even if what he said was not in fact true. Where inquiries are made as to the character and capabilities of a former servant, the occasion is a privileged one. Of that there is no question. It is the typical case of a privileged occasion.

Where the occasion is a privileged one the plaintiff can hold the defendant liable if he proves that (in saying what he said of the plaintiff) the defendant did not in fact use his privilege. That is to say: Although the defendant (in answering questions as to the character and capability of a former servant) is protected if he was "acting in bona fide answer to the needs of the occasion," yet if malice in fact is proved the defendant is liable. By malice in fact is meant "the wilful doing of an injurious act without lawful excuse." In this connection it means that (although the occasion was a privileged one) the defendant, in saying what he said of the plaintiff, was acting outside his privilege, and not under it. To prove malice in fact (that the defendant was acting outside his privilege, and not under it) the plaintiff may introduce direct evidence that the defendant made the untrue defamatory statements out of hatred for the plaintiff. That is perhaps the most common way of proving malice in fact in this connection.

But it is not the only way of proving malice in fact in this connection, namely, that the defendant was acting not under, but outside, his privilege. In *Gott v. Pulsifer*, 122 Mass. 235, 23 Am. Rep. 322, it was assumed that publishers of newspapers in making statements of facts which were not true, stand on the same footing as persons asked as to the character and capabilities of a former servant. On that assumption it was there held (in effect) that if an article in the defendant's newspaper containing an untrue statement of fact was written for the sake of writing a brilliant article, in

reckless disregard of the rights of the plaintiff, malice in fact was made out. It is now settled that the assumption made in *Gott v. Pulsifer* is not law. *Burt v. Advertiser Newspaper Co.* 154 Mass. 238, 13 L.R.A. 97, 28 N. E. 1, affirming *Shekell v. Jackson*, 10 Cush. 25. But on the assumption made in *Gott v. Pulsifer*, the decision in that case is correct. So, in a case where the slanderous words uttered by the defendant on a privileged occasion are based upon what he has heard, if there is great excess in repeating what he has heard, there is evidence that the defendant was not acting within the privilege which the occasion gave him, but outside it. See *Clark v. Molyneux*, L. R. 3 Q. B. Div. 237, 47 L. J. Q. B. N. S. 230, 37 L. T. N. S. 694, 26 Week. Rep. 104, 14 Cox, C. C. 10.

Malice in fact which destroys the defense of privilege must be taken to mean that the defamatory words, although spoken on a privileged occasion, were not spoken pursuant to the right and duty which created the privilege, but that they were spoken from some other motive. See in this connection *Lord Blackburn in Capital & Counties Bank v. Henty*, L. R. 7 App. Cas. 741, 787, 52 L. J. Q. B. N. S. 232, 47 L. T. N. S. 662, 31 Week. Rep. 157, 47 J. P. 214. "Duty," in this connection, is not confined to obligations enforced by law. Giving information as to the character and capabilities of a former servant (for example) is not a legal obligation enforced by law. The law recognizes its existence as a social obligation which cannot be performed unless it creates a privileged occasion. It is apparent that there are many ways of proving malice in fact in this connection, and that they cannot be enumerated in advance.

It follows from what has been said that the parts of the charge to which exceptions were taken did not properly present to the jury the questions to be decided by them in this case.

But the objection to one part of the charge excepted to goes deeper than that. In one part of the charge excepted to the presiding judge in effect told the jury that the defendant was liable (in case they found that the plaintiff did not in fact abuse the defendant's child) if the defendant did not honestly believe that fact, or if believing it she did not have sufficient cause to warrant the belief, but was reckless or careless in trusting to the statements made by Mrs. MacMahon and her (the defendant's) children.

When inquiry is made of a person as to the character and capabilities of a former servant, the person to whom the inquiry is addressed would not do his whole duty if he should confine his answer to facts which

he knows to be facts of his own knowledge. Nor would he do his whole duty if he should confine himself to giving information which he has fully investigated. Indeed, he would fail in doing his full duty if he should omit to impart any material information which has come to him, even if he has not attempted to investigate it at all. And *Bramwell, L. J.*, in *Clark v. Molyneux*, L. R. 3 Q. B. Div. 237, 244, went even farther, and laid down the proposition that "a person may honestly make on a particular [privileged] occasion a defamatory statement without believing it to be true; because the statement may be of such a character that on that occasion it may be proper to communicate it to a particular person who ought to be informed of it."

◀The person inquired of on a privileged occasion must be fair to the person making the inquiry as well as to the person about whom the inquiry is made. Where he has information (whether it has or has not been investigated by him), it is his duty to state in answer to the inquiry that he has the information, giving it (as the defendant did in the case at bar) as information concerning a fact, as distinguished from a statement of the existence of the fact. Where the person to whom the inquiry is put makes a statement that he has information as to a fact (as distinguished from a statement that the fact exists), his privilege does not depend upon whether he in good faith believes the fact, or whether he ought to have believed the fact, or was reckless and careless in believing the fact. Where the person to whom the inquiry is put makes that kind of answer (namely, that he has information as to a fact) he does not state that the reported fact is or is not a fact, or that he believes or does not believe the reported fact. The person who makes the inquiry is entitled to the information which has come to the person to whom the inquiry is addressed, and the statement that information has come to him, if honestly made in answer to the inquiry, is a privileged communication. The good faith in question in that case is not good faith in believing the fact, but good faith in giving the information that the needs of the privileged occasion call for. A charge to a jury substantially the same as the charge here in question, in a case (in its legal aspects) substantially the same as the case at bar, was held to be incorrect by the English court of appeal in *Clark v. Molyneux*, L. R. 3 Q. B. Div. 237, 47 L. J. Q. B. N. S. 230, 37 L. T. N. S. 694, 26 Week. Rep. 104, 14 Cox, C. C. 10. ↵

There have been a number of cases in Massachusetts in which the question of what malice in fact means (within the rule

that where malice in fact is proved, the defendant is liable for false defamatory words spoken on a privileged occasion) has been discussed. See *Remington v. Congdon*, 2 Pick. 310, 13 Am. Dec. 431; *Bodwell v. Osgood*, 3 Pick. 379, 15 Am. Dec. 228; *Swan v. Tappan*, 5 Cush. 104; *Brow v. Hathaway*, 13 Allen, 239; *Atwill v. Mackintosh*, 120 Mass. 177; *Gott v. Pulsifer*, 122 Mass. 235, 23 Am. Rep. 322; *Billings v. Fairbanks*, 139 Mass. 66, 29 N. E. 544; *Wright v. Lothrop*, 149 Mass. 385, 21 N. E. 963; *Howland v. Flood*, 160 Mass. 509, 36 N. E. 482; *Squires v. Wason Mfg. Co.* 182 Mass. 137, 65 N. E. 32; *Robinson v. Van Auker*, 190 Mass. 161, 76 N. E. 601; *Crafer v. Hooper*, 194 Mass. 68, 80 N. E. 2; *Christopher v. Akin*, 214 Mass. 332, 46 L.R.A. (N.S.) 104, 101 N. E. 971, and there may be others.

The decisions actually made in these cases do not seem to be in conflict. But it is not possible to harmonize all that was said when these cases were decided. This has come, to some extent at least, from an assumption that the question for the jury in such cases is always the same. But that is not so. Given the definition which has been stated above, the exact question to be passed upon by the jury in each case depends or may depend upon the form in which the defamatory words were put by the defendant, taken in connection with the knowledge or information which the defendant had as to the matter of the defamatory statements. Take an example. Suppose that bare information of a fact had come to a defendant who was inquired of with respect to the capabilities and character of a former servant, and the defendant was ignorant as to the trustworthiness of the source from which the information came; if under these circumstances he should state the existence of the fact as of his own knowledge, the question to be passed upon by the jury is a very different one from that which is presented when there is evidence that the statement made by the defendant matches exactly the information or knowledge which he had received, and the accuracy of the source from which that information or knowledge came. It is manifest that there are a number of intermediate cases between these two, where there is a discrepancy between the statements made and the information and the knowledge of the defendant as to the accuracy of the information. These discrepancies between the information and the statements are put as examples of one aspect only which may give rise to differences in the exact question to be passed upon by the jury in determining whether there was or was not that malice in fact which destroys the defense of privilege although the words were spoken on a privileged occasion.

No rule can be laid down in advance to cover all cases, beyond the statement of the fundamental proposition that in the case of false defamatory words spoken on a privileged occasion the defendant is not liable if he spoke the words in good faith under the right or duty which the occasion created, and that he is liable if he spoke the words from some other motive.

The cases of *Lothrop v. Adams*, 133 Mass. 471, 43 Am. Rep. 528, *Brown v. Massachusetts Title Ins. Co.* 151 Mass. 127, 23 N. E. 733, *Fay v. Harrington*, 176 Mass. 270, 57 N. E. 369, and *Conner v. Standard Pub. Co.* 183 Mass. 474, 67 N. E. 596, relied on by the defendant, arose under Stat. 1855, chap. 396 (and the re-enactments of that statute), which extended to civil actions for libel the provisions which theretofore had been applicable to criminal prosecutions for libel (Stat. 1826, chap. 107, § 1; Rev. Stat. chap. 133, § 6). By the original act (Stat. 1855, chap. 396), it was provided that in a civil action for libel, truth was a defense "unless malicious intention shall be proved." The wording of the act has been changed, so that in Rev. Laws, chap. 173, § 91, the provision is: "The truth shall be a justification unless actual malice is proved." These cases are not decisive here.

2. The evidence, which was excepted to, of the repetition of this (or of a substantially similar) slander made to Mrs. Eldridge and Mrs. Benson was admissible to prove malice, although it was not ground for an action, because both Mrs. Eldridge and Mrs. Benson, in procuring the repetition of the slander, confessedly acted as the agent of the plaintiff and at her request. *Howland v. George F. Blake Mfg. Co.* 156 Mass. 543, 31 N. E. 656. It is established at common law, that repetition of substantially the same slander may be shown in evidence for the purpose of proving malice to enhance damages. *Bodwell v. Swan*, 3 Pick. 376; *Baldwin v. Soule*, 6 Gray, 321; *Robbins v. Fletcher*, 101 Mass. 115.

3. But we are of opinion that the plaintiff should not have been allowed to introduce in evidence that, on applying to Mrs. Pillsbury and to Mrs. Felton for a position as nurse, and on referring them to the defendant, she received word in each case that her services were not required. This was admitted for the purpose of showing the defendant's state of mind toward the plaintiff, and for no other purpose. But in our opinion it was too remote. While it is a possible inference from these facts (without more) that in each case the plaintiff failed to get the position because of the reference given by the defendant, that inference is so remote that the evidence should

not have been admitted. The course of the trial of this case is an example. When Mrs. Pillsbury was later put upon the stand, she testified that she did not talk with the defendant at all. Thereupon the plaintiff's counsel stated that he would take her at her word. And Mrs. Felton testified that although she did apply to the defendant, all that the defendant said was that the plaintiff had been very satisfactory for two years, but the last year she had not done so well, and that this did not affect her (the witness) in deciding not to employ the plaintiff. Whether the exception to the admission of this evidence would have been sustained it is not necessary to decide. It was perhaps within the discretion of the presiding judge to admit it in evidence. This evidence ought not to be admitted at the new trial which has become necessary.

4. The ruling asked for by the defendant that there was no evidence to warrant a finding of malice on the part of the defendant was refused rightly. The plaintiff testified that on the day on which she left the defendant (although she had given a week's notice of her intention to leave), the defendant first told her "to pack up and get right out as quick as you can, in an hour if you can," and later (while she was packing) that the defendant said to her, "I will call up Mr. Grew; I will see whether you will go or not." One explanation of this inconsistent conduct on the defendant's part is that she was beside herself with anger. The fact that the defendant was angry with the plaintiff (if the jury adopted this explanation of the plaintiff's testimony and found that she was angry with the plaintiff) was sufficient to enable the plaintiff to go to the jury on the question whether the defendant (in making statements as to the plaintiff which were not in fact true—if the jury found that she did make statements not in fact true—) was acting under the privilege which the occasion created, or outside it.

5. Although Mrs. Hobart denied it on the witness stand, the jury were at liberty to find that she refused to take the plaintiff as a nurse because of the statements made to her by the defendant. The exception taken to the refusal to give the third ruling requested must be overruled.

6. The sixth, seventh, and eighth requests were aimed at the sufficiency of the fifth, sixth, and seventh counts under the rule of practice applied in *Murphy v. Russell*, 202 Mass. 480, 89 N. E. 107. These counts would seem to be counts for maliciously and without justifiable cause preventing the employment of the plaintiff by Mrs. Hobart under the doctrine of *Moran v. Dunphy*, 177 Mass. 485, 52 L.R.A. 115, 83 Am. St. Rep. L.R.A.1915C.

289, 59 N. E. 125 (a case of interference with an employment actually in existence), applied to the prevention of getting employment in place of interfering with an actual employment then in existence. With the exception of one incidental reference to these counts in the charge (which is not of consequence), the case was left to the jury as an action of slander. That is to say the case in fact was left to the jury on the first count. We do not know whether the fifth, sixth, and seventh counts (as distinguished from the first count) will be relied upon at the new trial. It is not necessary at this time to consider whether the allegations of these counts make out a case under the doctrine on which they seem to be founded.

7. It is necessary to state (on account of the contention made by the defendant in support of the exception to the judge's refusal to direct a verdict for the defendant) that Mrs. Hobart herself testified to some of the statements set forth in the first count.

8. The judge was wrong in charging the jury that "the burden is upon the defendant to show that they were privileged words for which she is not answerable."

If the occasion is a privileged one the burden is on the plaintiff to prove malice. *Brow v. Hathaway*, 13 Allen, 239; *Clark v. Molyneux*, L. R. 3 Q. B. Div. 237, 47 L. J. Q. B. N. S. 230, 37 L. T. N. S. 694, 26 Week. Rep. 104, 14 Cox. C. C. 10. No exception was taken to this instruction, but it becomes necessary to refer to it in view of the fact that there is to be a new trial.

We believe that we have covered all the contentions made by the defendant. We make this statement in this way because the defendant has not addressed her argument specifically to the exceptions which she took. The entry must be:

Exceptions sustained.

MISSOURI SUPREME COURT. (In Banc.)

STATE OF MISSOURI

v.

MISSOURI, KANSAS, & TEXAS RAIL-
WAY COMPANY.

(— Mo. —, 172 S. W. 35.)

Carrier — special rates to militiamen —
constitutionality.

1. Requiring railroads to give special

Note. — As to power to require carriers to give reduced rates to classes of persons, including militiamen, see notes to *Com. v. Interstate Consol. Street R. Co.* 11 L.R.A. (N.S.) 973, and *State ex rel. Simpson v.*

rates to militiamen traveling on orders from the governor does not violate a constitutional provision forbidding discrimination between transportation companies and individuals.

Same — discrimination — special rates.

2. A constitutional requirement that the legislature pass laws to prevent unjust discrimination in the rates of passenger tariffs by railroads renders unlawful a requirement that special rates be given to militiamen traveling on orders from the governor, where the legislature has acted upon its constitutional authority to establish a reasonable maximum passenger tariff, and the conditions under which the transportation of the Militia must occur are not materially different from those for which the rate was established.

(Bond, J., dissents.)

(December 19, 1914.)

ON DEMURRER by defendant to an alternative writ of mandamus to compel it to grant a special rate over its road to militiamen traveling on orders from the governor. Demurrer sustained.

Statement by Faris, J.:

Mandamus brought originally in this court. Plaintiff, upon filing a petition containing apt allegations, procured the issuance by us of an alternative writ of mandamus, the pertinent part of which reiterated the allegations of the petition, and, omitting caption and formal parts, is as follows:

"Comes now the state of Missouri and represents and shows to the court that the Missouri, Kansas, & Texas Railway Company is a corporation duly organized and existing according to law, and owning and operating a line of railway from Jefferson City to Nevada, Missouri, wholly within this state.

"Your petitioner further shows that this state has formed and maintains an organized Militia known and designated as the National Guard of Missouri, and that, under and by virtue of § 8396 of Revised Statutes of 1909 of said state, it was and is the duty of all companies and corporations owning or operating lines of railroad in this state to transport said organized Militia or National Guard over the lines of said railroads between points wholly within this state, at the rate of 1 cent per

mile for each man belonging to said organization, whenever said National Guard is ordered by the governor of this state to travel on military duty in this state.

"Your petitioner further shows that on the 22d day of May, 1914, a part of said National Guard, to wit, Capt. W. S. Moore and fifteen men of Company L, Second Regiment, Infantry, was ordered by the governor of this state to go from Jefferson City to Nevada, in this state, on military duty, to wit, for target practice at the government rifle range near Nevada; that on said date. Adjutant General John B. O'Meara, by order of the governor, and acting for this petitioner, applied to the said Missouri, Kansas, & Texas Railway Company for transportation for the said sixteen members of said Company L, Second Regiment, National Guard, from Jefferson City to Nevada, over the line of said railway company at said rate of 1 cent per mile for each man so transported; that the distance from Jefferson City to Nevada over defendant's railway is 174 miles, and that said adjutant general tendered to said railway company the sum of \$27.84 for the transportation aforesaid.

"Your petitioner further states that said Missouri, Kansas, & Texas Railway Company refused to accept said sums so tendered, and refused to issue transportation to said organized Militia, and failed and refused to transport said Militia, as by law it is required to do, and asserts that it will not in future transport said National Guard at said rate."

Defendant demurred to said alternative writ upon one ground and divers specifications, which demurrer, that the said ground and the specifications thereunder may be clearly seen, we likewise set out, omitting caption and formal parts, to wit:

"(1) Because it does not state facts sufficient to constitute a cause of action.

"(2) Because the 1-cent Militia fare law (§ 8396, Revised Statutes of 1909 of Missouri) is in violation of § 14 of article 2 of the Constitution of Missouri, being an unjust discrimination against other passengers in the state.

"(3) Because said 1-cent fare law deprived defendant of the equal protection of the law, and takes its property without due process of law, and is in violation of § 1, article 14, of the Constitution of this state.

"(4) Because said section is in violation of §§ 12 and 23 of article 12 of the Constitution of this state, which prohibit discriminations in charges or facilities for transportation between companies and individuals, or in favor of either.

"(5) Because said 1-cent Militia fare law is confiscatory and in violation of § 1

Chicago, M. & St. P. R. Co. 41 L.R.A.(N.S.) 524.

As to who are within statute or ordinance requiring carriers to give reduced rates to "pupils" or "school children," see note to State ex rel. Seattle v. Seattle Electric Co. 43 L.R.A.(N.S.) 172, L.R.A.1915C.

of the 14th Amendment to the Constitution of the United States, and § 30 of article 2 of the Constitution of Missouri.

"(6) Because the order to Capt. W. S. Moore and fifteen men to go to Nevada, Missouri, and engage in target practice, was not military duty within the meaning of said § 8396, Revised Statutes of 1909."

From the pertinent part of the alternative writ as we set it out above, and from the above demurrer thereto, the points up for ruling will be clearly seen.

The statute, the constitutionality of which is the only bone of contention, will be found set out at length in the subjoined opinion, to which reference is likewise made for further facts, should such become necessary.

Mr. J. W. Jamison, for defendant:

Section 8396 of the statute is in conflict with § 23 of article 12 of the Constitution, which expressly prohibits discrimination by railroads in charges or facilities for transportation, between transportation companies and individuals, or in favor of either, in that it expressly commands and requires such discrimination in favor of the organized Militia, and against all persons who are nonmembers of that organization.

Re Gardner, 84 Kan. 264, 33 L.R.A. (N.S.) 956, 113 Pac. 1054; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; McCully v. Chicago, B. & Q. R. Co. 212 Mo. 1, 110 S. W. 711.

Section 8396, with other maximum rate statutes fixing maximum charges for carriage of freight and passengers, was repealed by the law of 1913 creating the Public Service Commission.

State ex rel. Missouri Southern R. Co. v. Public Service Commission, 259 Mo. 704, 168 S. W. 1156; Gregg v. Laird, 121 Md. 1, 87 Atl. 1111; Henderson's Tobacco, 11 Wall. 657, 20 L. ed. 235; Henricetta Min. & Mill Co. v. Gardner, 173 U. S. 123, 43 L. ed. 637, 19 Sup. Ct. Rep. 327; Public Service Commission Law, Laws of 1913, p. 556.

Messrs. **John T. Barker**, Attorney General, **Lee B. Ewing**, and **F. M. Fitch**, Assistant Attorneys General, for the State:

If it should be held that the Public Service Commission act gave the Commission power to fix any rate above the statutory maximum rates, then such construction of said act would make it unconstitutional and void.

State ex rel. Barker v. Assurance Co. 251 Mo. 278, 46 L.R.A. (N.S.) 955, 158 S. W. 640, Ann. Cas. 1915A, 247.

The 1-cent rate provided for the state to pay for carrying her Militia is proper, and L.R.A.1915C.

the statute is neither discriminatory in its effect nor unreasonable in its classification.

State ex rel. Simpson v. Chicago, M. & St. P. R. Co. 118 Minn. 380, 41 L.R.A. (N.S.) 524, 137 N. W. 2, Ann. Cas. 1913E, 494; Atlantic & P. R. Co. v. United States, 76 Fed. 186; Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 263, 36 L. ed. 699, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844.

Section 8396 is not in conflict with § 30, art. II., of Missouri Constitution, and § 1, art. XIV., of the Amendments to the United States Constitution.

Julian v. Kansas City Star Co. 209 Mo. 67, 107 S. W. 496; International Harvester Co. v. Missouri, 234 U. S. 199, 58 L. ed. 1276, 52 L.R.A. (N.S.) 525, 34 Sup. Ct. Rep. 859; State ex rel. Simpson v. Chicago, M. & St. P. R. Co. 118 Minn. 383, 41 L.R.A. (N.S.) 524, 137 N. W. 2, Ann. Cas. 1913E, 494; State v. Missouri P. R. Co. 242 Mo. 339, 147 S. W. 118; Roeder v. Robertson, 202 Mo. 522, 100 S. W. 1086; Chilton v. St. Louis & I. M. R. Co. 114 Mo. 88, 19 L.R.A. 269, 21 S. W. 457; Younger v. Judah, 111 Mo. 303, 16 L.R.A. 558, 33 Am. St. Rep. 527, 19 S. W. 1109; Missouri P. R. Co. v. Kansas, 216 U. S. 262, 54 L. ed. 472, 30 Sup. Ct. Rep. 330.

The state, in the exercise of its sovereign power, may require a public utilities body to render a service at a less rate than is charged individuals. Such a requirement is not illegal or unreasonable.

Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 48 L.R.A. (N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 263, 278, 36 L. ed. 699, 704, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; Atlantic & P. R. Co. v. United States, 76 Fed. 189.

The statute in question will not be stricken down as confiscatory, until such fact is made to appear beyond a reasonable doubt.

State v. Cantwell, 179 Mo. 261, 78 S. W. 569.

The legislature having enacted a 1-cent rate for the transportation of the Militia, that rate is presumed to be compensatory.

State ex rel. Simpson v. Chicago, M. & St. P. R. Co. 118 Minn. 384, 41 L.R.A. (N.S.) 524, 137 N. W. 2, Ann. Cas. 1913E, 494; Atlantic & P. R. Co. v. United States, 76 Fed. 190; Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400; San Antonio Traction Co. v. Altgelt, 200 U. S. 304, 50 L. ed. 492, 26 Sup. Ct. Rep. 261; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398.

Faris, J., delivered the opinion of the court:

It is patent that the demurrer to the alternative writ of mandamus is well taken, if, as defendant contends, § 1 of "An Act to Establish the Maximum Rates to be Charged by Railroad Companies for Transporting the Organized" Militia, etc. (Laws 1909, pp. 368 and 369), now § 8396, is unconstitutional. In the last analysis this is the only question in the case. Other matters of minor moment are urged, but none of the latter is of any decisive importance in a final determination of the real question in issue.

In order that we may have the matter under discussion plainly before us, we set out said § 8396 below: "Whenever it shall be necessary for the organized Militia of the state, designated the National Guard of Missouri, to travel on any railroad between points wholly within this state on military duty, ordered by the governor, the rate charged shall not exceed 1 cent per mile for the transportation of each officer and enlisted man, with not to exceed 100 pounds of baggage or camp equipage, and the individual, company or corporation owning, operating, controlling or leasing such road or part thereof shall be limited to such compensation therefor, and shall not charge, demand or receive any greater rate or compensation for such service."

Defendant, to escape the force of the above section, says that it violates the provisions of § 23 of article 12 of our Constitution, which reads thus: "No discrimination in charges or facilities in transportation shall be made between transportation companies and individuals, or in favor of either, by abatement, drawback or otherwise; and no railroad company, or any lessee, manager or employee thereof, shall make any preference in furnishing cars or motive power."

And that it also violates the provisions of § 14 of article 12 of the Constitution of Missouri, which thus provides: "Railways heretofore constructed, or that may hereafter be constructed in this state, are hereby declared public highways, and railroad companies common carriers. The general assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this state, and shall from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on said railroads, and enforce all such laws by adequate penalties."

Other specific contentions of unconstitutionality are also urged, as the demurrer L.R.A.1915C.

shows, the which we shall discuss when, and if, we reach them.

I. It will be noted that § 23, supra, forbids discrimination as between, or in favor of, transportation companies and individuals. The discrimination here confronting us is not between "transportation companies and individuals," nor is it in favor of such companies or individuals. We judicially know that the organized Militia of the state, when traveling "on orders from the governor," travels at the expense of the state, and that therefore the conditions present a case of discrimination in favor of the state of Missouri. The suggestion urged on us that the United States in the end recoups the state of Missouri for these outlays does not affect the argument, so we need not inquire whether this be true or not. Since, if it be so, said § 8396 makes, in the last analysis, a prima facie case of discrimination in favor of the United States as against any and all persons who, not being members of the organized Militia traveling on orders from the governor, are required to pay fare at the rate of 2 cents per mile. Neither the state nor the United States is mentioned in said § 23, supra, so no ban thereby is laid against either, which forbids in their favor a discrimination. We do not think § 23 of article 12 of the Constitution is in point.

II. The applicable part of § 14, supra, of the Constitution, which defendant contends renders said § 8396 unconstitutional, is the inhibition contained in the words: "The general assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this state."

It is contended that since the Constitution in plain terms requires the legislature to "pass laws to . . . prevent unjust discrimination . . . in the rates of . . . passenger tariffs on the different railroads," by this language and the unmistakable command of its converse, it forbids the legislature to pass any law, the effect of which is to produce a plain, and an alleged unjust, discrimination. May the legislature, having by the express command of the organic law a duty laid upon it to do a certain thing, not only fail to do that thing, but without any other authority from the Constitution do the diametrically contrary thing? We do not think so. Such a conclusion in the light of our Constitution would serve as the mother in logic of a pestiferous brood of vicious, absurd, and outrageous laws, which like chickens would come home to us to roost and vex us. For if the legislature may validly pass a statute

compelling the railroads to carry members of the organized Militia for 1 cent per mile, and thus save to the state at the expense of the railroads, 1 cent for each mile traveled, it may, by the same token, pass an act requiring such transportation to be furnished for 1 mill per mile; likewise it may pass a statute requiring all transportation, both of freight and passengers, moving at the ultimate expense of the state, to be furnished at a merely nominal cost. We bear in mind, of course, such exceptions, if any, as might arise from the constitutional provision which forbids the giving of "free passes or tickets at a discount" to state officers and others. Mo. Const. § 24, art. 12.

Similar statutes, in the main features thereof, have been before the supreme court of both Kansas and Minnesota. Though Kansas has no such constitutional provision as we have here under discussion, it was yet held in that state (*Re Gardner*, 84 Kan. 264, 33 L.R.A.(N.S.) 956, 113 Pac. 1054) that a statute which required railroads to furnish transportation to the officers and men of the Kansas National Guard, when traveling to perform military duty under orders from competent authority, was invalid, for that it denied to the railroads the equal protection of the laws guaranteed by the 14th Amendment to the Constitution of the United States. In Minnesota, which likewise has no such section in its Constitution as § 23 of art. 12, *supra*, a 1 cent per mile fare statute for the benefit of the organized Militia and state Naval Reserves was held, in the case of *State ex rel. Simpson v. Chicago, M. & St. P. R. Co.* 118 Minn. 380, 41 L.R.A.(N.S.) 524, 137 N. W. 2, Ann. Cas. 1913E, 494, not to violate either the Federal or state Constitutions in respect that it took the property of the railroad without compensation, or without due process of law, or that it deprived it of the equal protection of the laws. That these opposite and contrary rulings are irreconcilable goes without saying, but in the view we hold of this case in the light of the inhibition directed to our state legislature by § 14 of article 12 of our Constitution, we are not necessarily called on to reconcile the wide differences existing in the views held by the able jurists who wrote these adverse holdings. While the precise contentions held in judgment in the cases of *State ex rel. Simpson v. Chicago, M. & St. P. R. Co.* and *Re Gardner*, *supra*, to wit, that our statute violates those Federal and state constitutional provisions guarantying due process of law, and the Federal Constitution's provision guarantying the equal protection of the laws, are all raised by defendant in the instant case, we need not discuss them, since we have L.R.A.1915C.

another constitutional provision equally in point, and not subject to doubt and contrariety of ruling.

The Supreme Court of the United States, passing upon an analogous matter in the case of *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565, likewise held that a statute of Michigan requiring railroads to issue 1,000-mile tickets and sell them at a price fixed by such statute took the property of the railroad without due process of law, and failed to afford to the railroad the equal protection of the laws, and thus violated the 14th Amendment to the Constitution of the United States. The Constitution of Michigan was not, of course, under review or there held in judgment, since it was not the province of the Supreme Court of the United States to pass upon whether the statute violated the Constitution of Michigan. The latter matter was for the courts of Michigan to determine. The statute of Michigan so held to violate § 1 of the 14th Amendment provided, in substance, that all railroads in Michigan, whether intrastate or interstate, should keep for sale and sell at all principal ticket offices 1,000-mile tickets at a price not to exceed \$20 in the Lower Peninsula and \$25 in the Upper Peninsula; that such tickets should be non-transferable, valid for two years from the date of the purchase thereof, and whenever required by the purchaser, should be issued in the names of such purchaser and his wife and children, designating the names of the purchaser and each member of the family on such tickets.

The court of appeals of New York in the case of *Beardsley v. New York, L. E. & W. R. Co.* 162 N. Y. 230, 56 N. E. 488, likewise held that a 1000-mile ticket law, similar to that held in judgment in *Lake Shore & M. S. R. Co. v. Smith*, *supra*, was invalid because it violated the provisions of § 1 of the 14th Amendment to the Constitution of the United States. The identical point has been similarly ruled in other jurisdictions; in fact, in every jurisdiction to which our attention has been called, and in which the question has arisen. *State ex rel. McCue v. Great Northern R. Co.* 17 N. D. 370, 116 N. W. 89; *Com. v. Atlantic Coast Line R. Co.* 106 Va. 61, 7 L.R.A.(N.S.) 1086, 117 Am. St. Rep. 983, 55 S. E. 572, 9 Ann. Cas. 1124. It may be objected that the opinions of the state courts following the ruling of the Supreme Court of the United States in the case of *Lake Shore & M. S. R. Co. v. Smith*, *supra*, upon a Federal question, prove nothing of moment; that it is but a "piling of Pelion upon Ossa." This is conceded. The state courts are compelled to follow the

Federal courts upon Federal questions. But it does show with some degree of certainty that the consensus of opinion is that the Supreme Court of the United States is still adhering to the views expressed in the Lake Shore-Smith Case, *supra*, and that the case of Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 48 L.R.A. (N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034, is not in conflict, as, certainly in our views, it is not in point therewith, though counsel rely with much assurance thereon, as likewise does the supreme court of Minnesota in the Simpson Case, *supra*. Briefly, the Willcox Case, *supra*, held that so long as the total income of an established gas company, monopolistic as to its occupancy of the field, furnished an adequate profit upon the capital and plant employed, it did not legally matter that as to some customers, namely, the city and its departments, the profit was not enough to do so.

So if, by reason of paucity of provisions in our organic law, we had been compelled to resort (as counsel, among other points, urges us to do) to the inhibitions of the 14th Amendment against the passage of any state law which deprives a person of his property without due process of law, or which denies to such person the equal protection of the laws, we could, in the above cases, and that of *Re Gardner*, 84 Kan. 264, 33 L.R.A. (N.S.) 956, 113 Pac. 1054, find authority well grounded and well reasoned for our holding. But the makers of our own state Constitution, apparently zealous to prevent discrimination and preserve fairness of treatment, not only placed in our organic law the two sections which we quote above and with which we began this opinion, but also § 12 of article 12, forbidding discrimination in short as opposed to long hauls; § 24 of article 12, which forbids the giving of passes, or the sale of tickets at a discount to certain statuted officers, and § 30 of article 2, which forbids that any person shall be "deprived of life, liberty, or property without due process of law." We merely mention these provisions *arguendo* to point the moral that the Constitution makers labored to prohibit discriminations, rebates, combinations, monopolies, and unfair practices which might confer upon some patrons of railroads advantages not attainable by others. We are not saying that they apply to the instant case. On the contrary, we say they do not. We mention them to emphasize the frame of mind of the Constitution makers.

While Alabama (§ 243, Const. 1901), Kansas (§ 10, art. 17, Const. 1874), Colorado (§ 6, art. 15, Const. 1876), Georgia L.R.A. 1915C.

(¶ 1, § 2, art. 4, Const. 1877), Illinois (§ 15, art. 11, Const. 1870) Mississippi (§ 186, Const. 1890), Pennsylvania (§ 3, art. 17, Const. 1874), South Dakota (§ 17, art. 17, Const. 1889), Texas (§ 2, art. 10, Const. 1874), Utah (§ 15, art. 12, Const. 1895), Washington (§ 18, art. 12, Const. 1889), and West Virginia (§ 9, art. 11, Const. 1872), each has provisions in their several Constitutions, either making it the duty of their legislatures to pass laws to prevent unjust discriminations in freight and passenger rates upon railroads and common carriers, similar to our own constitutional provision (§ 12, art. 12, Mo. Const. 1875), or providing that no such discrimination shall be permitted, yet our attention has not been called to, nor have we been able to find, any case in either of these states on the precise point. Nevertheless we feel neither hesitation nor doubt that § 8396, Rev. Stat. 1909, is invalid, though we bear in mind the strict rule we are enjoined to follow in declaring a law unconstitutional (*State v. Baskowitz*, 250 Mo. 82, 156 S. W. 945, Ann. Cas. 1915A, 477; *State v. Thompson*, 144 Mo. 314, 46 S. W. 191), for it contravenes the provisions of § 14 of article 12 of our Constitution, provided we shall conclude that the discrimination compelled by its provisions is an "unjust discrimination." Let us look to this point.

III. We do not understand that the defendant contends against the authority of the legislature reasonably to regulate its rates of passenger fare. This authority is well settled; but likewise is it well settled that the exercise of such right must be accomplished by means which do not result in depriving the railroad of due process of law or of the equal protection of the laws. This is the general rule, based wholly upon a consideration of the Federal questions involved, and without any specific reference, as a rule of decision, to our own constitutional provision (§ 14, art. 12, Const. 1875) now being considered.

In the year 1907 the general assembly of Missouri passed an act (Laws 1907, pp. 170, 171) so amending § 1192, Rev. Stat. 1899 (now § 3232, Rev. Stat. 1909), as to fix the maximum fare permitted to be charged by railroads of defendant's class for the transportation of adult persons, at 2 cents per mile, and for children under twelve years of age at 1 cent per mile. A reference to § 3232, as this section now appears in our statutes, will disclose that it does not, upon its face, specifically purport to fix or "establish reasonable maximum rates of charges for the transportation of passengers," authority for which is conferred by § 1 of article 12, *supra*, of

the Constitution, nor is said § 14, either specifically or by the language adopted, in any way referred to in this statute. Since, however, the only constitutional power to establish a reasonable maximum rate of charge for such service comes from said § 14 of the Constitution, and since said statute indubitably does, by its terms, fix a maximum rate of charges, it follows that the rate of 2 cents per mile per person so fixed by said § 3232 is *prima facie* a "reasonable maximum rate." The fixing of the passenger fares at such sum is presumptively a legislative determination that such sum is "reasonable;" that is to say, a reasonable compensation for the service rendered. *State ex rel. Missouri Southern R. Co. v. Public Service Commission*, 259 Mo. 704, 168 S. W. 1156; *Atlantic & P. R. Co. v. United States* (D. C.) 76 Fed. 186; *Re Gardner*, *supra*. Such presumption is only *prima facie*, and may, of course, be overthrown by an adequate showing in a proper proceeding of the value of the capital employed, and of expenses and receipts during an adequate period. *Chicago & G. T. R. Co. v. Wellman*, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400; *Dow v. Beidelman*, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 401, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047.

In passing, and before coming to a discussion of the main question, we may say that we cannot lend our concurrence to the bold position assumed by the state here,—that neither the Constitution nor the statute forbidding discrimination relates to, or is binding upon, the state of Missouri. On the contrary, there is, we think, nothing in its alleged sovereignty, or in the fact that by our Constitution railroads are declared to be public highways, which will serve to absolve the state from the application to it of its own Constitution and statutes. Yet we gather that some such view is involved in the position of learned counsel for the state. For our attention is called to the case of *Atlantic & P. R. Co. v. United States* (D. C.) 76 Fed. 186, wherein the ruling is made that the said railroad may be compelled to transport soldiers traveling at the expense of the United States at a fare 50 per cent less than that charged private persons for similar transportation and service. The latter case is no authority for the view that the state, by virtue of its inherent sovereignty, may exact from a common carrier a discriminatory rate, or a rate less than that charged to a private person for a like serv-

ice. The railroad affected by the ruling in the case of *Atlantic & P. R. Co. v. United States*, *supra*, was what is called a "Land Grant Railroad," as to which the right to exact a lower rate for service rendered to the United States lies in a solemn legislative contract to this effect. It is, we think, surely too unreasonable for dignified discussion to consider whether § 14 of article 12 of our Constitution, which declares railroads to be "public highways," nullifies, by the use of the word "public," the provision of § 21 of article 2, which forbids the taking of private property for "public use without just compensation." Some such idea must have been in the minds of the makers of the Constitution as this, since § 20 of article 2 of the Constitution forbids the taking of private property for private use; the railroads could not exercise the right of eminent domain in the absence of a provision thus fixing, in a sense, their public character. The nature of this character and the sense in which such railroads are public highways may be deduced by the curious, pursuant to the "method of exclusion," by an examination of the cases construing said "public highway" provision in § 14, *supra*. *Heman Constr. Co. v. Wabash R. Co.* 206 Mo. 172, 12 L.R.A. (N.S.) 112, 121 Am. St. Rep. 649, 104 S. W. 67, 12 Ann. Cas. 630; *Nevada use of Gilfillan v. Eddy*, 123 Mo. 546, 27 S. W. 471; *Farber v. Missouri P. R. Co.* 116 Mo. 81, 20 L.R.A. 350, 22 S. W. 631, 8 Am. Neg. Cas. 475; *Hyde v. Missouri P. R. Co.* 110 Mo. 272, 19 S. W. 483. We need not here pursue it further.

Is the discrimination unjust? If a discrimination be apparent, as it is in the instant case, it does not follow as an inevitable corollary that it is an unjust discrimination. It needs neither a statute nor a constitutional provision to make unjust discrimination unlawful, for such discrimination was forbidden by the common law. *Porcher v. Northeastern R. Co.* 14 Rich. L. 181; *Hannibal & St. J. R. Co. v. Swift*, 12 Wall. 262, 20 L. ed. 423; *Great Northern R. Co. v. Shepherd*, 8 Exch. 30, 7 Eng. Ry. & C. Cas. 310, 21 L. J. Exch. N. S. 286; 4 Elliott, Railroads, 1467. While the question has arisen as a rule in cases brought by a shipper injured in his business by such alleged discrimination, to recover damages (*Sloan v. Pacific R. Co.* 61 Mo. 24, 21 Am. Rep. 397), or in proceedings against railroads for violations of statutory provisions forbidding discriminations (*Louisville & N. R. Co. v. Com.* 108 Ky. 628, 57 S. W. 508), we can yet see no valid reason for not applying the learning in the other cases as a decisive test in determining whether the 1 cent Militia

fare statute is unjustly discriminatory as the term is used in our Constitution. For if a railroad be forbidden by law or by the Constitution, to make unjust discriminations, it follows surely that it cannot by law be compelled to make them.

Arbitrary discriminations alone are unjust; if the difference in rates be based upon a reasonable and fair difference in conditions which equitably and logically justify a different rate, it is not an unjust discrimination. *Interstate Commerce Commission v. Alabama Midland R. Co.* 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. Rep. 45; *Interstate Commerce Commission v. Chicago G. W. R. Co.* 209 U. S. 108, 52 L. ed. 705, 28 Sup. Ct. Rep. 493; *Bayles v. Kansas P. R. Co.* 13 Colo. 181, 5 L.R.A. 480, 2 Inters. Com. Rep. 643, 22 Pac. 341; *Root v. Long Island R. Co.* 114 N. Y. 300, 4 L.R.A. 331, 2 Inters. Com. Rep. 576, 11 Am. St. Rep. 643, 21 N. E. 403; *Lough v. Outerbridge*, 143 N. Y. 271, 25 L.R.A. 674, 42 Am. St. Rep. 712, 38 N. E. 292; *Hoover v. Pennsylvania R. Co.* 156 Pa. 220, 22 L.R.A. 263, 36 Am. St. Rep. 43, 27 Atl. 282. Illustrating this view, it was held in the case of *Com. v. Interstate Consol. Street R. Co.* 187 Mass. 436, 11 L.R.A. (N.S.) 973, 73 N. E. 530, 2 Ann. Cas. 419, that a law requiring street railways to carry pupils of the public schools at rates not in excess of half the regular fare charged others for like hauls was constitutional. In the course of its opinion, at page 438 of 187 Mass. the court said: "The most important and difficult question in the case is whether there is constitutional justification for a discrimination between pupils of the public schools and other persons. If this were an absolute and arbitrary selection of a class, independently of good reasons for making a distinction, the provision would be unconstitutional and void. As was said by Mr. Justice Brewer in *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 159, 41 L. ed. 666, 669, 17 Sup. Ct. Rep. 255, 258: 'Arbitrary selection can never be justified by calling it classification. The equal protection demanded by the 14th Amendment forbids this.' The subject of compelling a railroad company to make an exception as to its rates, in favor of a certain class of persons, was considered elaborately in *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565, and it was held that ordinarily the legislature has not power to compel such action. The subject is also referred to in *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 301, 45 L. ed. 194, 201, 21 Sup. Ct. Rep. 115. But if the difference is founded on a reasonable distinction in principle, such dis-

crimination does not deny the equal protection of the laws. *Opinion of Justices*, 166 Mass. 589, 34 L.R.A. 58, 44 N. E. 625; *Pacific Exp. Co. v. Seibert*, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; *American Sugar Ref. Co. v. Louisiana*, 179 U. S. 89, 92, 45 L. ed. 102, 103, 21 Sup. Ct. Rep. 43. In this case the selection of a class is not entirely arbitrary. The education of children throughout the commonwealth is a subject for legislation which has occupied the thoughts of our lawmakers from early times. The duty of legislatures and magistrates to be diligent in the promotion of education among all the people is especially declared in chapter 5, § 2, of the Constitution of the commonwealth. Compulsory attendance of children in the schools is provided for by our laws. *Rev. Laws*, chap. 44, § 1. Money may be appropriated by cities and towns for conveying pupils to and from the public schools. *Rev. Laws*, chap. 25, § 15. It cannot be said that the legislature may not concern itself with the transportation of children to the public schools in the interest of popular education, just as it provides such children with books and other necessary articles. *Rev. Laws*, chap. 42, § 35. So far as this statute merely gives help to these pupils in connection with their acquisition of knowledge in the schools, it is justified. As a police regulation in the interest of education, the law may well require street railway companies to permit these children to ride to school upon their cars without profit to the companies, provided it can be done without causing them loss. But if such a requirement involves expense, the cost can only be put upon the general taxpayers. It cannot be imposed upon the street railway companies, or upon that part of the public which pays fares to street railway companies. If, therefore, it plainly appeared that the enforcement of this section would cause expense to street railway corporations, which they must bear themselves or put upon other classes of passengers in the form of increased fares to make good the loss from carrying school children at half rates, we should be obliged to hold that there was a taking of property without due process of law, through unconstitutional discrimination."

In the case of *Re Gardner*, 84 Kan. loc. cit. 267, 33 L.R.A. (N.S.) 956, 113 Pac. 1055, the supreme court of Kansas, holding invalid a statute on all fours with the instant one, in the course of its opinion, on the phase of discrimination, said: "This court is not inclined to the view that the power of the legislature is completely exhausted by a maximum rate regulation,

and does not so interpret the decision quoted. But members of the National Guard cannot be segregated from the body of the state's citizens and made a preferred class, unless they sustain some relation to transportation by rail which, in the nature of things, indicates they should have the benefit of an exceptional rate. Classification, to be valid, must be based upon differences in character, condition, or situation which lead to that difference in regulation which the statute undertakes to make. Thus, in the case involving a reduced rate for school children on street cars (*Com. v. Interstate Consol. Street R. Co.* 187 Mass. 436, 11 L.R.A.(N.S.) 973, 73 N. E. 530, 2 Ann. Cas. 419), the considerations which moved the court to sustain the rate were, among others, that pupils go to and from the public schools at hours when other persons make little use of the cars; that they are of such a size and age that they occupy much smaller spaces than other passengers; and that the difference in rate was of so much importance to parents that twice as many pupils would ride at half rate as at full rate, so that the revenue of the carrier would not be materially reduced. This court neither approves nor disapproves the conclusion reached in that case, but the method employed for testing the classification upon which the rate was based is sound."

Approving a similar view upon the principle under discussion, the circuit court of appeals in the seventh circuit, in the case of *United States v. Chicago & N. W. R. Co.* 62 C. C. A. 465, 127 Fed. loc. cit. 792, quoted with approval the rule laid down by Elliott on Railroads, viz.: "Neither at common law nor under the Federal statute does the mere fact that there is a difference in rates necessarily constitute an unjust discrimination, since there is no such discrimination in cases where the conditions and circumstances are essentially different. It is the English rule that, in passing upon the question of undue or unreasonable preferences, various facts and circumstances must be considered, and that an undue preference, within the meaning of the statute, is not shown by mere evidence of a difference in charges. The Federal courts have substantially adopted the rule declared by the English courts."

If members of the organized Militia averaged in weight but one half that which other members of the traveling public weigh, or if they traveled at fixed hours or times when other business is slack, or if they carried far less, rather than far more, baggage, equipment, and impedimenta than the ordinary traveling person carries; or if they traveled at known and definitely

fixed times, in large bodies, or by the train-load; or if travel with them were a matter of personal volition, to be exercised or not as a low rate might induce, rather than as a matter of stern duty transacted under order; or if the service of transportation required to be furnished were of an inferior class by a slow, unscheduled train, rather than that furnished to regular passengers who are compelled to pay 2 cents per mile,—there might be some valid reason for saying as a matter of law that the plain discrimination presented is not an unjust discrimination. *Louisville, E. & St. L. Consol. R. Co. v. Wilson*, 132 Ind. 517, 18 L.R.A. 105, 32 N. E. 311; *Messenger v. Pennsylvania R. Co.* 37 N. J. L. 531, 18 Am. Rep. 754; 4 T. C. L. 571.

Upon this identical phase of the case we are constrained to concur in what was said by the supreme court of Kansas in the similar case of *Re Gardner*, supra, at page 268 of 84 Kan.: "In accordance with the principle recognized the legislature might no doubt require that precedence be given to the transportation of troops over other traffic, . . . that special schedules be adopted, and that other exceptional services be rendered whenever the public interest demands them. But the law in question has no such basis for the discrimination which it makes. Major Mills stood upon precisely the same footing, so far as the expected service to him was concerned, as any other individual. The times when members of the National Guard will travel are as uncertain as for other people. The number who will travel at any particular time is wholly indefinite. They come to the railroad stations singly, in groups, or in larger bodies, just as other citizens come singly, in groups, or in crowds, sufficient to load the cars of one or more trains. They occupy the same space and have the same privileges as other persons. Their movements are controlled by duty, and not by special inducements, and the matter of rate can have no effect upon the volume of traffic. They are taken up, carried, and set down without any mark or circumstance whatever to distinguish them from the general public, or to distinguish the subject of their transportation from that of the general public, except that they carry orders for transportation without payment of fare and at reduced rates. Without any ground, therefore, for the classification, and without any regard to the reasonableness or unreasonableness of the regulation, the state simply demands that its troops be transported by rail at a purely arbitrary rate, which, so far as the principle involved is concerned, might be 1 cent per hundred miles or nothing at all.

No other corporation or individual in the state is obliged to conduct business upon any such partial and unequal conditions, or to make any such sacrifice for the support of the National Guard or any other public institution or purpose. Therefore the act denies the railroads the equal protection of the laws."

It fairly follows, then, that if 2 cents per mile per passenger was a reasonable rate in 1907, as the general assembly by legislative act by all fair intents presumptively determined and fixed, then, in the absence of a showing of some change in conditions (and there is no such here in the instant case), 1 cent per mile per adult passenger is not reasonable in 1909, when the special act favoring the organized Militia was passed, and is not reasonable now. The law prescribing such a rate was clearly a discrimination, and violative of the provisions of said § 14, which provides for the passage of laws to prevent discriminations, and by its plain, cogent converse forbids the passage of a law compelling the railroads to discriminate, when, as we have concluded above, this discrimination was unjust, for that it laid an extra burden upon the railroads.

We think this view could easily be sustained by the great weight both of authority and reason, on the ground that it violates the provisions of § 1 of the 14th Amendment to the Constitution of the United States, as was done by the supreme court of Kansas in the case of *Re Gardner*, 84 Kan. 267, 33 L.R.A.(N.S.) 956, 113 Pa. 1055, and in the analogous cases of *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565, and the four or five cases which followed the latter case; but fortunately we are saved from the embarrassment of deciding between the above cases and that of *State ex rel. Simpson v. Chicago, M. & St. P. R. Co.* 118 Minn. 380, 41 L.R.A.(N.S.) 524, 137 N. W. 2, Ann. Cas. 1913E, 494, by the provisions of said § 14 of our Constitution, and so we may clearly hold it invalid for that it is in conflict with both the spirit and the letter of § 14, supra, of our Constitution.

IV. Having reached this conclusion, we need not take up space to inquire whether said § 8396 is a bona fide effort to establish rates and regulate railroad transportation, or whether it is purely a revenue measure, ingeniously designed to shift from the taxpayers and from the state revenue fund, to the railroads of the state, a portion of the cost of maintaining the organized Militia. *Re Gardner*, 84 Kan. loc. cit. 269, L.R.A.1915C.

33 L.R.A.(N.S.) 956, 113 Pac. 1054. The curious may read in the Kansas case, supra, an interesting discussion of this phase of the statute under criticism, and may learn therefrom under what conditions such special and unequal burdens may be imposed.

Other matters mooted have, by the conclusion reached, become merely academic; for example, the contention that Captain Moore and his men were not engaged in such military duty as to bring them within the purview of the statute. If a statement of this contention, in the light of the fact that the governor is the Constitution-appointed commander-in-chief of the National Guard, and upon a consideration of all the statutes providing for the government of the National Guard, does not plainly answer it, we will nevertheless leave it till it becomes a live question in a live case.

Furthermore, it is strenuously urged by learned counsel for plaintiff through many pages of an able brief, that we erred most seriously in holding in effect that the power in a proper case to raise railroad rates above the maximum fixed in § 3232, Rev. Stat. 1909, is under our Constitution delegable by the legislature, and that by the enactment of § 47 of the Public Service Commission act (Laws 1913, p. 583), § 3232, supra, is conditionally repealed or temporarily suspended. *State ex rel. Missouri Southern R. Co. v. Public Service Commission*, 259 Mo. 704, 168 S. W. 1156. In this holding it is contended we overlooked the plain letter of the Constitution, and in that case held (to quote the epigrammatic language of counsel) what we "thought the law ought to be rather than what it is." We do not think this question is in, or that it could ever get into, this case, having conceded, as we do, the prima facie reasonableness of the 2 cent rate till its unreasonableness be demonstrated. Be this as may be, however, having come to a conclusion by another path, we will leave this question where *State ex rel. Missouri Southern R. Co. v. Public Service Commission* left it, till it again becomes the "lion in the path."

It follows, therefore, that the demurrer of defendant to the alternative writ of mandamus should be sustained, and since said writ was improvidently granted, it should be quashed, and the issuance of a peremptory writ denied. It is so ordered.

Lamm, Ch. J., and Brown and Walker, JJ., concur. Woodson, J., concurs, and also for reasons given in case of *Re Gardner*,

84 Kan. 264, 33 L.R.A.(N.S.) 956, 113 Pac. 1054.

Bond, J., dissents.

Graves, J., concurring:

I concur in the result reached by the majority opinion, and in most of the reasoning therein by our Brother Faris, the writer thereof.

I agree that § 14 of article 12 of the Constitution directs the legislature to pass laws to prevent "unjust discrimination" in passenger and freight rates. I agree that the converse of this should also be true, *i. e.* that the legislature should not itself pass a law which makes "unjust discrimination," and if it passes such a law, it should be condemned as violative of the spirit of this constitutional provision. It should be noted that the terms of this constitutional provision are mandatory, inasmuch as it uses the word "shall" in a mandatory sense. However, there is no way of enforcing this mandate of the Constitution except by the voluntary act of a Constitution-loving legislature. I agree, further, that the legislature, in passing § 3232, Rev. Stat. 1909, was attempting to carry out that other mandate of said § 14, article 12, of the Constitution, which imposes upon the legislature the duty to "from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers." I also agree that when it did pass this law it was *prima facie* a reasonable maximum rate, and that without there being further showing, we have a right to say by comparison that the later law is unjust and discriminatory, and therefore bad.

I do not agree to that portion of my brother's opinion whereat he says: "Since however, *the only constitutional power to establish a rate of charge for such service comes from said § 14 of the Constitution.*"

The italics are ours. This, in my judgment, is not the only constitutional source of power for the legislature to pass maximum passenger or freight laws. Rate making is a legislative power and has always been so held and considered. When, by article 3 of the Constitution, the powers of state government were divided into three distinct departments, *i. e.*, legislative, executive, and judicial, and when, by § 1, article 4, the legislative powers were vested in "the general assembly of the state of Missouri," such general assembly became fully possessed with the power to pass rate laws of all kinds, such things being legislative in character rather than judicial or executive in character. So that I say the legislative branch had full constitutional

power to pass all kinds of rate laws, had there been no § 14 of article 12 in the Constitution. This may be important in some future litigation where the real purpose of § 14, article 12, will have to be discussed, and for that reason I do not want to be recorded as announcing that said § 14 is the only constitutional authority for legislative action as to maximum rates in Missouri.

I do not agree to another conclusion which my brother has reached. I think that the constitutionality of § 47 of the Public Service Commission act is fairly lodged in this case, and that we should thresh it out at this time. It is only a question of a short time when we will be forced to thresh out the question. If the public print is to be believed, then at this very time the railroads of the state are asking the Public Service Commission to raise their rates under said § 47, and with a showing that they are justly entitled to such a raise in rates. The constitutionality of that section has never been adjudicated by this court. We did hold in *State ex rel. Missouri Southern R. Co. v. Public Service Commission*, 259 Mo. 704, 168 S. W. 1156, that the legislature by said § 47 intended to authorize the Public Service Commission to raise rates above the maximum fixed by § 3232, *supra*, but we did not pass upon the question as to whether or not the statute, thus construed, violated § 14 of article 12 of the Constitution. This question should be passed upon now, so that these railroads may know whether they shall go to the Public Service Commission or to the legislature for their needed redress. The question is squarely lodged in this case, and this is an opportune time for the judgment of the court upon this extremely intricate question as to whether or not the legislature can, under § 14 of article 12, delegate to any commission the right to fix *maximum rates*. We purposely underscore the words "maximum rates." This delicate question might be stated otherwise, and perhaps be made plainer. If the legislature had the constitutional power without § 14 of article 12 to fix rates, both maximum and minimum, then should said § 14 be construed as an express limitation upon the power of the legislature to delegate such right to a commission or other body? But it is not my purpose to discuss the constitutionality of § 47, *supra*. It is my purpose to dissent from the majority views in postponing the evil day, when, in my judgment, the time is ripe for us to act now.

I therefore concur in the result, and in such portions of the opinion as above indicated.

MISSOURI SUPREME COURT.
(Division No. 1.)

AUGUST HUNICKE, Admr., etc., of Fred
R. Hunicke, Deceased, Resp't.,
v.

MERAMEC QUARRY COMPANY, Appt.

(— Mo. —, 172 S. W. 43.)

Master and servant — failure to procure medical assistance — liability.

1. A corporation whose employee is engaged in dangerous business for it is liable for his death through its failure to use reasonable diligence to furnish him with surgical aid upon his being so badly injured while in the performance of his duties that he is physically or mentally incapable of

procuring assistance for himself, and aid is necessary to save his life, although the injury was not caused by the fault of the employer.

Same — ability to show negligence cause of death.

2. The liability of a master for the death of an employee through its failure to furnish him with surgical aid when he is so badly injured that he is incapacitated from securing it for himself cannot be made to depend upon the ability of the jury to determine whether or not death would have ensued even though proper medical assistance had been furnished, but liability exists if the evidence shows that in all reasonable probability the master's failure was the proximate cause of death.

(December 19, 1914.)

Note. — Master's duty to furnish medical aid to servant.

The earlier cases on this question may be found in notes in 28 L.R.A. 546, and 4 L.R.A.(N.S.) 49.

Some questions treated in the earlier notes mentioned which dealt generally with the broad matter of the master's duty to provide his servants medical assistance have been excluded from the present note, having been the subject of other supplementary notes.

Thus, the question of the duty to furnish medical aid to seamen, discussed in the earlier notes mentioned, has been excluded.

So, this note eliminates such cases as *Van Valkenburg v. Northern Nav. Co.* 30 Ont. L. Rep. 142, where it was held that the owners of a lake steamer were not legally bound to rescue a seaman who, while off duty, fell overboard as a consequence of his own negligence, and that they were not guilty of negligence in failing to use all reasonable means to that end. As to the duty and obligation of vessel on inland lake or river in respect of sick or injured member of crew, see note to *Lapier v. Beaubien Ice & Coal Co.* 35 L.R.A.(N.S.) 199, supplementing on this question cases in subdivision 5 of note 4 L.R.A.(N.S.) beginning on page 68.

Another question not discussed in this note is the power of a conductor to hire a physician to treat a person injured by a train. See as to this the note to *Bonnette v. St. Louis, I. M. & S. R. Co.* 16 L.R.A.(N.S.) 1081. That note is limited to cases in which the injured party was a passenger, a trespasser, or a licensee.

So, the implied power of an employee to employ a physician to attend injured employee is treated in note to *Atlantic Ref. Co. v. Leffingwell*, 34 L.R.A.(N.S.) 351, and supplementary cases in note in 4 L.R.A.(N.S.) pages 58, 62, 63, 66 and 68; and the later cases on this question are contained in supplementary note to *Vanderboget v. Campbell Mill County*, post, 808.

And the liability of master for negligence of physician or surgeon employed at the L.R.A.1915C.

master's expense to attend servant is the subject of a note to *Jones v. Tri-State Teleph. & Teleg. Co.* 40 L.R.A.(N.S.) 485, supplementing cases on pages 66, 67, and 68 of 4 L.R.A.(N.S.)

As to liability of master for medical attendance engaged by employee who, by the contract of employment, was entitled to such attendance, see note to *Jackson v. Pacific Coast Condensed Milk Co.* 37 L.R.A.(N.S.) 757.

As to liability of master for services of physician whom he summons to care for employee, see note to *Norton v. Rourke*, 18 L.R.A.(N.S.) 173.

As to liability for negligence of attendance furnished by relief department toward which employees contribute, see notes to *Phillips v. St. Louis & S. F. R. Co.* 17 L.R.A.(N.S.) 1167, *Texas C. R. Co. v. Zumwalt*, 30 L.R.A.(N.S.) 1207, and *Nations v. Ludington, W. & V. S. Lumber Co.* 48 L.R.A.(N.S.) 531.

As to nondelegability of duty to furnish proper medical treatment to sick or injured servants, see note in 54 L.R.A. 83.

As to right of servant to recover for master's delay in taking him to hospital, see note in 7 L.R.A.(N.S.) 997.

The general question of the care due to sick or disabled persons is covered by note to *Union P. R. Co. v. Cappier*, 69 L.R.A. 513.

Servants generally.

Supplementing cases in 28 L.R.A. 546, and 4 L.R.A.(N.S.) 50 et seq.

In line with *HUNICKE v. MERAMEC QUARRY Co.* the duty of a master toward an injured employee in an emergency is well stated in *Tippecanoe Loan & Trust Co. v. Cleveland, C. C. & St. L. R. Co. — Ind. App. —*, 104 N. E. 866, as follows: "If an employee of a railroad company is injured as a result of hazards to which his employment exposes him, and if his injuries are of such a nature as to render him incapable of caring for himself, it becomes the duty of the company to take such steps as are reasonably necessary and proper, under the circumstances, to prevent an aggravation

APPEAL by defendant from an order of the Circuit Court of the City of St. Louis granting a new trial after judgment in its favor in an action brought to recover damages for the death of plaintiff's son alleged to have been caused by defendant's negligent failure to furnish him with proper medical attention after an injury received while in its employ. Affirmed.

Statement by Woodson, P. J.:

This suit was instituted in the circuit court of Jefferson county by the plaintiff, as administrator of the estate of Fred R. Hunicke, deceased, against the defendant, to recover the sum of \$10,000 damages for the death of said Fred, caused by the alleged negligence of the defendant in failing to

procure a physician or surgeon to attend and treat him upon receiving severe personal injuries while in the employ of the defendant. The trial resulted in a verdict and judgment for the defendant, upon which timely motions for a new trial and in arrest of judgment, having been filed, were by the circuit court sustained and a new trial ordered for certain reasons assigned, which will be presently noticed. From this action of the court in ordering a new trial, the defendant timely and properly appealed the cause to this court.

Counsel for the defendant insist that the petition does not state facts sufficient to constitute a cause of action against it; and for that reason we are required to set it out and pass upon its sufficiency.

of the injury through exposure, or for the want of medical or surgical assistance. Under such circumstances, if the servants of the company knowingly leave such injured person to die of exposure, or to bleed to death from his wounds, a legal responsibility for such consequences will be imposed upon the company; and, if they take him into their custody, they must exercise reasonable care in the treatment accorded him. Under such circumstances the common instincts of humanity require that the helpless, injured person should be taken in charge and removed to a place of safety, and that, if necessary, medical or surgical aid should be provided. This duty has been recognized by the supreme court of this state as one which arises in extraordinary cases where medical or surgical assistance is imperatively required to save life, or to prevent further serious bodily injury. It is said that the duty arises with the emergency, and with it expires." In the above case a railway employee was struck by a train, receiving injuries which rendered him unconscious and incapable of taking care of himself. After being placed in the hospital by the railway's servants, it became necessary to amputate his leg, and he finally died of blood poisoning. The gravamen of the action was the negligence of the railway employees, after decedent's injury and after such servants had taken him in charge, in failing with reasonable despatch to procure medical and surgical aid for him, or to place him in a hospital where such aid could be furnished. In caring for the injured man after taking him in charge, stated the court, the servants of the railway company were bound to use such care and such care only as a person of ordinary prudence would have exercised in view of the situation and surroundings and of the facilities available, and of the apparent condition of the person injured. The complaint alleged that, while the injured employee was being carried from the place of the accident to Colfax, he was negligently placed in a car which was cold, and that no proper covering was provided, and that as a result he became chilled and his vitality reduced, L.R.A.1915c.

and that the servants of the railway company negligently failed and neglected to bandage the wound, or adopt any means to stop the flow of blood, and that as a consequence he lost a large quantity of blood before he received surgical aid, by reason of which his physical strength was greatly reduced and his power to resist blood poisoning was greatly reduced. On behalf of the railway company it was urged that the complaint was defective because it did not allege that the company had the means of carrying the injured person in a heated car and failed to do so, or that covering was available with which he might have been protected from the cold, and that the servants of the railway company failed to make use of it for that purpose, or that bandages were at hand with which the flow of blood might have been stanching, and that the servants of the company possessed the skill to properly apply them, and failed to do so. The court, however, upheld the allegations of the complaint, stating that they alleged the ultimate fact that the company negligently failed to do certain things, and such a charge was sufficient to admit proof of every evidentiary fact necessary to show that the company's servant did not use due care, making use of the means available in view of all the circumstances. It may be well said, observed the court, that a local passenger train is not required to carry bed clothing and bandages; but whether or not such things were in fact available was an evidentiary fact, which might have been proved under the general allegations stated. Certain questions of pleading are discussed in 106 N. E. 739, where the court reiterates that the ends of justice will be best subserved by granting a new trial.

But that a master is not, in the absence of some stipulation, under any legal obligation to furnish medical attendance to a servant who falls sick or is injured while engaged in his duties is explicitly recognized in *Voorhees v. New York C. & H. R. Co.* 129 App. Div. 780, 114 N. Y. Supp. 242, affirmed in 198 N. Y. 558, 92 N. E. 1105, where it is held that a railroad company, having placed an injured employee in a pub-

Formal parts omitted, the petition reads:

"Plaintiff, August Hunicke, states that he is a resident of Jefferson county, Missouri, and that he is the duly appointed and qualified administrator of the estate of his son, Fred R. Hunicke, who came to his death in said county of Jefferson on the 12th day of March, 1909; and the defendant, Meramec Quarry Company, is a corporation under the laws of the state of Missouri, engaged in conducting a stone quarry at a point called Wicks, on the main line of the St. Louis, Iron Mountain, & Southern Railroad Company, in said Jefferson county, Missouri, and said defendant company has an office and place of business at Wicks in said Jefferson county, Missouri.

"Plaintiff further states that his said son, Fred R. Hunicke, on and for some time prior to the 12th day of March, 1909, was in the employ of the defendant corporation at its said quarry at Wicks; that said defendant company at that time maintained a certain track of railroad extending from the said main line of the said Iron Mountain Railroad Company into the private yards of the said quarry company to its plant; that on said 12th day of March, 1909, while certain cars loaded with coal for the use of the defendant company were being transported over said spur track into the private yard of the defendant company, plaintiff's said son, Fred R. Hunicke, was struck by said moving cars, and was severely crushed and injured by the same. And plaintiff

lic hospital where medical services were gratuitous, and paying a dollar a day for him while there, and having notified the hospital superintendent to call a certain physician in such cases, was not liable for the services of a physician not connected with the hospital called in by the superintendent in an emergency when she was unable to get the physician named by the railroad, and there was no physician on the hospital staff present. The court observes that it is the general rule in New York state that an employer is not required to provide medical attendance for his employee unless he has agreed to do so, and the exception to this rule obtaining in some jurisdictions in case of emergency does not prevail in this state.

So far as *Rich v. Edison Electric Co.* 18 Cal. App. 354, 123 Pac. 230, concerns the implied power of an employee to employ a physician to attend an injured employee, it is not within the scope of this note. The court observed, however, that if the servant's injury was occasioned through the defendant company's negligence from which would arise a legal obligation imposed by law, and surgical services were rendered to save the life of an injured one, thereby lessening the damages which would thereafter result to the corporation in the event of the death, the corporation would not be heard to say that such services, rendered for its benefit, were unauthorized, and thus avoid payment. Consequently if the surgical services in this case were performed voluntarily, the company would not be liable therefor unless the company's negligence occasioned the injury.

A construction company has been held not guilty of negligence rendering it liable for the death of an injured employee, in failing to have a resident physician at or near a place where there was no town and where it had less than twelve employees engaged, where it had made arrangements with a physician residing at a town 8 miles distant to treat any of its employees that should need medical treatment. *Merrill v. Missouri Bridge and Iron Co.* 69 Or. 585, 140 Pac. 439.

L.R.A.1915C.

Where a boy sixteen years old, while engaged in repairing a roadbed, was killed by the falling of a tree, and as a ground for damages it was urged that he was not properly taken care of after the accident, the court in *Baptiste v. Baptist*, 130 La. 898, 58 So. 702, stated that while the master who neglects a wounded employee is liable for the resulting damage, the plaintiff had failed to show such a state of facts as to charge the defendant, an independent contractor, with liability.

Under statute.

In a number of jurisdictions, enactments have been passed requiring the master to provide surgical appliances or medical assistance for miners who may be injured or taken sick in the mines. See 5 *Labatt, Mast. & S.* 2d ed. § 1890.

Thus it is held in *Wolf v. Smith*, 149 Ala. 457, 9 L.R.A.(N.S.) 338, 42 So. 824, that breach by a miner of the statutory duty to keep bandages, oil, stretchers, and blankets for the use of persons injured in the mines, will give a right of action to an employee injured thereby, although the statute provides no penalty for its breach, and provides no remedy for failure to comply with its terms, and the primary injury was not due to negligence for which the mine owner was responsible; that requiring mine owners to keep at the mines bandages, oil, stretchers, and blankets for the use of injured employees is within the police power, and does not infringe the constitutional rights of the owner. (See note to this case in 9 L.R.A.(N.S.) 338, on the subject, "Private action for violation of statute not expressly conferring it.")

On a later appeal of the above case (*Smith v. Wolf*, 160 Ala. 644, 49 So. 395), the miner sought to escape liability on the ground that the statute which he is claimed to have breached was unconstitutionally discriminatory in that it required coal-mine operators to furnish, as a part of their equipment, articles and appliances not required to be supplied by the operators of other mines conducted under like circum-

states that the wheels of said moving cars ran over his said son, and broke and crushed the bones of his right leg several inches below his thigh, and lacerated the flesh, muscles, and veins of his leg, and tore a large hole in the same, through which the bones of his leg protruded, so that blood flowed from said wound in large quantities; that said wounds were of such a nature, and the flow of blood therefrom was in such quantities, that it created a sudden emergency that required the immediate attention and service of a physician or surgeon to treat and dress said wound and stop said flow of blood, said injuries being of such a nature as to require the amputation of the deceased's said right leg.

"And plaintiff avers that owing to the said serious injury so occasioned to his said son, and the sudden emergency thus created, it became and was the duty of the defendant company to render prompt and immediate assistance and surgical aid to his said son, in order to stop the flow of blood from his body and to save his life; and plaintiff avers that if prompt and prop-

er surgical attention had been furnished his son, and the flow of blood from his wounds had been stopped within a reasonable time, his said son's life would have been saved, with no other serious consequences than the loss of his said right leg; and plaintiff avers that the said defendant company, recognizing the duty thus imposed upon it by the said sudden emergency, did assume and undertake to render surgical assistance and first aid to his said son, but in so doing acted in such a careless and negligent manner that his said son was allowed to bleed to death before any effective assistance was furnished him.

"Plaintiff avers that the point at which his said son was injured in the yards of the defendant company was within a few hundred feet from the main tracks of the said Iron Mountain Railroad, and distant but 2 miles from the town of Kimswick, in said Jefferson county, and was only about 15 miles from the Broadway station of the said railroad in the city of St. Louis, and that just beyond Kimswick, and within a few miles of the scene of said injuries,

stances. The court, however, upheld the statute as operating on all coal-mine operators who, by themselves, formed a proper and legitimate class with reference to the purposes of the act and were distinguishable from ore-mine operators. Upon the right of the injured person to recover, the court states that the mere proof of failure to comply with the statute, or such proof supplemented by proof of the injury received at or in the mines, will entitle the plaintiff to recover no more than nominal damages. Therefore, to warrant recovery for substantial, as contradistinguished from nominal, damages, there must be added to such specified evidence proof that plaintiff's pain and suffering, the result of his injuries, would probably have been alleviated, or that the harmful effects of his injuries would have been lessened, had the articles and emollients prescribed been kept on hand. Stated differently, the mere failure to comply with the statute, unaccompanied by augmentation of the plaintiff's pain and sufferings by reason of his not being supplied with the articles and emollients specified, will not warrant a verdict for more than nominal damages. So, a charge that "if the jury believe from the evidence that substantially all the damages suffered by the plaintiff were the proximate result of the explosion of the dynamite in his hand, you cannot find a verdict for more than nominal damages," was held properly refused, since the damages may have been the proximate result of the explosion of the dynamite, and at the same time plaintiff's suffering might have been alleviated had the articles and emollients been at hand. Proof that the mine physician had a full supply of medicines and medicinal supplies for cases of injury at the mines would not have shown

a compliance with the statute by the defendant, where the doctor's office was some distance from the mine. And a charge that "if you believe from the evidence that there was a failure to furnish the plaintiff a waterproof blanket at or about the mouth of the mine, but that such failure did not cause or contribute to any aggravation of plaintiff's injuries, or cause him any additional injury, you cannot find any damages on that account," was held, with respect to the second alternative at least, misleading, since the failure to furnish the blanket may not have caused plaintiff additional injury; but at the same time if it had been furnished it might have diminished his suffering and pain incident to the physical injury. The court further states that it is only upon the theory that the pain and suffering were probably aggravated by lack of the articles and emollients named in the statute, or some of them, that damages could be assessed. The amount of damages assessed (\$2,500) is considered excessive.

Specific agreements to provide medical assistance.

Supplementing cases in 4 L.R.A. (N.S.) 55-57.

It is held in *Harding v. Ostrander R. & Timber Co.* 64 Wash. 224, 116 Pac. 635, that a lumber company which withholds a hospital fee from the wages of its employees to maintain a hospital is under an implied duty to furnish free transportation to the hospital, and where, with available means, after being notified, it leaves an injured employee prostrate in the woods for twenty-four hours, it is liable for the injuries resulting from the delay. It is suggested in this case that the injured person could not

there are several other towns at which competent and skilful surgeons reside and could have readily been obtained, and to any of which stations on said railroad plaintiff's said son could have readily and speedily been transported and taken to any of such surgeons or physicians, and said defendant company had then and there in its said yard a number of hand cars used in its work of hauling stone, and which were adapted to run on the tracks of said railroad, upon which plaintiff's said son could have been easily taken to any of the neighboring towns or to St. Louis; and plaintiff avers that his said son was injured a few minutes after 9 o'clock in the morning of said day, and at a time when a local passenger train, south bound, was standing on the said Iron Mountain tracks very close to the point where his said son was injured, and the said defendant company could readily have detained it, or have intercepted it, before it reached said town of Kimswick, so that plaintiff's said son could have been transported on said train to a suitable

place where the surgical attention could have been given him.

"Plaintiff further avers that the superintendent of the defendant company in charge of said quarry was present at the time his said son was injured; that said superintendent thereupon directed other servants of the defendant company to carry plaintiff's said son to the office of the company adjacent to the said main line of the Iron Mountain Railroad, and accompanied him to said office, and caused him to be laid on a cot which was there provided for him; that said superintendent examined said injuries, and saw the great amount of blood that was being lost through said wounds, and realized their serious nature and the urgent necessity of securing immediate surgical attention, and his duty in such emergency to furnish the same; that in consequence thereof he immediately telephoned to a competent surgeon in the said town of Kimswick, and asked him to come at once to Wicks, distant 2 miles from Kimswick, but that said surgeon replied that he was then busy and could not come,

recover the additional damages arising from a failure of the company to furnish transportation to the hospital, because when the company failed in the performance of that duty, it was the injured person's duty to make reasonable efforts to reach the hospital. This argument, observes the court, overlooks the averment in the complaint that the person injured was left lying prostrate in the woods. The reasonable inference from the complaint is that the injured person was so prostrated from the shock and from the injuries that he was unable to care for himself. It is of course elementary that when the injured person found that the company would not convey him to the hospital, it was his duty, if physically and mentally able, to make reasonable efforts to minimize the damages, that is, to get to the hospital or to otherwise secure medical assistance; and that if he failed to do so, or to the extent that he did not do so, there is no liability upon the company for the damages occasioned thereby. In other words, it was the duty of the party injured to act as a man of ordinary prudence would have acted under the circumstances, and if he failed to do so the lumber company is not liable for the damages flowing from his own negligence.

Power of corporation to defray the medical expenses of their servants.

Supplementing cases under this heading in 4 L.R.A.(N.S.) 57.

As to implied authority of particular officers, agents, or employees of corporation to exercise the power, see notes to *Atlantic Ref. Co. v. Leffingwell*, 34 L.R.A.(N.S.) 351, and *Vanderboget v. Campbell Mill County*, post, 808.

L.R.A.1915C.

That a mining company has the implied power to incur expenses for medical attendance would seem to be clear from *Gibson v. O'Gara Coal Co.* 151 Ill. App. 424, where it is stated that "what its chartered powers are is not in proof. Assuming, however, that no such explicit powers were given it by its charter, it would be going very far to hold that a corporation, for the purpose of mining coal simply, would not have the right and power to choose and hire a physician to treat men injured in its employ. It is most certainly liable to the employees for necessary physician's bill in an action for an injury caused by the negligence of the company. If, then, it is liable in such cases for such bills, it certainly will not be contended that in such cases it cannot bind itself for such services to a physician of its own selection, when the employee being treated accepts such treatment. We think such a contract would be within its implied powers. If so, the duty to determine when and in what cases it would be liable for the physician's bill would rest on the coal company, and not on the physician; and for any employment of a physician by it to treat its injured employees, the company would be liable to the physician although it might afterwards appear that the employee was not injured by the coal company's negligence. Our supreme court, however, has decided that corporations may incur such a liability although their charters may not in terms authorize it, and further discussion is unnecessary." Whether ordinary care required persons in charge of a train which injured an employee to back the train to a certain place, and place the injured person in a hospital there, was a question for the jury to determine upon proof that it was practicable,

but suggested to said superintendent that he send the injured man to him at Kims-wick, which said superintendent carelessly and negligently failed and refused to do, as he very easily could have done. And plaintiff avers that instead of making use of means readily at hand to tie up and bind the leg of the plaintiff's son, and stop the loss of blood, by tying a rope or other bandage around said leg above said wounds, said superintendent of said company carelessly and negligently failed to bind said leg tightly and stop the flow of blood, but only wrapped a sheet loosely around the said injured leg in such a way that the blood continued to flow from said wounds, and instead of calling surgical assistance from some other town, or of transporting plaintiff's said son to such a place where surgical attention could be had, said superintendent carelessly and negligently allowed plaintiff's said son to lie in the office of said company for the space of about four hours, without attention, during all which time he continued to lose large quantities of blood from his said wounds, and carelessly and negligently allowed his said son to remain there without attention until the regular train of the said Iron Mountain Railroad, going to St. Louis, arrived at Wicks nearly one hour later than its usual time; that, upon the arrival of said train, defendant's said superintendent placed plaintiff's said son on said train, and telephoned to the defendant's office in the

city of St. Louis, to convey plaintiff's said son to the hospital, and the officers of the defendant company in St. Louis called an ambulance, and upon the arrival of said train at said Broadway station conveyed plaintiff's said son to the Lutheran Hospital, a short distance from said Broadway station.

"And plaintiff avers that, upon the arrival of his said son in the said ambulance at the said hospital, all of the blood in his body had been allowed to escape, so that, although his said leg was immediately amputated, it was impossible to save his life, and he immediately died as the direct result of the loss of blood occasioned by the careless and negligent attention given him in said emergency by the officers and servants of the said defendant company. And plaintiff avers that but for the careless and negligent manner in which defendant's said servants discharged the duty which the defendant company owed and assumed towards his said son, and their carelessness and negligence in allowing him to lie several hours without adequate aid, so that he lost all the blood from his body, his life would have been saved, and he would have not died.

"And plaintiff avers that, at the time of the death, his said son, Fred R. Hunicke, was a young man about twenty-one years and six months of age, and was single and unmarried, and left no widow or children surviving him; and that a cause of action

and possible to have backed the train so as to have obtained earlier care and medical attendance.

And it has been held that a manufacturing corporation has the same implied power. *Weinsberg v. St. Louis Cordage Co.* 135 Mo. App. 553, 116 S. W. 461.

So, where an association of railroads maintained a relief and hospital department for its injured employees and their families, both employers and employees contributing to its support, the court in *Harrison v. Alabama Midland R. Co.* 144 Ala. 246, 40 So. 394, 6 Ann. Cas. 804, in upholding such establishment as not *ultra vires*, said: "We have been pointed to nothing in the charters of either of the companies which would prevent them from establishing such a relief hospital. The primary object of a railroad company is to build, equip, and operate its line for the transportation of freight and passengers. In doing so, a vast number of employees are employed, all of whom, while in service on the line, are subject to dangers in multiplied forms, and to physical injuries, for which the companies are subjected to liabilities, and the injured often to irreparable loss. Any device or improvement which prevents, or is intended to prevent, these evils, is incident to the due exercise of their powers and clearly within the scope of their L.R.A.1915C.

organization. A ground on which this right is assailed is that the scheme is an insurance business, but this is a mistake. It does not purport to be an insurance company. The benefits are in the way of relief in cases of sickness, accident, or death, and is a beneficial, and not an insurance, association, as has been expressly held." The court in this case further said that the employers' liability act had no effect on the general principle of the validity of the establishment of such a relief department.

So, a contract whereby a lumber company agrees with an employee, in consideration of monthly deduction therefor from his wages, to furnish a competent and skilled physician to attend and treat him for any sickness or accident occurring while in its service, is held not *ultra vires* in *Neil v. Flynn Lumber Co.* 71 W. Va. 708, 77 S. E. 324.

In the absence of the charter of a railroad company, a foreign corporation, from the record, and of any information therein as to what powers were conferred upon it by such charter, the court in *Atlantic Coast Line R. Co. v. Beazley*, 54 Fla. 311, 45 So. 761, would not undertake to say whether the formation by such railroad company of a "relief and hospital department," and guaranteeing the payment of its obligations, was, or was not, *ultra vires*. J. D. C.

for the said negligence on the part of the defendant company has accrued to him, as administrator of the estate of his said deceased son, in the sum of \$10,000, for which amount he asks judgment against the defendant corporation, together with the costs of this suit."

The answer was a general denial.

The facts of the case are practically undisputed; yet there is some conflict among the opinions of expert witnesses.

The evidence for the plaintiff tended to show: That the defendant was a corporation duly organized and incorporated under the laws of this state, and was engaged in the stone business at Wicks, in Jefferson county, and in the city of St. Louis, Missouri. That the plaintiff was the duly appointed, qualified, and acting administrator of the estate of Fred Hunicke, deceased. That deceased was the lawfully begotten son of the plaintiff. That he was never married, and died intestate, leaving his father and mother and brothers and sisters as his only heirs at law. That deceased was about twenty-two years of age at the time of his death, 6 feet tall, and weighed about 165 pounds, and that he was hale, hardy, and robust, never sick in his life, nor did he smoke or chew tobacco or drink intoxicating liquors. That he was employed in the quarry of the defendant on March 12, 1909, at Wicks, the time when he sustained the injuries mentioned. The injuries mentioned were caused by a car running over him, belonging to the St. Louis & Iron Mountain Railway Company, while moving on a spur track in the defendant's premises. That the injuries were most grievous, his right leg was severely crushed, lacerated at a point from 4 to 7 inches below the hip joint. The fractured bone punctured a hole about the size of a silver dollar in the fleshy part of the limb, through which great quantities of blood were freely flowing at the time assistance reached him, which was almost simultaneous with the reception of the injury.

The injury occurred about 9 o'clock A. M., and Mr. Buder, the superintendent of the quarry, who was present, at once had Hunicke taken to and placed upon a cot in the company's office building near by, and telephoned to Dr. Kirk, a physician at Kimswick, some 2 miles distant, requesting him to come at once and treat the injured party. The doctor, having been previously called to attend another person who was dangerously ill, so notified Mr. Buder; and stated that he could not come, and that about one hour later he again called the doctor, who replied that he was still engaged, and could not leave the dying patient. Dr. Kirk requested Mr. Buder to take the injured

party to Kimswick, which could have been done on a hand car, then present. Mr. Buder, for reasons not made perfectly clear, declined to take Hunicke to Kimswick as suggested by the doctor. In the meantime one George Dotzler, who was present, and also an employee of the defendant company, proposed to tie a rope tightly around the leg of the injured party above the injury, so as to stop the flow of blood; but the superintendent, Buder, told him not to do so, as it would do no good. At a time not made definite by the evidence, Buder notified the manager of the company at St. Louis of the injury, who instructed him to place Hunicke on the next train bound for St. Louis,—13 miles away,—and made arrangements for automobiles, doctors, nurses, etc., to carry him to the hospital in that city for treatment.

The witness George Dotzler, previously mentioned, and who wanted to tie the rope around the injured leg, had served for several years in the United States Cavalry, and had received instructions, as all such do, in rendering the first or emergency aid to the injured persons from gunshots or other causes; but the record nowhere shows that Buder had any knowledge of that fact when he told Dotzler that it would do no good to tie a rope around the injured limb.

Mrs. Buder, wife of the superintendent, a good woman, as evidently she was, with a heart full of the milk of human kindness, as soon as she heard of the sad affair, immediately went to the office where Hunicke was resting, and administered unto him all the aid she possessed, trying to alleviate his suffering and make him comfortable, and, in order to stanch the flow of blood, she placed a sheet under and over the injured parts of the limb, and never left him from that time until some four to seven hours afterwards, when he was placed in the care of physicians and nurses in the hospital at the city of St. Louis, save and except for a few moments before starting to the city she left him to change the blood-stained dress she wore while administering unto his necessities.

The evidence also tended to show: That there were other physicians in the near-by towns and villages, but none of them were called. That he could have been taken to the city of St. Louis, 13 miles away, in an automobile in a comparatively short time as compared to the time consumed in waiting for the train and carrying him thither. Nothing further was done for the injured party until about 1 o'clock P. M. of that day, when he was put upon a train, sent to the hospital, and his leg amputated. During the entire time from the instant of the injury down to the time the bandage was

placed upon his leg in the hospital, four or five hours later, the blood never ceased to flow from this ugly, gaping wound, and when the amputation took place his body was practically bloodless and lifeless, though he was still rational. That a few hours thereafter he breathed his last.

The operating surgeons were Drs. Nietert and Konzelman. The latter first attended the young man and testified: That the injury was between the middle and upper third of the femur, and the flesh and bone were crushed and lacerated. That he at once administered an anesthetic and put a rubber band above the injury to stop the flow of the blood of what blood was left. He testified:

"That his loss of blood was to such an extent that there wasn't anything to do for the boy," and that, if a bandage had been applied shortly after the accident, "the chances are that he would have saved a great deal of blood." That "there is no question about that," but "I am unable to say whether it would have stopped the flow of blood entirely." "That there was a reasonable probability of stopping the flow entirely by putting on a tight bandage, and probably if there was a tight bandage of stopping the flow of blood." "If a bandage had been promptly applied, it would in reasonable probability have stopped the flow of blood, and naturally increased his chances of recovering from the accident." "A towel or rope or leather strap is frequently used in such emergencies to stop the flow of blood."

Dr. Konzelman testified substantially to the same effect: That, almost immediately after the accident occurred, Mr. Buder telephoned to his St. Louis office and reported the injury and the serious character thereof. That thereupon the manager directed Buder to bring the injured party to the city of St. Louis and place him in a hospital, and that he engaged an ambulance to meet the train to carry him to the hospital, and employed Dr. Nietert to attend the young man upon his arrival in the city. That the St. Louis manager had an automobile and rode in it to the station to meet the parties, but did not go or offer to send the automobile to Wicks, 13 miles away, to bring the injured party to the city, which would have taken a comparatively short time.

The evidence of the defendant tended to contradict that of the plaintiff: That the injuries sustained by Hunicke were so serious and extensive in character that he would have died in spite of prompt and the best efforts of the most skilled physicians. That his death was caused solely from the injuries received by him, and not because

of any negligence on the part of the defendant or any of its agents or servants. That the condition of the injuries was such that it would have been impossible to have safely carried Hunicke on a hand car or automobile to Kimswick or from Wicks to St. Louis upon either of those carriages. That the roughness of the roads and jar and motion of the body incident to such means of travel would have kept the wound open and caused the blood to flow more freely than if lying still on a cot in the office of the company at Kimswick or on the train bound for St. Louis. In other words, the defendant's evidence tended to show that it was in no manner guilty of any negligence in the case, while that for the plaintiff tended to show the contrary.

Thereupon counsel for the plaintiff requested, and the court, over the objections of defendant, instructed the jury as follows:

(1) "The court instructs the jury that if you find and believe from the evidence that on the 12th day of March, 1909, Fred R. Hunicke was in the employ of the defendant Meramec Quarry Company, at a stone quarry owned or operated by it in Jefferson county, and that while so employed said Fred was injured at said quarry by his leg being crushed below the thigh, and that said injury was of so serious a character as to render him unable to help himself, and as to endanger his life from loss of blood through his said wounds, unless it were promptly checked, and that an emergency was thus created which demanded prompt or immediate aid and surgical attention so as to prevent his bleeding to death, then the court instructs you that it became the duty of the defendant corporation, through its officers or employees present at the place of accident, to exercise ordinary care in rendering to the injured boy such aid and assistance and to furnish such surgical treatment, in such emergency, as was reasonably possible under all the circumstances surrounding the parties, with a view to stopping the loss of blood and saving the life of the boy, if you find that it was reasonably possible to render any such attention. And if you further find and believe from the evidence that, if such emergency aid and surgical treatment had been furnished within a reasonable time, it would with reasonable certainty have stopped the flow of blood and prevented the boy's dying from loss of blood (if you find he did die from loss of blood), or would have saved his life, and that the defendant corporation carelessly and negligently failed or unreasonably delayed to exercise such ordinary care in rendering such assistance, if you find that it could have rendered it as above

explained, and that the injured boy died as a natural and direct consequence of such failure and negligence (if you so find), then the defendant corporation is liable in damage for such death. And if you further find from evidence that the plaintiff is the administrator of his said deceased son, and that said Fred, at the time of his death, was over twenty-one years old, and unmarried, and left no children, then your verdict should be for the plaintiff in a sum not to exceed \$10,000."

(2) "The court instructs the jury that if you find and believe from the evidence that on the 12th day of March, 1909, Fred R. Hunicke was in the employ of the defendant Meramec Quarry Company at a stone quarry owned or operated by it in Jefferson county, and that while so employed said Fred was injured at said quarry by his leg being crushed below the thigh, and that said injury was of so serious a character as to render him unable to help himself, and as to endanger his life from loss of blood through his wounds, unless it were promptly checked, and that an emergency was thus created, which demanded prompt or immediate aid and surgical attention so as to prevent his bleeding to death, and if you further find and believe from the evidence that the defendant corporation, by and through its officers or employees then present, assumed and undertook to render emergency assistance and treatment to said injured boy, by removing him to its office and treating his wounds or by calling a surgeon and sending the boy to the hospital, as mentioned in the evidence, then the court instructs you that it became the duty of the said defendant corporation, through its said officers or servants, to act promptly and to use ordinary care and diligence in binding or treating his said wounds as to stop the flow of blood, and to place the wounded boy in the charge of a competent surgeon, if it so undertook to do, within a reasonable time, in view of the nature of his injuries and the circumstances of the case, so as if possible to save his life. And if you further find and believe from the evidence that the defendant corporation, by the use of such care and diligence in furnishing emergency treatment to said injured boy and in placing him in charge of a surgeon within a reasonable time after his injury, could with reasonable certainty have stopped the loss of blood and saved his life, but that it carelessly failed and neglected to use such ordinary care or did those things which it undertook to do in a careless and negligent manner, or unnecessarily and beyond a reasonable time delayed in performing the services which it assumed to render, and that such carelessness and negligence of

L.R.A.1915C.

delay, if any such you find, were the natural and proximate cause of the death of the said Fred R. Hunicke, then the defendant corporation is liable in damages for his death. And if you further find from the evidence that plaintiff is the administrator of his said deceased son, and that said Fred, at the time of his death, was over twenty-one years of age, and unmarried, and left no children, then your verdict should be for the plaintiff and against the defendant corporation in a sum not exceeding \$10,000."

And the court on behalf of the defendant then instructed the jury, over the objections and exceptions of plaintiff, as follows:

(1) "The court instructs the jury that this suit is not based on any liability of defendant for injuring the deceased, Fred Hunicke, by striking or running over him with a car, and therefore plaintiff is not entitled to any verdict at your hands on account of the inflicting of injury upon the deceased, Fred Hunicke, on the occasion in question."

(2) "The court instructs the jury that if you believe and find from the evidence in this case that, after the deceased, Fred Hunicke, was injured, defendant exercised ordinary care to secure for him surgical and medical treatment at the hands of competent physicians and surgeons, then the defendant fully discharged its duty towards said Fred Hunicke and is not liable to the plaintiff in this case."

(3) "By the term 'ordinary care,' as mentioned in these instructions, is meant such care as a reasonably prudent person would exercise under the same or similar circumstances."

(4) "The court instructs the jury that if, after considering all the evidence in the case, you are unable to determine whether the deceased, Fred R. Hunicke, would have died from the injury he received on the defendant's premises even if proper medical assistance had been promptly rendered him, then your verdict must be for the defendant."

(6) "The court instructs the jury that if, after considering all the evidence in the case, you are unable to determine whether the deceased, Fred R. Hunicke, would have died from the injury he received on the defendant's premises even if proper medical assistance had been promptly rendered him, then your verdict must be for the defendant."

Counsel for the defendant asked two other instructions, which in effect were in the nature of demurrers to the evidence. Both of these were refused, and the defendant duly saved its exceptions.

Messrs. J. E. Carroll and Watts, Gentry, & Lee, for appellant:

The verdict for the defendant was the only verdict that could properly have been rendered, and should not have been disturbed.

Davis v. Forbes, 171 Mass. 548, 47 L.R.A. 170, 51 N. E. 20, 4 Am. Neg. Rep. 289; Galveston, H. & S. A. R. Co. v. Hennegan, 33 Tex. Civ. App. 314, 76 S. W. 452; Gray v. Lumpkin, — Tex. Civ. App. —, 159 S. W. 880; Pittsburgh, C. C. & St. L. R. Co. v. Sullivan, 141 Ind. 83, 27 L.R.A. 840, 50 Am. St. Rep. 313, 40 N. E. 138; Spelman v. Gold Coin Min. & Mill. Co. 26 Mont. 76, 55 L.R.A. 640, 91 Am. St. Rep. 402, 66 Pac. 597; Voorhees v. New York C. & H. R. R. Co. 129 App. Div. 780, 114 N. Y. Supp. 242, 198 N. Y. 558, 92 N. E. 1105; Vorass v. Rosenberry, 85 Ill. App. 623; Sweet Water Mfg. Co. v. Glover, 29 Ga. 399; Denver & R. G. R. Co. v. Iles, 25 Colo. 19, 53 Pac. 222; King v. Interstate Consol. R. Co. 23 R. I. 583, 70 L.R.A. 924, 51 Atl. 301.

There was no sufficient showing that the death of young Hunicke resulted from failure to furnish surgical treatment. It may just as well have been due to the original injury. Under such circumstances, a demurrer to the evidence should be sustained.

Warner v. St. Louis & M. River R. Co. 178 Mo. 134, 77 S. W. 67; Root v. Kansas City Southern R. Co. 195 Mo. 367, 6 L.R.A. (N.S.) 212; 92 S. W. 621; Goransson v. Ritter-Conley Mfg. Co. 186 Mo. 300, 85 S. W. 338; Kane v. Missouri P. R. Co. 251 Mo. 29, 157 S. W. 644.

Where the demurrer to the evidence ought to have been sustained, a verdict for defendant should not be set aside, even though technical error may have been committed at the trial.

Mockowik v. Kansas City, St. J. & C. B. R. Co. 196 Mo. 530, 94 S. W. 256; Bradley v. James H. Forbes Tea & Coffee Co. 213 Mo. 320, 111 S. W. 919; Wagner v. Edison Electric Illuminating Co. 177 Mo. 44, 75 S. W. 966; Lomax v. Southwest Missouri Electric R. Co. 119 Mo. App. 200, 95 S. W. 945.

Mr. Joseph Wheless, for respondent:

An employer, although a corporation, owes a legal duty to an injured employee in the emergency caused by such injury to use reasonable care and diligence in furnishing emergency aid and surgical treatment to such injured employee; and he is liable to him for failure to perform this duty or for negligence in its performance, and is liable to a physician or surgeon for the cost and expenses of such emergency treatment.
L.R.A.1915C.

Weinsberg v. St. Louis Cordage Co. 135 Mo. App. 553, 116 S. W. 461; Freeman v. Junge Baking Co. 126 Mo. App. 124, 103 S. W. 565; Meisenbach v. Southern Coöperation Co. 45 Mo. App. 232; Powell v. St. Louis & S. F. R. Co. 229 Mo. 246, 129 S. W. 963; Brown v. Missouri, K. & T. R. Co. 67 Mo. 122; McCarthy v. Missouri R. Co. 15 Mo. App. 385; Evans v. Marion Min. Co. 100 Mo. App. 670, 75 S. W. 178; Reynolds v. Chicago, B. & Q. R. Co. 114 Mo. App. 670, 90 S. W. 100; Phillips v. St. Louis & S. F. R. Co. 211 Mo. 419, 17 L.R.A. (N.S.) 1167, 124 Am. St. Rep. 786, 111 S. W. 109, 14 Ann. Cas. 742; Ghio v. Schaper Bros. Mercantile Co. 180 Mo. App. 686, 163 S. W. 551; Newberry v. Missouri Granite & Constr. Co. 180 Mo. App. 672, 163 S. W. 570; Salter v. Nebraska Teleph. Co. 79 Neb. 373, 13 L.R.A. (N.S.) 545, 112 N. W. 600; Depue v. Flatau, 100 Minn. 299, 8 L.R.A. (N.S.) 485, 111 N. W. 1; Ohio & M. R. Co. v. Early, 141 Ind. 73, 28 L.R.A. 551, 40 N. E. 257; Northern C. R. Co. v. State, 29 Md. 420, 96 Am. Dec. 545; Glenn v. Hill, 210 Mo. 297, 16 L.R.A. (N.S.) 699, 109 S. W. 27; Pate v. Tar Heel S. B. Co. 148 N. C. 571, 62 S. E. 614; Bresnahan v. Lonsdale Co. — R. I. —, 51 Atl. 624; Farmer v. Central Iowa R. Co. 67 Iowa, 136, 24 N. W. 895; Louisville, N. A. & C. R. Co. v. Smith, 121 Ind. 353, 6 L.R.A. 320, 22 N. E. 775; Schumaker v. St. Paul & D. R. Co. 46 Minn. 39, 12 L.R.A. 258, 48 N. W. 559; Hill v. Winsor, 118 Mass. 251; Holmes v. McAllister, 123 Mich. 493, 48 L.R.A. 398, 82 N. W. 220; Union P. R. Co. v. Cappier, 66 Kan. 649, 69 L.R.A. 518, 72 Pac. 281, 14 Am. Neg. Rep. 37; Cincinnati, N. O. & T. P. R. Co. v. Marrs, 119 Ky. 954, 70 L.R.A. 293, 115 Am. St. Rep. 289, 85 S. W. 188; King v. Interstate Consol. R. Co. 23 R. I. 583, 70 L.R.A. 924, 51 Atl. 301; The Iroquois, 55 C. C. A. 497, 118 Fed. 1005.

It is sufficient that the injuries are the natural, though not the necessary and inevitable, result of a negligent fault, such injuries as are likely in ordinary circumstances to ensue from the act or omission in question.

Ghio v. Schaper Bros. Mercantile Co. 180 Mo. App. 686, 163 S. W. 556; Phillips v. St. Louis & S. F. R. Co. 211 Mo. 442, 17 L.R.A. (N.S.) 1167, 124 Am. St. Rep. 786, 111 S. W. 109, 14 Ann. Cas. 742; Smiley v. St. Louis & H. R. Co. 160 Mo. 629, 61 S. W. 667, 9 Am. Neg. Rep. 514; Gerdes v. Christopher & S. Architectural Iron & Foundry Co. 124 Mo. 361, 25 S. W. 557, 27 S. W. 615; Gharst v. St. Louis Transit Co. 115 Mo. App. 411, 91 S. W. 453; Miller v. St. Louis, I. M. & S. R. Co. 90 Mo. 394, 2 S. W. 439.

Woodson, P. J., delivered the opinion of the court:

1. The first error counsel for defendant complain of is stated in this language: "The court erred in sustaining plaintiff's motion for a new trial, because the petition does not state facts sufficient to constitute a cause of action against the defendant, and therefore could not have supported a verdict for the plaintiff, if one had been rendered. Hence the verdict for the defendant was the only verdict that could properly have been rendered in the case, and should not have been disturbed."

In support of this contention, we are cited to the following authorities: *Davis v. Forbes*, 171 Mass. 548, 47 L.R.A. 170, 51 N. E. 20, 4 Am. Neg. Rep. 289; *Galveston, H. & S. A. R. Co. v. Hennegan*, 33 Tex. Civ. App. 314, 76 S. W. 452; *Gray v. Lumpkin*, — Tex. Civ. App. —, 159 S. W. 880; *Pittsburgh, C. C. & St. L. R. Co. v. Sullivan*, 141 Ind. 83, 27 L.R.A. 840, 50 Am. St. Rep. 313, 40 N. E. 138; *Spelman v. Gold Coin Min. & Mill. Co.* 26 Mont. 76, 55 L.R.A. 640, 91 Am. St. Rep. 402, 66 Pac. 597; *Voorhees v. New York C. & H. R. R. Co.* 129 App. Div. 780, 114 N. Y. Supp. 242, and 198 N. Y. 558, 92 N. E. 1105; *Vorass v. Rosenberry*, 85 Ill. App. 623; *Sweet Water Mfg. Co. v. Glover*, 29 Ga. 399; *Denver & R. G. R. Co. v. Iles*, 25 Colo. 19, 53 Pac. 222; *King v. Interstate Consol. R. Co.* 23 R. I. 583, 70 L.R.A. 924, 51 Atl. 301.

The principal legal proposition involved in this case is somewhat novel, and this is the first time it has been directly presented to this court for consideration. For this reason I deem it important that the authorities relied upon by counsel for the respective parties as sustaining their respective positions should be reviewed somewhat extensively. However, before undertaking to discuss this question, it might not be out of place to state the well-known and universally established rule that "where a physician or surgeon renders services to one at the mere request of a third person on whom there rests no obligation to provide such service, the law will not imply a contract to pay on such mere request. On this question the law is succinctly and accurately stated in 22 Am. & Eng. Enc. Law, 790, 791, as follows: 'When a person requests a physician to perform services for a patient, the law does not raise an implied promise to pay the reasonable value of the services so rendered, unless the relation of the person making the request to the patient is such as raises the legal obligation on his part to call in a physician and pay for his services.'" *Weinsberg v. St. Louis Cordage Co.* 135 Mo. App. 553, 116 S. W. 461, and cases cited.

L.R.A.1915C.

Orderly conduct requires that we consider, first, those of the defendant, the appellant here, and thereafter those of the plaintiff, the respondent here.

Before taking up the cases of the defendant in detail, it may be well to state generally none of them "is on all fours" with the case at bar, for the reason that the question of "emergency" so strongly urged in this case was not presented or considered in any of the cases cited by counsel for defendant.

The case of *Davis v. Forbes*, 171 Mass. 548, loc. cit. 553, 47 L.R.A. 170, 51 N. E. 20, 4 Am. Neg. Rep. 289, was where a boy, whose exact age was not shown, sued his employer for personal injuries alleged to have been sustained by him through the negligence of his employer and for negligence in not furnishing him with medical attendance. He was injured by falling from or by having been thrown from a horse he was training on a race course. Neither the character nor the extent of the injuries was shown, and therefore the question of emergency was not involved. The court held, first, that he could not recover for the injuries sustained, because he assumed the risk, etc.; and, second, without discussing the question, said: "An employer is under no legal obligation to furnish his injured employees with medical attendance."

In the light of the facts of that case, the opinion is of but little weight in this case.

In the case of *Galveston, H. & S. A. R. Co. v. Hennegan*, 33 Tex. Civ. App. 314, 76 S. W. 452, the company had agreed to furnish the employee medical service, but, having failed to so do, the latter sued in tort, for the injuries he claimed were negligently inflicted upon him by that failure. In that case the court simply held that the plaintiff's cause of action was for a breach of the contract, and not in tort for negligence. Consequently that case has no application whatever to the case at bar.

The case of *Gray v. Lumpkin*, — Tex. Civ. App. —, 159 S. W. 880, also grew out of an alleged contract whereby the employer agreed to furnish the employee medical service, which fact renders it inapplicable as an authority in this case.

In the case of *Spelman v. Gold Coin Min. & Mill. Co.* 26 Mont. 76, 55 L.R.A. 640, 91 Am. St. Rep. 402, 66 Pac. 597, the plaintiff sued the company to recover the value of medical services rendered at the request of the superintendent to one of its injured employees. The court held that the superintendent, as such, had no authority to employ a physician in such a case, in the absence of negligence on the part of the company. There being no claim of negligence, the court added:

"Query,—Whether in a case where an employee is injured through the actionable negligence of the company, the general manager of a mining company can bind his principal by such a contract."

To the same effect is the case of Voorhees v. New York C. & H. R. R. Co. 129 App. Div. 780, 114 N. Y. Supp. 242, affirmed in 198 N. Y. 558, 92 N. E. 1105.

It will be observed that the two last cases turned upon the authority of the superintendent to employ the physician, and not the liability of the master, had the physician been employed by a duly constituted agent of the company. *Quære*, If the company was in legal duty bound to furnish medical aid in such case, was not the superintendent authorized to employ the physician, as a matter of law?

The case of Vorass v. Rosenberry, 85 Ill. App. 623, was a suit brought by a physician against the father of an injured son, to recover for medical services rendered to the latter, who was of age, and who was found lying unconscious in the middle of the street where he had fallen from a wagon and fractured his left thigh bone. The physician, Rosenberg, the defendant in error, was summoned to attend the son by a stranger. The son was removed to the father's house accompanied by the physician, who was a stranger to both the father and son. The son continued to live with his father and assisted him in his business after attaining his majority, just as he did prior to that time. The evidence showed that the father never employed the physician, and that he did not desire him to treat his son; but the son insisted upon being treated by this physician. The circuit court rendered a judgment in favor of the physician, but upon writ of error the court of appeals reversed the judgment and held the father not liable.

The case of King v. Interstate Consol. R. Co. 23 R. I. 583, 70 L.R.A. 924, 51 Atl. 301, involved the legal duty of the company to furnish its employees with food and shelter, etc. The court held he could not recover. This case is not in point.

The case of Weinsberg v. St. Louis Cordage Co. 135 Mo. App. 553, 116 S. W. 461, was a suit to recover a doctor bill. There the points decided, first, were: Did the corporation have the charter power to employ a physician to treat an injured employee; and, second, did the president of the company, without express authority from the board of managers of the company, have the authority to employ the physician to treat the injured employee? In that case the court ruled both of those points in favor of the plaintiff. The same conclusions were announced in the case of Free-

man v. Junge Baking Co. 126 Mo. App. 124, 103 S. W. 565.

Neither of those cases involved the question of the legal duty of the company, in the absence of contract, to furnish medical aid to an injured employee of the company; nor was that question discussed or decided by the court.

We are also cited to two cases recently decided by the St. Louis court of appeals. Ghio v. Schaper Bros. Mercantile Co. 180 Mo. App. 680, 163 S. W. 551, and Newberry v. Missouri Granite & Constr. Co. 180 Mo. App. 672, 163 S. W. 570.

These cases were also predicated upon contract; that is, the physicians who sued for their fees were employed by the proper officers of the respective companies to perform the services.

None of these cases are in point. Nor is the case of Phillips v. St. Louis & S. F. R. Co. 211 Mo. 419, 17 L.R.A. (N.S.) 1167, 124 Am. St. Rep. 786, 111 S. W. 109, 14 Ann. Cas. 742, in point. There the railroad company not only agreed to pay the doctor bills and hospital charges, etc., but in advance deducted from his and the other employees' wages so much money, estimated to be sufficient to pay all such bills.

Practically all, if not all, of the cases so far considered were cases where various physicians or surgeons sued various defendants to recover bills for services performed by them to various injured employees of the various defendants. Some of the cases were based upon contracts, and the defenses were that either the company had no charter authority to employ a physician or surgeon in any case, or that the agent of the company, who made the contract on behalf of the company, had no authority from the company to make the same.

The remainder of the cases considered turned upon the point whether or not the agent of the company had the implied authority to employ a physician or surgeon to treat, at the expense of the company, an injured employee thereof.

The supreme court of Indiana, in the case of Pittsburgh, C. C. & St. L. R. Co. v. Sullivan, 141 Ind. 83, 27 L.R.A. 840, 50 Am. St. Rep. 313, 40 N. E. 138, held that the company was under no general legal obligation to employ medical service for its injured employees; and that if it did so gratuitously, and the surgeon amputated a limb of an injured employee against his consent and expressed command, the company would not be liable in damages to the employee for the unlawful amputation.

In the case of Sweet Water Mfg. Co. v. Glover, 29 Ga. 399, the plaintiff, a physician, sued the company for surgical services rendered to one of the company's injured

employees. In that case the supreme court of Georgia held that, in the absence of contract, the company was not liable to the plaintiff for the services so rendered, and that the authority of the superintendent of the company, as such, did not authorize him to employ physicians to treat its employees.

In the case of *Denver & R. G. R. Co. v. Iles*, 25 Colo. 19, 53 Pac. 222, the supreme court of Colorado held that the company, in the absence of contract, was not legally bound to furnish medical services to its injured employees; and if, therefore, it neglected or refused to summon medical aid for one injured, while acting within the scope of his employment, it could not be held liable for negligently failing to do so.

The last three cases mentioned in effect support the contention of counsel for the defendant, in that the petition does not state facts sufficient to constitute a cause of action against it. It will be observed, however, that the question of emergency relied upon in this case was not involved or decided in any of those. The emergency in this case seems to be the differentiating fact between this case and those. In the light of this difference, it may be said that counsel for defendant has cited no authority that is directly in point in this case.

Having with considerable care and pains considered the contention of counsel for defendant that the petition in this case does not state facts sufficient to constitute a cause of action against it, we will now state the position counsel for plaintiff take regarding that question, and then consider the authorities cited by them in support thereof.

The position of counsel for plaintiff is stated in the following language: "The petition states a good cause of action. An employer, although a corporation, owes a legal duty to an injured employee, in the emergency caused by such injury, to use reasonable care and diligence in furnishing emergency aid and surgical treatment to such injured employee, and he is liable (1) to the injured employee for failure to perform this duty or for negligence in its performance, and (2) is liable to a physician or surgeon for the cost and expenses of such emergency treatment. And 'whether the injured employee received his hurt through the negligence of the employer or not is certainly immaterial.' 135 Mo. App. loc. cit. 568, 116 S. W. 461."

The authorities cited by plaintiff are as follows: *Weinsberg v. St. Louis Cordage Co.* 135 Mo. App. 553, 116 S. W. 461; *Freeman v. Junge Baking Co.* 126 Mo. App. 124, 103 S. W. 565; *Meisenbach v. Southern Cooperage Co.* 45 Mo. App. 232; *Powell v. L.R.A.* 1915C.

St. Louis & S. F. R. Co. 229 Mo. 246, 129 S. W. 963; *Brown v. Missouri, K. & T. R. Co.* 67 Mo. 122; *McCarthy v. Missouri R. Co.* 15 Mo. App. 385; *Evans v. Marion Min. Co.* 100 Mo. App. 670, 75 S. W. 178; *Reynolds v. Chicago, B. & Q. R. Co.* 114 Mo. App. 670, 90 S. W. 100; *Phillips v. St. Louis & S. F. R. Co.*; *Ghio v. Schaper Bros. Mercantile Co.*; and *Newberry v. Missouri Granite & Constr. Co.*, — *supra*; *Salter v. Nebraska Teleph. Co.* 79 Neb. 373, 13 L.R.A.(N.S.) 545, 112 N. W. 600; *Depue v. Flatau*, 100 Minn. 290, 8 L.R.A.(N.S.) 485, 111 N. W. 1; *Ohio & M. R. Co. v. Early*, 141 Ind. 73, 28 L.R.A. loc. cit. 551, 40 N. E. 257; *Northern C. R. Co. v. State*, 29 Md. 420, 96 Am. Dec. 545; *Glenn v. Hill*, 210 Mo. loc. cit. 297, 16 L.R.A.(N.S.) 699, 109 S. W. 27; *Pate v. Tar Heel S. B. Co.* 148 N. C. 571, 62 S. E. 614; *Bresnahan v. Lonsdale Co.* — R. I. —, 51 Atl. 624; *Farmer v. Central Iowa R. Co.* 67 Iowa, 136, 24 N. W. 895; *Louisville, N. A. & C. R. Co. v. Smith*, 121 Ind. 353, 6 L.R.A. 320, 22 N. E. 775; *Schumaker v. St. Paul & D. R. Co.* 46 Minn. 39, 12 L.R.A. loc. cit. 258, 48 N. W. 559; *Hill v. Winsor*, 118 Mass. 251; *Holmes v. McAllister*, 123 Mich. 493, 48 L.R.A. loc. cit. 398, 82 N. W. 220; *Union P. R. Co. v. Cappier*, 66 Kan. 649, 72 Pac. 281, 14 Am. Neg. Rep. 37, 69 L.R.A. 518 (see note loc. cit. 533); *Cincinnati, N. O. & T. P. R. Co. v. Marra*, 119 Ky. 954, 70 L.R.A. loc. cit. 293, 115 Am. St. Rep. 289, 85 S. W. 188; *King v. Interstate Consol. R. Co.* 23 R. I. 583, 70 L.R.A. loc. cit. 924, 51 Atl. 301; *The Iroquois*, 55 C. C. A. 497, 118 Fed. loc. cit. 1005.

While counsel have cited a great many authorities in support of their proposition, yet we do not feel called upon to review all of them in this opinion; however, we will notice such as we consider as specially applicable to the case.

I do not understand counsel for plaintiff to make the broad claim that, in the absence of the question of emergency, presented in this case, it would have been the duty of the defendant to have furnished medical or surgical treatment for the injured man, upon the occasion mentioned; but I do understand counsel to contend, and which I believe is the law, that when an employee is engaged in any dangerous business for the master, and that while in the performance of his duties, as such, he is so badly injured that he is thereby rendered physically or mentally incapable of procuring medical assistance for himself, then that duty, as a matter of law, is devolved upon the master, and that he must perform that duty with reasonable diligence and in a reasonable manner, through the agency of such of his employees as may be present

at the time. In other words, without trying to state the law in detail governing the master's duties in all cases of this character, that duty is put in operation whenever, under the facts and circumstances of the case, the employee is thereby so injured that he or she is incapacitated from caring for himself or herself, as the case may be.

The uncontradicted evidence in this case shows that the deceased was so badly injured that he was physically incapacitated to care for himself or to engage medical or surgical treatment; also that the character of his injuries was such as required immediate surgical attention, for it was apparent to all present that his leg was frightfully crushed, and that his life's blood was freely flowing from his body. So obvious was this that several of those present, at the time of the accident, tried by their crude methods to stop its flow. But the highest officer of the company present, the superintendent, thought none of their remedies were worthy of trial, and told them that their proposed treatment would do no good. He then telephoned to Dr. Kirk, at Kimswick, the condition of the injured man, Hunicke, and requested him to come to Wicks and treat the injured man; but the doctor, being previously engaged in a serious case, could not leave it. The doctor, however, telephoned the superintendent to bring the injured party to Kimswick, some 2 miles distant, and that he would there treat him.

The evidence shows that both Wicks and Kimswick were on the railroad, and that a hand car was present which could have been used in conveying Hunicke from the former to the latter place for treatment.

For some reason not made clear, the superintendent declined to take the injured man to Kimswick for treatment, but telephoned the facts of the injury to the manager of the company at St. Louis, some 12 or 14 miles distant, who telephoned back to the superintendent to place the injured man on the next train and send him to St. Louis. This was done; and some three or four hours later the train arrived in the city; and upon the arrival of the train Hunicke was speedily taken to the hospital, where his limb was amputated; but in the meantime practically all of the blood of his body had flown therefrom; and he died shortly thereafter.

In the statement of the case we have set out much of the evidence tending to show the negligence of the defendant in not procuring surgical treatment for Hunicke more promptly; and that he would not have died had he received prompt treatment. That evidence tended to show that Kimswick was only 2 miles distant from the place of in-

jury, and that the injured man could have been taken there on a hand car in a very few minutes, probably from fifteen to twenty, at the outside. Had this been done, in all probability the flow of blood would have been stanchd several hours before it was finally stopped in the city of St. Louis. It is true that there was some evidence which tended to show that such a trip on a hand car would have been rough and jolting, and thereby might have aggravated the flow of the blood, but, conceding that to be true, it could not have caused more waste of blood than did the constant flow during the hours that passed while he was waiting for the train and being conveyed to the city of St. Louis thereon. And it seems to me that common sense would teach us that a trip on a hand car to Kimswick would not have caused the blood to flow more freely than the trip on the train to St. Louis, six or seven times as far, would have done. But be that as it may, when we consider those facts in connection with all the other facts and circumstances shown by the evidence, we have reached the conclusion that this, as well as the question of negligence in delaying the procurement of a surgeon, was for the jury, and that the evidence introduced was sufficient to make out a *prima facie* case for the plaintiff. In other words, we are of the opinion that the evidence tended to show that the company was guilty of negligence in not using more diligence in procuring medical and surgical treatment for this party; also that it tended to show that said negligence was the proximate cause of his death. These views, in our opinion, are fully supported by the following authorities, which we will briefly review:

In the case of *Union P. R. Co. v. Cappier*, 66 Kan. 649, loc. cit. 650, 69 L.R.A. 518, 72 Pac. 281, 14 Am. Neg. Rep. 37, the supreme court of that state, in discussing this question, said:

"While attempting to cross the railway tracks, Ezelle was struck by a moving freight car pushed by an engine. A yard master in charge of the switching operations was riding on the end of the car nearest to the deceased and gave warning by shouting to him. The warning was either too late or no heed was given to it. The engine was stopped. After the injured man was clear of the track, the yard master signaled the engineer to move ahead, fearing, as he testified, that a passenger train then about due would come upon them. The locomotive and car went forward over a bridge, where the general yard master was informed of the accident and an ambulance was summoned by telephone. The yard master then went back where the injured

man was lying, and found three Union Pacific switchmen binding up the wounded limbs and doing what they could to stop the flow of blood. The ambulance arrived about thirty minutes later, and Ezelle was taken to a hospital, where he died a few hours afterward.

"In answer to particular questions of fact, the jury found that the accident occurred at 5:35 P. M.; that immediately one of the railway employees telephoned to police headquarters for help for the injured man; that the ambulance started at 6:05 P. M. and reached the nearest hospital with Ezelle at 6:20 P. M., where he received proper medical and surgical treatment. Judgment against the railway company was based on the following question and answer: 'Ques. Did not defendant's employees bind up Ezelle's wounds and try to stop the flow of blood as soon as they could after the accident happened? Ans. No.'

"The lack of diligence in the respect stated was intended, no doubt, to apply to the yard master, engineer, and fireman in charge of the car and engine.

"These facts bring us to a consideration of the legal duty of these employees toward the injured man after his condition became known. Counsel for defendant in error quotes the language found in Beach on Contributory Negligence, 3d ed. § 215, as follows: 'Under certain circumstances, the railroad may owe a duty to a trespasser after the injury. When a trespasser has been run down, it is the plain duty of the railway company to render whatever service is possible to mitigate the severity of the injury. The train that has occasioned the harm must be stopped, and the injured person looked after, and, when it seems necessary, removed to a place of safety, and carefully nursed, until other relief can be brought to the disabled person.'

"The principal authority cited in support of this doctrine is Northern C. R. Co. v. State, 29 Md. 420, 96 Am. Dec. 545. The court in that case first held that there was evidence enough to justify the jury in finding that the operatives of the train were negligent in running it too fast over a road crossing without sounding the whistle, and that the number of brakemen was insufficient to check its speed. Such negligence was held sufficient to uphold the verdict, and would seem to be all that was necessary to be said. The court, however, proceeded to state that, from whatever cause the collision occurred, it was the duty of the servants of the company, when the man was found on the pilot of the engine in a helpless and insensible condition, to remove him, and to do it with proper regard to his safety and the laws of humanity. L.R.A.1915C.

In that case the injured person was taken in charge by the servants of the railway company, and, being apparently dead, without notice to his family, or sending for a physician to ascertain his condition, he was moved to defendant's warehouse, laid on a plank, and locked up for the night. The next morning, when the warehouse was opened, it was found that during the night the man had revived from his stunned condition and moved some paces from the spot where he had been laid, and was found in a stooping posture, dead but still warm, having died from hemorrhage of the arteries of one leg, which was crushed at and above the knee. It had been proposed to place him in the defendant's station house, which was a comfortable building, but the telegraph operator objected, and directed him to be taken into the warehouse, a place used for the deposit of old barrels and other rubbish."

While the court decided that case against the plaintiff because he was a trespasser, and not an employee, yet it clearly recognized the doctrine contended for by counsel for the plaintiff in this case.

And in the case of Depue v. Flatau, 100 Minn. 299, 303, 8 L.R.A.(N.S.) 485, 111 N. W. 1, the supreme court of Minnesota, in discussing this question, said:

"The facts in this case bring it within the more comprehensive principle that whenever a person is placed in such a position with regard to another that it is obvious that, if he does not use due care in his own conduct, he will cause injury to that person, the duty at once arises to exercise care commensurate with the situation in which he thus finds himself, and with which he is confronted, to avoid such danger; and a negligent failure to perform the duty renders him liable for the consequences of his neglect. This principle applies to varied situations arising from noncontract relations. It protects the trespasser from wanton or wilful injury. It extends to the licensee, and requires the exercise of reasonable care to avoid an unnecessary injury to him. It imposes upon the owner of premises, which he expressly or impliedly invites persons to visit, whether for the transaction of business or otherwise, the obligation to keep the same in reasonably safe condition for use, though it does not embrace those sentimental or social duties often prompting human action. 21 Am. & Eng. Enc. Law, 2d ed. 471; Barrows, Neg. 4. Those entering the premises of another by invitation are entitled to a higher degree of care than those who are present by mere sufferance. Barrows, Neg. 304. The rule stated is supported by a long list of authorities, both in England and this country,

and is expressed in the familiar maxim, *Sic utere tuo*, etc. They will be found collected in the works above cited, and also in 1 Thompson on Negligence, 2d ed. § 694. It is thus stated in *Heaven v. Pender*, L. R. 11 Q. B. Div. 503, 19 Eng. Rul. Cas. 81: 'The proposition which these recognized cases suggest, and which is therefore to be deduced from them, is that, whenever one person is by circumstances placed in such a position with regard to another that every-one of ordinary sense, who did think, would at once recognize that, if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.' It applies with greater strictness to conduct towards persons under disability, and imposes the obligation as a matter of law, not mere sentiment, at least to refrain from any affirmative action that might result in injury to them. A valuable note to *Union P. R. Co. v. Cappier*, 69 L.R.A. 513, discusses at length the character of the duty and obligation of those coming into relation with sick and disabled persons, and numerous analogous cases are collected and analyzed.

"In the case at bar defendants were under no contract obligation to minister to plaintiff in his distress; but humanity demanded that they do so, if they understood and appreciated his condition. And, though those acts which humanity demands are not always legal obligations, the rule to which we have adverted applied to the relation existing between these parties on this occasion, and protected plaintiff from acts at their hands that would expose him to personal harm. He was not a trespasser upon their premises, but, on the contrary, was there by the express invitation of Flatau, Sr. He was taken suddenly ill while their guest, and the law, as well as humanity, required that he be not exposed in his helpless condition to the merciless elements. The case, in its substantial facts, is not unlike that of *Cincinnati, N. O. & T. P. R. Co. v. Marrs*, 119 Ky. 954, 70 L.R.A. 291, 115 Am. St. Rep. 289, 85 S. W. 188. In that case it appears that one Marrs was found asleep in the yards of the railway company in an intoxicated condition. The yard employees discovered him, aroused him from his stupor, and ordered him off the tracks. They knew that he was intoxicated, and that he had left a train recently arrived at the station, and he appeared to them dazed and lost. About forty minutes later, while the yard employees were engaged in switching, they ran over him and killed him. He had again fallen asleep

on one of the tracks. The court held the railway company liable; that, under the circumstances disclosed, it was the duty of the yard employees to see that Marrs was safely out of the yards or, in default of that, to exercise ordinary care to avoid injuring him; and that it was reasonable to require them to anticipate his probable continued presence in the yards. The case at bar is much stronger, for here plaintiff was not intoxicated, nor a trespasser, but, on the contrary, was in defendants' house as their guest, and was there taken suddenly ill in their presence, and, if his physical condition was known and appreciated, they must have known that to compel him to leave their home unattended would expose him to serious danger.

"We understand from the record that the learned trial court held in harmony with the view of the law here expressed, but dismissed the action for the reason, as stated in the memorandum denying a new trial, that there was no evidence that either of the defendants knew, or in the exercise of ordinary care should have known, plaintiff's physical condition, or that allowing him to proceed on his journey would expose him to danger. Of course, to make the act of defendants a violation of their duty in the premises, it should appear that they knew and appreciated his serious condition. The evidence on this feature of the case is not so clear as might be desired, but a majority of the court are of the opinion that it is sufficient to charge both defendants with knowledge of plaintiff's condition—at least that the question should have been submitted to the jury. Defendant Flatau, Sr., testified that he was in the room at all times while plaintiff was in the house and observed his demeanor, and, though he denied that plaintiff fell to the floor in a faint or otherwise, yet the fact that plaintiff was seriously ill cannot be questioned. Flatau, Jr., conducted him to his cutter, assisted him in, observed that he was incapable of holding the reins to guide his team, and for that reason threw them over his shoulders. If defendants knew and appreciated his condition, their act in sending him out to make his way to Madelia the best he could was wrongful and rendered them liable in damages. We do not wish to be understood as holding that defendants were under absolute duty to entertain plaintiff during the night. Whether they could conveniently do so does not appear. What they should or could have done in the premises can only be . . . [shown by] disclosing their situation and their facilities for communicating his condition to his friends or near neighbors, if any there were. All these facts will enable

the jury to determine whether, within the rules of negligence applicable to the case, defendants neglected any duty they owed plaintiff."

In the case of *Ohio & M. R. Co. v. Early*, 141 Ind. 73, 81, 28 L.R.A. 546, loc. cit. 551, 40 N. E. 257, the supreme court of Indiana said: "We do not think this evidence is sufficient to support the verdict. While a railroad company is under no general legal obligation to furnish an employee, who may receive injuries while engaged in the service of the company, with medical or surgical assistance, yet where a day laborer or employee has, by unforeseen accident to him while engaged in the line of his duty as such employee, been rendered helpless, the dictates of humanity, duty, and fair dealing would seem to demand that it should furnish medical assistance. Of course this duty could not rest upon the master in ordinary cases, in the absence of a contract to do so, but should rest upon him only in extraordinary cases, where immediate medical or surgical assistance is imperatively required to save life or avoid further serious bodily injury. This duty on the railroad company only arises out of strict necessity and urgent exigency, where immediate attention thereto is demanded in order to save life or prevent great injury. The duty arises with the emergency, and with it expires. *Terre Haute & I. R. Co. v. McMurray*, 98 Ind. 358, 49 Am. Rep. 752, and authorities there cited."

And in discussing the same question the supreme court of Nebraska in the case of *Salter v. Nebraska Teleph. Co.* 79 Neb. 373, loc. cit. 376, 13 L.R.A. (N.S.) 545, 112 N. W. 600, used this language:

"It will be unnecessary, as we view the case, to pass upon all the errors assigned by the appellant. While the rule is not uniform, there are many cases holding that where a company is engaged in a business dangerous to its employees, in case of an accident of such serious character that the injured employee stands in need of immediate medical or surgical attendance, the conductor of a train, or the highest officer of the company present at the time, has, from the necessities of the case, authority to represent the company and to bind it by the employment of a surgeon for such immediate medical or surgical services and care as are required. In support of this rule the court in *Terre Haute & I. R. Co. v. McMurray*, supra, said: 'An employer does not stand to his servants as a stranger; he owes them a duty. The cases all agree that some duty is owing from the master to the servant, but no case that we have been able to find defines the limits of this duty. Granting the existence of this L.R.A.1915C.

general duty, and no one will deny that such duty does exist, the inquiry is as to its character and extent. Suppose the axle of a car to break because of a defect, and a brakeman's leg to be mangled by the derailment consequent upon breaking of the axle, and that he is in imminent danger of bleeding to death, unless surgical aid is summoned at once, and suppose the accident to occur at a point where there is no station and when no officer superior to the conductor is present, would not the conductor have authority to call a surgeon? Is there not a duty to the mangled man that some one must discharge? And, if there be such a duty, who owes it, the employer or a stranger? Humanity and justice unite in affirming that someone owes him this duty, since to assert the contrary is to affirm that upon no one rests the duty of calling aid that may save life. If we concede the existence of this general duty, then the further search is for the one who in justice owes the duty, and surely, where the question comes between the employer and a stranger, the just rule must be that it rests upon the former."

"In *Marquette & O. R. Co. v. Taft*, 28 Mich. 289, the yard master of the defendant company employed a physician to amputate a leg and bind up the wounds and bruises of an employee injured in the service of the company. The employment by the yard master was afterwards ratified by the general superintendent. The company defended upon the ground that it was not shown that either the yard master or the general superintendent acted within the scope of their authority in employing the surgeon. Judgment went in favor of the plaintiff in the trial court. . . . Justices Graves and Campbell voting for a reversal, Cooley and Christiancy voting for an affirmance. Judges Cooley and Christiancy appear to have based their decision more upon the ground of the ratification of the employment by the general superintendent than upon the authority of the yard master to make a contract binding the company in the first instance.

"In *Toledo, St. L. & K. C. R. Co. v. Mylott*, 6 Ind. App. 438, 33 N. E. 135, a brakeman on the appellant's road met with an accident by which his skull was crushed. The conductor requested the appellee to board and care for the injured man in every way necessary, stating that the company would pay for the same. The conductor was the highest officer of the company then present. After discussing the right of a general officer to bind the company by such employment, the court proceeded to discuss the right of the conductor to do so. We quote from the opinion: 'It being es-

tablished that the general officers of the company would have the power under such circumstances to bind the company for the necessary board, care, and attention furnished an employee injured while in the performance of his duty, it follows, under the authorities, that the conductor also has such authority under certain circumstances. That the conductor has no such general authority in ordinary cases is conceded, but it is clear that he has such authority in the case of an emergency where an accident occurs remote from the general offices, when he is the highest officer of the company present, and when immediate action is required in order to preserve and protect the life of the injured man. In the face of this emergency, requiring immediate action to preserve human life, the duty devolves upon the company to act, and the conductor stands in the place of the company, clothed with such powers as may be necessary to meet the exigencies of the occasion.' The supreme court of Indiana, so far as our examination of the authorities has extended, has gone further than any other in adopting the rule that a subordinate officer has authority to bind the company by the employment of physicians and surgeons in case of an emergency, and where no higher officer of the company is present at the time, and these decisions are all to the effect that such employment binds the company only for the first or emergency service. There are numerous cases from other states holding that where such services are obtained, and where there is direct or inferential evidence of a ratification by some general officer, then the company is bound for all services so rendered.

'In Toledo, W. & W. R. Co. v. Rodrigues, 47 Ill. 188, 95 Am. Dec. 484, the station agent of the company employed the appellant to nurse and take care of one Johnson, an injured employee of the company. He wrote to the general superintendent, making a full statement of all that had been done. The fourth paragraph of the syllabus is in the following words: 'Where an employee of a railroad company has received injury, while in the discharge of his duty, and the station agent, in his capacity as such, assumes certain liabilities in his behalf, for nurse and medical attendance, and writes a letter to the general superintendent stating the facts, it is presumed that the general superintendent received such notice, and, in the absence of any instructions to the contrary, consented, on the part of the railroad company, to assume the liabilities of the station agent for all reasonable charges in this behalf.' Toledo, W. & W. R. Co. v. Prince, 50 Ill. 26, Indianapolis & St. L. R. Co. v. Morris, 67 Ill. 295, and Cairo & St. L. R. Co. v. L.R.A.1915C.

Mahoney, 82 Ill. 73, 25 Am. Rep. 299, are to the same effect, but, as will be seen, these are based on the ratification by a general officer of the company of employment made by one without general authority to do so. On the whole, we are inclined to adopt the rule that a general officer of the company has power to make such a contract as is here sued on without showing that he had special authority to do so, and, if an emergency demanding immediate action exists, then the highest officer then present, whether he be conductor of a train, the station agent of the company, or the foreman in charge of a gang of workmen, may bind the company for such medical and surgical attendance as the exigencies of the case may immediately demand. We recognize that this rule is one required by an emergency rather than one based on any general legal principle, and that the authority of the officer with limited powers can extend no further than the emergency demands. As said in *Holmes v. McAllister*, 123 Mich. 493, 48 L.R.A. 396, 82 N. W. 220: 'Authority to act is implied from the necessity of the case. . . . Neither the authorities nor reason carry the rule beyond the emergency. Such employment does not make the employer liable for the services rendered by the physician to the employee after the emergency has passed. If the physician desires to hold the employer responsible for subsequent services, he must make a special contract with him.'

'It is urged by appellee that the emergency in this case continued during the time that Crumb was in the hospital, and this was probably the theory upon which the district court directed a verdict for the plaintiffs for the full amount of their claim. Toledo, St. L. & K. C. R. Co. v. Mylott, supra, and *Williams v. Griffin Wheel Co.* 84 Minn. 279, 87 N. W. 773, are cited in support of this position. A careful reading of the opinion in the Mylott Case will disclose that the only question considered by the court was the right of the plaintiff to recover at all, and that the question of the amount of the recovery was not involved. In the concurring opinion of Davis, J., it is said: 'No question is raised as to the extent or amount of the recovery. The only question presented for our consideration is whether appellee was entitled to recover anything. The court does not hold that appellee was entitled to recover for board of others, or for the continued care and nursing of the brakeman beyond the emergency then existing.' We do not attempt to define what are primary or emergency services, and *Williams v. Griffin Wheel Co.* supra, does not assist us in attempting to determine the question, as the facts of that case are dissimilar from

this case, so far as disclosed in the opinion, and apparently are not fully stated. We believe, however, that emergency services, unless expressly limited at the time of procuring them, ought to extend to a sufficient time for the party employed to communicate with the company, and, if it declines to be further responsible, for notice to the proper poor authorities, if the injured party is entitled to public care.

"For the reason that the law will not impose upon the defendant company the duty of caring for one of their injured employees, except for emergency treatment, and for the reason that the court refused evidence going to show that the company expressly disclaimed liability for further treatment, we recommend a reversal of the judgment."

It will be observed that some of the cases reviewed go so far as to even hold that a trespasser may, under such facts and circumstances, recover for such negligence; but we will express no opinion regarding that matter, for the reason that Hunicke was unquestionably an employee of the defendant.

There are many other cases in this and other states which pass upon various phases of this case; but we have been cited to no others that deal with all of the elements of this case. However, in my opinion those considered are sound upon principle and based upon reason and humanity, the essence of all law.

In my opinion there is no possibility of doubt but what the law is that whenever one person employs another to perform dangerous work, and that, while performing that work, he is so badly injured as to incapacitate him from caring for himself, then the duty of providing medical treatment for him is devolved upon the employer; and that duty, in my opinion, grows out of the fact that, when we get down to the real facts in all such cases, there is an unexpressed humane and natural understanding existing between them to the effect that, whenever any one in such a case is so injured that he cannot care for himself, then the employer will furnish him medical or surgical treatment, as the case may be. This is common knowledge. There is not an industrial institution in this country, great or small, where that practice is not being carried on to-day; and that has been the custom and usage among men from the dawn of civilization down to the present day, and will continue to be practised in the future, just so long as the human heart beats in sympathy for the unfortunate, and desires to aid suffering humanity. The same principle underlies all other avocations of life. Even armies, while engaged in actual warfare, observe L.R.A.1915C.

and obey this rule when possible. The soldier who refuses to render surgical or medical aid to the victim of his own sword is eschewed by all decent men, while, upon the other hand, all who administer to the wants and necessities of the sick and wounded are considered as God's noblemen and as princes among men. So universally true and deep-seated is this humane feeling among men, and so universally recognized and practised among them, that it has become a world-wide rule of moral conduct among men, brothers, friends, and foes; and it says to one and all: You must exercise all reasonable efforts and means at hand to alleviate the pain and suffering and save the lives and limbs of those who have been stricken in your presence. For the violation of this rule of moral conduct there is no penalty attached, save the condemnation of God and the scorn of all good men and women.

But, seeing the wisdom, goodness, and justice of this moral law, the law of the land laid its strong hand upon it, the same as it did upon many other good and useful customs of England, and breathed into them a living rule of legal conduct among men. It says unto all who employ labor that, because of its universally practised custom of men to furnish medical or surgical aid for those who are stricken in their presence, you must furnish the employee with such services when he is so badly injured that he is incapacitated from caring for himself. This is but the application or extension of the common-law rule which requires the master to furnish his servant with a safe place in which to work, and safe instrumentalities with which to perform that labor. That law grew out of the old customs and usages of the English people of furnishing their servants with a safe place in which to work and safe instrumentalities with which to labor. So universally true was that custom that the law read into all contracts of labor an implied promise on the part of the master to furnish those safe-guards to his servants. There is no statutory or written law upon the subject. It is simply what is called the unwritten or common law of England, which has been adopted by statutes in this and many other states of the Union.

So in like manner the universal custom of employers furnishing their employees with medical aid when so badly injured that they could not care for themselves, the common law, as in the cases of the safety appliances before mentioned, breathed into that custom an implied agreement or duty on the part of the former to furnish the latter medical or surgical aid whenever he was so badly injured that he could not care for himself. This law, like the one previously

mentioned, has no statutory origin, but has ripened into a law from wise and humane usages and customs that are so old that the memory of man runneth not to the contrary, and will continue so long as the conduct of man is prompted and governed by love and humane sentiments.

As previously stated, I am firmly of the opinion that the petition stated a good cause of action against the defendant, and that the evidence was sufficient to make a case for the jury; and, so believing, I think the action of the trial court in granting a new trial to the plaintiff for the first and second reasons assigned by counsel for defendant was not erroneous, but proper.

II. Counsel for plaintiff contends that the evidence tended to show that the defendant was guilty of negligence in not properly treating Hunicke after it undertook to so do. Counsel have neglected to call our attention to that evidence, and, after a careful reading of the record, I have been unable to find any evidence tending to support that contention. The defendant did not undertake to treat the plaintiff until he reached the hospital in St. Louis, where his leg was promptly amputated, and there is not a word of evidence tending to show that the operation was not done in a proper and skilful manner. This contention is untenable.

III. This brings us to the consideration of the grounds assigned by the trial court for granting a new trial, which read as follows:

"The instructions given for plaintiff and for the defendant are contradictory, and I think the sixth instruction for defendant is not the law. Motion for new trial sustained." Signed by Judge Shields.

It is contended, and the trial court so held, that there was an irreconcilable conflict between instructions numbered 4 and 6, given for the defendant. By reading the fourth it will be observed that the court instructed the jury that if, after Hunicke was injured, the defendant exercised ordinary care to secure for him medical and surgical aid, then the defendant had fully discharged its duty to the deceased, and that there could be no recovery in this case. This instruction is in harmony with those given for the plaintiff, in that it assumed that the defendant owed Hunicke the duty to furnish him emergency treatment. That was a correct statement of the law. But when we read defendant's instruction numbered 6 it is seen that it tells the jury that if they were unable to determine whether the deceased would have died from the injury received, even though proper medical assistance had been promptly furnished him, then they should find for L.R.A.1915C.

the defendant. The effect of this instruction was to tell the jury that the defendant owed the plaintiff no duty whatever, unless the jury could determine an impossibility, namely, that Hunicke would not have died had proper medical attention been given him. God alone knew that fact, and no man or jury could determine that which no one knows, and which the evidence could not possibly reveal.

The law is that, just as soon as an injury of this character occurs, it then becomes the duty of the master to furnish medical treatment, and if he neglects to use reasonable efforts to do so, and the evidence shows that in all reasonable probability that failure was the proximate cause of the death, then the defendant is liable. In other words, in such a case, the court should have instructed the jury for the plaintiff that if they believed from the evidence that the negligence of the defendant in not furnishing medical treatment for the injured party was the direct and proximate cause of his death, notwithstanding the injury, then they should find for the plaintiff; but, upon the other hand, the court should have instructed the jury for the defendant that, if they believe from the evidence that the injury Hunicke sustained was the direct or proximate cause of his death, then they should find for the defendant. Such an instruction would have eliminated from the case all metaphysical speculations, and have submitted to the jury which of the two acts mentioned caused the death.

I am therefore clearly of the opinion that these two instructions are in conflict with each other; and that said instruction numbered 6, for the same reason, is in conflict with those given for the plaintiff, and should not have been given.

For the reasons stated, we are of the opinion that the action of the trial court in granting a new trial was correct; and that the judgment should be affirmed.

It is so ordered.

All concur.

WASHINGTON SUPREME COURT. (Department No. 1.)

C. L. VANDERBOGET, Resp't.,
v.
CAMPBELL MILL COMPANY, Appt.

(— Wash. —, 144 Pac. 905.)

Master and servant — injury to employee — liability for physician's services.

1. A master who has undertaken to fur-

nish surgical attention and hospital service to injured employees, and who retains money from their wages to meet the expenses, is not liable for the services of a physician employed by relatives of an injured employee after he reaches the hospital, upon being dissatisfied with the regular surgeon in attendance.

Same — authority to employ surgeon.

2. A salesman for a mill company, who is directed by the superintendent to take an injured employee to the hospital, has no implied authority to contract for the services of surgeons and nurses different from those whom the company has employed to care for its employees and who are at the time available.

(December 15, 1914.)

Note. — Implied power of employee to employ physician to attend injured employee.

The earlier cases on this question may be found in notes to *The Kenilworth*, 4 L.R.A.(N.S.) 58, and *Atlantic Ref. Co. v. Leffingwell*, 34 L.R.A.(N.S.) 351.

As to master's duty to furnish medical aid to servants, see note to *Hunicke v. Meramec Quarry Co.* ante, 789, where a number of analogous notes are also referred to.

As to liability of one who solicits the services of a physician or surgeon for another, see note to *McGuire v. Hughes*, 46 L.R.A.(N.S.) 577.

Railroad corporations.

Supplementing cases in note in 34 L.R.A.(N.S.) 352.

As to power of conductor to hire physician to treat person injured by train, see note to *Bonnette v. St. Louis, I. M. & S. R. Co.* 16 L.R.A.(N.S.) 1081.

It was held in *Southern R. Co. v. Hazelwood*, 45 Ind. App. 478, 88 N. E. 636, 90 N. E. 18, an action by a physician against a railroad company for services to an injured employee, that authority to employ a physician was reasonably incidental to the duty of visiting injured persons and settling claims, imposed upon an "assistant law agent," so that whether such agent acted within the scope of his authority in so doing was a matter of proof.

But it was assumed in *Hall v. New York, N. H. & H. R. Co.* 27 R. I. 525, 65 Atl. 278, that the station agent of a railroad company had no implied authority to employ a physician for an injured employee, the case turning on the question of ratification.

—in cases of emergency.

Supplementing cases in note in 34 L.R.A.(N.S.) 353.

With respect to the general rule that the employer is not required to provide medical attendance for his employee unless he has agreed to do so, the court in *Voorhees v. New York C. & H. R. R. Co.* 129 App. Div. 780, 114 N. Y. Supp. 242 (affirmed without L.R.A.1915C.

APPEAL by defendant from a judgment of the Superior Court for King County in plaintiff's favor in an action brought to recover the reasonable value of services rendered to an injured employee of the defendant by plaintiff, and another physician and a nurse whose claims had been assigned to him. Reversed.

The facts are stated in the opinion.

Messrs. W. H. Beatty and R. E. Thompson, Jr., for appellant:

Murphy was a mere salesman, employed by defendant in no other capacity, and there was no showing whatever that he had any actual or implied authority to bind defendant.

1 Am. & Eng. Enc. Law, 2d ed. 987;

opinion in 198 N. Y. 558, 92 N. E. 1105), where the plaintiff, a physician, had been summoned by the superintendent of a hospital to treat an employee of the defendant railroad company, who had been injured, said: "In a few of the states an exception to this rule has obtained in case of emergency treatment rendered by a physician to an employee, and it has been held that any employee present when the emergency arises may summon a physician on the responsibility of the employer. The exception has not prevailed in this state [New York] so far as my research has extended, and the trend seems to be against this invasion of the general rule."

Other corporations.

Supplementing cases in note in 34 L.R.A.(N.S.) 353.

The general manager of a bakery who operated its plant, and on occasions previous to the one in question had employed physicians, was held in *Freeman v. Junge Baking Co.* 126 Mo. App. 124, 103 S. W. 565, authorized to bind the corporation for services rendered by a physician to an employee injured while engaged in its employ.

—in cases of emergency.

Supplementing cases in note in 34 L.R.A.(N.S.) 353.

In holding a corporation liable for hospital charges for attending an injured employee at the direction of the assistant to the company's president and general manager, the court in *Rich v. Edison Electric Co.* 18 Cal. App. 354, 123 Pac. 230, said: "Selig was an assistant to the president of the company, and was also its general manager, with authority to look after the interests of the company where special attention could not be given by the general manager at the time; and it must follow that, where he acted in the line of his employment, he was the representative of the general manager, and in an emergency of the kind here presented possessed the authority, in behalf of the company, to look after this injured man, even though technically no liability attached to the company on account of the

Southern R. Co. v. Grant, 136 Ga. 303, 71 S. E. 422, Ann. Cas. 1912C, 472; *Stinson v. Sachs*, 8 Wash. 392, 36 Pac. 287; *Spelman v. Gold Coin Min. & Mill. Co.* 26 Mont. 76, 55 L.R.A. 640, 91 Am. St. Rep. 402, 66 Pac. 597; *Chaplin v. Freeland*, 7 Ind. App. 676, 34 N. E. 1007; *Harris v. Fitzgerald*, 75 Conn. 72, 52 Atl. 315; *Bond v. Hurd*, 31 Mont. 314, 78 Pac. 579, 3 Ann. Cas. 566; *Terre Haute & I. R. Co. v. Brown*, 107 Ind. 336, 8 N. E. 218.

Manufacturing companies are under no legal duty to furnish surgical or medical aid to an employee who is suddenly injured while in its service, even in cases of emergency; the calling of a doctor in such case being ascribed to the exercise of an ordi-

nary office of humanity, and raising no implied promise to pay. The rule, to our mind, is well established that even subordinate employees of a corporation who, under ordinary circumstances, are not empowered to bind the corporation by contract, nevertheless possess power where an urgent necessity exists for immediate employment by reason of injuries incident to the operations of the corporation, to employ medical help to alleviate the condition of persons so injured; and we are of opinion that the plaintiff in this case had the right to assume that these representatives of the heads of their respective departments possessed the authority which they assumed; and it appearing that the general manager of the company had knowledge of the conditions, and took no action personally in the premises, his acquiescence and that of the corporation must be presumed."

So, it was held in *Weinsberg v. St. Louis Cordage Co.* 135 Mo. App. 553, 116 S. W. 461, that the president of a manufacturing corporation had implied power in an emergency to employ a physician to attend an injured employee at the expense of the corporation, the court observing that "there certainly ought not to be any question of doubt with respect to the authority of the chief executive officer of an incorporated company of the character here involved, to execute the power. When a catastrophe occurs in its factory, the corporation ought not to be expected to assemble its board of directors in order to exercise the implied power referred to. There is certainly an emergency power incident to the office of president of such an institution, commensurate with the circumstances now in judgment. The proposition is entirely clear." Although in this case there was no express promise to pay, the fact of a contract between the parties was established by the testimony, the court finding that the president requested the services of the physician, with the intention that the corporation should pay therefor, and it conclusively appearing that the physician intended to charge for services rendered. In such circumstances, said the court, the law does not imply a contract, for such is found to

exist as a matter of fact, and upon this contract in fact, the law implies the defendant agreed to respond in a responsible amount; that is, instead of implying the contract which exists without implication, it implies a reasonable compensation will be made as a result of the contract in fact. Although the law might decline to imply a contract on a mere request in this case, it was certainly competent for the parties to make a contract by one requesting the performance of services, intending to pay therefor, and the other accepting the request and performing the services with the intention to charge. Having thus made a contract, it was entirely competent for the court to find it to exist as a matter of fact, and accordingly to give judgment thereon to the effect that, in the absence of express terms as to the amount, the law implied a reasonable compensation.

10 Cyc. 926; 31 Cyc. 1400; *Sourwine v. McRoy Clay Works*, 42 Ind. App. 358, 85 N. E. 782; *King v. Forbes Lithograph Mfg. Co.* 183 Mass. 301, 67 N. E. 330; *Harris v. Vienna Ice Cream Co.* 46 Misc. 125, 91 N. Y. Supp. 317.

Messrs. McClure & McClure, for respondent:

Defendant was liable for the services rendered to the injured employee.

Morris v. Frye-Bruhn Co. 20 Wash. 257, 55 Pac. 50; 31 Cyc. 1400; *Terre Haute & I. R. Co. v. McMurray*, 98 Ind. 358, 49 Am. Rep. 752; *Evansville & R. R. Co. v. Freeland*, 4 Ind. App. 207, 30 N. E. 803; *Ohio & M. R. Co. v. Early*, 141 Ind. 73, 28

In *Evans v. Marion Min. Co.* set out in note in 34 L.R.A.(N.S.) 354, the implied authority of the president and general manager of a mining company to employ a physician was upheld because the employee was injured through the company's negligence. The court in the *Weinsberg Case*, *supra*, however, in commenting upon the *Evans Case*, *supra*, and otherwise approving of its doctrine, states that "whether the injured employee received his hurt through the negligence of the employer or not is certainly immaterial. *Davis v. Forbes*, 171 Mass. 548, 47 L.R.A. 170, 51 N. E. 20, 4 Am. Neg. Rep. 289. A doctor called by the employer in an emergency to treat a man severely injured ought not to be required to inquire first as to whether the man was injured through the negligence of the employer, by accident or as a result of his own carelessness. And then, too, if such were to be treated with as an element of the defendant's liability in a case of this character, it would introduce the collateral issues of negligence or no negligence, and of contributory negligence or no contributory negligence, into every case in which a physician seeks to recover on a contract with the employer for compensation in treating an injured employee at its request."

treating an injured employee at its request."

L.R.A. 546, 40 N. E. 257; *Hanscom v. Minneapolis Street R. Co.* 20 L.R.A. 695, note; *Atchison & N. R. Co. v. Jones*, 9 Neb. 67, 2 N. W. 363; *Ellis v. Central P. R. Co.* 5 Nev. 255; *Klodek v. May Creek Logging Co.* 71 Wash. 573, 129 Pac. 99; *Harding v. Ostrander R. & Timber Co.* 64 Wash. 224, 116 Pac. 635.

Gose, J., delivered the opinion of the court:

The plaintiff, a physician and surgeon, brought this action to recover the reasonable value of services rendered by himself and by another surgeon and a nurse whose claims had been assigned to him. The services were rendered in attending one Ray Harney, an injured employee of the defend-

ant, who died three days after he met his injury. The plaintiff recovered in the court below. The defendant has appealed.

The facts are few and simple. After Harney was injured, the appellant's superintendent directed one Murphy to take him to Providence Hospital in the city of Seattle. He did so. A Mr. Reynolds, an uncle of the injured man, met Murphy at the ferry in Seattle and accompanied the two to the hospital. The appellant's superintendent, at the instance of the injured man, had telephoned the uncle to meet his nephew. When they arrived at the hospital Dr. Osborne, who was employed by the National Hospital Association to treat the appellant's employees, was there. He proceeded to examine the wounded man, but was shortly

It was held a question for the jury in *Ghio v. Schaper Bros. Mercantile Co.* 180 Mo. App. 686, 163 S. W. 551, whether the superintendent of an incorporated department store possessed authority to employ a physician to treat an injured employee beyond first aid, where it was alleged, on the one hand, that his authority was limited in employing persons by schedule, and that he had no authority to employ a physician or surgeon on the store's account save for temporary relief for first-aid treatment; and, on the other hand, it was alleged that such superintendent exercised broad contractual powers and possessed a general superintending control. While it is true, states the court, that the mere office of superintendent does not, in and of itself, imply authority essential to bind the corporation on such contracts for medical services rendered to a third person, it is abundantly well settled that one occupying the position of superintendent may commit the corporation he so represents, as by a contract, for medical and surgical services rendered to the benefit of a third person, injured in the employ of the company, if it appears he possesses, and is accustomed to exercise, broad and comprehensive authority with respect to the power to employ persons for the company and on its account, and otherwise exercises discretion with respect to the conduct of its affairs in a general way. The court further states that there can be no doubt that it is within the power of a corporation, such as defendant, to employ a physician and surgeon to treat a patient injured while in its employ; and it is equally well settled that the president of such corporation possesses the implied authority as incident to that office to execute such power. In line with *Weinsberg v. St. Louis Cordage Co.* 135 Mo. App. 553, 116 S. W. 461, the court in *Ghio v. Schaper Bros. Mercantile Co.* supra, states that though no one in express words promised to pay plaintiff for his services, he may nevertheless recover on contract if the jury find as a fact that he rendered the services at the request of defendant, with an in-

tention on his part to charge, and that defendant intended to pay, therefor.

Where some one in the temporary absence of the officer in charge of the defendant company's business, in an emergency, undertook to act for the company, and telephoned from its office to a physician to send an ambulance for a servant who was severely burned, stating that the company would pay the expense, it was held in *General Hospital Soc. v. New Haven Rendering Co.* 79 Conn. 581, 118 Am. St. Rep. 173, 65 Atl. 1065, 9 Ann. Cas. 168, in connection with other evidence, that the failure of the defendant company either to disavow knowledge of the despatch of the message purporting to be sent from it, or to disclaim the authority of the person sending it, justified the conclusion that the company had assumed the responsibility for the care of the injured servant.

To the same effect is *Taylor v. C. M. Robertson Co.* 85 Conn. 504, 83 Atl. 534, where the bookkeeper of a corporation represented to a physician that the corporation would be responsible for his services to an injured employee, the court reiterating what is said in *General Hospital Soc. v. New Haven Rendering Co.* supra, that "what the court has found, and what it made the basis of its judgment, is certain knowledge and conduct on the part of the defendant leading to the ultimate conclusion that it had assumed as its own the assurance of its responsibility for the care of its servant given by its bookkeeper to the plaintiff, and upon the faith of which he acted."

The fact that a company expressly authorizes its agents and employees to take all injured persons to its emergency hospital does not carry with it an implied authority to carry an injured and conscious man elsewhere against his protest. Consequently, where an injured employee was taken against his will, by other employees, to a public hospital, the employer was held not liable in *Allegar v. American Car & Foundry Co.* 124 C. C. A. 319, 206 Fed. 437, affirming 198 Fed. 447, for the negligence of the physician attending the aforesaid employee, where it was not shown that the em-

L.R.A.1915C.

informed by Reynolds that his services would not be required; that the respondent would have charge of the case. He told Reynolds that he was paid by the hospital association to treat the case, and that he was ready to do so. Reynolds, who was not satisfied with Dr. Osborne, employed the respondent, who in turn, with Reynolds' consent, employed Dr. Sharples and the nurse. Reynolds testified that he told Murphy that he was not satisfied with Dr. Osborne, and that he wanted the respondent, who was his family physician, to attend his nephew; that Murphy said, "That is all right; go ahead;" and that he then called the respondent. He said that he did not know Dr. Osborne; that he had not met him prior to that time. He further said that, after the young man died, he told Murphy over the telephone that there were physicians' and nurse's charges, and that Murphy answered, "We will see that all settled." Murphy testified that he told Reynolds that appellant would not pay for the services of a physician. He further said that he was employed by the appellant as a lumber salesman only, that his only directions were to take the injured man to the hospital, and that he was not directed to arrange for medical attention.

ployer authorized the employees' act or that he employed the physician.

Implied authority of servant of individual.

Supplementing cases in note in 34 L.R.A. (N.S.) 355.

Where an employee was detailed to accompany an injured employee to a sanitarium, with letters from his employer addressed to two doctors either of whom were desired to treat the case, and the agent, not finding either of the doctors present, requested other physicians to take charge of the patient, justice and humanity demanding prompt attention, it was held in *Gray v. Lumpkin*, — Tex. Civ. App. —, 159 S. W. 880, that the services of the physicians so secured should be compensated. The court said: "We think under the circumstances of this case that justice and humanity demanded prompt attention. No injury being shown appellant, he should not complain. There is no question made as to the reasonableness of the charges made for the services; none made that appellant [employer] did not authorize Kerr [agent] to employ medical assistance. The only controversy is a quibble whether the letter was addressed to two or three doctors. When life is at stake or great bodily suffering, demanding immediate relief, an exact adherence to the letters of instruction should not be demanded from the agent or from those dealing with him. Laws are doubtless enacted and should be administered for the welfare of humanity, and in a L.R.A.1915C.

The appellant's superintendent testified that he directed Murphy to take the boy to the hospital, and that he did not direct him to employ a physician. There is no testimony to the contrary. The superintendent further said that the appellant "had an arrangement with the hospital association under which \$1 per month was deducted from the wages of each man who worked at the mill, on the understanding that the deduction entitled him to medical attendance by the hospital association;" that he made arrangements with the hospital association for the treatment of Harney, and directed it to have its doctor there. The appellant's place of business was on Lake Summanish, and had telephonic communication with Seattle. The physicians and the nurse each testified that they had no conversation with any representative of the appellant.

Assuming that Reynolds correctly related his conversation with Murphy, the appellant is not liable. It had arranged in advance for medical and hospital care for Harney, in obedience to its contract with him. It exacted and withheld \$1 per month from the wages of each employee, and paid it to the hospital association. This entitled the employee to medical at-

case of this kind we feel that the services and skill of the appellees [physicians] should be compensated when secured under the circumstances here shown." It further appeared in this case that before the patient was discharged, the employer had informed the physicians that he had not employed them. As to this the appellant employer requested the court to charge the jury that they could not allow appellees (physicians) for anything after such denial of liability. The court, however, stated that the employer did not discharge appellees from the case, but denied that appellees were ever in his service. "Had they quit the case it would, under the statement of appellant then made, have amounted to an admission that they were never in his employment. We do not think the court erred in refusing the requested charge. The jury having found that appellees were employed to treat the case, that employment continued while the case demanded their services or until they were discharged by appellant. Where two or more persons enter into a contract of a continuing nature, one of them cannot, by his own act, discharge himself from liability and put an end to the contract without the consent of the other, unless there is an express power of defeasance reserved in him. . . . If the appellees had undertaken to treat the case under an employment to do so as found by the jury, they were legally bound to continue until the patient was in condition to be dismissed from further treatment."

J. D. C.

tendance at the hospital. The arrangement had the implied assent of Harney. Murphy was a subordinate employee, and under the circumstances had no authority to obligate the appellant to pay for medical and surgical assistance. It has been held in some jurisdictions that, while a corporation is not responsible generally for medical or surgical aid to a sick or injured employee, it is obligated to render an employee such assistance in extreme cases, where immediate attention is required to save life or prevent great injury. It is said that the duty begins and ends with the emergency. It has been held that, in a railroad accident, where an employee is seriously injured on the road at a place remote from the center of authority, the highest representative of the company present, from the necessities of the case, has authority to employ medical and surgical aid. The rule has usually, if not always, been applied to railroad corporations, and the liability has been limited to cases in which there was an extreme emergency calling for immediate medical or surgical attention. *Terre Haute & I. R. Co. v. McMurray*, 98 Ind. 358, 49 Am. Rep. 752; 31 Cyc. 1400; *Sourwine v. McRoy Clay Works*, 42 Ind. App. 358, 85 N. E. 782; *King v. Forbes Lithograph Mfg. Co.* 183 Mass. 301, 67 N. E. 330; *Cushman v. Cloverland Coal & Min. Co.* 170 Ind. 402, 16 L.R.A.(N.S.) 1078, 127 Am. St. Rep. 391, 84 N. E. 759; *Sevier v. Birmingham, S. & T. River R. Co.* 92 Ala. 258, 9 So. 405.

Though we should adopt the rule of these cases, and it has been rejected by many courts of the highest learning and respectability, no emergency was shown in this case which would enlarge the powers of a subordinate representative, such as Murphy, for two reasons: (a) The appellant had already made reasonable provision for medical and surgical attention and hospital care; and (b) the appellant's place of business was near Seattle, had telephonic communication with it, and its representative officers could have been readily communicated with.

The appellant relies upon *Terre Haute & I. R. Co. v. McMurray* and kindred cases. This case holds that a conductor on a railroad train had authority, in the name of the company, to employ a surgeon to attend an employee suddenly and seriously injured. There the accident happened on the road at a place remote from the center of authority, and the conductor was the highest representative of the company present. The court was careful to point out that it limited its decision to surgical services rendered upon an urgent exigency, where immediate attention was demanded L.R.A.1915C.

to save life or limb, and said that "the liability arose with the emergency and with it expired."

Respondent has argued that the appellant is liable in this case because it exacted and withheld a portion of the young man's wages. The answer is that this imposed a duty upon the appellant to provide reasonable care and attention. This it had arranged for in advance. The respondent has cited *Klodek v. May Creek Logging Co.* 71 Wash. 573, 129 Pac. 99. The case is not analogous. That was an action by an employee against the employer for damages flowing from negligent surgical treatment. The plaintiff there testified, and the jury found, that the defendant contracted to furnish good doctors, who would treat him until he got well, and the jury found that in this respect defendant had breached its contract.

The judgment is reversed, with directions to dismiss the action.

Crow, Ch. J., and Parker, Morris, and Chadwick, JJ., concur.

OKLAHOMA SUPREME COURT.
(Division No. 2.)

FORT SMITH & WESTERN RAILROAD
COMPANY, Appt.,

v.
C. M. SERAN.

(— Okla. —, 143 Pac. 1141.)

Evidence — crossing accident — safe way.

In an action for damages sustained in crossing the tracks of a railroad company at a public crossing alleged to be in a dangerous condition, it was prejudicial error to exclude evidence offered by the defendant to show that there was another and perfect-

Headnote by GALBRAITH, C.

Note. — Contributory negligence in attempting to use railroad crossing known to be in a dangerous or defective condition.

- I. General rules, 814.
- II. Effect of invitation to cross, 815.
- III. Choice of routes.
 - a. As between different crossings, 816.
 - b. As between different parts of same crossing, 819.
- IV. Circumstances in which question is held to be for the jury, 820.
- V. Circumstances in which question is held to be for the court, 822.

ly safe crossing by which the plaintiff might have crossed the tracks without inconvenient interruption to his journey.

(October 27, 1914.)

APPEAL by defendant from a judgment of the County Court for Okfuskee County in plaintiff's favor, and from an order denying a new trial, in an action brought to recover damages to plaintiff's automobile alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the Commissioner's opinion.

Messrs. C. E. Warner and H. P. Warner for appellant.

Mr. W. T. Banks for appellee.

Scope.

Cases where the condition of the crossing was merely temporary and due to passing or standing cars are not within the scope of this note. See note in 21 L.R.A.(N.S.) 659, as to the effect of choice of ways upon the question of contributory negligence as affecting the liability of municipal corporations for defects and obstructions in streets.

I. General rules.

An attempt to use a railroad crossing known to be in a dangerous or defective condition is not negligence as matter of law, unless the condition of the crossing is such that a person of ordinary prudence would not attempt to cross. *St. Louis, I. M. & S. R. Co. v. Box*, 52 Ark. 368, 12 S. W. 757; *Evans v. Charleston & W. C. R. Co.* 108 Ga. 270, 33 S. E. 901; *Evansville & T. H. R. Co. v. Carverner*, 113 Ind. 51, 14 N. E. 738; *Chicago, I. & L. R. Co. v. Leachman*, 161 Ind. 512, 69 N. E. 253; *Seybold v. Terre Haute & I. R. Co.* 18 Ind. App. 367, 46 N. E. 1054, 2 Am. Neg. Rep. 516; *Cleveland, C. C. & St. L. R. Co. v. Federle*, 50 Ind. App. 147, 98 N. E. 123; *Kelly v. Southern Minnesota R. Co.* 28 Minn. 98, 9 N. W. 588; *Madison v. Missouri P. R. Co.* 60 Mo. App. 599; *Morris v. St. Louis & S. F. R. Co.* 184 Mo. App. 106, 163 S. W. 323; *Gulf, C. & S. F. R. Co. v. Gascamp*, 69 Tex. 545, 7 S. W. 227; *International & G. N. R. Co. v. Robertson*, — Tex. Civ. App. —, 27 S. W. 564; *St. Louis, Southwestern R. Co. v. Smith*, 49 Tex. Civ. App. 1, 107 S. W. 638; *Southwestern R. Co. v. Bradford*, — Tex. Civ. App. —, 139 S. W. 1046.

The rule that one is not bound to refrain from using a crossing because he knows it to be dangerous is especially applicable in a case where it is the only one which affords egress from, and access to, his home. *Seybold v. Terre Haute & I. R. Co.* 18 Ind. App. 367, 46 N. E. 1054.

It is ordinarily a question for the jury whether it is negligence for a traveler to attempt to cross notwithstanding the dangerous or defective condition of the

Galbraith, C., filed the following opinion:

This appeal is from a judgment of the county court of Okfuskee county, rendered upon the verdict of a jury in an action for damages. It was charged in the petition that the plaintiff was driving his automobile along the public highway and across the tracks of the defendant company's road at a public crossing near Okemah; "that said automobile was badly damaged on account of the defendant having negligently permitted the dirt and earth to work out from between the cross-ties in the said track, and from between the plank boards on each side of the rails, so that, when plaintiff attempted to cross over the said crossing, the wheels of his automobile fell

crossing. *St. Louis & S. F. R. Co. v. Dyer*, 87 Ark. 531, 113 S. W. 49; *Kelly v. Southern Minnesota R. Co.* 28 Minn. 98, 9 N. W. 588; *Meyers v. Chicago, R. I. & P. R. Co.* 59 Mo. 223; *Morris v. St. Louis & S. F. R. Co.* 184 Mo. App. 106, 163 S. W. 323; *International & G. N. R. Co. v. Robertson*, — Tex. Civ. App. —, 27 S. W. 564.

The negligence of a traveler in attempting to use a railroad crossing known to him to be in a dangerous or defective condition is a question of fact for the jury, where its condition is of such a character that a reasonably prudent man would not anticipate any injurious consequences, but could reasonably expect to cross in safety by the exercise of ordinary care; or if the defect is of such a nature as not to render the use of the crossing necessarily dangerous to a person ordinarily careful. *Evansville & T. H. R. Co. v. Carverner*, 113 Ind. 51, 14 N. E. 738; *Seybold v. Terre Haute & I. R. Co.* 18 Ind. App. 367, 46 N. E. 1054; *Kelly v. Southern Minnesota R. Co.* 28 Minn. 98, 9 N. W. 588; *Madison v. Missouri P. R. Co.* 60 Mo. App. 599.

Knowledge of the dangerous or defective condition of the crossing is merely a fact to be considered by the jury in connection with the other circumstances of the case, in determining whether a traveler in attempting to cross is guilty of contributory negligence. *Seybold v. Terre Haute & I. R. Co.* 18 Ind. App. 367, 46 N. E. 1054; *Kelly v. Southern Minnesota R. Co.* 28 Minn. 98, 9 N. W. 588; *Madison v. Missouri P. R. Co.* 60 Mo. App. 599; *Harper v. Missouri, K. & T. R. Co.* 70 Mo. App. 604; *Zwicky v. Atchison, T. & S. F. R. Co.* 164 Mo. App. 180, 148 S. W. 201; *Gulf, C. & S. F. R. Co. v. Gascamp*, 69 Tex. 545, 7 S. W. 227; *Missouri, K. & T. R. Co. v. Gillenwater*, — Tex. Civ. App. —, 146 S. W. 589.

A traveler, in attempting to pass over a crossing known to him to be in a dangerous or defective condition, must be careful in proportion to the known danger, and if he exercises such care as an ordinarily prudent person would exercise in like circumstances, he cannot be held negligent. *St. Louis, I. M. & S. R. Co. v. Box*, 52 Ark.

down between the cross-ties and caused the fly wheel on said automobile to strike the railroad track, breaking the same, together with the clutch, gear shaft, and other parts of the machinery of said automobile," alleging damages in the sum of \$500. The answer was, first, a general denial; and, second, the affirmative defense of contributory negligence. The jury returned a verdict for the plaintiff in the sum of \$300. To the order denying a new trial the defendant excepted, and appealed to this court.

The plaintiff testified at the trial that the crossing where the accident occurred was on the section line, and that it was a public crossing on the highway between Okemah and Castle; that he was familiar with the crossing, having crossed it fre-

quently, and knew that it was in a bad condition; that he had started from Okemah to Castle on the afternoon of the day of the accident; that he drove upon this crossing without looking or thinking of its condition or the possibility of accident. The plaintiff's attitude at the time is shown by the following excerpt taken from his testimony of cross-examination:

Q. Did you look before you reached that crossing to see whether or not the crossing was in a good state of repair?

A. No, sir; I did not.

Q. Did you pay any attention to it?

A. No, sir.

Q. Did you look to see whether the plank was gone from the ends of the tires on the

368, 12 S. W. 757; Chicago, I. & L. R. Co. v. Leachman, 161 Ind. 512, 69 N. E. 253; Seybold v. Terre Haute & I. R. Co. 18 Ind. App. 367, 56 N. E. 1054; Cleveland, C. C. & St. L. R. Co. v. Federle, 50 Ind. App. 147, 98 N. E. 123; Kelly v. Southern Minnesota R. Co. 28 Minn. 98, 9 N. W. 588.

Whether the failure to use another crossing is negligence is usually a question of fact to be determined from all the circumstances, including the inconvenience of seeking the other crossing and its condition. St. Louis, I. M. & S. R. Co. v. Box, 52 Ark. 368, 12 S. W. 757; International & G. N. R. Co. v. Robertson, — Tex. Civ. App. —, 27 S. W. 564; Texas & P. R. Co. v. Neill, — Tex. Civ. App. —, 30 S. W. 369; International & G. N. R. Co. v. Lewis, — Tex. Civ. App. —, 63 S. W. 1091, rehearing denied in 64 S. W. 1011.

The foregoing rules apply to cases of constructive as well as actual knowledge of the dangerous or defective condition of crossings, and it is immaterial, upon the question of a traveler's contributory negligence in attempting to use a railroad crossing, whether he knows its condition, or is chargeable with knowledge thereof because it is open and apparent, or because he is in possession of facts that would put a reasonably prudent man on inquiry as to its condition. Nashville, C. & St. L. R. Co. v. Ragan, 167 Ala. 277, 52 So. 522; Dallas & G. R. Co. v. Able, 72 Tex. 150, 9 S. W. 871; Missouri, K. & T. R. Co. v. Howell, — Tex. Civ. App. —, 30 S. W. 98, writ of error refused in 87 Tex. 429, 30 S. W. 102; Marshall & E. T. R. Co. v. Petty, — Tex. Civ. App. —, 134 S. W. 406; St. Louis Southwestern R. Co. v. Evans, — Tex. Civ. App. —, 166 S. W. 702.

II. Effect of invitation to cross.

One injured by being thrown to the ground when his wagon was overturned on his horse becoming frightened by an engine at a crossing at a railroad yard where many trains and engines were accustomed to cross and recross the street is not guilty as a matter of law of such contributory

negligence as will prevent his recovery, because he used such dangerous crossing rather than one only a block distant which he knew to be safer, where he stopped his horse and wagon at a reasonably safe and proper distance from the crossing and the flagman motioned him to come ahead and led him to believe that there was no danger in attempting to use the crossing at the time of the alleged injury. St. Louis & S. W. R. Co. v. Gill, — Tex. Civ. App. —, 55 S. W. 386.

Where the driver of a dray was injured in an attempt to cross a railroad track, and sought to recover upon the ground that he was expressly or impliedly invited by the railroad to cross the track at such place for the purpose of unloading a car of dry goods placed near there by the railroad, the court said: "If . . . [the railroad] either expressly or impliedly invited appellant to use the . . . crossing, then he was under no obligation to exercise ordinary care in selecting a crossing, since he had the right to assume that . . . [the railroad] had discharged its duty to supply him with a reasonably safe crossing, unless he himself was chargeable with knowledge of its bad condition. He would only be required to exercise this care in the event the company had in no way invited him to use the crossing and he chose the same himself in his effort to avoid the use of a defective and unsafe crossing provided by the company. We do not mean to indicate that it was improper to charge upon the issue of contributory negligence. We rather think the issue is in the case, and that a charge upon it should be given, but it should not impose upon appellant the duty of exercising ordinary care to select the crossing if he was invited to use the one he did. Even if appellant knew there was some danger attending the use of this crossing, yet, if he exercised the care of an ordinarily prudent person under all the circumstances, he would not be cut off from a recovery." Cowans v. Ft. Worth & D. C. R. Co. 40 Tex. Civ. App. 539, 89 S. W. 1118. A second judgment for defendant was re-

south side of the railing before you drove onto it?

A. No, sir; I never paid any attention to it at all. I just drove on it. I just threw the car on low and went upon it. I wasn't thinking anything about it until it was broken.

Q. It was daylight when you drove along there, wasn't it?

A. Yes, sir.

This testimony brings this case perilously near, if not within, the well-established rule of law that where one, with knowledge of the dangerous character of a public crossing, voluntarily drives upon it without the exercise of ordinary care, he assumes all the risks incident to the undertaking.

versed in 40 Tex. Civ. App. 463, 109 S. W. 403, because of error in excluding evidence tending to show an implied invitation to use the crossing.

In an action for injuries received from the overturning of his load of hay when attempting to drive over a temporary crossing, it appeared that plaintiff, when he came to the crossing, which had been taken up and the rails raised several inches to repair the track and roadbed, stopped and talked to the foreman in charge of the repairs, who said he would have the crossing ready for him in a few minutes, and who, after having the crossing boards put back and some dirt thrown in, told plaintiff that the crossing was ready for him, and asked him if he thought he could cross, and plaintiff replied that he thought he could, and attempted to do so. The court stated that it was not necessarily negligent for the plaintiff to use the crossing, but held that in using it he acted upon his own judgment, with full knowledge of its condition, and could not recover because there was no negligence on the part of the railway company. *McClelland v. Missouri P. R. Co.* 82 Kan. 167, 107 Pac. 545.

The question of contributory negligence is for the jury in a case where a traveler, upon coming to a place where a railroad was restoring the highway by making a crossing over a newly constructed track, and planks were placed askant against planks on the ends of the ties to allow wagons to pass over the track, asked the foreman in charge if he could get across, and, not hearing, on account of being deaf, the latter's reply that he would let him over as soon as he could, started to drive across, supposing he might pass over in safety, and the foreman had a man lead the horse over, but, as the wagon was passing down the sloping planks on the opposite side, the horse started and ran, the man let loose, and plaintiff was injured. A judgment for plaintiff was affirmed. *Reinbe v. New York, O. & W. R. Co.* 102 N. Y. 721, 7 N. E. 797.

A traveler who, relying upon the statement of the one in charge of the repair of L.R.A.1915C.

The rule is announced by the supreme court of Georgia in the third paragraph of the syllabus in the case of *Southern R. Co. v. Rowe*, 2 Ga. App. 557, 59 S. E. 462: "Where, with apparent full knowledge of the existence of a ditch in a public road, and without any emergency requiring it to be crossed, one endeavors to pass such an excavation, he will be treated as having voluntarily assumed all the usual risks incident to the attempt."

By the supreme court of Kansas in *Corlett v. Leavenworth*, 27 Kan. 673, the second paragraph of the syllabus reads: "Where there is danger, and the peril is known, whoever encounters it voluntarily and unnecessarily cannot be regarded as

a crossing, that it would be all right to cross by leading his horse, attempts to do so and discovers the depth of the excavations between the cross-ties for the first time when he leads his horse onto the skeleton track, and is injured by his horse running away on becoming frightened by reason of the condition of the track, is not negligent as a matter of law; nor does he assume the risk of injury in attempting to pass over the crossing, and a finding by the jury in his favor upon such issue was held to be supported by the evidence. *St. Louis Southwestern R. Co. v. Evans*, — Tex. Civ. App. —, 166 S. W. 702.

In holding the question of contributory negligence to be for the jury where a pedestrian was injured through stepping into the uncovered and unguarded portion of a sidewalk built by a railroad over a drain at a crossing, because, though having knowledge of the existence of the opening, he was unable to discover its location for the reason that darkness prevailed, the court in *Morris v. St. Louis & S. F. R. Co.* 184 Mo. App. 106, 168 S. W. 323, said that by constructing a sidewalk furnishing 7 feet of surface safe for crossing, and leaving a space of a foot and a half uncovered on the side abutting the building line of the street, the railroad invited plaintiff and others into the proximity of danger, but, though such be a dangerous condition, unless it was so obviously threatening of imminent peril as to make it clear no ordinarily prudent person would go upon it, plaintiff was justified in using the walk with a view of utilizing so much of it as was in good condition and at the same time avoiding the dangerous portion.

III. Choice of routes.

a. As between different crossings.

The fact that there was another crossing which might have been used does not render an attempt to use a known dangerous or defective one negligence *per se*, unless the danger of crossing is so great that a person of ordinary prudence in the exer-

exercising ordinary prudence, and therefore does so at his own risk."

In the case of *Artman v. Kansas C. R. Co.* 22 Kan. 296, Chief Justice Horton, speaking for the court in regard to this rule, said: "A party cannot, with his eyes open, imprudently and recklessly walk or drive into a dangerous culvert, or an uncovered pitfall left by a railway company, where, by contract or other duty, it is required to cover it safely, and then, notwithstanding his want of ordinary care, recover for his personal injuries inflicted by falling into such culvert or pitfall. This theory would relieve a party thus receiving injury from the exercise of any care. Upon this theory, the greater the carelessness and the grosser the negligence of the person in-

jured, the greater the liability of the company. This doctrine is unsound. Every adult is presumed to be endowed with sufficient reason to enable him to exercise ordinary prudence, and the law demands that every such person must employ reasonable means to foresee and prevent injury."

In *Reynolds v. Missouri, K. & T. R. Co.* 70 Kan. 340, 78 Pac. 801, 17 Am. Neg. Rep. 228, the syllabus reads: "In attempting to pass over a rough and unsafe crossing of a railroad track, a teamster who was standing upon loose, narrow dump boards lost his balance, fell from the wagon, and was injured. The crossing had been in the same unsafe condition for months, and the teamster was familiar with it, and had knowledge of its unsafe condition for weeks

cise of ordinary care would have avoided it by choosing the other crossing. *St. Louis & S. F. R. Co. v. Dyer*, 87 Ark. 531, 113 S. W. 49; *Evans v. Charleston & W. C. R. Co.* 108 Ga. 270, 33 S. E. 901; See *v. Wabash R. Co.* 123 Iowa, 443, 99 N. W. 106; *Zwicky v. Atchison, T. & S. F. R. Co.* 164 Mo. App. 180, 148 S. W. 201.

A traveler is not bound to depart from the usual way of travel, notwithstanding it may be defective and dangerous to his knowledge, unless the danger is so great that a person of ordinary prudence in the exercise of ordinary care would avoid it by choosing some other and safer route. *Zwicky v. Atchison, T. & S. F. R. Co. supra.*

And he is under no obligation to take another road, when he has reasonable ground for believing, and does in fact believe, that he can pass over a defective or dangerous crossing in safety by the exercise of reasonable care, and does not believe, and is not bound to believe as a reasonably prudent person, that it is imprudent to undertake its passage. See *v. Wabash R. Co. supra.*

Nor is he bound to abandon the only crossing reasonably or conveniently accessible, where the danger from using it is not so apparent that a person of ordinary care would not attempt to use it. *St. Louis, I. M. & S. R. Co. v. Box*, 52 Ark. 368, 12 S. W. 757; *St. Louis & S. F. R. Co. v. Dyer*, 87 Ark. 531, 113 S. W. 49.

It was held to be a question for the jury whether a man was negligent in attempting to pass over, with a loaded wagon, a crossing having a hole some 8 or 10 inches deep between the rails, into which the fore wheels dropped, throwing him from the wagon, where the next nearest crossing was about a half mile away; and a verdict for plaintiff was sustained. *St. Louis, I. M. & S. R. Co. v. Box, supra.*

In *International & G. N. R. Co. v. Robertson*, — Tex. Civ. App. —, 27 S. W. 564, a traveler, in attempting to cross a railroad in a loaded wagon, was thrown from his seat by the front wheels dropping from the edge of the crossing to the ground, a distance of 18 inches, because the embank-

ment on the side of the track had been washed away from the rails, ties, and planks composing the crossing. There was another crossing near by which he could have used, which was only objectionable by reason of heavy sand. It was held that a charge upon contributory negligence, confined to the manner in which the wagon was loaded and the care used in the manner of driving across the railroad, was erroneous, since it did not merely fall short of a full declaration of the law, but was misleading, in that it, in effect, directed the jury to look only to the manner of loading and driving the wagon in determining the issue of contributory negligence, the court saying: "Had the wagon been carefully loaded, and driven in the most cautious manner across the railroad, yet, if appellee knew of the defective condition of the crossing, and if there were another crossing near by which was safe, open to the use of appellee, and known to him, it could hardly be said that it was prudent in him to select the dangerous crossing. The question as to whether an ordinarily prudent man would have attempted to cross the railroad at the defective crossing, under similar circumstances, should have been submitted to the jury for their decision."

The owner of a traction engine, upon finding the planks placed next to the rails missing from the only crossing reasonably accessible, is not bound to refrain from attempting to cross, and where he procures fence rails and places them next to the steel rails in an effort to temporarily repair the defective crossing, and, in an attempt to propel the engine over, it is overturned and thrown down the embankment, his negligence is a question for the jury. *St. Louis & S. F. R. Co. v. Dyer, supra.*

A ranchman is not negligent in attempting to drive over a defective crossing near his home, because, leading toward his house is a private way in the inclosed pasture land of another who has told the former to instruct his hands not to use the way, which prohibition the ranchman understood included himself, although it was not ex-

prior to his injury. Held, in an action to recover from the railroad company, that, in ignoring the known danger and voluntarily attempting to go over the crossing while standing in such an insecure position, the plaintiff failed to exercise ordinary care for his own protection, and cannot recover."

The defendant was permitted to prove at the trial that there was another crossing 1 mile distant from this one where the accident occurred, and on the road between Okemah and Castle, that was perfectly safe, and that the plaintiff might have used with safety on this journey. After this evidence was admitted, upon motion, it was stricken and withdrawn from the jury. This action of the court is assigned as error.

pressly so declared, since he is not required to commit a trespass upon the inclosed land of another, to avoid the defective crossing. *Southwestern R. Co. v. Bradford*, — Tex. Civ. App. —, 139 S. W. 1046.

The fact that a sidewalk without side railings, extending from the boundary line of the right of way over a depression and up to the track, has been used by the public, both day and night, for many years, notwithstanding its defective construction, is a sufficient showing that the danger is not so great as to render a pedestrian who falls off the walk at night guilty of contributory negligence because of his failure to choose another route. *Zwicky v. Atchison, T. & S. F. R. Co.* supra.

In *St. Louis Southwestern R. Co. v. Smith*, 49 Tex. Civ. App. 1, 107 S. W. 638, a pedestrian injured through stepping into a hole in a bridge over a ditch, in attempting at night to pass over a crossing upon the only convenient or practicable route to his home, was held free from contributory negligence, where many people habitually passed over the crossing, and no one except him had been injured in doing so.

The question of the contributory negligence of one injured by being thrown from the top of a load of hay by reason of the dropping of one of the front wheels of his wagon from a wooden culvert in a crossing into a hole a foot deep, where the dirt had been washed away, was held to be for the jury, consideration to be given to the fact that the route over the only other crossing that he could have used was about 2 miles farther. *International & G. N. R. Co. v. Lewis*, — Tex. Civ. App. —, 63 S. W. 1091, motion for rehearing overruled, without discussion of the point annotated, in 64 S. W. 1011.

Whether one who, in attempting to drive over a crossing, was thrown from her seat and injured by a sudden jolt caused by a ditch with abrupt sides, was guilty of contributory negligence, was held to be a question for the jury, where there was no other public crossing short of 2½ to 3 miles in either direction, and the public L.R.A.1915C.

This assignment is well taken. It was prejudicial error for the court to withdraw this testimony from the jury. One of the issues raised by the pleadings was whether or not the plaintiff had exercised due care in attempting to make the crossing as he did, and whether or not the want of such care contributed to his injury. This evidence was competent and relevant to the issues. In *International & G. N. R. Co. v. Robertson*, — Tex. Civ. App. —, 27 S. W. 564, the second paragraph of the syllabus reads: "Where, in an action against a railroad company for injuries received in driving over a defective railroad crossing, it appeared that plaintiff knew of the defect, and that there was another way open to plaintiff, the only objection to which was

used the crossing in question in its defective and dangerous condition. *Texas & P. R. Co. v. Neill*, — Tex. Civ. App. —, 30 S. W. 369.

Where a person is injured by a train backing down upon him while attempting, at night, to cross a railroad at a place where there is a perfect network of tracks, with trains and locomotives almost constantly passing and repassing, and where there is no planking or filling between the tracks, or approaches of any sort, which is within 150 feet of a well-lighted crossing at which gates are maintained and a flagman stationed, he voluntarily takes the risk of obvious and serious danger merely to avoid inconvenience, when the injury would have been averted by the exercise of common and ordinary prudence. *Reynolds v. Northern P. R. Co.* 22 Wash. 165, 60 Pac. 120.

One who attempted to drive over a private crossing in a heavily loaded wagon, with knowledge that an empty wagon could hardly pass over without injury, was held to be negligent as matter of law, where he testified that when he had a load he went by the public road, about three quarters of a mile farther. *Artman v. Kansas C. R. Co.* 22 Kan. 296.

A farmer cannot recover, because he could have avoided the injury by the exercise of ordinary care and diligence, where he fell through a dilapidated bridge in his private way leading to the public highway, when there was a way through his field, though some farther than the route over the crossing, to go to the highway, and the testimony develops no emergency or special necessity why he should have gone to the highway, and, even if such necessity existed, why he could not have pursued the perfectly safe route which did not involve crossing the bridge. *Evans v. Charleston & W. C. R. Co.* 108 Ga. 270, 33 S. E. 901.

In a case where a pedestrian who, while attempting, in the dark, to cross diagonally a track resting upon piles, caught his foot between the ties, which were not planked over, and was injured by a train backing upon him, recovered damages because of the

that there was a large sand bed in it, the jury should consider, in determining whether plaintiff was guilty of contributory negligence, not only whether he exercised sufficient care in driving over the crossing, but also whether, under the circumstances, an ordinarily prudent man would have attempted to cross there."

In *Cohn v. Kansas City*, 108 Mo. 392, 18 S. W. 974, the supreme court of Missouri said: "Two things must concur to entitle the plaintiff to recover in this class of cases. And, first, there must be a defect in the road by the fault of the defendant; second, there must be no want of ordinary care on the part of the plaintiff to avoid it."

In *Walker v. Decatur County*, 67 Iowa, 307, 25 N. W. 256, the first paragraph of

negligence of the trainmen after his foot was caught, the court said that the evidence, which showed that he considered the crossing unsafe as he called to a companion who was preceding him, when they arrived at the trestle, to be careful and not slip, and that another safer but longer route might have been taken, would have defeated recovery if the injury had been directly caused by the unsafe condition of the way, and had not arisen from substantially an independent source, and that he could well be held to have assumed all the risks ordinarily incident to making the crossing. *Malmstrom v. Northern P. R. Co.* 20 Wash. 195, 55 Pac. 38.

Evidence as to the existence of another crossing that might have been used is admissible in an action for injuries received in attempting to use a railroad crossing known to be in a dangerous or defective condition. *Harper v. Missouri, K. & T. R. Co.* 70 Mo. App. 604.

In the case last cited it was held that the trial court should have permitted the defendant to prove the existence of another crossing near at hand which was reasonably accessible, since, although a traveler is not bound to abandon the use of a public highway for the reason that it is known to him to be out of repair or in a defective condition, the duty is imposed upon him to use ordinary care to avoid the defect, and all the surrounding circumstances ought to be shown, so that the jury may determine, in the light thereof, whether he exercised such care as an ordinarily prudent man would under like conditions.

In *Rusterholtz v. New York, C. & St. L. R. Co.* 191 Pa. 390, 43 Atl. 208, evidence as to whether there was another road which plaintiff might have taken was admitted apparently without objection, as it is stated in the opinion that "whether there was another route safe for travel and known to the plaintiff, by which he could have returned to his home, was in dispute at the trial. On this question the weight of the testimony was undoubtedly with the defendant, but it was nevertheless clearly a question for the jury." L.R.A.1915C.

the syllabus reads: "In an action for an injury sustained in crossing an unsafe county bridge, it was error to exclude evidence offered by the county to show that there was another equally convenient and perfectly safe route by which plaintiff might have reached his destination. *Parkhill v. Brighton*, 61 Iowa, 103, 15 N. W. 853, followed."

The plaintiff in error had a right to have this evidence submitted to the jury, and its withdrawal was prejudicial error, for which the judgment appealed from should be vacated, and the cause remanded to the County Court of Okfuskee County for a new trial.

Per curiam:

Adopted in whole.

And in *Malmstrom v. Northern P. R. Co.* supra, testimony that another safer but longer route might have been taken was received.

And in *See v. Wabash R. Co.* 123 Iowa, 443, 99 N. W. 106, the defendant offered evidence tending to show that the plaintiff might have traveled another and safe road to reach her home.

But in another case where there was a controversy as to whether the crossing was a crossing which the public had a right to use, or was private, and whether the plaintiff was lawfully using the crossing, or was there as a mere licensee, to whom the railroad company owed no duty, evidence offered by the plaintiff to show that there was no other street passable that he could have used for several blocks on either side, and that a viaduct extending over the tracks in question was impassable on the night of the injury, was held immaterial on the ground that it could not affect the question whether the plaintiff was rightfully at the crossing, or whether he exercised due care, or whether the defendant was negligent. *Reinhardt v. Chicago Junction R. Co.* 235 Ill. 576, 85 N. E. 605.

Evidence that the only other crossing in town had also been torn up and was in a bad condition on the day of the accident is admissible to show why the plaintiff, who knew the condition of the crossing before he attempted to drive across it, did not go out of town by some other route. *Galveston, H. & S. A. R. Co. v. Matula*, — Tex. —, 19 S. W. 376.

b. As between different parts of same crossing.

A traveler was thrown and injured, upon the foot of his mule being caught by a spike negligently allowed to project above the cross-ties in a portion of a street crossing, where no effort had been made by the railroad to provide a safe and proper crossing, and the railroad claimed that, having made a good crossing, wide enough for all practical purposes, appellee in attempting to cross, for his own convenience, the part

not properly prepared, was guilty of contributory negligence; but he was held not negligent, it being shown that the part used by him, which was partially filled with gravel, was commonly used by the public. *Dillingham v. Fields*, 9 Tex. Civ. App. 1, 29 S. W. 214.

Where a traveler was injured by a hind wheel of his wagon being forced into a hole at the side of the planking of a crossing, a charge presenting to the jury the subject of contributory negligence in regard to whether he selected the proper and safe part of the crossing, that they were not to understand that contributory negligence means any error of judgment, and that mere error of judgment as to what particular part of the crossing he would drive his loaded wagon over could not be called negligence, was held erroneous, because the phrase "error of judgment" should have been qualified by the statement that the judgment that is required to be exercised is the judgment of a man of ordinary and common prudence. *Hoyt v. New York, L. E. & W. R. Co.* 118 N. Y. 399, 23 N. E. 565.

A driver seated upon the top of a load of wood, who, because the ground under one span of a subway crossing has become muddy, chooses to pass under the other, where the ground is higher, and, in attempting to do so, is caught between the timbers of the trestle and the wagon and injured, is guilty of contributory negligence, because a prudent man would have anticipated or foreseen the danger. *Gulf, C. & S. F. R. Co. v. Montgomery*, 85 Tex. 64, 19 S. W. 1015.

A traveler is guilty of contributory negligence as matter of law, where she, in the daytime, drives aside from the traveled portion of a crossing and so near to one end of a plank culvert over a ditch extending across the highway, that the wheels of the vehicle run off into the ditch, throwing her out to her injury. *Chicago, R. I. & P. R. Co. v. Bartley*, 59 Kan. 776, 53 Pac. 66.

In an action by one having a stiff knee upon a shortened leg, who, after starting to pass over a crossing upon the sidewalk, his usual route, attempted, being in a hurry, to cut diagonally across the street, and, in crossing the track near the middle of the street, caught his foot on one of the rails and fell and broke his leg, the supreme court reversed the judgment entered on a verdict for him, upon the ground that a binding instruction to find for defendant was necessitated by the following requested charge, which was based upon uncontroverted facts furnished by the plaintiff's testimony, and was properly given by the trial court, that, although a pedestrian has the right to cross the highway at any point, if, in so doing, in the nighttime, a cripple departs from a path which he knows is safe, and ventures hastily upon one whose condition he does not know, in order to reach the same point on the opposite side of the street, he is guilty of L.R.A.1915C.

negligence, and cannot recover damages for injuries received by falling over an obstruction which he knew lay in his path. *Delaware, L. & W. R. Co. v. Cadow*, 120 Pa. 559, 6 Am. St. Rep. 730, 14 Atl. 450.

IV. Circumstances in which question is held to be for the jury.

See also cases cited *supra*, II.; III. a; III. b.

In determining whether a traveler who was injured when his wagon and team fell down an unguarded approach constructed so steep, rough, and narrow as to make it unsafe and dangerous to travel over with vehicles was negligent in attempting to use the crossing, the jury may take into consideration the fact that he had safely driven the same team, with an equal load, over the crossing frequently before, and believed, at the time of the accident, that he could safely drive over. *Chicago, I. & L. R. Co. v. Leachman*, 161 Ind. 512, 69 N. E. 253.

The risk of undertaking, in bringing home a load of wood by the only road to one's farm, to use a crossing with inclined approaches having a ridge in the center and sloping down therefrom toward the sides, in the winter when the whole surface of the road was covered with ice, was held not to be a risk which an ordinarily prudent man under like circumstances could not reasonably be expected to take, and the court stated that it was unable to say that the appellant was not sufficiently shown to have been free from contributory negligence. *Seybold v. Terre Haute & I. R. Co.* 18 Ind. App. 367, 46 N. E. 1054, 2 Am. Neg. Rep. 516.

The negligence of a traveler in passing over a railroad at a crossing, the unguarded approach to which was so steep and narrow that his wagon and team went over the embankment, is a question of fact, and a verdict in his favor will not be disturbed where it appears that there was no other crossing, that the team was gentle and easily managed, and that he had always before, by the observation of certain precautions, safely avoided the danger, and, at the time of his injury, had lightened his load by causing his family to get out, had set the brakes and locked the wheels of his wagon, and was standing up the better to manage and guide his team down the approach. *Chicago, I. & L. R. Co. v. Leachman*, *supra*.

An attempt by a horseman to cross a bridge over a ditch at a crossing, having a loose and rotten plank which becomes displaced and frightens his horse, which throws him across the iron rails to his injury, is not negligence as matter of law, and does not tend so strongly to establish negligence on his part that a verdict in his favor should not be permitted to stand, where many persons habitually pass over the bridge on horseback without injury to his knowledge, and the highway is the only public road from his house to the city, where he is going on the day of the acci-

dent. Gulf, C. & S. F. R. Co. v. Gasscamp, 69 Tex. 545, 7 S. W. 227.

Where a traveler, during the elevation of the tracks and reconstruction of the roadbed at a crossing, drove a loaded wagon upon the track, and then saw a train approaching at a high rate of speed, and, because the crossing was of an insufficient width, could not turn to either side, and, on account of the rapidly approaching train, could not stop, but was forced to continue on his way and go down the approach, which was constructed on a 40 per cent grade of loose unpacked sand and gravel, and in going down was thrown from his wagon and injured, the court stated that, even though he knew there was danger in attempting to drive over the crossing, it did not necessarily follow that injury would result, and under such circumstances, and particularly in view of the fact that his position on the track was one of positive danger on account of the approaching train, he was justified in proceeding if he used such caution as a person of ordinary prudence, in like place, would deem sufficient successfully to guard against the threatening danger. Cleveland, C. C. & St. L. R. Co. v. Federle, 50 Ind. App. 147, 98 N. E. 123.

It is for the jury to determine whether a traveler who was injured by his load of hay upsetting on passing over a crossing, because of the unsafe condition of the approach contiguous to the rail, was negligent in driving over the road, which he knew was out of repair. Maltby v. Chicago & W. M. R. Co. 52 Mich. 108, 17 N. W. 717.

The jury was held to be authorized to conclude from the evidence that a plaintiff was not guilty of contributory negligence where he testified that he approached an oblique crossing from the west, and had to cross to get to his destination; that it was about train time, and he was not paying much attention to the crossing, but was looking for the train; that he got upon the track all right, but when he went to leave on the east side, the right fore wheel fell into a deep rut, and he was thrown from his wagon and injured, and he further testified that he had used the crossing often times before, but not the particular fall when he was hurt, and that he passed over it twice three months before, but it was not then in bad condition; that he noticed, and another witness testified, that a man approaching from the west would not be likely to see the hole unless he was looking for it. Missouri, K. & T. R. Co. v. Howell, — Tex. Civ. App. —, 30 S. W. 98, writ of error refused, without discussion of point annotated, in 87 Tex. 429, 30 S. W. 102.

Where plaintiff, in order to draw the coal from his mine to the market therefor, was compelled to pass over a railroad at a crossing where the planks had been removed, leaving the rails 4 inches higher than the ground, and in attempting to cross, an axle broke and his wagon was

struck by an engine, his negligence was held to be a question for the jury, and their verdict was in his favor on that point. Johnson v. Great Northern R. Co. 7 N. D. 284, 75 N. W. 250, 4 Am. Neg. Rep. 568.

It is a question for the jury whether it is contributory negligence to attempt to pass, with a wagon loaded with hay, over a farm crossing without planks on the inside of the rails, where there is no evidence that there was anything in the appearance of the crossing to warn plaintiff that it was dangerous to attempt to drive a loaded wagon over it, and he testifies that it looked like a person could cross and that he had crossed with an empty wagon many times. Madison v. Missouri P. R. Co. 60 Mo. App. 599.

Whether an attempt to cross, with a loaded wagon and team, a track laid about 9 inches above the surface of the highway, is negligence, is a question for the jury, since the obstruction made passage over the crossing merely inconvenient, and not *per se* dangerous. A recovery for the death of one of the horses from the strain of pulling the wagon over the track was upheld upon the ground that the plaintiff could not reasonably have anticipated such result. Evansville & T. H. R. Co. v. Carvener, 113 Ind. 51, 14 N. E. 738.

In an action for damages sustained by reason of a projecting rail, by one attempting to pass over a crossing with a well-drilling outfit attached to a traction engine, where the proof showed that the rail on the approaching side was but little, if any, higher than the ties or earth, but that the rail on the opposite side was several inches above the roadbed, it was held to be a question for the jury to determine whether or not he was guilty of negligence in failing to stop, after the engine passed over and received a jar from crossing the last rail, and place something against the rail, so as to prevent a jar to the wagon or rear vehicle, or whether or not he could have stopped before the wagon struck the last rail. Nashville, C. & St. L. R. Co. v. Ragan, 167 Ala. 277, 52 So. 522.

Negligence in attempting to drive over a crossing with knowledge of the removal of a plank alongside of the rail, leaving a space in which the foot of plaintiff's horse was caught and injured, is a question for the consideration of the jury in view of all the circumstances of the case, and a verdict for plaintiff was held to be sustained by the evidence. Kelly v. Southern Minnesota R. Co. 28 Minn. 98, 9 N. W. 588.

In a case where a traveler was jolted out of his buggy by its striking deep holes in a crossing when his mule was running away, having been frightened before reaching the crossing, his negligence was submitted to the jury, and a judgment in his favor was affirmed. Missouri, K. & T. R. Co. v. Gillenwater, — Tex. Civ. App. —, 146 S. W. 589.

The negligence of one injured by being thrown from his sled, upon one of its runners catching in an opening between the rails of a track, was held to be a question for the jury, and a judgment in his favor was affirmed, where it appeared that he stopped, just before reaching the track, to sell his tobacco, and when he started to cross there was a man with a team on the other side waiting for him to get over, and he thought he heard a train whistle in the distance, and had his mind on the approaching train and momentarily forgot the opening in the track. *Chesapeake & O. R. Co. v. Meyers*, 150 Ky. 841, 151 S. W. 19.

The negligence of the owner of a threshing machine in attempting to haul it over a farm crossing which was out of repair, in consequence of which an axle broke and the machine was struck by a train, is properly submitted to the jury. A judgment for plaintiff was affirmed. *Meyers v. Chicago, R. I. & P. R. Co.* 59 Mo. 223.

In a case where a highway ran down a hill and under a railroad trestle, and a ravine also ran under the bridge, and sand and dirt had so washed in under the trestle that there remained a clearance of only about 6 feet from the ground to the timbers of the trestle supporting the track, so that a man could not ride erect on horseback in the road under the trestle without striking the bridge timbers, and plaintiff passed along the road on horseback, and, as he approached the trestle, looked at it in a general way, and, seeing horse and wagon tracks under the bridge, proceeded to ride under it, and was injured by striking his head on the trestle, it was held that, such condition of the crossing existing and being open and obvious, and it being assumed that it should not be said as a matter of law that there was contributory negligence, clearly there was presented a sufficiency of circumstances to have the jury say, under proper instructions, whether under all the circumstances of the case plaintiff knew, or by reasonable care could have known, that it was unsafe or dangerous to go under the trestle on horseback, and was negligent in attempting to do so, and a special charge that plaintiff, as a traveler along the public road, had a right to assume that the defendant had performed its duty of maintaining the crossing and keeping it in repair for the ordinary safety of the traveling public, was reversible error. *Marshall & E. T. R. Co. v. Petty*, — Tex. Civ. App. —, 134 S. W. 406.

It is for the jury to determine under all the circumstances disclosed by the evidence, whether or not a traveler exercised due care in going upon a railroad track without stopping to inspect it, where it appears that, in driving along a road which was to be crossed by a railroad in the process of construction, he saw the track-laying machine in operation a very short distance east of the road and, on his return about four hours later, observed that the machine was laying the track some distance west L.R.A.1915C.

of the crossing, and, presuming that the track had been laid and the crossing put in order, started down the incline to the track, and did not discover the incomplete condition of the crossing until it was impossible to stop his wagon, which was precipitated upon the rail and the end of a cross-tie, throwing him from his seat to his injury. The jury found in favor of plaintiff, and the appellate court stated that it did not feel warranted in disturbing the verdict. *Dallas & G. R. Co. v. Able*, 72 Tex. 150, 9 S. W. 871.

V. Circumstances in which question is held to be for the court.

See also *supra*, III. a.; III. b.

A traveler is guilty of contributory negligence as matter of law, in attempting to use a defective crossing, if the danger of injury is so obvious that no person of ordinary prudence would attempt to cross. *Houston & T. C. R. Co. v. Evans*, — Tex. Civ. App. —, 92 S. W. 1077.

One who, in open daylight, drives aside from the traveled portion of a highway and so near to one end of a plank culvert over a drainage ditch maintained by a railroad across the highway, that the wheels of the vehicle run off into the ditch, is negligent as matter of law. *Chicago, R. I. & P. R. Co. v. Bartley*, 59 Kan. 776, 53 Pac. 66.

And one who drives into an open ditch about 8 inches deep across the road at a crossing, without stopping his team to examine the ditch, assumes the risks incident to the attempt to cross, and cannot recover for his injuries. *Southern R. Co. v. Rowe*, 2 Ga. App. 557, 59 S. E. 462.

In attempting to go over a rough and uneven crossing while standing upon a loose narrow dump board, a teamster fails to exercise ordinary care for his own protection, and cannot recover for injuries received from falling from his wagon upon losing his balance. *Reynolds v. Missouri, K. & T. R. Co.* 70 Kan. 340, 78 Pac. 801, 17 Am. Neg. Rep. 228.

And where the owner of a grain separator weighing about 2 tons undertook to haul it, with a pole as a substitute for a broken hind wheel, over a crossing running at an acute angle with the rails, at a time when he knew a train was due, and, because of a rut in the planking of the crossing, the separator became fastened between a tie and one of the rails and was struck by the train, he was held guilty of contributory negligence for attempting to drive his heavy separator in that crippled condition across the tracks, with knowledge of the condition of the crossing and of the fact that it was train time. *Gates v. Pennsylvania R. Co.* 6 Pa. Co. Ct. 4.

The danger of using a bridge across a ditch at a private crossing, when two of the railroad ties of which the flooring is made are broken, and three others are rotten, is so obvious that one is negligent as matter of law who attempts to cross it

in such condition. *Houston & T. C. R. Co. v. Evans*, supra.

In the case last cited, the plaintiff was held negligent, although it appeared that there was no road or other way by which he would get from his premises to the public road.

A person who attempts to drive over his private crossing, which was left in an unfinished condition by the railroad, with a wagon partially filled with grain, and containing, besides himself, four others, with knowledge that an empty wagon could scarcely be driven over with safety, is guilty of contributory negligence, although there is no other crossing on his farm of 32 acres. *Artman v. Kansas C. R. Co.* 22 Kan. 296.

One who attempts to lead his horse over a crossing while, on account of repairs, the tracks with the ties are raised several inches above the surface of the road, without holding up a little, when a hind wheel of his buggy strikes the second rail, to prevent its sliding, the danger of which he apprehends because the railroad crosses the highway at an acute angle, is negligent and cannot recover for injuries sustained by reason of the horse running away on becoming frightened by the sliding of the wheel. *Thompson v. Flint & P. M. R. Co.* 57 Mich. 300, 23 N. W. 820.

Where a person engaged in carting earth across a railroad at a point where there is no crossing, and the ground between the tracks is very soft and muddy, attempts to drive a loaded cart across without placing planks or other material to enable him to surmount the rails, and, in consequence, his cart becomes fast in the mud between the tracks and is struck by a train, his attempt to cross is in itself negligence which will defeat a recovery by him. *Gramlich v. Germantown Branch R. Co.* 9 Phila. 78.

G. V. I.

OREGON SUPREME COURT.
(Department No. 1.)

GEORGE M. HYLAND, Appt.,
v.

OREGON HASSAM PAVING COMPANY,
Resp't.

(— Or. —, 144 Pac. 1160.)

Contract — for securing public contract — validity.

A contract to pay a commission for ob-

Note. — Validity of an agreement by which compensation is dependent on success in procuring a contract with public officer or board.

The earlier cases on this question are discussed in *Kansas City Paper House v. Foley R. Printing Co.* 39 L.R.A.(N.S.) 747, and note appended thereto.

As to an agreement to accept less than L.R.A.1915C.

taining a contract from a municipality for public work, which obligates the employee to do everything in his power to accomplish the success of and aid the business of his employer, is invalid as against public policy, since it might include the use of illegal means to induce the awarding of the contract and the securing of petitions therefor.

(Burnett, J., dissents.)

(December 22, 1914.)

APPEAL by plaintiff from a judgment of the Circuit Court for Multnomah County granting a nonsuit in an action brought to recover a commission for services performed by plaintiff under a written contract with defendant. Affirmed.

The facts are stated in the opinion.

Messrs. Stapleton & Sleight, for appellant:

When a contract is capable of two constructions, one of which is lawful and the other unlawful, the lawful construction will be adopted.

Keady v. United R. Co. 57 Or. 325, 100 Pac. 658, 108 Pac. 197; *Lay v. Bouton*, 73 Wash. 372, 131 Pac. 1153; *Ah Foe v. Bennett*, 35 Or. 231, 58 Pac. 508.

The contract was not void as against public policy.

Dunham v. Hastings Pav. Co. 57 App. Div. 426, 68 N. Y. Supp. 221, rehearing denied in 56 App. Div. 244, 67 N. Y. Supp. 632; *Kerr v. American Pneumatic Service Co.* 188 Mass. 27, 73 N. E. 857; *Knut v. Nutt*, 83 Miss. 365, 102 Am. St. Rep. 452, 35 So. 686, affirmed in 200 U. S. 13, 50 L. ed. 350, 26 Sup. Ct. Rep. 216; *Stroemer v. Van Orsdel*, 74 Neb. 132, 4 L.R.A.(N.S.) 212, 121 Am. St. Rep. 713, 103 N. W. 1053, 107 N. W. 125; *Kansas City Paper House v. Foley R. Printing Co.* 85 Kan. 678, 39 L.R.A.(N.S.) 747, 118 Pac. 1056, Ann. Cas. 1913A, 294; *Cole v. Brown-Hurley Hardware Co.* 139 Iowa, 487, 18 L.R.A.(N.S.) 1161, 117 N. W. 746, 16 Ann. Cas. 846.

Messrs. Carey & Kerr and Omar C. Spencer, for respondent:

The contract upon which this action is based is in itself void and against public

the amount of an appropriation, salary, or fee, see *Lukens v. Nye*, 36 L.R.A.(N.S.) 244, and note appended thereto.

As to the validity of a contract as affected by the fact that its performance may involve the necessity of procuring some action by public officials, see *Cole v. Brown-Hurley Hardware Co.* 18 L.R.A.(N.S.) 1161, and note appended thereto.

As to the validity of a contract to pro-

policy, because the tendency of such an agreement is wrong.

Sweeney v. McLeod, 15 Or. 330, 15 Pac. 275; *Crichfield v. Bermudez Asphalt Pav. Co.* 174 Ill. 466, 42 L.R.A. 347, 51 N. E. 552; *Russell v. Courier Printing & Pub. Co.* 43 Colo. 321, 95 Pac. 936; *Wilbur v. New York Electric Constr. Co.* 26 Jones & S. 539, 12 N. Y. Supp. 456; *Flynn v. Bank of Mineral Wells*, 53 Tex. Civ. App. 481, 118 S. W. 848; *Powers v. Skinner*, 34 Vt. 274, 80 Am. Dec. 677; *Providence Tool Co. v. Norris*, 2 Wall. 45, 17 L. ed. 868; *Mills v. Mills*, 40 N. Y. 543, 100 Am. Dec. 535;

cure legislative action, see notes to *Houlton v. Dunn*, 30 L.R.A. 737, and *Stroemer v. Van Orsdel*, 4 L.R.A. (N.S.) 213.

As to contract as to location of public buildings, see note to *Edwards v. Goldsboro*, 4 L.R.A. (N.S.) 589.

An agreement with an attorney to pay him a certain stipulated sum for his services in obtaining contracts for the building of bridges from the commissioners' court of a county, so much for each bridge, the contract for which is thus obtained, is invalid although the contract provides that the attorney is to use "his best efforts by all rightful and legal means to assist his employer in obtaining said contracts." *Flynn v. Bank of Mineral Wells*, 53 Tex. Civ. App. 481, 118 S. W. 848. The attorney had employed another person to assist him in securing the contracts from the commissioners' court, had personally appeared before the commissioners' court on several occasions, assisted in estimating the costs of the bridges, the resources of the county available for purposes of building the same, and later urged the acceptance of his employer's bid for the work.

A contract by which a person engages to sell a water plant to a municipality, in pursuance of which he solicits the members of the municipal council to purchase the water plant, is a lobbying contract and void, and no recovery can be had therefor. *Burke v. Wood*, 162 Fed. 533.

In *Brennan v. Purington Paving Brick Co.* 171 Ill. App. 276, the wife of an official brick tester for a city, who formed a partnership with one to whom a paving brick concern had given the exclusive agency for the sale of its paving bricks for use in the public works in the city at a stated commission, was denied relief in an action against the paving brick company, on the ground of fraud. The right of the plaintiff against the brick company was based on the fact that it had notice of the partnership agreement. It is stated that the real partner was the husband, and his official position precluded him from acquiring any rights under the contract.

The following cases, while not strictly in point on the question annotated, illustrate kindred questions:

In the case of *Obenchain v. Ransome-Crummey Co.* 69 Or. 547, 138 Pac. 1078, 139 L.R.A.1915C.

Terwilliger Land Co. v. Portland, 62 Or. 101, 123 Pac. 57.

Mr. Charles A. Hart also for respondent.

Ramsey, J., delivered the opinion of the court:

The defendant is a corporation and engaged in the business of paving streets with a certain patented process. On January 10, 1909, the defendant and the plaintiff entered into a written contract by which the defendant employed the plaintiff to work for it for a stated length of time for

Pac. 920, referred to in the opinion in *HYLAND v. OREGON HASSAM PAVING CO.*, an agent for the purpose of securing street improvement contracts of a municipality was held entitled to recover for his services and expense money although he had spent money in purchasing theater tickets, paying for liquor, and otherwise entertaining the councilmen, the contract not contemplating such unlawful expenditures, and there being no attempt to recover on account of such expenditures.

A contract of employment of attorneys to obtain the allowance of a claim by the Federal government for property destroyed during the Civil War, where the chief obstacle to the allowance of the claim was a strong belief on the part of certain members of the Senate that the claimant had not been a loyal citizen, was sustained in *Pennebaker v. Williams*, 136 Ky. 120, 120 S. W. 321. The trial court answered the objection in a manner which was approved by the court of appeals, by stating that there was no proof in the record to show that any lobbying was done by the attorneys, but there was proof that such services were rendered as any reputable lawyer might render under the circumstances. A petition for modification and extension of this opinion was overruled in 136 Ky. 143, 123 S. W. 672.

A contract for the prosecution of a claim against the Federal government, which provides for the presentation of the claims by the agent and for "any diplomatic negotiations as may be deemed by him best for the interest of the party of the second part," is not void on its face, and where there is no improper personal solicitation of the members of Congress the party performing the services is entitled to his compensation. *Knut v. Nutt*, 83 Miss. 365, 102 Am. St. Rep. 452, 35 So. 686, affirmed in 200 U. S. 13, 50 L. ed. 350, 26 Sup. Ct. Rep. 216.

In *Globe Works v. United States*, 45 Ct. Cl. 497, an attorney employed to collect a claim upon a contingent fee first obtained legislation conferring jurisdiction upon the court of claims of the claim in question. The court is not clear upon the question, but states in the course of the opinion that contracts for a contingent compensation for obtaining legislation are void as against public policy.

W. A. E.

a compensation stated in the said contract. A part of said contract is as follows:

"1. Said party of the first part agrees to pay said party of the second part, for and in consideration of the services rendered by said party of the second part, as hereinafter specified, the sum of 3 per cent of the contract price on all contracts for street improvement work entered into by and between said party of the first part and the city of Portland, or any other city, firm, corporation, or individual during the life of this agreement. The said contract price shall be the estimated amount of the total cost of such improvement according to the estimate supplied in plans and specifications therefor. The said remuneration shall be deemed to be earned by said party of the second part when the contract shall have been duly signed by said party of the first part and the city of Portland, or other city, firm, corporation, or individual, and the amount due said party of the second part under this agreement shall become due and payable thereafter on demand. It is further understood and agreed that the said party of the second part shall have the right to draw against an account, which shall be opened between him and the said party of the first part, the sum of two hundred fifty (\$250) dollars for each and every calendar month of any and all years during the life of this contract, and that said sum of two hundred fifty (\$250) dollars shall be charged against the account of said party of the second part, and shall be deducted from the sum or sums which are at any time due, or shall become due to the said party of the second part from said party of the first part.

"2. It is further understood and agreed that the party of the first part herein guarantees to the party of the second part that his annual compensation under the terms of this agreement shall be not less than three thousand (\$3,000) dollars during any one year of this contract, and the said party of the first part agrees in any event to pay to the party of the second part three thousand (\$3,000) dollars each and every year during the period of his employment, regardless of whether or not the commissions earned under the conditions of this agreement by the said party of the second part shall equal said sum. It being understood that commissions earned on business taken during any one year of this contract shall not be carried forward to make up any part of compensation for a succeeding year, and that all commissions are to be credited to the year in which the contract was taken, and not otherwise.

"3. It is further agreed by the party of the first part that, in addition to the com-

pensation of the party of the second part hereinbefore provided, said party of the first part shall pay unto the said party of the second part the sum of fifty (50) dollars a month for each and every month during the term of this agreement. Said sum to be an item of expense by said party of the first part, and in no way become a part of the compensation earned by said party of the second part under the other terms of this agreement.

"4. And the said party of the second part agrees to devote his time, and the whole thereof, and to give his best attention to the affairs and business of the said party of the first part. It is understood that said party of the second part shall at all times do everything in his power to accomplish the success of and aid the business of the said party of the first part; and it is expressly understood and agreed that the said party of the second part shall not at any time throughout the life of this agreement enter into any other employment in the interests of any other enterprise or parties, and shall devote his time and attention to the affairs of the said party of the first part."

When the demand that this is the basis of this action accrued, the said contract was in force and the plaintiff's rights are measured by said contract. The third, fourth, and fifth paragraphs of the complaint are as follows:

"That the plaintiff performed services for the defendant under and in pursuance of said contract in securing street improvement work for the defendant from the city of Portland. That as a part of said services the plaintiff procured for the defendant from the city of Portland a contract for the improvement of a portion of Macadam street, and that the defendant and the city of Portland entered into a contract for such improvement work on the 29th day of September, 1910, by the terms of which and the plans and specifications thereunder, defendant agreed with the city of Portland that it would pave and improve said portion of Macadam street, and the city of Portland agreed to pay the defendant therefor the sum of \$108,519.96. That under the terms of said contract the plaintiff earned the sum of \$3,255.59 as his commission and compensation for procuring the said contract, and that the same became due and payable on demand after the signing of said contract as aforesaid.

"That the plaintiff has duly performed all the conditions of said contract on his part to be performed.

"That on or about the 1st day of October, 1910, plaintiff demanded of said defendant

payment of said sum earned under said contract, but no part thereof has been paid."

The defendant denies parts of the complaint, and alleges, *inter alia*, that said contract for the paving of Macadam street stated in the complaint was void, and that the plaintiff, on the 24th day of February, 1911, executed and filed with the city of Portland, for and on behalf of the defendant, a written consent to the abandonment of all rights under said contract, and that the plaintiff agreed not to claim any commission on said contract. The plaintiff admits that the said contract was rescinded with his consent, and that the defendant did not improve or pave any part of said street. The defendant set up, *inter alia*, the following separate defense:

"Defendant, for a second, further, and separate answer and defense to the first alleged cause of action contained in the complaint herein, alleges as follows: That the said pretended contract set out in the complaint as exhibit A is and was void and against public policy in this: That by the terms of said contract plaintiff undertook to do everything in its power to accomplish the securing of paving contracts from the city council and the executive board of the city of Portland. That the said city council and said executive board were and are public bodies, and plaintiff undertook to use and did use his personal influence, friendship, and acquaintance to influence the deliberations and determinations of said bodies and the individual members thereof."

The reply admits portions of the answer, but denies other portions thereof, and sets up new matter. The plaintiff and one other witness testified in the case, and the plaintiff having rested, the court, on motion of the defendant, granted a judgment of nonsuit, holding that the plaintiff's claim for commissions and the contract on which it is based are void as being contrary to public policy, etc. The plaintiff appeals.

The question for decision is: Are the plaintiff's claim for commissions and said contract void, as being contrary to public policy? The complaint states that the plaintiff's cause of action is for procuring for the defendant, from the city of Portland, a contract for the improvement of a portion of said Macadam street. By this contract the defendant was to improve and pave a portion of said street, and said city was to pay the defendant therefor \$108,519.06. As stated supra, this contract was rescinded with the consent of the plaintiff, and the defendant received nothing from the city thereon. It is to be noted that the plaintiff demands from the defendant the said \$3,255.59 for obtaining from said city said contract. By the first para-

graph of said contract the defendant agrees to pay the plaintiff 3 per cent of the contract price on all contracts for street improvement work entered into by and between the defendant and the city of Portland during the life of said contract (five years), and said contract provides that said remuneration shall be deemed earned by said party of the second part (the plaintiff) when the contract shall have been duly signed by the defendant and the city. The following part of said contract has a material bearing on the point urged by the defendant and sustained by the trial court:

"And the said party of the second part (the plaintiff) agrees to devote his time and the whole thereof, and to give his best attention, to the affairs and business of said party of the first part (the defendant). It is understood that said party of the second part (the plaintiff) shall at all times do everything in his power to accomplish the success of and aid the business of the party of the first part" (the defendant).

It will be noted that the contract provides that the plaintiff shall at all times do everything in his power to accomplish the success of the business of the defendant. The plaintiff says that he wrote said contract, and hence he cannot reasonably contend that he did not intend to do all that the contract by its terms obliged him to do. His duty was to obtain from the city paving contracts for the defendant. In order to obtain such contract, petitions had to be circulated among the property owners adjacent to the streets, asking that the streets be paved, and these petitions, it seems, were required to be signed by at least 20 per cent of the property owners. The plaintiff had charge of obtaining these signatures, and in order to obtain them it was necessary for him to convince at least 20 per cent of the property owners that the streets should be paved with the Hassam pavement. When the proper petitions were obtained, they were presented to the city council. The plaintiff had charge of that, too, and had to do it, or see that it was done. If a remonstrance was presented against the proposed improvement, it was his duty to fight that also.

The following extracts from the plaintiff's evidence show some of the work done by him in obtaining contracts:

"When a remonstrance was filed by certain property holders on the street which was having the improvement, they did not want our particular street, or they did not want any, and so on, I copies from the city records a list of those remonstrances and would get some of my help,—whoever was working for me. I always paid my own help,

—and we went out and explained to the people as best we could that our street was superior, or that it was cheaper, or, if they were opposed to paving altogether, why the street should be paved; that is, as a matter of civic pride and improvement of their property. It was salesmanship in that respect. When we were getting these signers, we did not go to all of them, because it was a matter of expense to me, and time, and many men were working, and we could not see them. We were around all the time, but it was impossible to see all of them, and we did not know who objected until the remonstrances came in, and then we would go back and get them satisfied, if possible.”

“I can only testify to the part I had and those things that I was concerned in with my company. For instance, I took in a petition that represented thirty (30) per cent of the property owners on the presumption they were getting hard surface petitions as they had previously done on the twenty (20) per cent basis, and I presumed they would grant mine, and when did not and were discontinued and sent back, and the company complained to me about the matter, I immediately went down to the property owners on the street and solicited them to go to the city hall and assist me in showing to the council this was the street they wanted. This was the one they preferred. And sometimes I would get as many as a dozen, twenty, or thirty, and sometimes in some cases a hundred, to go up with me and fight for the pavement I represented. That was my method.” “I took the property owners to the street committee and sometimes before the council itself.” “I did not interview a member of the committee individually or a member of the council individually.” “Q. Did any of your property owners? A. I am not testifying to what they did.”

The foregoing is a fair example of the plaintiff's activity in obtaining contracts. Contracts could not be obtained without petitions to the council, and the passage of ordinances and resolutions by that body. The plaintiff was charged with the duty of getting all these things done, and he represented the defendant therein.

Mr. E. H. Bauer was a director and treasurer of the defendant while the plaintiff was working for it under said contract. He was a witness for the plaintiff, and stated the plaintiff's duties under said contract as follows:

“He was to secure the contracts and, as I understod it, solicit petitions, handle the promotion end of it up to the time when the company should sign the contract. I understood that Mr. Hyland's work, soliciting petitions, and, in general, watching

everything that might come up, as Mr. Hyland explained it, in furthering the contracts up to the time of signing—that we could sign the contracts with the city.”

According to the complaint, the contract, and the evidence given in the plaintiff's behalf, it was the duty of the plaintiff to devote all of his time as a “promoter” to obtaining paving contracts for the defendant, and he had charge of all the “promoting” business, from the preparing and the circulating of petitions for paving until the contracts had been awarded to the defendant by the city and they were ready to be signed by the city and the defendant. He appeared before committees and the council, and, with all of his power, urged the awarding of contracts to his employer. The contract provides that the plaintiff “shall at all times do everything in his power to accomplish the success of and aid the business of” the defendant. According to the contract, there is no limit upon what he is obliged to do. He is required to do his utmost to obtain contracts for paving streets for the defendant. He shows, by his evidence, that he circulated petitions to have streets paved, and importuned lot owners to sign them. He appeared before the council and before the committees thereof, and presented these petitions, and urged favorable consideration of them, and pressed these matters for the defendant, in order to obtain paving contracts and earn his compensation of 3 per cent on the contract price of the work obtained by him. He was to have 3 per cent of the contract price of all contracts that his company obtained in Portland or elsewhere in the state. However, the company guaranteed him at least \$3,000 per annum, and it furnished him, also, \$50 per month additional for “expenses.” His compensation above \$3,000 per annum was contingent on his obtaining contracts for paving that aggregated more than \$100,000 per annum. The evidence of Bauer shows that he obtained plenty of business for the company. The plaintiff does not claim that he had not been well paid, outside of the matters stated in the complaint.

The trial court held that the contract sued on is contrary to public policy and void. There is an irreconcilable conflict in the decisions of the courts of the different states on this point. The plaintiff's right, in this case, to the 3 per cent commission was contingent on his success in obtaining contracts from the city. In order to obtain them, it was necessary, as stated supra, to procure the passage by the city council of ordinances and resolutions authorizing the paving of the streets and assessing the expense thereof on the adjacent

lots. The plaintiff was to be paid 3 per cent of the contract price of the work authorized by each contract obtained, and this was due him, under the contract, as soon as each contract was signed. The employment of the plaintiff as a "promoter" under this contract very likely added 3 per cent to the cost of the pavement, as what he was to be paid was probably reckoned as a part of the expense, when the amount to be charged for paving was determined by the company.

Any person interested in any proposed legislation before any legislative body may legally employ an agent or an attorney to collect facts relating thereto and to prepare a bill for the contemplated legislation, and such agent or attorney may explain the desired measure to the legislative body or any committee thereof fairly and openly, and have it introduced, and a contract to pay for such services, so rendered, violates no principle of law or of public policy. 15 Am. & Eng. Enc. Law, 2d ed. p. 970. But public policy requires that legislators or councilmen act solely from considerations of public duty and with an eye single to the public interests, and the courts uniformly hold to be illegal contracts for services that involve the use of secret means or the exercise of sinister or personal influences upon lawmakers to secure the passage or the defeat of proposed laws or ordinances. This principle applies to common councils or other lawmaking bodies of municipal corporations to the same extent that it does to Congress or the legislature of a state. 15 Am. & Eng. Enc. Law, 2d ed. p. 969. In the case of *Sweeney v. McLeod*, 15 Or. 330, 339, 15 Pac. 275, 279, the plaintiff sought to recover for services rendered at the legislature to prevent by "legitimate importunity" the passage of a law prohibiting the taking of salmon by a fish wheel. The judgment of the court below was reversed; the court saying, *inter alia*: "Such contracts as the one sued on are always closely and rigidly scrutinized by the courts when sought to be enforced. Nothing wrong may have been intended in this particular case, nor was it necessary. If the terms of the contract required any services to be rendered, or if the party employed in furtherance of the general purposes of his employment rendered or designed to render any services, either to cause or to prevent any legislative action otherwise than by publicly presenting the subject before the legislature or some of its committees, such contract cannot be enforced in this state."

In *Crichfield v. Bermudez Asphalt Paving Co.* 174 Ill. 466, 42 L.R.A. 347, 51 N. E. 552, the court had under considera-

tion a contract substantially the same as involved in this case. The supreme court of Illinois held that the contract was against public policy and void, using this language: "Upon the face of the contract the meaning of the expression, 'to solicit and promote the asphalt paving business in the city of Chicago,' is to solicit, by the exercise of influence and other means, the passage of ordinances and the letting of contracts by the members of the common council of the city of Chicago. . . . There are some salient features of this agreement which stamp it as being against public policy. A special assessment for a public improvement under our statute is a species of taxation, and is authorized only as an exercise of the taxing power. A special assessment should not be levied, except for the purpose of making a needed public improvement. The property owners should not be assessed, and his property made to bear the burden of taxation except to secure the benefits of a needed public improvement. The [idea of] making . . . a contract to promote the levying of a public assessment, not for the purpose of securing to the public a needed improvement, but for the purpose of enabling a paving company to get a job, is not only against the public interest, but is abhorrent to all proper ideas of justice and honor. Property owners should not be assessed for the purpose of paying moneys into the pockets of paving contractors, and any contract by which parties agreed to obtain ordinances by solicitation and by the exercise of influence upon public officials, and with a view of obtaining contracts which result in the end from the passage of such ordinances, is against public policy, and will not be enforced by the courts."

In *Wilbur v. New York Electric Constr. Co.* 26 Jones & S. 539, 12 N. Y. Supp. 456, the contract under discussion was one wherein the plaintiff agreed to do certain work in soliciting, advocating, and procuring from the city of Utica a three-year contract for the defendant for lighting said city, and for a franchise to be granted to the defendant permitting it to erect its poles and appliances in the streets. Plaintiff was not a lawyer, but described himself as being familiar with the electric light business. The court held the contract void, saying, *inter alia*: "I think this contract is void. . . . It has long been settled that a contract to exert personal influence to induce a public officer or member of a legislative body to do any official act is illegal and void, and this principle has been applied to all the departments of government, judicial, executive, or legislative, and is placed upon the broad principle that all contracts leading

to secret, improper, and corrupt tampering with official action are void."

In *Powers v. Skinner*, 34 Vt. 274, 80 Am. Dec. 677, the contract relied upon was one wherein plaintiff agreed to perform services before the legislature in aid of an application for a charter for a bank. It was found that the contract was against public policy and void, the court laying down the following test to be applied in such cases: "The principle of these decisions has no respect to the equities between the parties, but is controlled solely by the tendency of the contract; and it matters not that nothing improper was done, or was expected to be done under it."

In *Providence Tool Co. v. Norris*, 2 Wall. 45, 17 L. ed. 868, Norris entered into an agreement by the terms of which he agreed to obtain, cause, or procure from the government of the United States contracts for the sale of muskets. The compensation to be paid Norris was contingent upon his success. Mr. Justice Field, delivering the opinion of the court, held the contract was against public policy and void, using the following language: "The question, then, is this: Can an agreement for compensation to procure a contract from the government to furnish its supplies be enforced by the courts? We have no hesitation in answering the question in the negative. All contracts for supplies should be made with those, and with those only, who will execute them most faithfully, and at the least expense to the government. Considerations as to the most efficient and economical mode of meeting the public wants should alone control, in this respect, the action of every department of the government. No other consideration can lawfully enter into the transaction, so far as the government is concerned. Such is the rule of public policy; and whatever tends to introduce any other elements into the transactions is against public policy. That agreements, like the one under consideration, have this tendency, is manifest. They tend to introduce personal solicitation and personal influence, as elements in the procurement of contracts, and thus directly lead to inefficiency in the public service, and to unnecessary expenditures of the public funds."

In *Mills v. Mills*, 40 N. Y. 543, 546, 100 Am. Dec. 535, the contract under discussion provided that the plaintiff should convey certain real property to the defendant as soon as a bill then pending before the senate of the state of New York should become a law. The defendant promised that he would give all the aid in his power, and spend such reasonable time as might be

necessary, and generally use his utmost influence and exertions to procure the passage of the law. The court held that the agreement to convey the property was against public policy and void, saying: "It is not suggested that the plaintiff was a professional man, whose calling it was to address legislative committees. It is not suggested that he had any claim of right, which he proposed to advocate, and which right or debt he proposed to transfer to the defendant. He had simply asked of the legislature the privilege or favor to be granted to him of building and operating a railroad upon certain streets of the city of Brooklyn. This privilege may be assumed to be of pecuniary value. To procure the passage of such a law for the benefit of the defendant, he undertook to use his utmost influence and exertions. This contract is void as against public policy. It is a contract leading to secret, improper, and corrupt tampering with legislative action."

See also in this connection *Flynn v. Bank of Mineral Wells*, 53 Tex. Civ. App. 481, 118 S. W. 848.

In 2 *Elliott on Contracts*, § 1051, the author says: "The numerical weight of authority supports the doctrine that all contracts for procuring legislation are void, where the compensation to be received is contingent on the success of the promisee in obtaining either the passage or defeat of a proposed act, even though the contract did not contemplate the rendition of improper services, and though no improper services were in fact rendered. A contingent fee is a strong and direct incentive to the exertion of not merely personal, but sinister, influence upon legislation. This rule is not, however, universal," etc.

1 *Page on Contracts*, § 414, says *inter alia*: "So a contract whereby A employs B, to act openly and legally in securing a reduction of an excessive claim against A for taxes is valid. But if the agent is to use his personal influence with the public officials whose favorable action he seeks to obtain, and if he is to resort to private solicitation therefor, the contract of employment is illegal, even if the fact of employment as lobbying agent is not a secret, and if no improper influence is to be used. Thus the employment of an attorney to render services which in part consist of personal solicitation of legislators is illegal. The invalidity is especially clear when the compensation of the agent is in part or in whole dependent on his success in obtaining the passage of an ordinance."

2 Elliott on Contracts, § 1042, says: "Contracts 'to give all the aid in his power, spend such reasonable time as may be necessary, and generally to use his utmost influence and exertions to procure the passage into a law' of a specific bill, to 'use his influence, efforts, and labor in procuring the passage of a law by the said legislature,' or to procure legislation upon a matter of public interest in regard to which neither of the parties had any claim against the United States, have been declared void. It has been said that 'if the terms of the contract be broad enough to cover services of any kind, whether secret or open, honest or dishonest, the law pronounces a ban upon the paper itself. Nor will honest services substantially performed sanctify an unlawful contract.'"

In *Weed v. Black*, 2 MacArth. 268, 274, 275, 20 Am. Rep. 618, the supreme court of the District of Columbia says: "Honest contracts, however, whose character appears upon their face, are unaffected by the rule. If the terms of the contract be broad enough to cover services of any kind, whether secret or open, honest or dishonest, the law pronounces a ban upon the paper itself. Nor will honest services substantially performed sanctify an unlawful contract. But contracts which provide for compensation in consideration of particular services to be rendered, such as the collection of evidence, the preparation of papers, or the delivery of arguments in support of claims, are legitimate everywhere."

The fact that the compensation to be paid is wholly or in part contingent upon the payee's success in obtaining the passage of the ordinance or law is an important circumstance to be considered in determining the validity or the invalidity of the contract under consideration, and a majority of the adjudications seem to hold such a contract to be invalid. See 2 Elliott, Contr. § 1051; *Coquillard v. Bearss*, 21 Ind. 479, 83 Am. Dec. 362; *Marshall v. Baltimore & O. R. Co.* 16 How. 314, 335, 14 L. ed. 953, 962; *Gil v. Williams*, 12 La. Ann. 219, 68 Am. Dec. 767; *Wood v. McCann*, 6 Dana, 386. Justice Grier, in *Marshall v. Baltimore & O. R. Co.* 16 How. 314, 335, 14 L. ed. 953, 962, after examining the cases upon this point, comes to the following conclusion: "The sum of these cases is that all contracts for a contingent compensation for obtaining legislation, or to use personal or any secret or sinister influence on legislators, is void by the policy of the law."

The following clause of the contract between the plaintiff and the defendant, as L.R.A.1915C.

we view it, is about as strong as it could be made, and it was written by the plaintiff himself: "It is understood that said party of the second part (the plaintiff) shall at all times do everything in his power to accomplish the success of and aid the business of the said party of the first part" (the defendant).

No one could do or be required to do more than said contract required the plaintiff to do to accomplish the success of the business of the defendant. The business that the plaintiff was employed to do was to obtain paving contracts from the city, and this could not be accomplished without the passage of ordinances and resolutions by the city. The effect and import of the contract are that the plaintiff shall at all times do everything in his power to obtain the passage of all necessary resolutions and ordinances, and to obtain contracts from the city. We think that this contract comes within the meaning of the court in *Weed v. Black*, supra, where the court says: "If the terms of the contract be broad enough to cover services of any kind, whether secret or open, honest or dishonest, the law pronounces a ban upon the paper itself. Nor will honest services substantially performed sanctify an unlawful contract."

The terms of this contract are broad enough "to cover services of any kind, secret or open, honest or dishonest." They are broad enough to cover secret interviews with councilmen, and the exercise of personal and private influence with the councilmen and other city officials. The terms of the contract are broad enough to cover any act, whether honest or dishonest, legal or illegal, that might be resorted to "to accomplish the success" in obtaining contracts. He promised to "do everything in his power" to succeed. Taking into consideration the fact that the plaintiff's compensation was contingent on his success in obtaining from the city paving contracts, and his promise to do everything in his power at all times to obtain these contracts from the public, we conclude that said contract is contrary to public policy, and that the court below did not err in granting the judgment of nonsuit. This conclusion is not in conflict with the decision in *Obenchain v. Ransome-Crummey Co.* 69 Or. 547, 138 Pac. 1078, 139 Pac. 920.

The judgment of the court below is affirmed.

McBride, Ch. J., and Moore, J., concur. Burnett, J., dissents.

TENNESSEE SUPREME COURT.

HAMILTON NATIONAL BANK

v.

S. D. COOK, Impleaded, etc., Appt.

(130 Tenn. 465, 171 S. W. 86.)

Bills and notes — accepting discount for renewal — release of surety.

Merely accepting the discount for renewal of notes on the understanding that completed notes, signed by the compensated surety, who is ill when the renewal period arrives, will be delivered as soon as he is able to attend to the matter, and carrying the old notes on an "incomplete file," is not such a binding agreement to extend time of payment as will, under the statute, release a nonassenting surety, although a discount tag attached to the notes indicates that they will mature at the dates to which the interest is paid, and entries are made in the bank's books indicating that the old notes are paid.

(November 28, 1914.)

APPEAL by defendant Cook from a decree of the Chancery Court for Hamilton County in plaintiff's favor in a suit to recover the amount alleged to be due on certain notes. Affirmed.

The facts are stated in the opinion.

Messrs. Sizer, Chambliss, & Chambliss, for appellant:

Any agreement, either express or implied, between a principal debtor and the payee

Note. — Agreement to extend time for payment, conditional upon surety's consent, as a release of the surety.

An agreement between the creditor and debtor for an extension of time upon condition that the surety assents thereto does not amount to a release of the surety, since, even if the assent is given, there is no release, and if the assent is not given, the agreement to extend fails. Barrett v. Davis, 104 Mo. 549, 16 S. W. 377.

The rule of this case is approved in Kuhlman v. Leavens, 5 Okla. 562, 50 Pac. 171. In the latter case the debtor informed the creditor at the maturity of the note that he did not have money to pay the note, and asked if the creditor would extend it and not push the sureties; he informed the creditor that he had seen the sureties and they did not object to an extension; with the understanding that the sureties did not object and would agree to an extension, it was arranged that the note should be extended. It is stated that the extension having been granted subject to the assent of the sureties, the agreement to extend was not enforceable until such assent was granted, and might be ignored by the sureties or by the holder of the note.

In Miller v. McCallen, 69 Iowa, 681, 29 L.R.A.1915C.

of the debt, whereby the time of payment is extended, will release the surety if made without his consent and without an express reservation of recourse against him.

Union Bank v. McClung, 9 Humph. 98; Lea v. Dozier, 10 Humph. 447; Apperson v. Cross, 5 Heisk. 481; Stone's River Nat. Bank v. Walter, 104 Tenn. 11, 55 S. W. 301; Negotiable Inst. Act of 1899, § 120, subsec. 6.

The proof shows that there was an actual extension of the time of payment granted to the principal maker, and not merely an agreement to extend if certain conditions were performed by the principal.

Mariner's Bank v. Abbott, 28 Me. 280; Lime Rock Bank v. Mallett, 42 Me. 349; National Park Bank v. Koehler, 204 N. Y. 174, 97 N. E. 468.

A reservation of rights against a surety, where an extension of time is granted the principal debtor, must be express and clear, and cannot be implied.

32 Cyc. 166; Calvo v. Davies, 73 N. Y. 211, 29 Am. Rep. 130; Negotiable Inst. Act of 1899, § 120, subsec. 6.

Messrs. Garvin & Cantrell, for appellee:

There was no agreement to extend the notes sued on and no agreement to wait any particular time for the renewal notes to be brought in. The bank could have sued on the notes at any time after they became due. The surety was not released.

Bank of Uniontown v. Mackey, 140 U.

N. W. 942, the facts in which are sufficiently set out in the opinion in HAMILTON NAT. BANK v. COOK, there was held to be, upon the facts there set forth, no extension of the time for payment of the note, and therefore no release of the surety.

An agreement between the payee of the note and the principal maker that the note might be renewed by paying the interest in advance for the period of the renewal does not release a surety thereon, although the interest has been paid, but the note has not been renewed, since the agreement is not thereby complied with, and the payee might have sued on the note at once. Farmers' Bank v. Wickiffe, 131 Ky. 787, 116 S. W. 249.

The fact that a renewal note, signed by the principal maker and one of two sureties, which was also to be signed by the other surety, but was never so signed, had been adjudged not to bind either of the sureties in an action brought thereon by the payee, in which the nonsigning surety was brought in by a cross petition, was held in Williams v. Martin, 2 Duv. 491, to estop the sureties in an action upon the original note from setting up any suspension of the right of action on that note as a discharge from their liability.

The following cases, involving indorsers,

S. 220, 35 L. ed. 485, 11 Sup. Ct. Rep. 844; Miller v. McCallen, 69 Iowa, 681, 29 N. W. 942; Kuhlman v. Leavens, 5 Okla. 562, 50 Pac. 171; Williams v. Martin, 2 Duv. 491; Dan. Neg. Inst. § 136; Barrett v. Davis, 104 Mo. 549, 16 S. W. 379; Meredith v. Dibrell, 127 Tenn. 387, 46 L.R.A.(N.S.) 92, 155 S. W. 163, Ann. Cas. 1914B, 1079.

Williams, J., delivered the opinion of the court:

The bank filed a bill of complaint against Breeden and Cook to recover on three notes, one for the sum of \$500, another for the sum of \$2,000, and the third for the sum of \$1,000, which were executed by the Breeden Medicine Company, as maker, to the bank for money borrowed by that company; defendant Cook being treated for the purposes of this decision, as a surety thereon for a consideration paid by the company. Cook alone is contesting the payment of the notes; his contention being that the bank had made a binding agreement with the medicine company without his knowledge or consent, and without any express reservation of the right of recourse against him, whereby the time of payment was extended, and that he thereby was released.

The record discloses the facts pertinent to be: The notes in suit were remote renewals of the original notes of the series. It was the custom of the president of the maker company to go to the bank on maturity dates and renew the obligations, delivering renewal notes properly signed by Cook, but, when the said notes matured, the president, Breeden, explained to an as-

sistant cashier of the bank, who had charge of that department of the business, that Cook was ill in a hospital, and could not be seen in order to get his signature. It may be stated that the sums required as discount on the several notes were accepted, but on condition that the maker should get renewal notes properly signed by Cook so soon as his condition would permit. As this course had been pursued previously when Cook was absent from the city, the assistant cashier presumed that Cook would join in the execution of renewal notes as he had done on such former occasions. Accordingly, on the agreement that such renewals would be brought in, he accepted the discount sums, and without entering any credits of interest paid, on the notes, he attached to each a "discount tag," indicating that the respective notes were to mature on the future dates to which interest was paid, and entries were made on the bank's discount register, indicating that the notes in suit were "paid." However, the notes thus tagged were placed and carried in an "incomplete file" on the desk of the assistant cashier, awaiting the coming in of the renewal notes. They were kept separate from notes completed as to renewal. The entries appear to have been made in anticipation of the redemption of the promise to bring in regular renewals. No new notes were signed by the maker and lodged with the bank.

The negotiable instruments law (Acts 1899, chap. 94), in § 120 (6), provides that a party secondarily liable on a negotiable instrument is discharged: "By an agree-

are illustrative of the rule, but the note does not purport to exhaustively discuss the rules applicable to indorsers:

The unauthorized dismissal of a suit by the agent of a payee of a note on which the suit was brought does not release an indorser thereon where the proposition made by the payee that an extension of time would be granted and the suit dismissed upon certain payments and upon giving a new note with the same indorsement as that borne by the old was not accepted and complied with by the principal debtor. Winfree v. First Nat. Bank, 97 Va. 83, 33 S. E. 375.

An agreement for extension of time of payment of a note cannot be inferred from the mere payment of interest, so as to release an accommodation indorser thereon, where the holder never agreed to extend payment except upon receiving a new note, signed by both the makers of the old one, and such note was never given. Bank of Uniontown v. Mackey, 140 U. S. 220, 35 L. ed. 487, 11 Sup. Ct. Rep. 844.

As is shown in the foregoing, the rule is quite well established that an agreement for the extension of time, conditioned on

the surety's consent, does not release the surety.

On the contrary, in Brown v. Fountain, 3 Tex. Civ. App. 227, 22 S. W. 129, where the time had actually been extended without the knowledge or consent of the sureties, the sureties were held released although, at the time of granting the extension, the creditor imposed as a condition that the sureties were to approve of it. It is stated by the court that the condition that the sureties were to approve of the extension had no purpose or meaning in the face of the fact that the extension was granted anyhow, that the creditor acted without consulting them, accepted the consideration, and granted the time which elapsed without their consent. It is stated to be the creditor's duty to see that they consented to the agreement before he made it and allowed the time to run in pursuance thereof.

As to the reservation of rights against a party secondarily liable on a bill or note upon granting extension of time to a party primarily liable, as preventing a discharge of the former, see note to Meredith v. Dibrell, 46 L.R.A.(N.S.) 92.

W. A. E.

ment binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved."

We think the fundamental error in the contention of the surety, Cook, touching the transaction on maturity date, outlined above, is in premising that there was effective any "agreement binding upon the holder to extend the time of payment." Until such agreement is made, expressly or by implication, there does not come up for consideration the subsequent clause of the quoted section in respect to the effectuation of the surety's release, "unless the right of recourse against such party is expressly reserved." In other words, the express reservation of the right of recourse is to be conceived of as being incorporated as a dependent incident in and to the main agreement between the maker and the bank, binding upon the former, as holder, to extend or postpone.

By the terms of such main agreement in the pending case, there was to be no extension proper, and no renewals, except on condition that Cook would sign the renewal notes.

In the case of *Kuhlman v. Leavens*, 5 Okla. 562, 80 Pac. 171, interest on a note was paid in advance, with the understanding between the holder and the principal that the sureties would agree to an extension. The sureties had no knowledge of the arrangement, but it was held that the extension was in effect conditional on the assent of the sureties, and they were still bound by the contract. In the course of the opinion the court, citing *Barrett v. Davis*, 104 Mo. 549, 16 S. W. 377, said: "If it is a conditional contract dependent upon the assent of the sureties, it will not release them, because, until their assent is given, it is not binding between the holder and maker of the note, and consequently cannot prejudice the rights of the sureties."

The case of *Miller v. McCallen*, 69 Iowa, 681, 29 N. W. 942, is directly in point. In that case, taking the distinction between extension and renewal, the court said: "The facts appear to be that the plaintiffs are proprietors of the Lyon County Bank; that McCallen borrowed money at the bank, and gave the note in question, with Wagner as surety; that, some time after the note fell due, he went into the bank and paid the accrued interest on the note, and also signed another note, which it was expected Wagner would sign, as a renewal note, and at the same time he paid a certain amount as discount on the renewal

note, but the old note was not surrendered, and was not to be surrendered unless Wagner signed the renewal note, which he never did. The plaintiff Miller testified that there was no agreement or conversation in regard to the extension of the note in suit.

What was done, indeed, was inconsistent with the idea of the extension of the note. What was done was for the purpose of a renewal, which would have been entirely unnecessary, if there had been an agreement for an extension of the original note.

"The defendant contends that the payment of discount on the renewal note shows an extension of the original note, but it appears to us that he wholly misconceives the situation. Renewal did not take place, and for the reason that the renewal note was not fully executed. If renewal had taken place, the old note, of course, would have been discharged, and Wagner would have had no occasion to plead a release of himself by extension. The payment of discount on the renewal note was in anticipation that it would be fully executed and accepted in renewal."

In *Bank of Uniontown v. Mackey*, 140 U. S. 220, 35 L. ed. 487, 11 Sup. Ct. Rep. 844, it appeared that the plaintiff bank had signified its willingness to take renewal notes of the parties who had executed the original notes, and, the surety being too sick to join in the execution of the new notes, the bank sent to the maker a statement of the interest for four months and a blank note to be executed by the maker and his surety when the latter should be able to do so. The interest was remitted and received; but the court, through Mr. Justice Gray, said: "Such interest was paid by the principal and received by the plaintiff after the surety's death; the plaintiff at that time being ignorant of his death, and expecting that the principal would procure and deliver renewal notes as before proposed, and nothing being then said as to an agreement for an extension of time, or as to the effect of the payment of interest. No present agreement for an extension of time can be inferred from the mere payment of interest, under such circumstances. The necessary conclusion from the facts found is that the plaintiff never agreed to extend payment of the old notes, except upon receiving new ones signed by both makers, which were never given; and that the payment of interest has no effect upon the case, except, as admitted in the complaint, by way of deduction from the amount that the plaintiff is entitled to recover."

See also *Williams v. Martin*, 2 Duv. 491.

While the cases on the point are by no

means numerous, they are clear to the effect that the surety is not released. The bank could have sued on the notes now in suit, at any time within the period in contemplation for the renewals.

The case of *National Park Bank v. Koehler*, 204 N. Y. 174, 97 N. E. 468, relied upon by solicitors of the surety, is not pertinent, since there it was an established fact that the holder and the maker of the note had made an agreement which was not conditional, and the question discussed was whether the terms of the agreement expressed a reservation of the creditor's rights against the indorser,—the subsidiary phase which we have not to deal with.

The defendant relies on the case of *Union Bank v. McClung*, 9 Humph. 98; but manifestly that case is not in conflict with what is here decided; its holding being that an agreement to extend may be implied from the fact that interest is accepted by the payee. Here there was an express agreement *contra*.

The chancellor's decree made provision for the defendant surety receiving credit for the interest paid, as was done in *Bank of Uniontown v. Mackey*, *supra*; and that decree is affirmed.

UNITED STATES SUPREME COURT.

ARIZONA & NEW MEXICO RAILWAY
COMPANY, Plff. in Err.,
v.

THOMAS P. CLARK.

(235 U. S. 669, 59 L. ed. —, 35 Sup. Ct. Rep. 210.)

Courts — jurisdiction — effect of admission of state — waiver.

1. Any irregularity in transferring to the Federal district court for the district of Arizona a suit begun prior to statehood in a territorial court, based upon the employers' liability act of April 22, 1908, as amended by the act of April 5, 1910, is waived where defendant answered upon the merits the amended complaint filed in the Federal court, without questioning the jurisdiction.

Evidence — confidential communications — physician and patient — waiver.

2. Neither the testimony of other witnesses, offered by the patient, nor his own voluntary testimony as to his physical condition at the time of his examination by a physician, nor any averments in the pleadings, amount to a waiver of his privilege,

Note. — As to waiver of privilege as to communications between physician and patient, see note to *Epstein v. Pennsylvania R. Co.* 48 L.R.A. (N.S.) 394. L.R.A.1915C.

under *Ariz. Rev. Stat.* 1901, § 2535, subdiv. 6, against the disclosure by the physician of any communications made by the patient with reference to any physical or supposed physical disease, or any knowledge obtained by personal examination of the patient, which, according to the proviso in that section, may be waived only in the event that the patient offers himself as a witness and voluntarily testifies with reference to the "communications" made by him to the physician.

(Mr. Justice Hughes and Mr. Justice Day dissent.)

(January 11, 1915.)

ERROR to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment which affirmed a judgment of the District Court for the District of Arizona, in plaintiff's favor, in a suit under the Federal employers' liability act to recover damages for personal injuries. Affirmed.

The facts are stated in the opinion.

Messrs. John A. Garver and William C. McFarland, for plaintiff in error:

At the time of the application for the removal of the case at bar, no case in the state court arising under the Federal employers' liability act could be removed to any court of the United States. Where such an action is brought in the state court, the defendant has no power to remove it into the Federal court, even though it arises under a Federal law, and there is, in addition, diversity of citizenship.

Lee v. Toledo, St. L. & W. R. Co. 193 Fed. 685; *McChesney v. Illinois C. R. Co.* 197 Fed. 85.

The United States district court is a court of limited jurisdiction, and can acquire jurisdiction only in the manner prescribed by statute; and it has no more power to proceed with an action commenced in the state court until a certified copy of the record has been duly lodged with it, than an appellate court has to review the decision of a lower court before the record in that court has been properly certified to it.

Blitz v. Brown, 7 Wall. 693, 19 L. ed. 280; *Idaho & O. Land Improv. Co. v. Bradbury*, 132 U. S. 509, 512, 33 L. ed. 433, 435, 10 Sup. Ct. Rep. 177.

The failure to file the record within thirty days may be waived.

St. Paul & C. R. Co. v. McLean, 108 U. S. 212, 216, 27 L. ed. 703, 704, 2 Sup. Ct. Rep. 498.

But it cannot be waived altogether, and the court cannot proceed with the action until the record has been filed.

Baltimore & O. R. Co. v. Koontz, 104 U. S. 5, 14, 26 L. ed. 643, 645.

The privilege given by statute was clearly waived by the plaintiff in the present case. Capron v. Douglass, 193 N. Y. 11, 20 L.R.A.(N.S.) 1003, 85 N. E. 827; Morris v. New York, O. & W. R. Co. 148 N. Y. 88, 51 Am. St. Rep. 675, 42 N. E. 410; Doheny v. Lacy, 168 N. Y. 213, 61 N. E. 255; Thompson v. Cashman, 181 Mass. 36, 62 N. E. 976.

Congressional legislation is necessary to enable United States courts, after admission into the Union, to take jurisdiction of cases previously commenced in the courts of the territory, and not finally adjudged before the admission of such territory into the Union.

Koenigsberger v. Richmond Silver Min. Co. 158 U. S. 41, 39 L. ed. 889, 15 Sup. Ct. Rep. 751; Freeborn v. Smith, 2 Wall. 160, 17 L. ed. 922; United States Exp. Co. v. Kountze Bros. 8 Wall. 342, 19 L. ed. 457; Baker v. Morton, 12 Wall. 150, 20 L. ed. 262.

The evidence of Dr. Stark shows that his opinion as an expert was based upon objective as well as subjective symptoms, the former not being within the general rule of privilege.

Union P. R. Co. v. McMican, 114 C. C. A. 311, 194 Fed. 395.

Mr. William M. Seabury, for defendant in error:

The making or the refusal to make an order by the state court has no effect whatever upon the jurisdiction of the Federal court, which, in a removable cause, vests *eo instanti* upon the filing of the proper application and bond in the state court.

National S. S. Co. v. Tugman, 106 U. S. 118, 27 L. ed. 87, 1 Sup. Ct. Rep. 58; Baltimore & O. R. Co. v. Koontz, 104 U. S. 5, 15, 26 L. ed. 643, 646; Kern v. Huidekoper, 103 U. S. 485, 490, 26 L. ed. 354, 356; Loop v. Winters, 115 Fed. 362; Hubbard v. Chicago, M. & St. P. R. Co. 176 Fed. 994; Mannington v. Hocking Valley R. Co. 183 Fed. 140; Lund v. Chicago, R. I. & P. R. Co. 78 Fed. 385; Eisenmann v. Delmar's Nevada Gold Min. Co. 87 Fed. 250; Burke v. Bunker Hill & S. Min. & Concentrating Co. 46 Fed. 644.

Whatever rights the plaintiff in error had in the premises were in the nature of a privilege personal to it, which was the subject of waiver, and which was, in fact, waived by the conduct to which we have already adverted.

Louisville & N. R. Co. v. Fisher, 11 L.R.A.(N.S.) 926, 83 C. C. A. 584, 155 Fed. 69; Kreigh v. Westinghouse, C. K. & Co. 214 U. S. 249, 53 L. ed. 984, 29 Sup. L.R.A.1915C.

Ct. Rep. 619; Re Moore, 209 U. S. 491, 52 L. ed. 904, 28 Sup. Ct. Rep. 585, 706.

Even supposing there were irregularities in the transfer, yet the Federal court's jurisdiction vested.

Bryant Bros. Co. v. Robinson, 79 C. C. A. 259, 149 Fed. 327.

Mr. Justice Pitney delivered the opinion of the court:

This action, brought by Clark against the railway company, was commenced in January, 1912, in the district court of the fifth judicial district of the then territory of Arizona. It was based upon the Federal employers' liability act of 1908 (35 Stat. at L. 65, chap. 149), as amended in 1910 (36 Stat. at L. 291, chap. 143, Comp. Stat. 1913, § 8682). The complaint alleged that while defendant was engaging in commerce between the territories of Arizona and New Mexico as a common carrier by railroad, and while plaintiff was employed by defendant in such commerce, he sustained certain personal injuries through the negligence of defendant and its employees, for which he claimed damages in the amount of \$40,000. After the action was commenced, and on February 14, 1912, the territory of Arizona became a state, and the further proceedings (improperly, it is said) were conducted in the district court of the United States for the district of Arizona. In that court plaintiff filed a first and a second amended complaint, and defendant, having unavailingly moved to strike the latter from the files, upon grounds not necessary to be specified, answered upon the merits, without interposing any objection to the jurisdiction of the court. A trial by jury was had, resulting in a verdict and judgment for plaintiff, and this was removed by defendant's writ of error to the United States circuit court of appeals for the ninth circuit, where the judgment was affirmed (125 C. C. A. 305, 207 Fed. 817). The present writ of error was then sued out.

Two matters only require particular discussion. The enabling act of June 20, 1910, under which Arizona was admitted as a state (36 Stat. at L. 577, chap. 310, § 33), provided in effect that actions which, at the date of admission, were pending in the territorial courts (other than the supreme court), should be transferred to and proceed in the proper Federal court in cases where, if they had been begun within a state, the Federal court would have had exclusive original jurisdiction, and that where the cause of action was one of which the state and Federal courts would have concurrent jurisdiction, the action should be transferred to and proceed in the appropriate state court, but in this case might

be transferred to the Federal court upon application of any party, to be made as nearly as might be in the manner provided for removal of causes from state to Federal courts.

The present action being one of which the Federal and state courts have concurrent jurisdiction, it is insisted that upon the commencement of statehood, it should have been transferred to the proper state court, subject to removal to the Federal court upon application made in due form for that purpose; that in fact the files and records in the territorial court were never transferred to the proper state court, or to any state court; and that a certain petition of plaintiff, which appears in the record, wherein he prayed for the removal of the cause from the state to the Federal court, was insufficient and inefficacious for the purpose, for want of compliance with certain of the requirements of the removal statute. It is further insisted that in the enabling act it was the intention of Congress to provide for the removal of actions from the state to the Federal courts only in case they might have been removed if the action had not been commenced until after the admission of the territory as a state; and that, under the express prohibition contained in the amendment of § 6 of the employers' liability act, passed April 5, 1910 (36 Stat. at L. 291, chap. 143, Comp. Stat. 1913, § 8662), shortly before the passage of the enabling act, and which declares that "no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States" (re-enacted as § 28, Judicial Code [36 Stat. at L. 1094, chap. 231, Comp. Stat. 1913, § 1010]), actions of this character were not removable under the general provisions of § 33 of the enabling act.

We need spend no time upon these questions, since there is no ground for denying the jurisdiction of the district court of the United States over the subject-matter, the objections urged are of such a nature that they might be waived, and the record shows that they were waived by the action of defendant in permitting the cause to proceed in the Federal court, and answering there upon the merits, without objection based upon the grounds now urged or any jurisdictional grounds. The action being one arising under a law of the United States, and the requisite amount being in controversy, the Federal district court had original jurisdiction under § 24, Judicial Code. The removal proceedings were in the nature of process to bring the parties before that court, and the voluntary appearance of the parties there was equivalent to a waiver L.R.A.1915C.

of any formal defects in such proceedings. *Mackay v. Uinta Development Co.* 229 U. S. 173, 176, 57 L. ed. 1138, 1139, 33 Sup. Ct. Rep. 638. The case of *United States v. Alamo Gordo Lumber Co.* 121 C. C. A. 162, 202 Fed. 700, cited by plaintiff in error, is clearly distinguishable, for timely objection was there made.

The second matter requiring mention is the alleged error of the trial court in excluding the evidence of two physicians called by defendant for the purpose of testifying to the results of a personal examination of plaintiff shortly after he received the injuries for which damages were claimed. The trial court based the rulings upon an Arizona statute (Rev. Stat. 1901, § 2535, subdiv. 6), which reads as follows:

"6. A physician or surgeon cannot be examined, without the consent of his patient, as to any communication made by his patient with reference to any physical or supposed physical disease, or any knowledge obtained by personal examination of such patient: Provided, That if a person offer himself as a witness and voluntarily testify with reference to such communications, that is to be deemed a consent to the examination of such physician or attorney [sic]."

A material part of the injury complained of was the loss of the sight of plaintiff's left eye; and because this was set forth in the pleadings, and upon the trial plaintiff testified personally in regard to his injuries, mentioning the loss of sight and pain in the eye, and called as a witness a nurse who attended him after the accident, and who testified as to the condition of the eye, it is insisted that plaintiff in effect consented to the examination of the physicians with respect to his condition. The argument is that the statute was intended to protect persons in the confidential disclosures that may be necessary in regard to their physical condition, but was not intended to close the lips of physicians where the patient voluntarily publishes the facts to the world. In support of this, plaintiff in error cites two cases from the New York court of appeals,—*Morris v. New York, O. & W. R. Co.* 143 N. Y. 88, 51 Am. St. Rep. 675, 42 N. E. 410, and *Capron v. Douglass*, 193 N. Y. 11, 20 L.R.A.(N.S.) 1003, 85 N. E. 827. But the New York statute¹ is materially different from that of Arizona. The purpose of the latter en-

¹ Extracts from the New York Code of Civil Procedure.

"Sec. 834. A person duly authorized to practise physic or surgery . . . shall not be allowed to disclose any information

actment is very clearly expressed in its language. Without the consent of the patient, the physician's testimony is excluded with respect to two subjects: (a), any communication made by the patient with reference to any physical or supposed physical disease, and (b), any knowledge obtained by personal examination of such patient. And this privilege is waived, according to the terms of the proviso, only in the event that the patient offers himself as a witness and voluntarily testifies "with reference to such communications." We would have to ignore the plain meaning of the words in order to hold, as we are asked to do, that the testimony of other witnesses offered by the patient, or the testimony of the patient himself with reference to other matters than communications to the physician, or any averments contained in the pleadings, but not in the testimony, amount to a waiver of the privilege. The enactment contemplates that the physician receives in confidence what his patient tells him, and also what the physician learns by a personal examination of the patient. It contemplates that the patient may testify with reference to what was communicated by him to the physician, and in that event only it permits the physician to testify without the patient's consent.

The express object is to exclude the physician's testimony, at the patient's option, respecting knowledge gained at the bedside, in view of the very delicate and confidential nature of the relation between the parties. The statute recognizes that they do not stand on equal terms. The patient is more or less suffering from pain or weakness, distracted by it, ignorant of the nature or extent of his injury or illness, driven by necessity to call in a professional adviser, sometimes with little freedom of choice; he relies, perforce, upon the physician's discretion, as well as upon his skill and experience, and is obliged by the circumstances of his own condition not only to make an explanation of his ailment or injury, so far as it may be within his knowledge and may be communicable by word of mouth, but also to submit to the more intimate disclosure involved in a physical examination of his person. The physician, on the other hand, is in the full possession of his faculties, and of that knowledge which is power. Manifestly, the patient

occupies, for the time, a dependent position. The chief policy of the statute, as we regard it, is to encourage full and frank disclosures to the medical adviser, by relieving the patient from the fear of embarrassing consequences. The question of dealing justly as between the patient and third parties is a secondary consideration.

It is a mistake, we think, to regard the patient's disclosures—whether verbal or physical—as voluntary in the full sense; they are believed by him to be necessary for the restoration of health or the preservation of life or limb. But, at least, if he has command of his mind and memory, the patient may somewhat control the extent of his disclosures by word of mouth, and may be able afterwards to testify respecting them; while, if he submits himself to a physical examination at the hands of the physician, he cannot know in advance the nature or extent of what the physician will learn, cannot confine the disclosure to the present ailment or injury, and cannot afterwards testify respecting its results, excepting as the physician may inform him of them. And, in many cases, the physician may, with perfectly proper motives, withhold from the patient the results of the physical examination and his deductions therefrom.

We cannot, therefore, without encroaching upon the domain of legislation, declare that there is no substantial ground for a distinction between the information the physician gains from verbal communications made by the patient and the far wider knowledge that he derives from his personal examination of the patient. Certainly it cannot be said that when the patient afterwards has occasion to make averments and adduce evidence respecting the nature of the ailment or injury, he thereby necessarily publishes to the world the facts as disclosed to the physician through the physical examination. In many cases this must be very far from true; the patient having no access to the facts as thus disclosed excepting with the consent of the physician. The language of the statute, as we think, shows a recognition of this, and also of the fact that when the patient himself has occasion to testify respecting his ailment or disease, he often must do so without knowing the range or the character of the testimony that might be given by the

which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity. . . ."

"Sec. 836. The last three sections apply to any examination of a person as a witness unless the provisions thereof are excluded. L.R.A.1915C.

pressly waived upon the trial or examination by the . . . patient; . . . The waivers herein provided for must be made in open court on the trial of the action or proceeding, and a paper executed by a party prior to the trial, providing for such waiver, shall be insufficient as such a waiver. . . ."

physician, and without any means of contradicting it. In order to prevent the patient from being subjected to this disadvantage, the act gives him the option of excluding the physician's evidence entirely by himself refraining from testifying voluntarily as to that respecting which alone their knowledge is equal, namely, what the patient told the physician with reference to the ailment.

The framer of the act was careful to choose language that recognizes the distinction between (a) communications made by the patient and (b) knowledge obtained by the doctor through a personal examination of the patient. The New York statute, which, so far as we have observed, was the first to establish a privilege with respect to the knowledge gained by a physician while attending a patient in a professional capacity, recognizes no such distinction. Nor does it define with precision what conduct on the part of the patient shall constitute a waiver of the privilege. Hence the courts of that state deemed themselves at liberty to determine this question upon general principles, derived from the supposed policy of the law. Not only, therefore, are the decisions of the courts of that state, and of other states having statutes formed upon the same model, valueless as guides to the meaning of the statute here in question, but the very fact that the legislature of Arizona departed from the form of the New York statute indicates that it did so because it had a different purpose to express. We are unable to see anything that would justify us in refusing judicial recognition to a distinction thus laid hold of by the lawmaking body in defining the extent and conditions of the privilege.

To construe the act in accordance with the contention of plaintiff in error would not only be a departure from its language, but would render it inapplicable in all cases where the "physical or supposed physical disease" is the subject of judicial inquiry, and where any averment respecting it is made in pleading, or evidence upon the subject is introduced at the trial in behalf of the patient. This would deprive the privilege of the greater part of its value, by confining its enjoyment to the comparatively rare and unimportant instances where the patient might have no occasion to raise an issue or introduce evidence on the subject, or where the patient's disease might happen to be under investigation in a controversy between other parties. We are constrained to reject this construction.

The other questions that are raised require no special mention. It is sufficient L.R.A.1915C.

to say that we find no error warranting a reversal of the judgment.

Judgment affirmed.

Mr. Justice Hughes, dissenting:

I am unable to agree to the approval of the ruling which excluded the physician's testimony. It should be supposed that it was the legislative intent to protect the patient in preserving secrecy with respect to his ailments, and not to give him a monopoly of testimony as to his condition while under treatment. Here, not only did the plaintiff introduce the evidence of his nurse, describing in detail his bodily injuries and the medical treatment, but the plaintiff offered himself as a witness and voluntarily testified as to his bodily condition. His testimony covered the time during which he was under the physician's examination, and it was upon this testimony that he sought to have the extent of his injuries determined by the jury and damages awarded accordingly. To permit him, while thus disclosing his physical disorders, to claim a privilege in order to protect himself from contradiction by his physician as to the same matter, would be, as it seems to me, so inconsistent with the proper administration of justice that we are not at liberty to find a warrant for this procedure in the statute, unless its language prohibits any other construction. See *Hunt v. Blackburn*, 128 U. S. 464, 470, 32 L. ed. 488, 491, 9 Sup. Ct. Rep. 125; *Epstein v. Pennsylvania R. Co.* 250 Mo. 1, 25, 48 L.R.A.(N.S.) 394, 156 S. W. 699; *Roeser v. Pease*, 37 Okla. 222, 227, 131 Pac. 534; *Forrest v. Portland R. Light & P. Co.* 64 Or. 240, 129 Pac. 1048; *Capron v. Douglass*, 193 N. Y. 11, 20 L.R.A.(N.S.) 1003, 85 N. E. 827; 4 Wigmore, Ev. § 2389 (2).

As I read the Arizona statute, it was framed not to accomplish, but to prevent, such a result. We have not been referred to any construction of it by either the territorial or state court, and we must construe it for ourselves. To my mind, its meaning is that if the patient voluntarily testifies as to his physical condition at the time of the examination, he cannot shut out his physician's testimony as to the same subject. To reach the contrary conclusion, emphasis is placed on the words "such communications" in the proviso, and it is insisted that the proviso was to apply only if the plaintiff testifies as to what he told the physician. I think that this is altogether too narrow. When the patient submits himself to an examination, he as truly communicates his condition to the physician as if he tells him in words.

Although the patient were dumb, his submission to inspection in order that he might be treated would be none the less a communication of what is thus made known. That is the very ground of the privilege. Nor does the fact that the statute, with unnecessary diffuseness, refers in the sentence defining the privilege to "any communication" or "any knowledge obtained by personal examination," limit the natural meaning of the proviso. In saying that "if a person offer himself as a witness and voluntarily testify with reference to such communications," it is to be deemed "a consent" to the physician's testifying, the proviso may be, and I think should be, taken to embrace implied as well as express communications. I can find no reasonable basis for a distinction. It is said that the plaintiff may not know what the physician has observed or what testimony he may give. But when the plaintiff testifies, he invites analysis and contradiction, and in contemplation of law he asks to have his statement judged by what is shown to be the truth of the matter. If the plaintiff testifies as to what he told the physician, it is conceded that the physician may be examined, and the obvious reason is that the plaintiff is not to be permitted to insist upon his privilege as to what he himself is disclosing. This is the policy of the statute, and it governs equally, as I read it, when the plaintiff testifies as to his physical condition at the time he submits himself to the physician's examination. The words "such communications" are broad enough to cover all communications for the purpose of treatment, whether by utterance or by what is usually more revealing—the yielding of one's body to the scrutiny of the practitioner. To repeat, it seems to me that the statute was intended to make it impossible for the plaintiff to claim the privilege when he himself has testified as to the subject of it.

As in this view competent, and presumably important, evidence was excluded, I think that the judgment should be reversed.

I am authorized to say that Mr. Justice Day concurs in this dissent.

NEW YORK COURT OF APPEALS.

JOHN R. BINNS, Resp.,
v.
VITAGRAPH COMPANY OF AMERICA,
Appt.

(210 N. Y. 51, 103 N. E. 1108.)

Privacy — moving picture show — violation of statute.

The use of the name and purported likeness of a person by photographing another made up to represent him, as part of a moving picture film for exhibition purposes, the name being used prominently in the advertising to increase the demand for the picture secured, is, where his personal movements are featured without relation to the other scenes for the amusement of the audience, and without design to instruct or educate them, a violation of a statute giving a right of action to anyone whose name or picture is used for advertising purposes or for the purpose of trade without his consent.

(December 30, 1913.)

A PPEAL by defendant from an order of the Appellate Division of the Supreme Court, First Department, affirming an interlocutory judgment of a Special Term, Part V., for New York County, in plaintiff's favor in an action brought to enjoin the use of plaintiff's picture and name, and to recover damages for the injuries received by him by reason of such use. Affirmed.

Statement by Chase, J.:

Appeal from a final judgment entered December 18, 1911, in an action for injunction and damages brought pursuant to §§ 50 and 51 of the civil rights law (Consol. Laws, chap 6). The appellant by its notice of appeal also brings up for review an interlocutory judgment entered at the New York special term April 19, 1910, granting an injunction *herein*, and directing that the plaintiff's damages be assessed by a jury, and an order of the appellate division of the supreme court in the first judicial department entered November 25, 1910, affirming said interlocutory judgment; also an order of the said appellate division entered December 1, 1911, which reversed an order theretofore made at special term setting aside conditionally a verdict of a

Note. — Right of action for use of photograph or name for advertising purposes.

The earlier cases on this question are discussed in the notes to *Henry v. Cherry*, 24 L.R.A.(N.S.) 991, and *Foster-Milburn Co. v. Chinn*, 34 L.R.A.(N.S.) 1137. Though depending upon statute, the case of *BINNS v. VITAGRAPH Co.* is an especially interesting addition to the development of the question, inasmuch as it goes a step further than the earlier cases and affords relief although the picture was not in fact that of the plaintiff, thus showing a liberality on the part of the court in construing the statute which the same court's conservatism had constrained it to hold (in *Roberson v. Rochester Folding Box Co.*, cited in note in 24 L.R.A.(N.S.) 991) necessary to supply the defect of the common law,

jury on the assessment of said damages, and granting a new trial, and which order of the appellate division reinstated said verdict.

The defendant is a corporation engaged in the business of manufacturing, leasing, licensing, selling, distributing, displaying, and circulating photographic films for use in motion picture machines. On January 23, 1909, the steamships Republic and Florida came into collision at sea. The Republic was equipped with machines for sending and receiving messages by wireless telegraphy, and the plaintiff, a British subject, was the operator of said machine. Immediately following the collision, he sent a danger signal consisting of the letters "C. Q. D," which were received by a wireless operator on the steamship Baltic and by such an operator at Siasconset, on Nantucket island. Messages were thereafter exchanged between the plaintiff on the Republic and the operator on the Baltic

and at Siasconset. The messages sent by the plaintiff resulted in the Baltic going to the rescue of the passengers on the other steamships, and the passengers and crew of the Republic were removed to the Baltic and transported to New York. The plaintiff was the first man to use wireless telegraphy at a time when its use resulted in saving hundreds of lives.

Soon after the day of the collision the defendant proceeded to make a series of pictures entitled "C. Q. D. or Saved by Wireless; A True Story of the Wreck of the Republic." These pictures, with the exception perhaps of one or more taken of the Baltic as it entered the harbor of New York, were manufactured or made up in the studio of the defendant, by the use of scenery prepared for the purpose and of actors employed to impersonate the plaintiff and others. A series of picture films were thus prepared from which moving pictures could be produced for public ex-

consisting in its inability to afford relief for an invasion of the so-called right of privacy,—a defect which the courts of other jurisdictions have held not to exist, as shown in the earlier notes. The statute involved, which is set out in the *BINNS CASE*, has also been invoked in other recent cases.

Thus, under this statute an employee who posed for a photograph to be used by his employer for advertising purposes was denied an injunction to compel the discontinuance of the use of the photograph after the termination of his employment, in *Wendell v. Conduit Mach. Co.* 74 Misc. 201, 133 N. Y. Supp. 758, upon the ground that, after the plaintiff had consented to its use, and after the defendant had expended considerable money in preparing for its use, the plaintiff did not have the standing in equity which would entitle him to an injunction.

But the use by a street railway company of the picture of a woman alighting from a car, to instruct patrons in the proper method of alighting, was enjoined under the statute, although the woman posed for the picture and consented to its use for that purpose, where that consent was not written as required by the statute. *Almind v. Sea Beach R. Co.* 157 App. Div. 230, 141 N. Y. Supp. 842, reversing 78 Misc. 445, 139 N. Y. Supp. 559. The court said that the picture, being used to instruct patrons, was to be considered as used for advertising purposes, and not for trade purposes.

It is held in *Wyatt v. Hall's Portrait Studio*, 71 Misc. 199, 128 N. Y. Supp. 247, that a right of action under the New York statute is not one that survives under a statute providing that for wrongs done to the property, rights, or interests of another, for which an action might be maintained against the wrongdoer, such action may be brought by the person injured, or after his death by his executors or administrators, etc., and that this provision shall not ex-

tend to an action for personal injuries as such action is defined in the Code, except that nothing in the provision shall affect the right of action existing to recover damages for injuries resulting in death,—“personal injury” being defined in the Code as including libel, slander, criminal conversation, seduction, and malicious prosecution, also an assault, battery, false imprisonment, or other actionable injury to the person either of the plaintiff or of another.

The case of *Douglas v. Stokes*, 149 Ky. 506, 42 L.R.A.(N.S.) 386, 149 S. W. 894, Ann. Cas. 1914B, 374, touches upon this question in holding that one who employs a photographer to photograph the dead body of his malformed child may recover damages in case the latter copyrights the picture and attempts to use it for his own purposes. In reaching its decision the court not only laid stress upon the contractual relation between the photographer and his customer (on this question there is a note appended to the case in 42 L.R.A.(N.S.) 386, dealing with the right of a photographer or artist to use a picture for his own purposes), but also stated that the injury to the feelings of the parents was one for which there should be a right of action, and said that it would be a reproach to the law if physical injuries might be recovered for, and not those incorporeal injuries which would cause much greater suffering and humiliation.

As to libel by publication of photograph as that of another person, see note to *Wandt v. Hearst's Chicago American*, 6 L.R.A.(N.S.) 919; and as to the publication of one's photograph in connection with scandalous matter concerning another, see the note to *Hillman v. Star Pub. Co.* 35 L.R.A.(N.S.) 595.

Generally, as to the law of privacy, see the note to *Corliss v. E. W. Walker Co.* 31 L.R.A. 283.

L. A. W.

hibition. Such pictures were exhibited in many places in this state by authority of the defendant. The series of pictures commenced with a subseries entitled "John R. Binns, the Wireless Operator in his Cabin Aboard the S. S. Republic." This subseries was followed by others, the last one of the series being entitled "Jack Binns and his Good American Smile." The picture of Binns appeared in the series five times and his name was used in the subtitles six or more times. This action is brought to enjoin the use of the plaintiff's picture and name, and to recover damages for the injuries received by him by reason of such use. It is not claimed that the plaintiff ever consented in writing or otherwise to the use of his picture and name. Further facts appear in the opinion.

Messrs. James J. Allen and Edgar T. Brackett, with Mr. Samuel O. Edmonds, for appellant:

The defendant has not used the plaintiff's name, portrait, or picture for the purposes of trade or advertising, within the meaning of the statute.

Roberson v. Rochester Folding Box Co. 171 N. Y. 538, 59 L.R.A. 478, 89 Am. St. Rep. 828, 64 N. E. 442; Rhodes v. Sperry & H. Co. 193 N. Y. 223, 34 L.R.A.(N.S.) 1143, 127 Am. St. Rep. 945, 85 N. E. 1097; United States v. Brewer, 139 U. S. 278, 288, 35 L. ed. 190, 193, 11 Sup. Ct. Rep. 538; Blaschko v. Wurster, 156 N. Y. 437, 51 N. E. 303; Ellis v. Hurst, 70 Misc. 122, 128 N. Y. Supp. 144; Moser v. Press Pub. Co. 59 Misc. 76, 109 N. Y. Supp. 963; Jeffries v. New York Evening Journal Pub. Co. 67 Misc. 570, 124 N. Y. Supp. 780.

The illustrated moving picture story is a literary, artistic, and dramatic composition, and the defendant's right to its unrestricted use and publication is within the constitutional guaranty of liberty of of speech and of the press.

American Mutoscope & Biograph Co. v. Edison Mfg. Co. 137 Fed. 263; Edison v. Lubin, 58 C. C. A. 604, 122 Fed. 240; Harper v. Kalem Co. 94 C. C. A. 429, 169 Fed. 61; Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289; People v. Crowell, 3 Johns. Cas. 337; Cooley, Const. Lim. 7th ed. p. 264; Brandreth v. Lance, 8 Paige, 23, 34 Am. Dec. 368; Marlin Fire Arms Co. v. Shields, 171 N. Y. 384, 59 L.R.A. 310, 64 N. E. 163; Daily v. Superior Ct. 112 Cal. 94, 32 L.R.A. 273, 53 Am. St. Rep. 160, 44 Pac. 458.

Mr. Arthur F. Hansl, for respondent:

Defendant has used the plaintiff's name and pictures in a most obnoxious manner, which has held him up to public ridicule and contempt, and has made of him a public

spectacle in places of cheap amusement. Those acts fall clearly within the intent and purview of the statute under which this action is brought.

Riddle v. MacFadden, 116 App. Div. 353, 101 N. Y. Supp. 606; Rhodes v. Sperry & H. Co. 193 N. Y. 223, 34 L.R.A.(N.S.) 1143, 127 Am. St. Rep. 945, 85 N. E. 1097; Elliot v. Jones, 66 Misc. 95, 120 N. Y. Supp. 989, affirmed in 140 App. Div. 911, 125 N. Y. Supp. 1119; Herbert v. Universal Talking Mach. Co. N. Y. L. J. March 9, 1904; Wyatt v. McCreery & Co. 126 App. Div. 650, 111 N. Y. Supp. 86; Wyatt v. Wanamaker, 126 App. Div. 656, 111 N. Y. Supp. 90; Kunz v. Bosselman, 131 App. Div. 288, 115 N. Y. Supp. 650; Parsons v. Teller, 188 N. Y. 318, 80 N. E. 930; Eames Vacuum Brake Co. v. Prosser, 157 N. Y. 289, 51 N. E. 986; Forsyth v. Oswego, 191 N. Y. 441, 123 Am. St. Rep. 605, 84 N. E. 392.

The statute under which this action is brought applies to individuals carrying on the business in which the defendant is engaged, and also to the pictures in question.

Kunz v. Bosselman, 131 App. Div. 288, 115 N. Y. Supp. 650; Crowell v. Parker, 22 R. I. 51, 84 Am. St. Rep. 815, 46 Atl. 35.

No constitutional right of the defendant was violated by the judgment in this action.

Rhodes v. Sperry & H. Co. 193 N. Y. 223, 34 L.R.A.(N.S.) 1143, 127 Am. St. Rep. 945, 85 N. E. 1097; Schuyler v. Curtis, 30 Abb. N. C. 376, 24 N. Y. Supp. 511; Pavesich v. New England L. Ins. Co. 122 Ga. 190, 69 L.R.A. 101, 106 Am. St. Rep. 104, 50 S. E. 68, 2 Ann. Cas. 561.

Chase, J., delivered the opinion of the court:

The special term found that the defendant used the plaintiff's name and picture for the purposes of trade and advertising. It is asserted that the defendant, by the way it used the plaintiff's name and picture, held him up to the public ridicule and contempt. In determining whether this action can be maintained, it is immaterial whether the defendant's use of the plaintiff's name and picture held him up to public ridicule and contempt, because the action is not brought for a libel. If the use made of the plaintiff's name and picture constituted a libel, it would be punishable as provided by the Penal Code, §§ 1340-1352 (Penal Law [Consol. Laws, chap. 40]), and damages could be recovered therefor at common law. This action is brought pursuant to the civil rights law (Consol. Laws, chap. 6), §§ 50, 51, and it cannot be maintained unless it is authorized by its provisions.

Section 50 of said law provides: "A person, firm or corporation that uses for ad-

vertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor."

Section 51 of said law provides that any person whose name, portrait, or picture is used within this state for advertising purposes, or for the purposes of trade, without the written consent of such person first obtained, may maintain an equitable action to prevent and restrain the use thereof, and to recover damages by reason of such unlawful use.

Prior to the passage of chapter 132 of the Laws of 1903, the exact provisions of which are now contained in said sections of the civil rights law, it was definitely determined in this state that the right of privacy, as a legal doctrine enforceable in equity, did not exist to prevent the use of a portrait for advertising purposes. *Roberson v. Rochester Folding Box Co.* 171 N. Y. 538, 59 L.R.A. 478, 89 Am. St. Rep. 828, 64 N. E. 442. The statute now recognizes and enforces the right of a person to control the use of his name or portrait by others so far as advertising or trade purposes are concerned. This right of control in the person whose name or picture is sought to be used for such purposes is not limited by statute. *Rhodes v. Sperry & H. Co.* 193 N. Y. 223, 34 L.R.A.(N.S.) 1143, 127 Am. St. Rep. 945, 85 N. E. 1097. Was the plaintiff's name and picture used by the defendant for advertising purposes, or for the purposes of trade?

The statute is very general in its terms, but, when a living person's name, portrait, or picture is used, it is not necessarily and at all times so used either for advertising purposes, or for the purposes of trade. The statute is in part, at least, penal, and should be construed accordingly. So construed, and also construed in connection with the history of chapter 132, Laws of 1903, which was enacted at the first session of the legislature after the decision in the *Roberson Case*, it does not prohibit every use of the name, portrait, or picture of a living person. It would not be within the evil sought to be remedied by that act to construe it so as to prohibit the use of the name, portrait, or picture of a living person in truthfully recounting or portraying an actual current event, as is commonly done in a single issue of a regular newspaper. It is not necessary now to attempt to define what is or is not within its prohibitive provisions. In the case before us, the series of pictures were not true pictures of a current event, but mainly a product of the imagination, based, however, largely

upon such information relating to an actual occurrence as could readily be obtained. The method used in designing and preparing the pictures is described by one of the officers of the defendant as follows: "Our method of reproducing current events, which I have described as news matters, is by getting all the data, all the matter in hand, from every reliable source, and weave it into what we call a picture story. That story is produced by first being written just as a playwright writes a play or an author writes a story." The same witness, referring to the series of pictures relating to the wreck of the *Republic*, testified: "It was under my own supervision. I was in collaboration with one of our stage directors, the author of the text that accompanied the picture. We purchased all the newspapers we could find, everything that had any bearing on the story, and we sat down and wrote out what we called a *scenario*. . . . We produced in our studio the interiors of the captain's cabin, the wireless operator's room on the *Republic*, the wireless operator's room on the *Baltic*, and the operator's room at *Siasconset*. . . . We assigned various actors and actresses in our employ to take the various parts. . . . The part of Mr. Binns was assigned to one of our actors. . . . We have to use our imagination largely in those cases."

After the negative films for the pictures under consideration so made were completed, a large number of picture films were manufactured. The defendant filed one set, which he defined as a "photograph," with the librarian of Congress, and a copyright was issued to it for the title to the picture story. The picture films ready for use in moving picture shows, and of course including the plaintiff's name and picture, were with others described at length in circulars and pamphlets, and such circulars and pamphlets were sent throughout this and other states to those engaged in the business of exhibiting pictures to the public.

About February 20th, following the collision, the picture films were placed upon the market, and were thereafter used in moving picture shows pursuant to leases from and other agreements with the defendant. The plaintiff's name was prominent in the advertisements put out by the defendant describing its manufactured product, and the purpose of the advertisements was to extend the defendant's business and add to its profits by increasing the demand for such pictures, and thus multiplying the number of leases or other agreements by which the pictures and films were put upon the market. The use of the

name and picture of the plaintiff by the defendant in the picture films, and pursuant to leases and agreements with the defendant in the moving picture shows, was commercial. Such use was, in the language of the opinion in the Roberson Case, "for his [its] own selfish purposes."

A picture within the meaning of the statute is not necessarily a photograph of the living person, but includes any representation of such person. The picture represented by the defendant to be a true picture of the plaintiff, and exhibited to the public as such, was intended to be, and it was, a representation of the plaintiff. The defendant is in no position to say that the picture does not represent the plaintiff, or that it was an actual picture of a person made up to look like and impersonate the plaintiff.

It is not necessary in this opinion to discuss the question whether a person, firm, or corporation would be liable under the statute for making and using a picture of a living person, when it is included in a picture of an actual event in which such person was an actor, and such picture is a mere incident to the actual event portrayed. The use of the plaintiff's name and picture, as shown by the testimony in this case, was not a mere incident to a general picture representative of the author's understanding of what occurred at the wreck of the Republic. The first picture of the series was essentially a picture of the plaintiff, although included therewith was a place having relation to the other parts of the pictures exhibited; but the last picture of the series had no connection whatever with any other place or person or with any event. His alleged personal movements, as exhibited in the now well-known form of moving pictures, had no relation to the other pictures, and it was not designed to instruct or educate those who saw it. The defendant used the plaintiff's alleged picture to amuse those who paid to be entertained. If the use of the plaintiff's name and picture as shown in this case is not within the terms of the statute, then the picture of any individual can be similarly made and exhibited for the purpose of showing his peculiarities as of dress and walk, and his personal fads, eccentricities, amusements, and even his private life. By such pictures an audience would be amused and the maker of the films and the exhibitors would be enriched. The greater the exaggeration in such a series of pictures, so long as they were not libelous, the greater would be the profit of the picture maker and exhibitor.

We hold that the name and picture of the plaintiff were used by the defendant as a L.R.A.1915C.

matter of business and profit and contrary to the prohibition of the statute. It is urged that there is danger of serious trouble in the practical enforcement of any rule which may be adopted in construing and enforcing the statute so far as it relates to purposes of trade. If there is any basis for the suggestion of danger in enforcing a part of the statute under consideration, it is the duty of the legislature to repeal such part thereof, or so modify it as to define with greater particularity what it intends should be prohibited, or perhaps permit the use of a person's name, portrait, or picture for purposes of trade, if the oral assent of such person or, if a minor, of his or her parent or guardian, is obtained therefor.

This court cannot consider the question whether the amount of damages given by the jury in its verdict is excessive.

We agree with the opinion of the appellate division in which it is said: "We are of opinion that the plaintiff can have only one recovery in the premises, and that it must be in this action. The terms of the statute are very broad, and they include all of the damages sustained by the plaintiff. It would be difficult to avoid a double recovery if the jury were to be permitted in one action to give damages under the statute for a violation of rights protected thereby, and in another action for the libel based on the same acts." [147 App. Div. 787, 132 N. Y. Supp. 237.]

The judgment should be affirmed, with costs.

Cullen, Ch. J., and Hiscock, Collin, Cuddeback, and Hogan, JJ., concur. Miller, J., not sitting.

UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

GREAT NORTHERN RAILWAY COMPANY, Plff. in Err.,

v.

CHARLES HARMAN.

(— C. C. A. —, 217 Fed. 959.)

Railroad — trespasser on track — duty to stop train.

1. A railroad company may be liable for negligence in failing to exercise ordinary care to stop a train after discovering a

Note. — The position taken by the court in *GREAT NORTHERN R. CO. v. HARMAN*, that the plaintiff was not as a matter of law guilty of continuing negligence in persisting in his efforts to remove the push car from the track in front of the approaching train, in

trespasser pushing a push car along a track in front of the train, so that it collides with and injures him.

Same — negligence as matter of law.

2. A trespasser pushing a push car along a railroad track is not, as matter of law, negligent in attempting to remove the car from the track upon discovering the approach of a train, instead of getting himself out of danger, so as to relieve the railroad company from liability for negligently injuring him; but the question of such negligence is for the jury.

(November 16, 1914.)

ERROR to the District Court of the United States for the District of Montana to review a judgment in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by the negligence of defendant's servant. Affirmed.

The facts are stated in the opinion.

connection with the fact that the trainmen discovered his presence upon the track and ought to have realized his peril in time to have prevented the accident, seems to have removed any objection to the application of the doctrine of last clear chance, notwithstanding the antecedent negligence of the plaintiff in getting into a position of danger. As shown in the note to *Southern R. Co. v. Bailey*, 27 L.R.A. (N.S.) 379, and earlier notes there referred to, the continuance of the negligence of the person injured until the very instant of the accident, or as long as the negligence of the defendant continues, will ordinarily preclude the application of the doctrine of last clear chance in his favor, where his danger was not actually discovered, and the negligence of the defendant is predicated upon its failure to perform a duty to keep a lookout, the performance of which would have disclosed the danger, since upon this hypothesis the negligence of both parties is contemporaneous and concurrent, both operating as proximate causes.

As shown in those notes, however the trend of the cases is toward the view that the plaintiff's negligence in failing to discover the danger, though it continues until the very instant of the impact, will not preclude a recovery, if his danger was actually discovered, and ought to have been realized, by the defendant in time to have averted the accident. As suggested, this is upon the assumption that the plaintiff does not actually discover the danger in time to escape therefrom. Doubtless, in the absence of such an excuse or justification as existed in the *HARMAN CASE*, the failure of the plaintiff to leave the track upon discovering his danger while there was still time to escape would prevent the application of the doctrine of last clear chance in his favor, even though the defendant actually discovered, and ought to have realized, his

Argued before Gilbert, Ross, and Morrow, Circuit Judges.

Messrs. Veazey & Veazey, for plaintiff in error:

Plaintiff's wrongful and unlawful conduct, involving moral turpitude, places him beyond the law of mere care, and no duty of care was owing.

Newcomb v. Boston Protective Dept. 146 Mass. 596, 4 Am. St. Rep. 354, 16 N. E. 555; *Wallace v. Cannon*, 38 Ga. 199, 95 Am. Dec. 385.

Plaintiff's conduct need not have been reckless or rash to be negligent.

Birsch v. Citizens' Electric Co. 36 Mont. 574, 93 Pac. 940.

Plaintiff's conduct in appropriating the car and his operation of it was negligence continuing as a cause of the injury.

29 Cyc. 524; *New York Transp. Co. v. O'Donnell*, 86 C. C. A. 527, 159 Fed. 659; *Atlanta & C. Air-Line R. Co. v. Leach*, 91 Ga. 419, 44 Am. St. Rep. 47, 17 S. E. 619;

danger, assuming that the defendant is charged with negligence only against which contributory negligence is a defense. Perhaps, in some circumstances, it might have that effect even though the defendant's misconduct in failing to take proper steps to avert the accident were to be regarded as wanton or wilful, upon the theory that plaintiff's conduct, in view of the apparent danger, should also be characterized as wanton or wilful. See note in 21 L.R.A. (N.S.) 427, 440. In the *HARMAN CASE*, however, as already suggested, the court was of the opinion that circumstances justified the plaintiff in remaining in the place of danger, notwithstanding that he discovered his danger.

As bearing on the question whether the plaintiff was guilty of continuing or concurring negligence in remaining in a place of danger while attempting to remove the push car which constituted a menace to life and property, see notes to *Corbin v. Philadelphia*, 49 L.R.A. 715, and *Norris v. Atlantic Coast Line R. Co.* 27 L.R.A. (N.S.) 1069, on "Voluntarily incurring danger to save another's life as contributory negligence." It is true that in the cases cited in those notes, the plaintiff did not, as he did in the *HARMAN CASE*, contribute by his own negligence to the creation of the danger, the consequences of which he sought to avert; but the question as to whether he was guilty of negligence at the instant he was struck, so as to preclude the doctrine of last clear chance, would seem to depend upon the principles applied in those cases, since, upon the assumption that he was justified in remaining in the place of danger in an attempt to remove the push car, his original antecedent negligence disappears as a proximate cause of the accident, and becomes merely a remote cause or a condition thereof, and so loses its character as contributory negligence.

G. H. P.

DeMahy v. Morgan's L. & T. R. & S. S. Co. 45 La. Ann. 1329, 14 So. 61; Bothwell v. Boston Elev. R. Co. 215 Mass. 467, L.R.A. —, 102 N. E. 665, Ann. Cas. 1914D, 275; West Chicago Street R. Co. v. Liderman, 187 Ill. 463, 52 L.R.A. 655, 79 Am. St. Rep. 226, 58 N. E. 367; Dummer v. Milwaukee Electric R. & Light Co. 108 Wis. 589, 84 N. W. 853; Smith v. Norfolk & W. R. Co. 107 Va. 725, 60 S. E. 56; Chattanooga Electric R. Co. v. Cooper, 109 Tenn. 308, 70 S. W. 72; Berg v. Milwaukee, 83 Wis. 599, 53 N. W. 890.

Messrs. Maury, Templeman, & Davies, for defendant in error:

Plaintiff was not guilty of such contributory negligence as would preclude a recovery under the last clear chance doctrine.

Melzner v. Northern P. R. Co. 46 Mont. 182, 127 Pac. 146; Donahoe v. Wabash, St. L. & P. R. Co. 83 Mo. 560, 53 Am. Rep. 594; 29 Cyc. 624; Becker v. Louisville & N. R. Co. 110 Ky. 474, 53 L.R.A. 267, 96 Am. St. Rep. 459, 61 S. W. 997.

Gilbert, Circuit Judge, delivered the opinion of the court:

The plaintiff had been working as a carpenter in the employment of certain railroad contractors who were engaged in relining a tunnel on the defendant's road. On being discharged from his work, the plaintiff took a push car belonging to the defendant, placed thereon his tool chest, blankets, and personal baggage, and, accompanied by another man, proceeded to push the car along the track of the defendant from the tunnel to Basin, a station where he expected to take a train in the direction of Butte. He claimed the right so to use the push car on the ground that the railroad track was the only available way to Basin; that if he took the county road he would have to wade a creek, he having no money with which to pay for a livery team; that the track from the tunnel to Basin was a general thoroughfare for employees on the tunnel work, and that the push car had regularly been used by them in carrying emergency supplies from Basin to the tunnel. While on his way, and while he and his companion were pushing the car around a curve, the plaintiff saw a train 400 or 500 feet ahead, approaching at a speed variously estimated by the witnesses at from 20 to 45 miles an hour. While he was diligently endeavoring to remove the push car and its load from the track, and when he had almost succeeded in doing so, the train struck the push car, driving it against the plaintiff and seriously injuring him.

The court below ruled that the plaintiff was at the time of the accident a trespasser L.R.A.1915C.

upon the defendant's tracks, and that in using the push car as he did he was guilty of contributory negligence. The plaintiff's action for damages, however, was tried upon the theory that the defendant had "the last clear chance" to avoid injuring the plaintiff, and that it negligently failed in its duty so to do.

It is assigned as error that the court denied the defendant's request for a peremptory instruction to the jury to return a verdict in its favor. On a careful consideration of the evidence we are not convinced that it was error to deny the request. There was evidence tending to show that, after the engineer of the train discovered the plaintiff's danger, he had ample time in which to bring the train to a stop before reaching the place where the plaintiff was. In view of such evidence, the question whether or not the defendant was guilty of negligence in the matter charged was properly submitted to the jury.

The defendant contends that the wrongful and unlawful conduct of the plaintiff, involving moral turpitude, placed him beyond the law of care, and that the defendant owed him no duty to avoid injuring him, even after his perilous position was seen. No authority is cited which sustains so harsh a doctrine. In Missouri P. R. Co. v. Weisen, 65 Tex. 447, the court said: "A man does not forfeit his life, or his right to remain whole, by going where he has no right to go, or being where he has no business."

Cases are cited in support of the proposition that one who is engaged in violation of law cannot recover if his own illegal act was an essential element of his case. In the case at bar the plaintiff was engaged in no violation of a statute. It is true that he was a trespasser, but notwithstanding that fact the defendant's employees in charge of the operation of the train owed him the duty of ordinary care as soon as his position of danger was actually seen and appreciated. A cause of action arose in his favor, if the defendant actually knew of his peril and thereafter failed to exercise ordinary care to avoid injuring him; and the plaintiff's contributory negligence cannot defeat the action, if it can be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of that negligence. Grand Trunk R. Co. v. Ives, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679, 12 Am. Neg. Cas. 659; Chunn v. City & Suburban R. Co. 207 U. S. 302, 52 L. ed. 219, 28 Sup. Ct. Rep. 63; Turnbull v. New Orleans & C. R. Co. 57 C. A. 151, 120 Fed. 783; Herr v. St. Louis & S. F. R. Co. 98 C. C. A. 553, 174 Fed. 943; The Ply-

mouth, 108 C. C. A. 217, 186 Fed. 108; St. Louis & S. F. R. Co. v. Summers, 97 C. C. A. 328, 173 Fed. 358; Atchison, T. & S. F. R. Co. v. Taylor, 116 C. C. A. 440, 196 Fed. 878.

But it is urged that the court erred in refusing to instruct the jury that if, after seeing the approaching train, the plaintiff remained on the track in an endeavor to remove the push car, his carelessness in so doing continued as a cause of his injury, and that therefore he cannot recover, notwithstanding that the defendant, in the exercise of reasonable care, might have stopped the train in time to avoid striking him. The cases which are cited to sustain this proposition do not involve the doctrine of the last clear chance. We do not find that what the plaintiff did under the circumstances shows such obvious disregard of duty and safety as amounts to misconduct which the courts should declare to be negligence as a matter of law. The question was clearly one for the jury. *Linnehan v. Sampson*, 128 Mass. 506, 30 Am. Rep. 692, 1 Am. Neg. Cas. 17; *Mobile & O. R. Co. v. Ridley*, 114 Tenn. 727, 86 S. W. 606, 4 Ann. Cas. 925; *Corbin v. Philadelphia*, 195 Pa. 461, 49 L.R.A. 715, 78 Am. St. Rep. 825, 45 Atl. 1070, 7 Am. Neg. Rep. 563; *Maryland Steel Co. v. Marney*, 88 Md. 482, 42 L.R.A. 842, 71 Am. St. Rep. 441, 42 Atl. 60, 5 Am. Neg. Rep. 159; *Saylor v. Parsons*, 122 Iowa, 679, 64 L.R.A. 542, 101 Am. St. Rep. 283, 98 N. W. 500, 15 Am. Neg. Rep. 543; *Becker v. Louisville & N. R. Co.* 110 Ky. 474, 53 L.R.A. 267, 96 Am. St. Rep. 459, 61 S. W. 997; *Pennsylvania Co. v. Langendorf*, 48 Ohio St. 316, 13 L.R.A. 190, 29 Am. St. Rep. 553, 28 N. E. 172.

The defendant, in view of the obstruction on the track and the plaintiff's peril, was in duty bound to stop the train if possible. The situation was not like that in which an engineer of a train sees a man walking on the track several hundred feet ahead of him, and has the right to assume that the man will get out of the way. It was a situation in which the engineer discovered men on the track with a push car, which, if it were not removed, and the train were not stopped, might occasion a disastrous collision. He saw that the two men were in the act of removing the push car, yet, according to the plaintiff's testimony, the speed of the train had not been perceptibly diminished when the collision occurred. The plaintiff had knowledge and experience in the handling of trains, as was shown by the evidence, and on seeing the approaching train may well have assumed that it would be brought to a stop before reaching the place where he was. L.R.A.1915C.

He was acting in an emergency, with but a moment for deliberation, and what he did was presumably for the purpose of avoiding injury to the passengers on the train. His conduct in so doing should not be held to absolve the defendant from the duty of reasonable care under the last clear chance doctrine, and it should not be held as matter of law that it was the duty of the plaintiff, on seeing the approaching train, to betake himself to a place of safety and abandon the car on the track, with all the possible resulting consequences. In 29 Cyc. 523, it is said: "The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, and one who attempts to rescue another from imminent danger is not guilty of contributory negligence, although he thereby imperils his own life, whether he is aware of the danger or not, where such attempt is made in good faith, in the belief that he could save the life of the person in danger and avoid injury himself, unless the attempt be made under circumstances amounting to rashness or recklessness in the judgment of a man of ordinary prudence. Error in judgment at such a time will not defeat recovery."

The judgment is affirmed.

DISTRICT OF COLUMBIA COURT OF APPEALS.

HENRY J. RUPPERT, *Exr.*, etc., of Kate France, Deceased,

v.

THOMAS E. McARDLE, *Exr.*, etc., of Apolonia Stuntz, Deceased.

(42 App. D. C. 392.)

Life tenant — retail business — increase in value — ownership.

Under a devise for life of a retail business, the estate of the life tenant is entitled to the difference in value of the stock at the time he receives possession of

Note. — Rights as between life tenant and remainderman to an increase in the value of the estate.

I. Introductory, 847.

II. Personal property.

a. In general, 847.

b. Live stock; slaves, 849.

c. Corporate stock.

1. In general, 851.

2. Increase resulting from withholding earnings, 851.

3. Increase resulting from nearness of dividend-paying period, 852.

d. Bonds, 853.

III. Real estate, 854.

the property and the time of his death, even though the first value is ascertained by appraisalment and the last by actual sale of the property.

(November 2, 1914.)

CROSS APPEALS from a decree of the Supreme Court directing respondent, executor of the Stuntz Estate, to pay to petitioner, executor of the France Estate, a certain sum of money; petitioner appealing from the amount decreed to him; and respondent appealing from so much of the decree as held the estate indebted to petitioner, and directed payment to him of the amount decreed. Reversed.

The facts are stated in the opinion.

I. Introductory.

The general questions connected with the extent of the rights of life tenants and remaindermen independently of each other are not considered. It is only where there is a general gift of a life estate to one, with a general remainder to another, that the specific question treated in the present note arises.

The question under consideration presupposes a precedent estate or interest limited to the lifetime of one person, and an eventual estate or interest to another, dependent upon the termination of the estate; and therefore cases involving the question whether the first taker has the entire estate or interest are not within the scope of the note. (In this connection see the notes referred to in Index to L.R.A. Notes, "Wills," §§ 80, 81.)

The rights of the life tenant under provisions allowing him to use the principal or corpus if necessary are also beyond the scope of the note.

II. Personal property.

a. In general.

The increase in the general personal property upon a farm during a life tenancy belongs to the life tenant. *Milner v. Brokhhausen*, 153 Iowa, 560, 133 N. W. 1008; *Evans v. Iglehart*, 6 Gill & J. 171.

So, under a will giving to the life tenant all of the estate, real, personal, and mixed, of the testator, which consisted of a small farm, furnished, stocked, and equipped as farms of its quality usually are, with power in the life tenant to use and consume so much of the same as may be requisite for her comfort and convenience, the life tenant is entitled to whatever income, increase, or profits therefrom she may have saved. *Gorham v. Billings*, 77 Me. 386. "The income and increase of the estate," says the court, "became absolutely her own."

Under a will bequeathing an estate for life, giving to the life tenant "the free use, possession, enjoyment, benefit and advan-

Mr. Francis L. Neubeck, for petitioner:

This case comes within the principle which governs the rights of life tenants and remaindermen in respect to live stock, the rule being that where property is consumable, but also reproductive, the life tenant is entitled to the increase, but must keep up the original stock.

11 Cyc. 620, 622; *Lewis v. Davis*, 3 Mo. 133, 23 Am. Dec. 698; *Horry v. Glover*, 2 Hill, Eq. 515; *Poindexter v. Blackburn*, 36 N. C. (1 Ired. Eq.) 286; *Perry v. Terrel*, 21 N. C. (1 Dev. & B. Eq.) 441.

The representative of a tenant for life is entitled to be paid for increased value of stock or personal property of the estate during the existence of the life estate.

Woods v. Sullivan, 1 Swan, 507.

tage" thereof, the life tenant, who has given a bond as required by statute, and taken possession of the estate, is entitled to any increase thereof over the appraised value during the tenancy. *Re Letterle*, — Pa. —, 93 Atl. 935.

Nor does a gift in a will to a widow "for her own individual use and benefit for and during her natural life with full power and authority to my said wife to expend the whole of my net personal estate" limit the estate of the life tenant to such portion of the income and increase of the personal property as may be used or appropriated by her during her life. *Milner v. Brokhhausen*, supra.

Farming tools purchased to replace those worn out belong to the life tenant. *Woods v. Sullivan*, 1 Swan, 507; *Forsey v. Luton*, 2 Head, 183 (*dictum*).

Corn and cotton on hand at the death of the life tenant were held, in *Tatum v. McLellan*, 56 Miss. 352, to belong to the tenant for life, and at her death to go to her representatives. This was held not to be changed by a provision in the will that the property of the testator should be kept together, with the increase thereof, until a sale as directed in an item of the will.

It is stated in *Broome v. Curry*, 19 Ala. 805, that a tenant for life of money, who is entitled to its possession, may use the money as he sees fit in the purchase of property, unless those in remainder restrain him on the ground of danger to their ulterior interests, nor can the remaindermen, even in equity, claim the benefits of the life tenant's contracts as their own; that the tenant for life is entitled to the use of the money, and if he purchases property with it, to give the remaindermen the specific property, and not the money, would be to give them to some extent the use and benefit of the money during the life of the tenant for life.

Interest which had been allowed to accumulate was held to belong to the contingent life tenant instead of to the contingent remainderman, in *Worthington v. McPherson*, 5 Gill, 51.

There was apparently no dispute as to

Messrs. Daniel W. Baker and William E. Leahy, for respondent:

Respondent, executor of the original testatrix, has the right not only to a sum equal to the original appraisal and inventory of said store at the time of the death of his testatrix, but the right to the store as it exists now at the time of the death of the life tenant.

Diversey v. Johnson, 93 Ill. 547; *Beach v. Schmultz*, 20 Ill. 190; *Winter v. Atkinson*, 92 Ill. App. 165; *Wingate v. Smith*, 20 Me. 287; *Hesseltine v. Stockwell*, 30 Me. 237, 50 Am. Dec. 627; *State ex rel. Newark & N. Y. R. Co. v. Goll*, 32 N. J. L. 285; *Samson v. Rose*, 65 N. Y. 411; *Jenkins v. Steanka*, 19 Wis. 126, 88 Am. Dec. 675;

the manner of determining the increase in *Milner v. Brokhausen*, 153 Iowa, 560, 133 N. W. 1068. The difference between the value of the personal property received by the life tenant at the beginning of her tenancy and that of which she was in possession at the time of her death was taken as the increase belonging to the life tenant.

In case of a business, whether an increase is regarded as an increase merely, or profits or income, depends somewhat upon the action of the life tenant in putting the profits back into the business, or appropriating them to his use. The present note is concerned only with the rights as between the life tenant and remainderman where there has been an increase in the value of the business resulting from the profits having been put into it, or from any other cause; but is not concerned with the rights of these parties in profits as such. As illustrative of the latter class of cases is *Re Rogers*, 37 Misc. 54, 74 N. Y. Supp. 829, where a profit made in a partnership business in which the testator was interested, by the surviving partners, who were allowed by the executor to continue the business for about two years after the testator's death, was held to belong to the life tenant as income. It was contended by the remainderman that this should be regarded as an increase in the business.

And in *Skirving v. Williams*, 24 Beav. 282, 3 Jur. N. S. 927, the profits of a business owned by a partnership in which the testator was a partner, and which, by the partnership articles, was to continue for a stated time after the death of any of the partners, were held to belong to the life tenant as income.

The case of *Wakefield v. Wakefield*, 32 Ont. Rep. 36, makes a clear distinction on this question. In this case it was held that a life tenant who continued a brick business of the testator under a devise and bequest to her, to be used and enjoyed by her for and during the term of her natural life and widowhood, is entitled to all the income, earnings, and profits derivable therefrom each year in so far as she has applied them to the maintenance of the family or L.R.A.1915C.

Kelly-Goodfellow Shoe Co. v. Sally, 114 Mo. App. 222, 89 S. W. 889.

Mr. Justice Van Orsdel delivered the opinion of the court:

This is an appeal from a decree of the supreme court of the District of Columbia, requiring Thomas E. McArdle, executor of the estate of Appolonia Stuntz, to pay to Henry J. Ruppert, executor of the estate of Kate France, the sum of \$79.25.

It appears that Appolonia Stuntz died in the city of Washington, District of Columbia, in 1901, testate, leaving certain real and personal property to one Kate France for life. Among the property left was a small dry goods business, consisting of notions, toys, etc. Upon the appoint-

in the acquisition of other property, or in the paying off of mortgages; but whatever profits went into the business to increase it, and whatever plans, stock, and belongings of the business remained on the premises or elsewhere at the date of her death, became the property of the remainderman. Compare with *RUPPERT v. MCARDLE*.

So, where the increased value results not from earnings, but from an increase in value, it has been held to belong to the remainderman. Thus, a premium received by the executrix of a testator on the gold value of a draft held by him is not income of the estate, but belongs to the corpus thereof. *Van Blarcom v. Dager*, 31 N. J. Eq. 783. It is stated by the court that there is a distinction between the earnings or profits from his business and the mere increase or rise in the market value of an investment; that the difference between the par value of the gold and its value in legal tender money is not earnings, but, like the increase in value of the testator's jewelry or pictures, is a part of the property from which the income is to arise.

The profits on certain uncompleted contracts which the testator directed to be completed, authorizing his executors to make necessary advancements for the purpose of such completion, were held to belong to the corpus of the estate, and not to the life tenant, under a provision directing "the net annual income" of the estate to be paid to the life tenant. *Re Pollock*, 3 Redf. 100.

Under a will bequeathing the property of the testator in trust, and directing that certain ships which constituted a part of the estate should be sailed until they could be satisfactorily sold by the executors, with directions to pay the income to the life tenants, a profit made upon the sailing of a ship was divided in *Brown v. Gellatly*, L. R. 2 Ch. 751, by placing a value upon the ship as at the death of the testator, and paying the tenant for life 4 per cent on the amount of such value from the day of the death of the testator, and investing the residue of the profits to form a part of the estate.

ment of Thomas E McArdle as executor of the estate of Stuntz, the goods and fixtures in the store were appraised at \$350. Under the will, France was to carry on the business in the store for life and enjoy the benefits thereof, which she continued to do until the date of her death, in 1913. Upon the qualification of Henry J. Ruppert as executor of the estate of France, the goods and fixtures were appraised at \$429.25. Both appraisements were made under order of court.

Subsequent to the last appraisement, the court ordered the Stuntz executor to sell the goods and fixtures, which was done, the amount realized being \$740. Whereupon this action was brought by the France executor to recover \$390, the difference be-

tween the first appraisement and the selling price, less the proportionate share of the expense of selling the property. The Stuntz executor answered, admitting the life estate of France and the inventories and sale, but denying any liability whatever, maintaining, as matter of law, that the excess became a part of, and belonged to, the Stuntz estate. On hearing, the court entered a decree in favor of the France executor for the sum of \$79.25, the difference between the valuations fixed by the respective appraisements. From the decree both parties have appealed.

Can the France executor recover in any view of the case? The property in question bequeathed to the life tenant was a store. The only way she could derive any use and

b. Live stock; slaves.

So, a life tenant is entitled to increase from live stock. *Leonard v. Owen*, 93 Ga. 678, 20 S. E. 65; *Davison v. Davison*, 149 Ky. 571, 149 S. W. 982; *Perry v. Terrel*, 21 N. C. (1 Dev. & B. Eq.) 441; *Poindexter v. Blackburn*, 36 N. C. (1 Ired. Eq.) 286; *Saunders v. Houghton*, 43 N. C. (8 Ired. Eq.) 217, 57 Am. Dec. 581; *Patterson v. Devlin*, M'Mull. Eq. 459; *Forsey v. Luton*, 2 Head, 183; *Vancil v. Evans*, 4 Coldw. 340; *Woods v. Sullivan*, 1 Swan, 507.

This rule was applied in *Hunt v. Watkins*, 1 Humph. 498, where the live stock upon a farm was kept by the tenant for life with the consent of the executor, instead of being sold for the payment of the testator's debts.

A life tenant of stock upon a farm, who has carried on the farming business and extended it, taking additional land adjoining the original farm, and increasing the stock, is entitled to all such farming stock and effects as, at her death, were on the additional farm and would be properly attributable to and fit and proper for the carrying on of the farming business upon such additional land, and the remainder estate is entitled to all such farming stock as was on the original land and was proper for carrying on the farming business of the testator at his death. *Groves v. Wright*, 2 Kay & J. 347, 2 Jur. N. S. 277.

So, one who was to hold live stock for life, or during widowhood, is entitled to the increase during the widowhood. *Lewis v. Davis*, 3 Mo. 133, 23 Am. Dec. 698.

But the increase of stock on a farm will be held to belong to the remainder estate where such is the intention of the testator. Thus, where the testator had bequeathed a life estate to his widow in stock on the farm, and indicated an intention that it should be used for the benefit of the family and to improve the farm, thus enabling the widow to keep together the family upon the farm, the increase from the stock will be treated as the property of the remainderman. *Flowers v. Franklin*, 5 Watts, 265.
L.R.A.1915C.

And under a bequest of live stock upon a farm to the wife of the testator during her lifetime or while she remains his widow, followed by an expression of a desire that she manage and control it for the benefit of herself and children, with a bequest over of the remainder, the increase in the live stock passes to the remainderman upon the remarriage of the widow. *Major v. Herndon*, 78 Ky. 123. The widow is here treated as occupying the relation of trustee. The bequest also included farming implements, and there were left at the time of her marriage some of these implements and other property procured in lieu of that left by the testator, which had been worn out, and this was treated as trust property.

Nott, J., in *Patterson v. Devlin*, M'Mull. Eq. 459, was of the opinion that while the tenant for life is entitled to the increase of stock, he must keep up the stock in the condition in which he receives it; while *Colcock, J.*, after stating that the rule of the civil law, that the original number of stock must be preserved by supplying any deficiency out of the increase, states that this would not be true where only a single animal was given.

In *Robertson v. Collier*, 1 Hill, Eq. 370, *Nott's* opinion is cited with approval in case of a gift of a plantation including stock, slaves, and farming implements.

Under a Code provision involved in *Leonard v. Owen*, 93 Ga. 678, 20 S. E. 65, the life tenant was relieved of the obligation to keep up the stock to its original number.

In case of the increase of slaves, the majority of the courts refused to apply the rule as to the increase in domestic animals, but held that the increase belonged to the remainderman. This is based by most courts upon humanitarian reasons. But in a discussion of the case of *Tims v. Potter*, 1 N. C. pt. 1, p. 7 (*Martin*, pt. 1, p. 22), it is stated that this rule probably arose from the idea that the increase of slaves belonged to the absolute proprietor, exclusive of the claim of temporary owners or usufructuaries; and that idea, for want of examining its foundation, having once become general, the inhabitants of the coun-

benefit from it was by selling the goods and replacing them with others of like or different kind. She was entitled not only to the profit on the goods sold, but the profits of the business generally. She was not required to keep the stock on hand down to the level shown by the original appraisalment. She could increase the business in volume and value as she pleased, and any increase so made over the amount of the original appraisalment was hers. From the nature of the property and business, it would be folly to require the return of the same or like property at the termination of the tenancy. Either an equivalent amount of property under a due ap-

praisalment, or the value of the property originally received, is all that the estate of the life tenant can be held to account for. In this instance, the property has been sold; hence, the value of the original property, as shown by the appraisalment thereof, is the proper measure of the interest of the Stuntz executor therein.

But it is contended that the goods became so mixed by the act of the life tenant that those received from the Stuntz estate and those subsequently added by France could not be identified or separated. It is sufficient answer that the very object of the life tenancy would have been frustrated

try began to act under it, in making their contracts, wills, and settlements as provisions for their families; and probably continued to do so until at length it became dangerous and fraught with mischievous and unjust consequences to attempt the establishment of a different rule. That the increase of slaves born during the life of the legatee for life belonged to the ulterior legatee, who was the absolute owner, is the reason given in *Erwin v. Kilpatrick*, 3 Hawks (N. C.) 456.

It was accordingly held by the majority of the courts that the children of a female slave, born during a life tenancy, are the property of the remainderman upon the termination of the life tenancy. *Wilks v. Greer*, 14 Ala. 437; *Strong v. Brewer*, 17 Ala. 706; *Murphy v. Riggs*, 1 A. K. Marsh. 532; *Miller v. McClelland*, 7 T. B. Mon. 231 (*dictum*); *Johnson v. Johnson*, 8 B. Mon. 470; *Glasgow v. Flowers*, 2 N. C. (1 Hayw.) 233; *Tims v. Potter*, 1 N. C. pt. 1, p. 7 (*Martin*, pt. 1, p. 22); *Erwin v. Kilpatrick*, 3 Hawks (N. C.) 456; *Smith v. Barham*, 17 N. C. (2 Dev. Eq.) 420, 25 Am. Dec. 721; *Covington v. McEntire*, 37 N. C. (2 Ired. Eq.) 316; *Patterson v. High*, 43 N. C. (8 Ired. Eq.) 52; *Saunders v. Haughton*, 43 N. C. (8 Ired. Eq.) 217, 57 Am. Dec. 581; *Horry v. Glover*, 2 Hill, Eq. 515; *Wirt v. Cannon*, 4 Coldw. 121. This rule is recognized in *Henderson v. Vaulx*, 10 Yerg. 30, and *Preston v. McGaughey*, *Cooke* (Tenn.) 113, Fed. Cas. No. 11,397.

Nor is this rule changed by the fact that in the clause disposing of the slaves in question nothing is said as to their increase, while in another clause, in no way connected with it, disposing of other slaves, the increase is disposed of. *Covington v. McEntire*, 37 N. C. (2 Ired. Eq.) 316.

This rule was applied to the child of a female slave, born within a tenancy for years, and such child was held to belong to the reversioner. *Young v. Small*, 4 B. Mon. 220.

Tidyman v. Rose, Rich. Eq. Cas. 294, approves of the rule that the increase of slaves belongs to remainderman, but holds that testator may make a different disposition.

Slaves and stock on a farm which have L.R.A.1915C.

been improved and increased to a very great degree by the life tenant were decreed to the remaindermen in *Carter v. Webb*, Jeff. (Va.) 123.

See *Holmes v. Mitchell*, *infra*.

The contrary rule, that the children of a female slave born within the life tenancy are the property of the life tenant, has been established in some jurisdictions. *Smith v. Milman*, 2 Harr. (Del.) 497; *Scott v. Dodson*, 1 Harr. & M'H. 160; *Somerville v. Johnson*, 1 Harr. & M'H. 348; *Standiford v. Amoss*, 1 Harr. & J. 526 (without opinion); *Wootten v. Burch*, 2 Md. Ch. 190.

The trial court in *Bohn v. Headley*, 7 Harr. & J. 257, instructed the jury in accordance with this theory, but this question was not discussed by the supreme court, the case being reversed on other grounds. The contest here was between the remainderman and one to whom the life tenant had conveyed the slaves absolutely.

The rule that children born to a female slave during the life tenancy belong to the life tenant was adhered to in *Concklin v. Havens*, 12 Johns. 314. In this case the application of the doctrine resulted in the freedom of the issue of the slaves.

The Maryland rule that the issue of slaves belongs to the life tenant unless the increase are given over by express words is applied in the South Carolina case of *Lattimer v. Elgin*, 4 Desauss. Eq. 26, in case of a contract made in Maryland.

But where a mass of property consisting of real and personal estate, including slaves, is devised and bequeathed to a trustee, the income arising therefrom to be applied for the benefit of two persons for life, remainder over, the issue of the female slaves does not go to the legatee, but remains a part of the corpus of the estate. *Holmes v. Mitchell*, 4 Md. Ch. 162. It is stated by the court that when the testator directed the "income" of the estate left in trust to be applied to the mutual benefit of the life tenants, he meant the annual income, and no more. Upon appeal, this decision was affirmed by a divided court in 4 Md. 532.

Where the owner of female slaves transfers the ownership thereof to another person, reserving nothing more than a limited and temporary right as user during her life,

had she been required to keep the goods received, or goods of like kind, to turn over at the termination of her tenancy. Under the will of Stuntz, the store was given the life tenant for her use and benefit. Of necessity, the original goods and the proceeds from the sale thereof would soon become mixed in the general business beyond the possibility of identification. In the absence of any fraud or wrongdoing on the part of the life tenant, it would be inequitable to hold that the life tenant was not entitled to the enhancement in the general value of the store. It was not contemplated by the bequest that the estate of Stuntz should be enhanced, but that all

profits derived from it should inure to the use and benefit of the life tenant. The most, therefore, that the Stuntz executor can equitably claim, is the value of the estate turned over to the life tenant.

But the court decreed judgment only for the difference between the two appraisements. Had there been no sale, the appraisements would have been a proper basis for judicial computation. But in the last instance, there was a judicial sale, which, we think, should be taken as conclusive evidence of the value of the property. An appraisalment is merely *prima facie* evidence of the value of property, and may

the issue of such female slaves during the life tenancy belongs to the remainderman. *Hope v. Hutchins*, 9 Gill & J. 77.

c. Corporate stock.

1. In general.

This note, so far as corporate stock is concerned, is confined to cases involving an increase in the value of the stock or profits realized on its sale, but is not concerned with the respective rights of life tenant and remainderman in dividends or distributions made by the corporation pending the life estate. As to that question, see note to *Re Osborne*, 50 L.R.A.(N.S.) 510, and earlier notes on the same subject appended to *Holbrook v. Holbrook*, 12 L.R.A.(N.S.) 768, and *Newport Trust Co. v. Van Rensselaer*, 35 L.R.A.(N.S.) 563.

The increase in the value of bank stock while in the hands of the life tenant belongs to the remainderman. *Bains v. Globe Bank & T. Co.* 136 Ky. 332, 136 Am. St. Rep. 263, 124 S. W. 343.

An increase in the value of bank stock which has been purchased by the trustee with trust funds does not belong to the life tenant under a trust providing that the income shall be paid to the life tenant during his life. *Letcher v. German Nat. Bank*, 134 Ky. 24, 119 S. W. 236, 20 Ann. Cas. 815.

A premium received upon a sale of bank stock constituting a part of the trust fund, at the vesting thereof at the testator's death, over and above the book value of such stock, belongs to the principal of the fund, and not to the life tenant. *Guthrie v. Akers*, 157 Ky. 649, 163 S. W. 1117.

It was on the theory that a remainderman is not confined to having the fund kept intact to the extent of the original market value and the life tenant entitled to all else which may have flowed from or accrued to it by way of profits or increases in valuation of the securities which have made up the fund, that *Boardman v. Mansfield*, 79 Conn. 634, 12 L.R.A.(N.S.) 793, 118 Am. St. Rep. 178, 66 Atl. 169, was decided; the gift of the "dividends, rents, and profits" by the testator to the life tenant was re-

garded as not being sufficient to confine the remainderman, as above stated.

A part, at least, of the profit involved in *Re Letterle*, supra, II. a, consisted of an increased value of railroad stock; but the question is there considered as one involving an increase of the entire estate.

See *Connolly's Estate*, 198 Pa. 137, 47 Atl. 1126, *infra*.

2. Increase resulting from withholding earnings.

The general rule that in the absence of a declaration of dividends an increase in the value of corporate stock belongs to the remainderman has been applied, although that increase is due to a setting aside of earnings to surplus.

Upon the sale of stocks at a premium, that part of the premium which was due to the increase in the book value of shares of stock during the period from the vesting of the trusts at the testator's death until the date of the sale of the shares, and which resulted from the action of the directors of the bank in setting aside a part of its earnings to surplus, constitutes a part of the principal of the fund, and belongs to the remainderman, and does not go to the life tenant as income. *Guthrie v. Akers*, 157 Ky. 649, 163 S. W. 1117. The stock involved in this case had paid a satisfactory dividend to the life tenant during the time it was held as a part of the trust estate, and this fact is taken into consideration by the court in determining the question.

The increase in value of stock belonging to an estate, due in part to surplus earnings retained by the corporation to give it financial standing and meet losses, and in part to the enhancement of the original value of such stocks, belongs to the remainderman, and not to the tenant for life as income. *Connolly's Estate*, 198 Pa. 137, 47 Atl. 1125. The remainder, including the increase of a part of the stock involved in this case, had been specifically bequeathed. It is the theory of this case that the income, only, was given to the life tenant; that her rights were no greater than the testator's in his lifetime, and as he could

be accepted in the absence of better evidence of its market value. But a fair sale is the best evidence of the market value of the property sold. The court, therefore, erred in not decreeing judgment for the difference between the first appraisal and the sum for which the goods were ultimately sold, less the cost of conducting the sale.

The decree is reversed with costs against Thomas E. McArdle, executor of the estate of Appolonia Stuntz, deceased, and the cause remanded for a decree in accordance with this opinion.

not have compelled a distribution of the surplus profits, his legatee could not.

An *obiter* statement by the court in *Lauman v. Foster*, 157 Iowa, 275, 50 L.R.A. (N.S.) 531, 135 N. W. 14, is to the effect that any enhancement in the value of the stock by reason of withholding the earnings of the corporation inures entirely to the benefit of the corpus, and the life tenant derives no advantage therefrom.

On the contrary, an increase in the value of bank stock, as shown by the difference in value of the stock at the time of its acquisition by the trust estate and the value at the time of the death of the life tenant, due in part to an increase in book value of the shares from the retention of earnings undistributed, passes to the devisees of the life tenant, and not to the remainderman. *Wallace v. Wallace*, 90 S. C. 61, 72 S. E. 553. The will involved in this case contained a direction to pay over the "annual income, interest or profits" of the shares given to such life tenant.

The circuit court in *Wallace v. Wallace*, *supra*, approved of the rule that earnings of a corporation should be distributed between the life tenant and the remainderman according to the time when such earnings are made, and not according to the chance action of corporate officers in withholding or declaring dividends. The circuit court approves of *Simpson v. Millsaps*, *infra*, but places little stress upon the intention of the testator.

Other courts have treated it primarily as a question of the intention of the testator.

In *Simpson v. Millsaps*, 80 Miss. 239, 31 So. 912, the court held that the intention of the testator was that the life tenant should have the increase due to retaining earnings and carrying it to surplus. A division was effected in this case and the increase in the value of bank stock, arising out of the policy of the bank to withhold a part of its earnings from the distribution of dividends, and carry it to surplus, resulting during the life of the testator, was given to the corpus of the estate; but that resulting from the same policy followed out during the life tenancy was given to the life tenant, upon a sale of the stock. The testator had indicated a desire that all the profits his estate produced should be annually devoted to the support, maintenance, and education of the life beneficiary. See *Wallace v. Wallace*, *supra*.

Where no intention of the testator appears that the life tenant shall have the increase in value, upon a sale, the increase in the value of stock in a trust estate, caused by the accumulation of the undistributed profits, does not become income L.R.A.1915C.

or profits payable to the life tenant. It is stated that until the dividends are actually declared by the directors, and thus separated from the capital of the corporation, to be distributed as profits to its stockholders, the life tenants are not entitled to any part of the earnings. *Stewart v. Phelps*, 71 App. Div. 91, 75 N. Y. Supp. 526, affirmed in 173 N. Y. 621, 66 N. E. 1117. In this case, the testator provided that the "rents, income, issues, and profits" of his residuary estate should be paid to the life tenant. It was urged that the use of the words "issues and profits," which had been omitted by the testator from other trusts contained in the will, indicated an intention that all profits should be paid to the life tenant. The court, however, after reviewing other trusts created by the will, including those in which the words "issues and profits" had been used, concludes by stating that the testator used these phrases interchangeably, and there was nothing in the will which would indicate an intention to give to the life beneficiary more than the annual income received from the trust estate.

Under a will bequeathing stocks to a life tenant "for her sole use and benefit, and subject to her control during her natural life," an increase in the value of stock during the life tenancy belongs to the remainder estate. *Re Cutler*, 23 Misc. 508, 52 N. Y. Supp. 842.

A profit resulting from a sale of stock set apart as a fund directed to be invested by the testator, and the "interests, dividends or other income" thereof to be paid to the life tenant, belongs to the principle fund, and not to the life tenant. *Whitney v. Phenix*, 4 Redf. 180. The profit realized is stated to be in no sense income or dividend.

An increase in the value of corporate shares resulting from a surplus and undivided profits accumulated by the corporation does not pass to the life tenant as income. *Tubb v. Fowler*, 118 Tenn. 325, 99 S. W. 988. The will in this case directed the whole net interest of investments or income from personal property to be paid to the life tenant; and the court states that the surplus and undivided profits in the several banks do not constitute in any sense income within the sense of the law or intent of the testator as manifested in the will. Part of the stock involved in this case belonged to the estate at the death of the testator, and other stock was purchased by the executor.

3. Increase resulting from nearness of dividend-paying period.

Cases like *Abercrombie v. Riddle*, 3 Md.

Ch. 320; *Bostock v. Blakeney*, 2 Bro. Ch. 653, and *Freeman v. Whitebread*, L. R. 1 Eq. 266, 35 L. J. Ch. N. S. 137, 13 L. T. N. S. 550, 14 Week. Rep. 188, merely denying the right of the life tenant to an apportionment of the price received for stock sold between dividend days, it not appearing that the price was enhanced by the proximity to the dividend period, are not within the scope of this note.

The rule of these cases, however, was followed in *Scholefield v. Redfern*, 2 Drew. & S. 173, 32 L. J. Ch. N. S. 627, 9 Jur. N. S. 485, 8 L. T. N. S. 487, 11 Week. Rep. 453, and an apportionment of the price received for stocks bearing dividends payable at half yearly periods, when sold a short time before the dividend-paying period, between the life tenant and the remainderman, was refused, although the amount realized by the sale was compounded partly of the value of the stock itself and partly of the value of that proportionate part of the current half year's dividends which, it is stated, may be considered to have accrued since the last dividend day.

A contrary holding appeared in *Londesborough v. Somerville*, 19 Beav. 295, 23 L. J. Ch. N. S. 646, where the life tenant was held entitled to the amount by which the stock was augmented by the dividends.

This case is explained in *Scholefield v. Redfern*, supra, by saying that it was decided upon very special circumstances. The trustees of the fund had purchased land, and it was necessary for them to sell the stock before the dividend day in order to make the payment for the land, and they sold it at the latest possible period.

In *Bulkeley v. Stephens*, 10 L. T. N. S. 225, 3 New Reports, 105, where the stock sold included the value of the current dividend, it was held that the life tenant must be compensated therefor by the apportionment of the dividend.

d. Bonds.

In view of the scope of the note, only cases where the bonds have appreciated in value, or have been sold at a premium over their value at the time they became a part of the corpus, are included. The question as to the respective rights and liabilities of the life tenant and remainderman on account of premium paid for bonds will form the subject of a future note in this series.

A premium received from the sale of bonds belonging to the trust estate constitutes a part of the corpus of the trust fund, and is not subject to appropriation by the life tenant or the owner of the income. *Whittingham v. Schofield*, 23 Ky. L. Rep. 2444, 67 S. W. 846; *Re Lawrence*, 26 N. Y. S. R. 238.

So, a profit realized by the trustees of a trust estate from a purchase and sale of bonds belongs to the corpus of the estate. *Graham's Estate*, 198 Pa. 216, 47 Atl. 1108.

And an increase made in the value of an estate consisting of stocks, bonds, and other

securities, by sale and reinvestment by the life tenant, belongs to the remainder estate. *Re Cutler*, 23 Misc. 508, 52 N. Y. Supp. 842. It was here held that it will not be presumed that the remainder has been increased by accumulations of income.

And increase in the value of municipal loans, owing to the prosperousness of the times, is a part of the principal, and cannot be treated as income. *Hubley's Estate*, 16 Phila. 327.

Under a will directing the investment of the trust fund in bonds or mortgages on real estate, with directions to pay "the annual interest, income and dividends thereof" to the life tenant, an increase in the value of bonds occasioned by a depreciation in the rate of interest, effected by natural causes, thus giving an increased value to securities bearing the higher rates at former times, belonged to the remainderman. *Re Gerry*, 103 N. Y. 445, 9 N. E. 235.

An increase over and above the appraised value received by trustees upon the sale of securities belonging to their estate, consisting of bonds, stocks, and securities of a like character, was held to be a part of the corpus of the estate, in *Stewart v. Phelps*, 71 App. Div. 91, 75 N. Y. Supp. 526, affirmed in 173 N. Y. 621, 66 N. E. 1117. See discussion of this case under "Corporate stock," supra, II. c.

An increase in the value of securities held by a trust estate belongs to the principal of the fund, and not to the life tenant as income, under a will giving to the life tenant the "income and profit" of the estate, especially where the securities were not sold until after the death of the life tenant. *Re Vedder*, 2 Connolly, 548, 40 N. Y. S. R. 119, 15 N. Y. Supp. 798, affirmed in 62 Hun, 275, 17 N. Y. Supp. 93. A similar holding appears in *Duclos v. Benner*, 62 Hun, 428, 17 N. Y. Supp. 168, with reference to a profit made on a sale of bonds in which the trust fund had been invested.

An increase in the value of bonds which were purchased by trustees, and sold at the expiration of the life tenancy, belongs to the remainder estate. *Re Proctor*, 85 Hun, 572, 33 N. Y. Supp. 196. The direction of the testator that "the interest, income and profits" of the amount involved should be paid the life tenant was held equivalent to the direction that the "interest or income shall be payable to her at the time the same accrues on the investment."

A profit realized upon the sale of bonds belongs to the principal, and cannot be paid to the life tenant as income under a will authorizing and directing the payment to the life tenant of "the interest, income or dividends" arising from the trust fund. *Townsend v. United States Trust Co.* 3 Redf. 220.

A bonus of interest not yet due, paid by the government upon the redemption of bonds, belongs to the principal of the fund. *Whittemore v. Beekman*, 2 Dem. 276.

In *Seovell v. Roosevelt*, 5 Redf. 121, where a trustee had accepted the offer of the Uni-

ted States government and exchanged 6 per cent five-twenty bonds for 4 per cent bonds, receiving therefor the bonus offered by the government of the accrued interest on the 6 per cent bonds and the additional three months' interest not then due thereon, in distributing this bonus between the life tenant and the remainderman it was held that the amount was presumably controlled by the time the five-twenties had to run, the rate of interest they bore, and that but 4 of the 6 per cent can be regarded as a bonus paid on account of the capital, and the additional two per cent as a consideration for the reduced rate of interest, and that such 2 per cent would go to the life tenant, the balance to the remainderman.

III. Real estate.

The increase in value of unproductive property held by trustees in the exercise of their discretion, with a view to getting a satisfactory price therefor, is a part of the corpus of the estate, and does not go to the life tenant as income. *Outcalt v. Appleby*, 36 N. J. Eq. 73.

So, a profit made upon the sale of real estate which had been purchased at foreclosure by the trust estate, due to the enhancement in value of the real estate, belongs to the principal of the fund, and not to the life tenant as income. *VanVleck v. Lounsbery*, 34 Hun, 569.

The profit resulting from an investment of trust funds in real estate by the trustee of the funds under a will giving the "interest and profits" annually accruing from the trust fund to the life tenant, with remainder over, belongs to the principal fund, and does not go to the life tenant. *First Nat. Bank v. Lee*, 23 Ky. L. Rep. 1897, 66 S. W. 413. It is stated that the testator intended that the income only from the principal fund should be available to the life tenant, and that he used the words "interest" and "profits" as synonymous terms; so that, as treated by the court, the will was the same as though it were provided that the interest only be paid to the life tenant.

It is stated in *Coleman v. Grimes*, 33 Ky. L. Rep. 455, 110 S. W. 349, that if, by judicious investment, the property in which a trust fund is invested enhances in value, the increase attaches to and becomes a part of the principal fund, subject to the trusts under which it is held.

In New Jersey profits arising from real estate purchased with trust funds, consisting partly of principal and partly of interest, upon the foreclosure of a mortgage in which the trust fund is invested, are divided between the tenant for life and the remainderman in the proportion which the principal represented by the investment bears to the interest, which was in arrears, and also represented by the investment. *Parker v. Seeley*, 56 N. J. Eq. 110, 38 Atl. 280.

Where there are probable losses as well as gains upon such an investment, the court L.R.A.1915C.

will not make any application of the gains, but will hold it to be applied on the losses, should any occur. *Parker v. Johnson*, 37 N. J. Eq. 366.

On the contrary, profits realized upon a resale of property which the trustees had been forced to purchase to protect a mortgage held by the trust estate thereon have been held to belong to the life tenant, under a will authorizing the trustees "to receive and collect the rents of the real estate hereby devised to them in trust, and the income and profits of the personal estate hereby bequeathed to them in trust," and after deducting taxes and expenses and some minor annuities "to pay the residue of the net income arising from said real and personal estate held by them in trust" to the life tenant. In the opinion of the dissenting judge in the court below, upon which the prevailing opinion is reversed by the supreme court, it is stated that the gift being not of specific property, but general and residuary in its character, the measure of the remainder is the value at the date of testator's death, and that of the life estate the increase thereafter. *Park's Estate*, 173 Pa. 190, 33 Atl. 884.

The court, in *Graham's Estate*, 198 Pa. 216, 47 Atl. 1108, states of this case that it appears that there was a misapprehension as to the provisions of the will, as it is quoted as giving both the income and profits to the tenant for life. In the *Graham Case* the income alone was given, and this is stated as a possible distinction between the cases.

The securities involved in *Re Gerry*, 103 N. Y. 445, 9 N. E. 235, included mortgages on real estate, but whether there was an increase in the value of these is not stated.

W. A. E.

ILLINOIS SUPREME COURT.

UNIVERSITY CLUB OF CHICAGO

v.

EARL H. DEAKIN, Plff. in Certiorari.

(265 Ill. 257, 106 N. E. 790.)

Landlord and tenant — breach of covenant not to let premises to rival business.

1. The letting by a property owner of a storeroom for the sale of articles which by

Note. — Landlord and tenant: provision in lease the purpose of which is to assure lessee an exclusive right to conduct a certain business on premises owned by lessor.

It is intended in this note to include all cases of the lessor's restrictive covenants concerning the remaining part of his land, made for the purpose of preventing competition with the business of the lessee, whether the covenant is that the lessee shall have the exclusive right, or whether it is

a lease signed by both parties, of another room in the building, he has covenanted with its lessee not to do, justifies the latter in rescinding his contract and surrendering possession of the property.

Same — provision against breach of lease — effect.

2. A lessor does not relieve himself from liability for breach of a covenant not to rent another storeroom in the building for a rival business, by merely inserting in a lease of another room a provision that it shall not be used for that business.

(October 16, 1914.)

CERTIORARI to the Appellate Court, First District, to review a judgment affirming a judgment of the Municipal

an agreement not to let for the purpose of a business similar to that of the lessee or to a person engaged in such business, etc. There seem to be more cases in the books of covenants not to let for the purpose in question, etc., than of those which in terms assure the tenant the exclusive right to conduct a certain kind of business on the landlord's premises.

For eviction by admitting inconsistent business into building, see the note to *Wade v. Herndl*, 5 L.R.A. (N.S.) 855.

Restraint of trade.

The question of restraint of trade seems to have rarely arisen in these cases.

In *Herpolsheimer v. Funke*, 1 Neb. (Unof.) 304, 95 N. W. 687, *infra*, succeeding subdivision, the court said: "It is elementary that if the covenant in question, rightly construed, is in general restraint of trade, and not reasonably limited as to place, it is unenforceable; while on the other hand, if, rightly construed, it merely prohibits the one party from engaging in competitive business for a reasonable time and within a limited area, and not larger than is reasonably necessary for the protection of the other, it is valid and enforceable. . . . We think the

fact that the lessors were conducting a large department store in the same building, and the context of the lease, show clearly that no general restraint of trade was in contemplation, but that the intention of the parties was to prohibit the lessors in the conduct of their business from competing with the retail business of the lessees in the building."

In *Texas & P. Coal Co. v. Lawson*, 89 Tex. 304, 32 S. W. 871, 34 S. W. 919, it was held that no recovery for rent could be had on the lease in question, as it was void under the Texas anti-trust statute of 1889. In that case the plaintiff was the owner of a large quantity of land on which it had a mining camp, and employed about 2,000 people, about 400 of them being miners, and it leased to the defendant a saloon, etc., at such camp, covenanting that neither

Court of Chicago in plaintiff's favor in an action brought to recover rent alleged to be due and unpaid. Reversed.

The facts are stated in the opinion.

Mr. James P. Harrold, with Messrs. John S. Goodwin and James B. Devitt, for plaintiff in certiorari:

The same rules of law are applicable to the construction of a lease that are applicable to the construction of other contracts, and if it was the intention of the parties to make the clause of the lease a term of the contract, it must be so regarded.

Chicago Auditorium Asso. v. Fine Arts Bldg. Co. 244 Ill. 532, 91 N. E. 665, 18 Ann. Cas. 253; *Street v. Chicago Wharfing & Storage Co.* 157 Ill. 605, 41 N. E. 1108.

Where the contract is, in fact, understood

it, its successors, nor its assigns would, during the continuance of such lease, sell, or permit any person or persons other than said Lawson, his agents or servants, to sell, any wine, beer, or spirituous liquors upon any lands owned or occupied by said company during the term of said lease; that in case of sale of any such lands, restrictions should be inserted in the deeds prohibiting the sale of such liquors; the lease stating also that it was "the purpose of this lease to confirm to said Lawson the exclusive privilege of selling wine, beer, and spirituous liquors upon the land of the company during the term of this lease." The statute in question provided that "a trust is a combination of capital, skill, or acts by two or more persons, firms, or corporations, or associations of persons, or of either two or more of them for either, any, or all of the following purposes: First, to create or carry out restrictions in trade. . . . Third, to prevent competition in . . . sale or purchase . . . of . . . commodities;" and declared "that any contract or agreement in violation of the provisions of this act shall be absolutely void, and not enforceable in law or equity." The court apprehended that it would be difficult to sustain the contract at common law.

In *Sell v. Brannen*, 70 Ill. App. 471, *infra*, "Sale of the reversion," the court refused to accede to the objection that the contract was in restraint of trade in intoxicating liquors, as such was not contrary to public policy.

For validity of agreement not to compete, ancillary to sale or lease of property, as affected by covenantant's purpose to procure a monopoly, see the note to *Anderson v. Shawnee Compress Co.* 15 L.R.A. (N.S.) 846.

For contracts in partial restraint of trade as affected by modern anti-trust acts, see the note to *Lanyon v. Garden City Sand Co.* 9 L.R.A. (N.S.) 446.

Lessor transacting the prohibited business.

The simplest form of the question is

by one of the parties in a certain sense, and the other party knows that he so understands it, then the undertaking is to be taken in that sense, provided this can be done without making a new contract for the parties.

Snead & Co. Iron Works v. Merchants' Loan & T. Co. 225 Ill. 442, 9 L.R.A. (N.S.) 1007, 80 N. E. 237; *Street v. Chicago Wharfing & Storage Co.* supra; *Wells v. Carpenter*, 65 Ill. 447; *Mueller v. Northwestern University*, 195 Ill. 236, 88 Am. St. Rep. 194, 63 N. E. 110.

If the landlord does any act which renders the lease unavailing to the tenant, he is thereby discharged from its terms and conditions, and may abandon it.

Wright v. Lattin, 38 Ill. 293; *Waite v. O'Neil*, 34 L.R.A. 550, 22 C. C. A. 248, 47 U. S. App. 19, 76 Fed. 408; *Royce v. Gugenheim*, 106 Mass. 201, 8 Am. Rep. 322; *Coulter v. Norton*, 100 Mich. 389, 43 Am. St. Rep. 458, 59 N. W. 163; *Scott v. Simons*, 54 N. H. 426; *Hoeverler v. Fleming*, 91 Pa. 322.

Mr. Laird Bell, with Messrs. *Matz, Fisher, & Boyden*, for defendant in certiorari:

Whether, if Sandberg had made a speciality of the sale of pearls, it would have been the breach of so essential a covenant as to justify defendant in refusing to pay rent, is a mixed question of law and fact.

Cheney v. Cross, 181 Ill. 31, 54 N. E.

where the lessor himself transacts the prohibited business.

A landlord who conducts a large department store in a building, a small part of which he leases to a tenant engaged in the sale of glassware, etc., with a covenant that the landlord will not sell glassware, etc., during the term of the lease, will be enjoined from such selling. *Herpolsheimer v. Funke*, 1 Neb. (Unof.) 304, 95 N. W. 687.

In another action the same tenant received damages for the breach. 1 Neb. (Unof.) 471, 95 N. W. 688.

But it has been said *arguendo* that a covenant not to let for a certain business would not be violated by the lessor himself engaging in such business. *Brigg v. Thornton* [1904] 1 Ch. 386, 73 L. J. Ch. N. S. 301, 32 Week. Rep. 276, 90 L. T. N. S. 327.

Covenant in terms assuring the exclusive right.

The court will enforce a covenant assuring the lessee the sole or exclusive right of conducting a certain kind of business on the landlord's property. *Altman v. Royal Aquarian Soc.* L. R. 3 Ch. Div. 228; *Shaft v. Carey*, 107 Wis. 273, 83 N. W. 288; *Holloway Bros. v. Hill* [1902] 2 Ch. 612, 71 L. J. Ch. N. S. 818, 87 L. T. N. S. 201, 18 Times L. R. 745. See also to same effect *Western U. Teleg. Co. v. Rogers*, infra. But compare *Taylor v. Owen*, infra.

A lessee of a stall in an exhibition building "for the purpose, and with the sole right, of exhibiting therein and selling" china, etc., may restrain his landlord from permitting or neglecting to prevent the exhibition or sale in the building by others of china, etc. *Altman v. Royal Aquarium Soc.* supra.

In *Shaft v. Carey*, supra, 107 Wis. 273, 83 N. W. 288, a landlord leased the barroom of the "Palmer House" hotel to the plaintiff with a stipulation that the lessee was to have the exclusive right to sell liquors and cigars in the "Palmer House Block," and thereafter leased to his codefendant the hotel building, except a few rooms thereto. L.R.A.1915C.

fore leased to others, such codefendant covenanting that he "is not to sell or permit to be sold any wine, beer, or liquors or any kind of cigars in said hotel" (unless he secured the first-mentioned lease). Thereafter the defendants built a lean-to on the end of the hotel building using the end wall of such building, and opened a door thereto from the hotel and commenced selling therein liquors and cigars, and it was held that the lean-to was an integral part of the hotel block, and that the plaintiff had a right to enjoin such sale, which right was not defeated by a mere trick or subterfuge in the manner of construction, and that, the second lessee having recognized the plaintiff's rights so far as to bind himself not to sell, etc., it was immaterial to consider whether the covenant in the plaintiff's lease ran with the land.

In *Western U. Teleg. Co. v. Rogers*, 42 N. J. Eq. 311, 11 Atl. 13, supra, it was held that an injunction would be granted to a telegraph company restraining a hotel owner and another telegraph company from carrying into effect an agreement extending to such last-mentioned company the right to transact the business of telegraphing in such hotel, where there was an unexpired agreement by which such hotel owner was to furnish the first-mentioned company with space in said hotel for the transaction of commercial or public telegraph business, and to assure it the exclusive right of establishing, maintaining, and operating a telegraph office in said hotel, and of connecting telegraph wires therewith during the term of such agreement. The court declined to assent to the contention that there was an adequate remedy at law, and considered that the remedy at law was not full and complete.

In *Holloway Bros. v. Hill* [1902] 2 Ch. 612, 71 L. J. Ch. N. S. 818, 87 L. T. N. S. 201, 18 Times L. R. 745, the plaintiff was held entitled to a declaration that his landlord had not the right to permit or suffer to be carried on upon other premises of the landlord, the business of a tailor, and to an injunction restraining the lessee of such other premises from carrying on such business thereon, where, in the plaintiff's lease,

564; Meyer v. Butterbrodt, 146 Ill. 131, 34 N. E. 152; Bare v. American Forwarding Co. 242 Ill. 298, 89 N. E. 1021.

Even if Sandberg had made a specialty of the sale of pearls, it would have been a matter for damages only, and would not have justified an abandonment by defendant of his lease, or his refusal to pay rent.

Hayner v. Smith, 63 Ill. 430, 14 Am. Rep. 124; Keating v. Springer, 146 Ill. 481, 22 L.R.A. 544, 37 Am. St. Rep. 175, 34 N. E. 805; Rubens v. Hill, 213 Ill. 523, 72 N. E. 1127; John Anisfield Co. v. Covey, 140 Ill. App. 364; Barrett v. Boddie, 158 Ill. 479, 49 Am. St. Rep. 172, 42 N. E. 143; Lynch v. Baldwin, 69 Ill. 210; Chicago Legal News Co. v. Browne, 103 Ill. 317;

Clark v. Ford, 41 Ill. App. 199; Wright v. Lattin, 38 Ill. 293; White v. Y. M. C. A. 233 Ill. 526, 84 N. E. 658.

Even if Sandberg undertook, after signing his lease, to sell pearls as a specialty, in violation of his own lease, defendant would not be excused from paying rent, because it was a covenant "not to rent" only, and plaintiff discharged all the obligations imposed upon it by renting to a tenant who agreed not to make a specialty of selling pearls.

Postal Tele. Cable Co. v. Western U. Teleg. Co. 155 Ill. 335, 40 N. E. 587; Ashby v. Wilson [1900] 1 Ch. 66, 69 L. J. Ch. N. S. 47, 48 Week. Rep. 105, 81 L. T. N. S. 480; Kemp v. Bird, L. R. 5 Ch. Div. 974, 46 L. J.

the lessee covenanted that he would not use the premises leased, or permit the same to be used, for any business except that of a tailor, clothier, and general outfitter, and the lessor covenanted for himself, his heirs, executors, administrators, and assigns, that they should not, nor would he carry on by himself, or suffer to be carried on by others, upon such other premises, the business of a general clothier and tailor, and the second and later lease of such other premises contained a covenant on the part of the lessees therein not to use the premises leased for any business except that of a tailor, and there was, at least, constructive notice of the earlier covenant.

But in Taylor v. Owen, 2 Blackf. 301, 20 Am. Dec. 115, it was held that a lessee had no right to enjoin the vending of merchandise in a town, although the owner in fee simple of the town, who had a mercantile establishment there, sold the whole of his merchandise to the complainant, leased him the buildings in which the business had been carried on, and agreed in the lease that he should have the exclusive right of keeping a store in the town for ten years. It appeared that the lessor thereafter leased another house and lot in the town to C without restriction as to trade except that he should not sell spirituous liquors, and that C thereafter underlet a part of such house free of any restriction to D, who commenced the vending of merchandise there. The suit was against the lessor and C and D. The court considered that the covenant was merely personal, that it did not run with the land nor create any lien thereon, legal or equitable, and that if it was valid the lessee was limited to an action at law for damages against his lessor, and that it was immaterial that D had notice of the first contract before the date of his lease, and that C also had notice of it before D offered his goods for sale.

Sale of the reversion.

A sale of the reversion of the landlord is not a breach of a covenant not to rent for the prohibited purpose.
L.R.A.1915C.

In Carr v. King, 24 Cal. App. 713, 142 Pac. 131, it was held that the lessors of about 2 acres for a hotel and summer resort, out of a tract of about 1,000 acres, did not, by selling the rest of the tract, breach the lease, which provided (after granting to the lessee certain rights of way over the unleased lands, and also granting the right to permit the lessee's guests and patrons to use the premises of the landlords, where not enclosed, for pleasure walks and recreation) that "the said parties of the first part will not demise or let any other part of their said premises to be used for like purposes as those herein let to the said party of the second part, and that they will not grant similar rights and privileges upon their said premises to any other persons as those granted to the said party of the second part herein." The court said that the fact, if it was a fact, that the defendants knew that the grantees intended to maintain summer resorts was immaterial.

In Postal Tele. Cable Co. v. Western U. Teleg. Co. 155 Ill. 335, 40 N. E. 587, affirming 51 Ill. App. 62, it was held that one leasing part of a building to a telegraph company was not prevented from selling the building to another telegraph company by a clause in the lease stating that "during the said term the lessor will not lease offices in said building to any other telegraph company for use as a telegraph office, without consent of the lessee;" and that the lessee might not enjoin such purchasing telegraph company from carrying on its business in said building.

So, where the lessor of a stable had covenanted not to keep a public stable during the term within 6 miles of the town where such leased stable was located, it was held that this was merely a personal obligation, and that, the lessor having sold other premises in the town to A, who sold to B, who erected a stable thereon, A and B purchasing with full notice of the covenant, the lessee had no remedy against the lessor and A and B. Hebert v. Dupaty, 42 La. Ann. 343, 7 So. 580.

But a contract to restrain competition was enforced in spite of a real or pretended sale, in Sell v. Branen, 70 Ill. App. 471,

Ch. N. S. 828, 37 L. T. N. S. 53, 25 Week. Rep. 838; *Brigg v. Thornton* [1904] 1 Ch. 386, 73 L. J. Ch. N. S. 301, 52 Week. Rep. 276, 90 L. T. N. S. 327; *Lucente v. Davis*, 101 Md. 526, 61 Atl. 622.

Defendant waived any right he might have had to abandon the premises by not acting promptly. He went by Sandberg's store everyday, and saw his display for practically two months before he claimed an eviction.

Orcutt v. Isham, 70 Ill. App. 102; *Parke v. Proby*, 130 Ill. App. 571; *Dennick v. Ekdahl*, 102 Ill. App. 199; *Kistler v. Wilson*, 77 Ill. App. 149; *Barrett v. Boddie*, 158

Ill. 479, 49 Am. St. Rep. 172, 42 N. E. 143; *Haven v. Wakefield*, 39 Ill. 509.

Defendant abandoned the premises, not because Sandberg sold pearls, but because his health was bad, and he wanted to assign his lease, and the club would not consent. He must abandon solely because of the breach of the covenant.

Leiferman v. Osten, 167 Ill. 93, 39 L.R.A. 156, 47 N. E. 203; 2 Wood, Land. & T. 1107; *McCormick v. Potter-Herrick Wall Paper Mills*, 147 Ill. App. 487.

A tenant may not abandon the premises for breach of an independent covenant. Covenants are either dependent or inde-

where a lessee of a hotel building sublet two rooms therein, stipulating that he should retain and have the use of the rooms for any purpose except the retailing of intoxicating liquors, and that he should not, for the entire term of the lease, enter into or be in any wise interested in the retail traffic of liquor within the city, and that for a violation of his agreement he should be required to give immediate possession to such sublessee, who was at the time in the saloon business in such city. After about a year such sublessor "turned over" his lease of the hotel to third parties, who opened a saloon in rooms adjoining those subleased, and the subleased rooms were used not for the sale of liquors, but for a restaurant and lunch counter, which the sublessor conducted for those to whom he had turned over his lease of the hotel. It was held that the sublessee might maintain an action of forcible detainer against the sublessor and those to whom he had "turned over" the lease of the hotel, as the very purpose of the contract was to prevent the competition of a saloon in the hotel.

In *Jay v. Richardson*, 30 Beav. 563, 8 Jur. N. S. 689, 31 L. J. Ch. N. S. 398, 6 L. T. N. S. 177, 10 Week. Rep. 412, a lessee was granted an injunction restraining a grantee of his landlord's grantee from keeping or permitting any hotel for the sale of beer, etc. There the plaintiff covenanted not to use the premises for any other purposes than a hotel, the lessor covenanting that he, his heirs and assigns, would not during said term, within a certain distance of such hotel, let any building, or any land for the erection of any building, to be used as a hotel or for the retail sale of beer, etc. The lessor had before leased other premises within said distance to one who covenanted that he, his executors, administrators, and assigns would not use, or permit or suffer to be used, any building for the purpose of selling beer, etc., without the written authority of the lessor. The landlord sold both pieces of property to one who had full notice of the leases, and the latter sold at auction to the defendant the property covered by the lease secondly mentioned, the sale being subject to any restrictions in the leases and the defendant having notice thereof; and on his purchase L.R.A.1915C.

of the earlier lease he erected a hotel for the sale of beer, etc.

In *Brigg v. Thornton* [1904] 1 Ch. 397, 73 L. J. Ch. N. S. 301, 52 Week. Rep. 276, 90 L. T. N. S. 327, it was said *arguendo* that the lessor might himself carry on the prohibited business, or sell his remaining property for that business, without violating a covenant not to let for a certain business.

It will be observed that the question of notice of the earlier covenant was considered immaterial in *Hebert v. Dupaty*, *supra*, but that it was an element in the case in *Jay v. Richardson*, *supra*, and perhaps was assumed in *Sell v. Branen*, *supra*.

Illustrations of broken covenants.

In *Waldorf-Astoria Segar Co. v. Salomon*, 109 App. Div. 65, 95 N. Y. Supp. 1053, affirmed in 184 N. Y. 584, 77 N. E. 1197, it was held that a tenant who had leased part of his landlord's premises, agreeing to use the same for a wholesale and retail tobacco business, may enjoin his landlord and a subsequent lessee of another part of the landlord's premises, from breaching the landlord's covenant in the first lease "not to rent any portion of the building and premises, of which the store hereby leased is a part, to any one for the purpose of wholesaling or retailing cigars and tobacco, . . . [and] not to consent to other tenants subletting for purposes of wholesaling and retailing cigars and tobacco." By the lease to the subsequent lessee the premises leased to it were "to be used by the tenant as one of its branch grocery stores, and for no other purpose," a considerable percentage of which business was in cigars. It was aware of the covenant in the prior lease, and had contracted to indemnify the landlord against any expenses that would be incurred by him in consequence of any legal proceedings taken against him by the plaintiff.

Where the plaintiff leased two floors of a seventeen-floor building, the lessor covenanting not to rent during the continuance of the lease "any part of said building to any firm or person handling a similar line of goods as that of the said lessee," which

pendent, and if the covenant as to pearls was not dependent, the tenant had no right to abandon.

White v. Naerup, 57 Ill. App. 114; *Tiffany, Land & T.* § 51; *Underhill, Land & T.* § 379; 24 Cyc. 918; 18 Am. & Eng. Enc. Law, 620; *Rubens v. Hill*, 213 Ill. 523, 72 N. E. 1127; *Huber v. Ryan*, 26 Misc. 428, 56 N. Y. Supp. 135; *Delmar Invest. Co. v. Blumenfeld*, 118 Mo. App. 308, 94 S. W. 823; *Wright v. Lattin*, 38 Ill. 293.

The breach of an independent covenant does not justify rescission.

Prairie Farmer Co. v. Taylor, 69 Ill. 440, 18 Am. Rep. 621; *Nelson v. Oren*, 41

Ill. 18; *Pollak v. Brush Electric Asso.* 128 U. S. 446, 456, 32 L. ed. 474, 478, 9 Sup. Ct. Rep. 119; *Brusie v. Peck Bros. & Co.* 4 C. C. A. 597, 14 U. S. App. 21, 54 Fed. 820; *Elliott, Contr.* § 2049; *Page, Contr.* § 1471; 2 *Parsons, Contr.* 7th ed. p. 810; 9 Cyc. 641, 642.

Cooke, J., delivered the opinion of the court:

Defendant in error, the University Club of Chicago, brought suit in the municipal court of Chicago against Earl H. Deakin, the plaintiff in error, to recover rent alleged to be due under a lease. A trial was had

was dressmakers' materials and supplies, and the lessor thereafter leased another floor of said building to a competitor of the plaintiff engaged in similar business, who was aware of the covenant in the earlier lease, the lessor and the later tenant were enjoined from violating such covenant. But the second lessee having removed from the premises, and not appealing, it was held on appeal that the injunction against the lessor preventing him from renting any part of the premises to anyone for the purpose of dealing in any one of the numerous articles dealt in by the plaintiff was too broad. *Harry Angelo Co. v. Improved Property Holding Co.* 137 App. Div. 308, 122 N. Y. Supp. 199. (The terms of the second lease are not reported.)

In *Cave v. Horsell* [1912] 3 K. B. 533, 81 L. J. K. B. N. S. 981, 107 L. T. N. S. 186, 28 Times L. R. 543, Ann. Cas. 1913D, 840, a lessee recovered damages against his landlord for a breach of a covenant in a lease in which the lessee had covenanted not to use the premises for any business except that of upholsterers, cabinetmakers, etc., the lessor covenanting that he would not, during the continuance of the lease, let "any of the adjoining shops belonging to him on the Limes estate" for the purpose of the businesses named; the lessor thereafter leased a shop on said estate to a lessee who covenanted that he would not use the premises for any business except that of a cabinetmaker, etc. The only question discussed was whether the premises secondly leased, not being next door to those first leased, but (apparently) separated therefrom by one house, were embraced within the word "adjoining."

It may be noted that *Vale & Sons v. Moorgate Street & B. Street Bldgs. Co.* 80 L. T. N. S. 487, was decided on the ground that the expression "adjoining premises" did not mean other than contiguous premises. In *Derby Motor Cab Co. v. Crompton & E. Union Bank*, 29 Times L. R. 673, 57 Sol. Jo. 701, while the court considered that the facts did not show a breach, it distinguished the meaning of "adjoining premises" from that adopted in *Cave v. Horsell*, as there was nothing to change the ordinary meaning of the expression.

L.R.A.1915C.

Breadth of the covenant not to rent or let for the prohibited purposes, etc.

It will be seen that in *UNIVERSITY CLUB v. DEAKIN*, the court holds that a covenant not to rent other premises to any tenant making a specialty of a certain business is not satisfied by inserting a prohibitory clause in a lease of such other premises, the court declining to follow *Lucente v. Davis*, *infra*, where there seem to have been no restrictions in the second lease. The English cases on the subject are confusing, if not contradictory, and it is not easy to say how much of the reasoning of those cases belongs to the question of recovery against the lessor, and how much to the question of the recovery or relief against the second lessee. (For discussion of the question of recovery against "the subsequent lessee," see *infra*, that subdivision.)

In *Lucente v. Davis*, 101 Md. 526, 61 Atl. 622, disapproved in *UNIVERSITY CLUB v. DEAKIN*, it was held that a lessee of half an acre of a farm for the purpose of a commissary to supply railroad laborers and others had no action for damages against his landlord, although the lease contained a covenant by the landlord not to lease or rent any other part of said farm to any person for running a commissary or selling whisky or beer, and the landlord thereafter leased a part of such farm for a camp to a third person, who conducted a commissary thereon, as there was no proof that the landlord had authorized the business of such commissary by such third party, and so there was nothing to show any breach of the covenant.

Compare *Harry Angelo Co. v. Improved Property Holding Co.* *supra*, preceding subdivision.

In *Kemp v. Bird*, L. R. 5 Ch. Div. 974, affirming L. R. 5 Ch. Div. 549, a lease to the plaintiff's assignor of a house used as a coffeehouse or eating house contained a covenant by the landlord that he would not demise any of the houses in the same street to any person whomsoever for the purpose of carrying on the trade or business of an eating house, etc., such covenant to be binding only on the landlord, and not on his heirs, executors, administrators, or assigns. The landlord thereafter demised another

before the court without a jury, and resulted in a judgment for \$2,007.66. Deakin prosecuted an appeal to the appellate court for the first district, where the judgment of the municipal court was affirmed. A writ of certiorari having been granted by this court, the record has been brought here for review.

On March 31, 1909, defendant in error leased to plaintiff in error, for a term of one year, a storeroom in its building at the corner of Michigan avenue and Monroe street, in the city of Chicago, at a rental of \$5,000 for the year. The lease provided that plaintiff in error should use the room for a jewelry and art shop, and for no other purpose. It also contained the following clause, numbered 12: "Lessor hereby agrees

during the term of this lease not to rent any other store in said University Club building to any tenant making a specialty of the sale of Japanese or Chinese goods or pearls."

Shortly after this lease was made defendant in error leased to one Sandberg, for one year, a room in the University Club building, two doors from the corner, at a rental of \$2,500. The following provision was inserted in the Sandberg lease: "It is further distinctly understood and agreed by and between the parties hereto that at no time during the term of this lease will the lessee herein use the demised premises for a collateral loan or pawn shop, or make a specialty therein of the sale of pearls."

On May 1, 1909, being the first day of

house in the same street to a lessee who covenanted that he, his executors, administrators, and assigns would not carry on upon the property any trade or business without the leave of the lessor, and this lease was assigned by such lessee to one of the defendants, who the plaintiff alleged was carrying on the business of an eating house in the house last mentioned. It was held that the plaintiff, who sought to enjoin the landlord and the last-mentioned defendant, claiming that the latter and his assignor both had notice of the covenant in the plaintiff's lease, could not succeed as the landlord had not demised the property for the business of an eating house, and the covenant was not against his assignee. James, L. J., said: "If it had been intended that there should have been a positive restriction on the use of the premises during the term, there is a well-known form which the parties might have used, and which would have been binding on the owner and on his representatives and on the assignee,—that is, 'That the said G. Bird, his heirs, executors, administrators, and assigns shall not, during the said term, demise or let, or permit any of the said messuages or tenements to be demised or let,' and so on."

In *Fitz v. Iles* [1893] 1 Ch. 77, 62 L. J. Ch. N. S. 258, 2 Reports, 132, 68 L. T. N. S. 108, a lessee covenanted not to use the premises for any other purpose than that of a coffeehouse keeper, and the lessor covenanted that he would not during the term let any other shop in the same road as a coffeehouse. Later the landlord leased other premises in the same road to another lessee, who covenanted not to use the premises or permit them to be used as a coffeehouse. And it was held that the first lessee might prevent the carrying on of a coffeehouse business on the last-mentioned premises, and might enjoin the landlord and the second lessee in that behalf.

In *Ashby v. Wilson* [1900] 1 Ch. 66, 69 L. J. Ch. N. S. 47, 48 Week. Rep. 105, 81 L. T. N. S. 480, decided by a single judge, the court declined to permit the assignee of a lessee to enjoin the landlord and the L.R.A.1915C.

subsequent lessee of other premises of the landlord from permitting or carrying on thereon a certain business, where the landlord had covenanted in the first lease that he would not let such other premises for the purposes of such business. In that case the assignor of the plaintiff took a lease of a house covenanted to use the same only for the business of a fruiterer, etc., the lessor covenanted not to let any of his other five neighboring houses for the purpose of the trade of a fruiterer, etc.; thereafter the lessor leased another of the houses to one who covenanted that he would use it as and for an oil, etc., warehouse only. It was held (1) that the lessor had not broken his covenant, but had done his duty as lessor; (2) that the plaintiff could not sue the second lessee directly, and (3) that he could not sue him through the lessor or compel the lessor to sue him, as the plaintiff was not a covenantee with the second lessee, or the assignee of a covenantee with him. The court said: "Whatever inconsistency there is between *Fitz v. Iles* and *Kemp v. Bird*, supra, must be got rid of on some other occasion. *Kemp v. Bird* was not cited in *Fitz v. Iles*, and I think that *Kemp v. Bird* is exactly in point here, and is binding upon me."

In *Brigg v. Thornton* [1904] 1 Ch. 386, 73 L. J. Ch. N. S. 301, 52 Week. Rep. 276, 90 L. T. N. S. 327, infra, "—the subsequent lessee—other cases," the landlord was held liable in damages for letting for a prohibited purpose, but it was held that there was no remedy against the second lessee.

Actions by assignees.

The authorities are not agreed as to whether an assignee of the lessee may sue upon the covenant.

It was held in *Norman v. Wells*, 17 Wend. 136, that damages might be recovered against a landlord by an assignee of the lease of a mill, a dam, and appurtenances, where the landlord, for himself, his heirs, executors, and assigns, had covenanted that he would not let or establish any other place or seat on the same stream to be used for

the term of the lease, plaintiff in error took possession of the premises and thereafter paid the rent, in monthly instalments, for May and June. During the latter part of June plaintiff in error, through his attorney, sought to obtain from defendant in error a cancellation of his lease on the ground that by leasing a room in the University Club building to Sandberg, and permitting him to display and sell pearls therein, defendant in error had violated the provision of plaintiff in error's lease above quoted, and that for such violation plaintiff in error was entitled to terminate the lease. Defendant in error refused to cancel the lease, and on June 30th plaintiff in error vacated the premises, surrendered the keys, and refused to pay any further instalments of rent.

This suit was brought to enforce payment of subsequent instalments of rent accruing under the lease for the time the premises remained unoccupied after June 30th.

The evidence offered by plaintiff in error tended to show that Sandberg had made a specialty of the sale of pearls in connection with the conduct of his general jewelry business ever since he took possession of the room leased to him, and that plaintiff in error vacated the premises and surrendered possession because of the failure of defendant in error to enforce the twelfth clause of his lease. The evidence offered by defendant in error tended to prove that Sandberg had not made a specialty of the sale of pearls, and that when plaintiff in error first made known his desire to assign or cancel his

sawing mahogany or any description of veneers, except to the lessee, etc., and before the assignment the landlord leased without restriction another mill site on the stream to a third party, upon which, after the assignment, a mill was put in operation in the sawing of mahogany, the court holding that the covenant ran with the land. (But the case went back for a new trial on account of admitting expert opinion as to the amount of damages.)

On the other hand in *Thomas v. Hayward*, L. R. 4 Exch. 311 (insufficiently reported), it was held that the assignee of a lease could not sue the lessor upon a covenant in the lease which did not touch or concern the thing demised, but only the beneficial occupation of the thing. In that case the lessee covenanted for himself, his executors, administrators, and assigns, during the continuance of the term, to use and continue the demised house for the sale of spirits; the defendant, for himself, his executors, administrators, and assigns, covenanted "not to build, erect, or keep, or be interested or concerned in building, erecting, or keeping, any house for the sale of spirits or beer within the distance of half a mile from the premises thereby demised, during the continuance of the said term."

The cases of *Kemp v. Bird* and *Ashby v. Wilson*, supra, preceding subdivision, do not seem to have turned at all upon the fact that the plaintiff was an assignee of the lessee, and not the lessee himself.

Persons liable other than the lessor.

For liability of subsequent grantees of the reversion, see supra, "Sale of the reversion."

In *Holloway Bros. v. Hill* [1902] 2 Ch. 612, the court (Byrne, J.) said: "A negative bargain, that is a bargain against particular user of land retained, on sale or lease of part of an estate, may be enforced by any person entitled in equity to the benefit of the bargain against any person bound in equity by notice of it, either express or to be imputed at the time of acquisition of his own title. This is a right L.R.A.1915C.

which may be enforced by virtue of the equitable doctrine applicable, and does not depend upon the existence of a covenant running with the land, or upon the existence of any right to relief under the common law."

—the subsequent lessee.

A practical question of great importance in many of the cases is whether any relief will be granted against a subsequent lessee of the landlord's other premises.

In the following cases, it will be observed that the subsequent lessees covenanted not to engage in the prohibited business, or at least to use the premises for other business: *Shaft v. Carey*; *Holloway Bros. v. Hill*; *Fitz v. Iles*; and *Ashby v. Wilson*,—*infra*.

It will be observed that notice of the covenant to a subsequent lessee was considered immaterial in *Taylor v. Owen*, 2 Blackf. 301, 20 Am. Dec. 115, supra, "Covenant in terms assuring the exclusive right;" and such seems to have been the case in *Kemp v. Bird*, L. R. 5 Ch. Div. 974, 46 L. J. Ch. N. S. 828, 37 L. T. N. S. 53, 25 Week. Rep. 838, affirming L. R. 5 Ch. Div. 549, supra, "Breadth of the covenant," etc., and in *Brigg v. Thornton*, *infra*,—"other cases." But it was an element in the case in *Waldorf-Astoria Segar Co. v. Salomon*, 109 App. Div. 65, 95 N. Y. Supp. 1053, affirmed in 184 N. Y. 584, 77 N. E. 1197, supra, "Illustrations," etc. There was constructive notice of the covenant in *Holloway Bros. v. Hill*, supra, "Covenant in terms assuring the exclusive right," and probably actual notice of it in *Shaft v. Carey*, 107 Wis. 273, 83 N. W. 238, supra, "Covenant in terms assuring the exclusive right."

—under covenants assuring the exclusive right.

The lessee under a covenant that he shall have the exclusive right enjoined not only the landlord, but the subsequent lessee of his landlord's other premises, who in his lease had covenanted not to sell the pro-

lease, he gave as his only reason that his health was failing and that he had been advised by his physician to leave the city of Chicago.

Propositions were submitted to the court by both parties to be held as the law of the case. The court held, at the request of plaintiff in error, that the lease sued upon was a bilateral contract, and upon a breach of an essential covenant thereof by the lessor, the lessee had a right to refuse further to be bound by its terms, and to surrender possession of the premises, and that a breach of the twelfth clause of the lease would be a good defense to an action for rent if the tenant surrendered possession of the premises within a reasonable time after discovery of the breach. The court refused

to hold as law propositions submitted by defendant in error stating the converse of the propositions so held at the request of plaintiff in error. The court properly held that the lease in question was a bilateral contract. It was executed by both parties and contained covenants to be performed by each of them. The proposition so held with reference to the effect of a breach of the twelfth clause of the lease also correctly stated the law. By holding these propositions the court properly construed the twelfth clause as a vital provision of the lease, and held that a breach of that provision by the lessor would entitle the lessee to rescind. Where there is a failure to comply with a particular provision of a contract, and there is no agreement that the

hibited thing. *Shaft v. Carey*, supra, "Covenant in terms assuring the exclusive right." So, in *Western U. Teleg. Co. v. Rogers*, 42 N. J. Eq. 311, 11 Atl. 13, supra, "Covenant in terms assuring the exclusive right," a hotel owner and a co-contracting telegraph company were enjoined by a telegraph company having an earlier contract with the hotel owner for the exclusive right of a telegraph office in the hotel.

In *Holloway Bros. v. Hill*, supra, "Covenant in terms assuring the exclusive right," the court granted relief to the lessee against both the lessor and his subsequent lessee of such other premises, holding that the question did not depend upon whether the covenant ran with the land, and that the use of the word "assigns" without mention of lessees did not mean that lessees were not bound by the covenant. In that case the lessor covenanted for himself, his heirs, executors, administrators, and assigns, that he, his heirs, executors, administrators, and assigns should not nor would, etc., carry on by himself, nor suffer to be carried on by others, the prohibited business. It was contended on the one hand that the second lessee was an assign within the express wording of the covenant, and on the other hand, that a lessee was not an assign, and that the use of that word showed that lessees were not intended to be included. The court said: "I think that the authorities show that the lessee of a person bound by a restrictive covenant may be sued, whether assigns are mentioned or not;" and seemed to be of the opinion that assigns included lessees. The court referred to *Bryant v. Hancock* [1898] 1 Q. B. 716, 67 L. J. Q. B. N. S. 507, 78 L. T. N. S. 397, 46 Week. Rep. 386, 62 J. P. 324, holding that the undertenant of a lessee's assignee is not an assign of the lessee, and to *Taite v. Gosling*, L. R. 11 Ch. Div. 273, 48 L. J. Ch. N. S. 397, 40 L. T. N. S. 251, 27 Week. Rep. 394, holding that a lessee in a lease for ninety-nine years was an assign of his lessor, and so could enforce a restrictive covenant made in favor of such lessor, his heirs and assigns. In *Brigg v. Thornton*, infra, *Stirling, L. J.*, was of the L.R.A.1915C.

opinion that a lessor's "assigns" included his "lessees."

But in *Taylor v. Owen*, supra, "Covenant in terms assuring the exclusive right," it was held that a covenant of the exclusive right to keep a store in a town which was owned entirely by the lessor was merely personal, and did not run with the land, nor create any lien thereon, legal or equitable, and that no relief would be granted against a subsequent lessee of other premises of the lessor, nor against the underlessee of such subsequent lessee, and that the relief against the lessor, if any, was limited to an action at law for damages.

— —other cases.

As heretofore stated, the English cases on the subject are confusing. And while they can be distinguished on the facts, at least academically, they do not seem to have resulted in any stable rule. *Fitz v. Iles* allowed relief against both lessor and second lessee. That decision does not refer to the earlier case of *Kemp v. Bird*, infra, where the plaintiff was refused relief, which was followed thereafter in *Ashby v. Wilson*, infra (a case decided by a single judge). The *Kemp* and *Ashby* Cases were brought by assignees of the lessee, but this feature does not seem to have influenced the decisions. In the *Kemp* Case, however, the covenant was expressed to be binding on the landlord only, and not on his heirs, executors, administrators, or assigns. In *Brigg v. Thornton*, infra, it was held that the remedy was only against the landlord.

In *Kemp v. Bird*, L. R. 5 Ch. Div. 974, affirming L. R. 5 Ch. Div. 549, supra, "Breadth of the covenant," where there was a denial of relief against the landlord and also against the assignee of a subsequent lessee of the landlord's other premises, the covenant was that the landlord would not demise any of the houses in the same street to any person whomsoever for the purpose of carrying on the trade or business in question, and this covenant was in terms to be binding only on the landlord, and not on his heirs, executors, ad-

breach of that term shall operate as a discharge, it is always a question for the courts to determine whether or not the default is in a matter which is vital to the contract. *Belleville v. Citizens' Horse R. Co.* 152 Ill. 171, 26 L.R.A. 681, 38 N. E. 584; *People ex rel. Shallberg v. Central Union Teleph. Co.* 232 Ill. 260, 83 N. E. 829. While there was no provision in this contract that plaintiff in error should have the option to terminate it if the terms of the twelfth clause were not observed, it is apparent that it was the intention of the parties to constitute this one of the vital provisions of the lease. It was concerning a matter in reference to which the parties had a perfect right to contract, and it will be presumed that plaintiff in error would

not have entered into the contract if this clause had not been made a part of it. It is such an essential provision of the contract that a breach of it would warrant plaintiff in error in rescinding the contract and surrendering possession of the premises.

The court was not asked to make any finding of fact, and there is nothing in the record to indicate that the judgment is based upon any finding of fact. Whether Sandberg had, in fact, made a specialty of the sale of pearls, was one of the controverted questions in the case. One of the propositions submitted by defendant in error and held by the court stated that the conduct of a general jewelry business was not "making a specialty of the sale of pearls," within the meaning of the words

ministrators, or assigns. The landlord thereafter demised a house to a lessee who covenanted that he, his executors, administrators, and assigns would not carry on upon the property any trade or business without the leave of the lessor, and this lessee assigned this lease to one of the defendants, who was charged with carrying on the business in question. It was held that the plaintiff (who was the assignee of the first lessee) could not succeed, as the landlord had not demised the property for the business in question, and the covenant was not against his assignee. *James, L. J.*, said: "It is said that he [the landlord] has undertaken some trusteeship. There is no trusteeship between landlord and tenant that I am aware of, any more than there is between tenant and landlord. I cannot find anything here that makes Bird [the landlord] a trustee at the will and pleasure of Kemp [the plaintiff], to enforce anything against Godfrey [the assignee of the second lessee]. Bird has certainly not, in my opinion, violated his covenant; nor has he come under any obligation to Kemp to allow his name to be used."

In *Fitz v. Iles* [1893] 1 Ch. 77, 62 L. J. Ch. N. S. 258, 2 Reports, 132, 68 L. T. N. S. 108, supra, "Breadth of the covenant," it was held that the lessee might have relief by injunction against the lessor and a lessee of another part of the lessor's premises, to prevent the carrying on upon such other premises of a coffeehouse business, where the landlord covenanted in the lease to the plaintiff that he would not during the term let any other shop in the same road as a coffeehouse, and thereafter he leased other premises in the same road to the other defendant, who covenanted not to use the premises or permit them to be used as a coffeehouse. The court did not refer to *Kemp v. Bird*.

Kemp v. Bird was followed in *Ashby v. Wilson* [1900] 1 Ch. 66, supra, "Breadth of the covenant," where the case is set out. The court in that case, besides the quotation there given, stated that he was asked to say that, although the lessor had not broken his contract with the plaintiff, the L.R.A.1915C.

plaintiff was entitled to call upon the lessor to sue the second lessee, and said: "The answer to that is to be found in a few words of *Cotton, L. J.*, in *Kemp v. Bird*, L. R. 5 Ch. Div. 978. He says: 'I know of no authority for saying that under such circumstances as these'—and for my purpose I think the circumstances here are sufficiently similar—a landlord is a trustee for his tenant in the sense that he must, at the request of the lessee, enforce a covenant against another lessee.' I am asked to say that *Wilson* is bound to enforce against *Bebb* the covenant into which *Bebb* has entered with him, because he has himself entered into another covenant with the plaintiff, which covenant he has faithfully observed. It seems to me that to hold that would be to contradict *Kemp v. Bird*, L. R. 5 Ch. Div. 549, affirmed in L. R. 5 Ch. Div. 974, 46 L. J. Ch. N. S. 828, 37 L. T. N. S. 53, 25 Week. Rep. 838; which negatives the wider construction of *Wilson's* covenant with the plaintiff, and negatives also, I think, the right of the plaintiff to sue here."

In *Holloway Bros v. Hill* [1902] 2 Ch. 612, supra, preceding subdivision, the court (*Byrne, J.*) said: "There was a suggestion in *Ashby v. Wilson*, supra, that *Kemp v. Bird*, L. R. 5 Ch. Div. 549, is not reconcilable with *Fitz v. Iles* (1893) 1 Ch. 77, 62 L. J. Ch. N. S. 258, 2 Reports, 132, 68 L. T. N. S. 108, but *Kekewich, J.*, did not decide that this is so, and I can see no inconsistency between the two cases."

In *Brigg v. Thornton* [1904] 1 Ch. 386, 73 L. J. Ch. N. S. 301, 52 Week. Rep. 276, 90 L. T. N. S. 327, the plaintiff took an agreement for a lease of a shop in an arcade, agreeing not to carry on any business thereon other than that of a dealer in pictures, etc., and artistic stationery, etc., the landlord, his heirs and assigns, covenanting "not to let any other portion of the said arcade for the trade or business hereinbefore mentioned to be carried on by the tenant." Thereafter the landlord agreed to let other premises in such arcade to a third party, who agreed not to carry on any business other than that of a libra-

quoted as they were used in the twelfth clause of plaintiff in error's lease. This cannot be construed as a holding that Sandberg did not, in fact, in addition to his conduct of a general jewelry business, make a specialty of the sale of pearls.

rian, etc., or stationer. It was held in a suit for an injunction and damages against the landlord and such third party, that the landlord had broken the covenant and that he was liable in damages, but not to an injunction, as the plaintiff had treated the letting as an accomplished fact, and that the third party was not liable at all, as the covenant was only not "to let;" that if there could be any remedy against the third party, it would be to declare his lease void, but that, if the lease stood, his use of the premises could not be limited. (It was held in the court below, where an injunction and damages were granted against both defendants, that the third party had at least constructive notice of the covenant in the first agreement.)

In *Waldorf-Astoria Seagar Co. v. Salomon*, 109 App. Div. 65, 95 N. Y. Supp. 1053, affirmed in 184 N. Y. 584, 77 N. E. 1197, supra, "Illustrations," etc., a lessee was granted injunctive relief against his landlord and a subsequent lessee of the landlord's other premises, where the landlord had covenanted not to rent to anyone for the prohibited purpose, and not to consent to other tenants subletting for such purpose, and thereafter he leased other premises for a purpose in effect embracing the prohibited purpose, to the other defendant, who had notice of the covenant in the first lease and contracted to indemnify the landlord against any expenses that would be incurred by him in consequence of any legal proceedings taken against him by the plaintiff.

See also in this connection *Harry Angelo Co. v. Improved Property Holding Co.* 137 App. Div. 308, 122 N. Y. Supp. 199, supra, "Illustrations," etc.

Miscellaneous.

In *Delmar Invest. Co. v. Blumenfeld*, 118 Mo. App. 308, 94 S. W. 823, it was held that where the tenant of a part of premises calls on the landlord for a restoration of his rights under a covenant not to let any other portion of the premises for the same business as the tenant's, he has no right to abandon the premises without giving the landlord a reasonable time to effect such restoration. In this case the use complained of was by a sublessee of another portion of the premises, and the landlord by suit promptly enjoined such use, but the first-mentioned tenant abandoned the premises pending the injunction proceedings, and it was held that he must pay his rent.

A lessee of two blocks subleasing for amusement purposes a definite part of one block and an undivided half of the other, and covenanting in such sublease not to

The following proposition was submitted by defendant in error and held by the court as the law of the case: "That plaintiff performed all the obligations imposed upon it by its covenant that it would not rent any other store in its building to a tenant mak-

conduct any amusement "on said premises," is not restricted as to the use of the premises not subleased by him, but covered by the lease to him. *Looff v. Seattle Park Co.* 59 Wash. 217, 109 Pac. 806. The same was held on a further litigation between the same parties, arising out of the same contract, but complaining of a different breach. 70 Wash. 363, 126 Pac. 902.

Where a lease of a store to a jeweler contained a provision that during the term no other jewelry store should be allowed in any portion of the three-story building of which the store leased was a part, it was held that there was no breach in the fact that another jeweler, a sublessee of a prior lessee whose term had expired, held over in the very store in question until he was removed by legal proceedings promptly undertaken by the landlord. *Goldman v. Dieves*, — Wis. —, 149 N. W. 713.

In *Welz v. Rhodius*, 87 Ind. 1, 44 Am. Rep. 747, it was held that a complaint was not demurrable in setting up a verbal agreement collateral to a purchase of furniture and the lease of a hotel, that the landlord would not open a hotel in the city; but whether the hotel afterward opened by landlord was upon premises owned by her or not does not appear.

It may be noted that in *Coulter v. Norton*, 100 Mich. 389, 43 Am. St. Rep. 458, 59 N. W. 163, it was held that a sublessee of a cigar and newsroom in a hotel had an action for damages for a constructive eviction, where there was an abandonment of the ground floor of the hotel, the upstairs rooms being used for sleeping rooms in connection with another hotel across the street, such sublease containing an agreement on the part of the sublessors not to sell cigars except those bought from the plaintiff, and the defendants being (it seems) one of the sublessors and the successor of the other sublessors. The case seems to have depended on the question of abandonment, it not appearing whether cigars were sold in the other hotel.

It may be noted that in *Apollo Cigar Co. v. O'Brien*, 30 Ohio C. C. 710, it was held that there was no covenant by the landlord; that in *Metzger v. Brincat*, 154 Ala. 397, 45 So. 633, the only questions left open by stipulation were the amount of damages and the amount of rent; and that *Wills v. Adams*, 25 Times L. R. 85, is not sufficiently reported to show whether the covenant was the landlord's or the tenant's.

For a case of a grant of an exclusive right of way to construct and maintain pipe lines, see *West Virginia Transp. Co. v. Ohio River Pipe Line Co.* 22 W. Va. 600, 46 Am. Rep. 527.

B. B. B.

ing a specialty of the sale of pearls, by incorporating in its lease to the second tenant that said second tenant should not make a specialty of the sale of pearls in the demised premises."

From a consideration of all the propositions of law held and refused, it appears that the judgment of the trial court was reached from the application of the proposition just quoted to the facts in the case. The court erred in holding this proposition as the law. By covenanting with plaintiff in error not to rent any other store in this building, during the term of plaintiff in error's lease, to any tenant making a specialty of the sale of pearls, defendant in error assumed an obligation which could not be discharged by simply inserting in the contract with the second tenant a covenant that such tenant should not make a specialty of the sale of pearls. It was incumbent upon it to do more than to insert this provision in the second lease. By the terms of its contract with plaintiff in error, it agreed that no other portion of its premises should be leased to anyone engaged in the prohibited line of business, and, if it failed to prevent any subsequent tenant from engaging in the business of making a specialty of the sale of pearls, it did so at the risk of plaintiff in error terminating his lease and surrendering possession of the premises.

This precise question has never been passed upon by this court, so far as we are able to ascertain. Defendant in error cites and relies upon *Lucente v. Davis*, 101 Md. 526, 61 Atl. 622, which supports its theory. We cannot yield our assent to the doctrine there announced. Defendant in error cannot escape its obligation by the mere insertion of a clause in the lease with the second tenant prohibiting him from engaging in the line of business named. Plaintiff in error contracted for the exclusive right to engage in this particular business in that building. There was no privity between him and Sandberg, and he was powerless to enforce the provisions of the contract between defendant in error and Sandberg. It is idle to say that an action for damages for a breach of contract would afford him ample remedy. He contracted with defendant in error for the sole right to engage in this specialty in its building, and, if defendant in error saw fit to ignore that provision of the contract and suffer a breach of the same, plaintiff in error had the right to terminate his lease, surrender possession of the premises, and refuse to further perform on his part the provisions of the contract.

For the errors indicated, the judgment of the Appellate Court and the judgment of L.R.A.1915C.

the Municipal Court are reversed, and the cause is remanded to the Municipal Court for a new trial.

Petition for rehearing denied December 2, 1914.

KENTUCKY COURT OF APPEALS.

J. H. FIELDS et al., Appts.,

v.

E. G. HOLLAND et al.

(158 Ky. 544, 165 S. W. 699.)

Monopoly — contract between transfer companies — validity.

1. A contract between competing companies each engaged in transferring persons and freight in a particular city, by which one is to surrender the transfer of passengers, and the other the transfer of freight, is invalid, under a constitutional provision that no common carrier shall acquire any parallel or competing line or operate the same.

Contract — illegality — remedies.

2. Neither specific performance of a contract, its rescission, nor damages for its breach, will be awarded where it is illegal because creating a monopoly in violation of the Constitution.

(April 24, 1914.)

APPEAL by plaintiffs from a judgment of the Circuit Court for Calloway County dismissing a petition filed to compel specific performance of a written contract made by defendants with plaintiffs.

Note. — Who are common carriers within constitutional or statutory provision directed specifically against suppression of competition between carriers.

For constitutional and statutory provisions affecting combinations between railroads to prevent competition, see the note to *Gulf, C. & S. F. R. Co. v. State*, 1 L.R.A. 849.

It will be observed that in *FIELDS v. HOLLAND*, the court holds that the transfer companies concerned were common carriers within the restrictive provision of the Kentucky Constitution.

In most cases the provisions against suppression of competition relate not in terms to carriers, but to persons, corporations, companies, railroads, etc.

In *Straight Creek Coal & Coke Co. v. Straight Creek Coal Min. Co.* 135 Ky. 536, 122 S. W. 842, it was held that the plaintiff, a corporation engaged in the coal mining business, was not a common carrier within the clause of the Kentucky Constitution prohibiting a corporation engaged in

and to enjoin defendants from operating a competing omnibus line in violation of the contract, or for rescission of the contract, or damages for its breach. Affirmed.

The facts are stated in the opinion.

Mr. J. P. Holt, for appellants:

The contract does not violate § 201 of the Kentucky Constitution.

Louisville & N. R. Co. v. Com. 97 Ky. 675, 31 S. W. 476; Com. ex rel. Breathitt v. Louisville & N. R. Co. 144 Ky. 324, 138 S. W. 291, Ann. Cas. 1913A, 633; Robertson v. Kennedy, 2 Dana, 431, 26 Am. Dec. 466; Mills v. State, 23 Tex. 303; 6 Am. & Eng. Enc. Law, 2d ed. 238; 1 Smith's Lead. Cas. 8th ed. Eng. Notes to Coggs v. Bernard, *234.

the business of common carrier from owning mines, although the plaintiff, desiring a railroad corporation to build a switch 4 miles long to some of its lands, entered into contracts with the various landowners through whose lands it was proposed to run, by which it was agreed, among other things, that the owner would convey a right of way 50 feet wide to the coal company, and the latter agreed that the landowner might have the use of the switch for transporting his coal to market at a trackage charge of 5 cents per ton, and entered into a contract with the railroad that it would make certain developments of coal mines upon its land, which would insure a large haulage over the road, and to make good that contract it leased parts of its land, which was to be developed by the switch, to two coal mining companies, and agreed, among other things, that, in consideration for the payment by its tenants of 8 cents royalty on each ton of coal mined, it would haul, or cause to be hauled, the coal of its tenants to the railroad for the purpose of being transported to market; there being a statute authorizing the owner of a coal mine within 3 miles of any navigable stream or railroad to condemn a right of way, not to exceed 50 feet wide, for the purpose of building a switch or track in order to get his produce to market, and providing that "the owner or operator of such road shall be, so far as they are applicable, governed and controlled by the laws relating to other railroads, and shall have the same rights and privileges granted to corporations owning and operating lines of railroad."

In this connection the two following recent cases may be referred to, while they are not within the scope of this note:

In *State ex rel. Winnett v. Union Stock Yards Co.* 81 Neb. 67, 115 N. W. 627, it was held that a stock yards corporation was a common carrier within the constitutional and statutory provisions hereafter referred to, where it was authorized by its charter to construct and operate a railroad for the purpose of carrying freight for the general public, and it had constructed railroad tracks connecting with the tracks

The contract is not void on the ground of public policy, as being in restraint of trade.

20 Am. & Eng. Enc. Law, 2d ed. 851; *California Steam Nav. Co. v. Wright*, 6 Cal. 258, 65 Am. Dec. 511; *Davis v. Brown*, 98 Ky. 475, 32 S. W. 614, 36 S. W. 534; *Hill v. Gudgeall*, 9 Ky. L. Rep. 436; *Barrone v. Moseley Bros.* 144 Ky. 294, 137 S. W. 1048; *Sutton v. Head*, 86 Ky. 156, 9 Am. St. Rep. 274, 5 S. W. 410; *Skaggs v. Simpson*, 33 Ky. L. Rep. 410, 110 S. W. 251; *Western Dist. Warehouse Co. v. Hobson*, 96 Ky. 550, 29 S. W. 308; *Louisville Bd. of Fire Underwriters v. Johnson*, 133 Ky. 797, 24 L.R.A.(N.S.) 153, 119 S. W. 153.

Mr. A. D. Thompson also for appellants.

of other carriers, and connecting also with a large number of industries whose plants were established upon the margin of its property, and was engaged in the carrying of freight to the several industries upon its tracks and to the commission men who received live stock, etc., and for such carriage of freight it received a compensation. The Constitution created a state railway commission whose powers and duties "shall include the regulation of rates, service, and general control of common carriers as the legislature may provide by law," and the statute prescribing the powers, etc., of the railway commissions, provided that "the term 'common carriers' as used herein shall be taken to include all corporations . . . that may now or hereafter own, operate, manage or control any railroad, . . . or any express company, car company, sleeping car company, freight and freight line company, telegraph and telephone companies and any other carrier engaged in the transmission of messages or transportation of passengers or freight for hire."

In *Pipe Line Cases (United States v. Ohio Oil Co.)* 234 U. S. 548, 58 L. ed. 1459, 34 Sup. Ct. Rep. 956, the court construed the amendment of 1906 to the interstate commerce act, which provided "that the provisions of this act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this act," and said: "The words 'who shall be considered and held to be common carriers within the meaning and purpose of this act' obviously are not intended to cut down the generality of the previous declaration to the meaning that only those shall be held common carriers within the act who were common carriers in a technical sense, but an injunction that those in control of pipe lines and engaged in the transportation of oil shall be dealt with as such."

B. B. B.

Messrs. Rainey T. Wells, Coleman & Wells, and Holland & Ryan for appellees.

Settle, J., delivered the opinion of the court:

This action was brought in the court below by the appellants, J. H. Fields & Son, a partnership at the time of making the contract hereinafter mentioned composed of J. H. Fields and Lee Fields, but later succeeded by Lee Fields and Noah Moody under the same style, against the appellees, E. G. Holland & Son, a partnership composed of E. G. Holland and Oscar Holland, to compel the specific performance of a written contract the latter made with appellants in 1909, and restrain them by injunction from operating a competing omnibus line in further violation of same. The contract, omitting the signatures, is as follows: "This contract or agreement this day made and entered into by and between E. G. Holland & Son, a firm composed of E. G. Holland and Oscar Holland, doing a general transfer business in the city of Murray, Ky., party of the first part, and J. H. Fields & Son, a firm composed of J. H. Fields and L. V. Fields, of the city of Murray, of the second part, witnesseth that, for and in consideration of \$1,500 cash in hand paid, the receipt of which is hereby acknowledged by J. H. Fields & Son to E. G. Holland & Son, and the further consideration that the said Fields & Son, nor either of them, shall not at any time within the corporate limits of the city of Murray, or within the immediate vicinity surrounding the corporate limits of the city of Murray, go into in opposition to the said Holland & Son, nor either of them, operating the business of the transferring of freight within said territory, they have this day and do by this contract sell and deliver unto the said J. H. Fields & Son the following described property, to wit: Two two-horse busses, being the busses owned and operated by us in said city, and one two-horse transfer wagon—and do hereby further agree, which is a part of the consideration of this contract, that we will not, or either of us, at any time re-enter or go into the business of transferring passengers and their personal baggage, such as trunks, etc., as against the said Fields & Son, or either of them, within the corporate limits of said city, or within the vicinity surrounding the said corporate limits; and they further and hereby agree that they will not, at any time within the corporate limits of said city, or the vicinity surrounding the said city, go into the livery stable business in opposition to said Fields & Son, or either of them, and we further assign and do hereby transfer as

a part of the consideration of this trade our contract with the United States government or Postoffice Department for the carrying of the U. S. mails from the depot in Murray to the postoffice in Murray and return, and assign to the said Fields & Son, not only the said contract, but the remuneration thereunder, and agree that the said Fields & Son may carry the said mail in our name, and authorize and direct the checks amounting to \$15 per month to be turned over to and paid to them from this date, and further agree that, should the said contract for carrying the mail be relet, not to bid against them, or either of them, should they desire to bid. It is further agreed by and between the parties hereto that each shall give to the other in their respective business herein agreed to their good will, and the same is here signed."

It appears from the provisions of the contract and allegations of the petition as amended that, at the time of and prior to the making of the contract, appellants and appellees were both engaged in the town of Murray and vicinity in the business of hauling, transferring, and delivering passengers and freight from place to place in and about the city and vicinity, and to and from the railroad station, each firm owning and operating in the business busses, wagons, and other vehicles necessary to its successful prosecution; that by the terms of the contract appellants sold and surrendered to appellees so much and all of the business in which they had been mutually engaged as appertained to the hauling, transferring, and delivering, within the city of Murray and vicinity, and to and from the railroad station, of freight of whatsoever kind, including appellants' good will, appellants obligating themselves not to again engage in that character of business in Murray or vicinity, in consideration of which undertaking on the part of appellants, and the payment by them to appellees of \$1,500, cash in hand, the latter sold and delivered to appellants two two-horse busses, one two-horse transfer wagon, and in addition sold and surrendered to them so much and all of the business that they (appellees) had been and were then conducting as appertained to the hauling and transferring of passengers and their baggage in Murray and vicinity, and to and from the railroad station, including their good will, and obligated themselves not to again operate busses or engage in the business of hauling or transferring passengers or their baggage in the same territory; that in addition, and as a further consideration for the undertaking on the part of appellants mentioned and the \$1,500 paid

by the latter, appellees sold, assigned, and transferred to them a contract with the United States government for carrying the mails between the postoffice in Murray and the railroad station, which paid \$15 per month, and had a year to run from the date of the contract.

It was further alleged in the petition that the provisions of the contract in question were in good faith complied with and carried out by appellants, but that appellees, after a few months' apparent compliance with the terms thereof, wrongfully violated the contract by again engaging in the business of hauling and transferring passengers and their baggage, and depriving appellants of the privilege of carrying the United States mails between the postoffice and railroad station at Murray, and again carrying it themselves, by all of which violations of the contract appellants were damaged in the sum of \$1,500. By the prayer of the petition appellants asked a specific performance of the contract and an injunction restraining appellees from further violating it; but, if the court should be of opinion that they were not entitled to this relief, that they be granted a rescission of contract and recovery of the \$1,500 which they had paid appellees, with interest, less the value of the busses and wagon purchased of them, and if, in the opinion of the court, they were not entitled either to the specific performance or rescission of the contract, that they be adjudged entitled to recover \$1,500 by way of damages for its violation by appellees.

The appellees, E. G. Holland & Son and E. G. Holland individually, filed a joint and separate answer to the petition, containing a traverse of its averments, and alleging that the contract in question was first violated by appellants, who, contrary to its provisions, resumed the business of hauling and transferring freight in the city of Murray and vicinity, and to and from the railroad station, in which business they were still engaged at the time of the institution of their action. The answer admitted appellees' resumption of the carrying of the mails between the Murray postoffice and railroad station, but alleged that they were compelled to do so because of appellants' failure to carry them as they had obligated themselves by the contract to do, and because of the liability such failure imposed upon appellees on the bond they had executed to the United States, upon which they and their sureties remained bound, notwithstanding their assignment of the mail contract to appellants. It was further alleged in the answer that, at and subsequent to the time the contract between appellants and appellees was entered into,

there were two passenger bus lines and two freight transfer lines being operated in Murray and vicinity, one of these bus and freight transfer lines being operated by appellants, and the other by appellees, and both being common carriers; that, by reason of the operation of these two passenger bus and freight transfer lines, competition in passenger and freight rates, beneficial to the public, was maintained, but that, by the contract made between appellants and appellees, and following its execution, there was in Murray and vicinity but one passenger bus line and one freight transfer line, the one operated by appellants, and the other by appellees; and that the object and effect of the contract was to destroy competition, and create a monopoly in the passenger transfer business for the benefit of appellants, and a like monopoly in the freight transfer business for the benefit of appellees, in violation of the public policy of the state, and contrary to the provisions of § 201 of its Constitution.

The affirmative matter of the answer was controverted by reply, and, following the taking of proof and submission of the case, the circuit court, by the judgment rendered, refused appellants any and all relief, and dismissed the petition. Of that judgment, appellants strongly complain; hence this appeal.

It is manifest from the pleadings and evidence in this case that, at the time of making the contract under consideration, appellants and appellees were common carriers because engaged in the business of carrying both passengers and freight for hire at the same place; the business being one which affected not a few individuals or a single community, but the entire public. Persons residing in the state or out of it, who visited Murray on business or pleasure, or who shipped merchandise to Murray, or who received merchandise therefrom, were, as much as the citizens of Murray and vicinity, dependent upon these carriers, and in a situation to be benefited or oppressed by them. It may well be said, therefore, that the business in which both appellants and appellees were engaged was distinctively a public business.

It is equally manifest that they were competitors in this public business, and that the effect of the competition between them was to restrain each carrier from making or maintaining exorbitant charges for carrying passengers or freight, and to compel them to be reasonable and just in such charges. By the contract in question the business in which the two competitors had theretofore engaged was divided; appellants, by the compulsory provisions of the contract, became exclusively a carrier of

passengers and their baggage; appellees, by like compulsion, became exclusively a carrier of freight; and by this means, instead of two carriers of both passengers and freight, there was left in Murray but a single local carrier of passengers and a single local carrier of freight. So the inevitable and immediate effect of the contract was, as intended by the parties, to destroy the competition previously existing between them, and establish a monopoly for each carrier in a single line of business. It is apparent from the record that the increase in charges for the carrying of both passengers and freight in Murray and vicinity, resulting from the contract, became at once burdensome and injurious to the public.

In view of this situation, the viciousness of the contract between appellants and appellees is clearly established. The great disfavor in which such contracts are held both by the law and the courts is demonstrated by § 201, Constitution, and the numerous decisions declaring them void. The section of the Constitution, *supra*, provides: "No railroad, telegraph, telephone, bridge or common carrier company shall consolidate its capital stock, franchises or property, or pool its earnings, in whole or in part, with any other railroad, telegraph, telephone, bridge or common carrier company, owning a parallel or competing line or structure, or acquire by purchase, lease or otherwise, any parallel or competing line or structure, or operate the same; nor shall any railroad company or other common carrier combine or make any contract with the owners of any vessel that leaves or makes port in this state, or with any common carrier, by which combination or contract the earnings of one doing the carrying are to be shared by the other not doing the carrying."

It will be observed that the inhibition in this section includes any and every character of common carrier company, and prevents it from acquiring or operating by purchase, lease, or otherwise, any parallel line or competing business. It therefore applies to appellants and appellees and the contract made by them. Where there are, in the same city or town, two competing transfer companies, whether incorporated or copartnerships, engaged in the business of operating busses or other vehicles in hauling passengers and freight, they are as much common carriers as a railroad company, and the busses and other vehicles operated by them are competing lines in the meaning of the section of the Constitution, *supra*.

As previously stated, there are numerous decisions, many of them from this court, condemning such contracts. Thus, in *Louisville & N. R. Co. v. Com.* 97 Ky. 675, 31 S. W. 476, and in *Com. v. Louisville & N. R. Co.* 144 Ky. 324, 138 S. W. 291, Ann. Cas. 1913A, 633, we held that a court of equity has jurisdiction in an action by the state to enjoin a railroad company from doing acts illegal and injurious to the public; and in each case the Louisville & Nashville Railroad Company was prevented by injunction from consummating the purchase of a parallel or competing line in violation of § 201 of the state Constitution.

Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714. Again, in *Calor Oil & Gas Co. v. Franzell*, 128 Ky. 715, 36 L.R.A.(N.S.) 456, 109 S. W. 328, we held that a lease granting to a gas company the exclusive right to construct pipe lines across the lessor's land was void as against public policy, in so far as it excluded others from crossing the tract.

Such contracts between persons and companies other than common carriers have also been condemned by this court. One of the latter cases is that of *Clemons v. Meadows*, 123 Ky. 178, 6 L.R.A.(N.S.) 847, 124 Am. St. Rep. 339, 94 S. W. 13, in which it was held that a contract between competing proprietors of hotels in a town, whereby one of them agreed to keep his hotel closed for three years, reserving the right to rent the same for offices and for roomers, and whereby the other agreed to pay a specified sum monthly to the former during the three years, was in restraint of trade and illegal, since a hotel is a quasi public institution, and an agreement by a proprietor not to perform a duty imposed on him by law is in contravention of public policy. *Anderson v. Jett*, 89 Ky. 375, 6 L.R.A. 390, 12 S. W. 670.

Another such case is that of *Arctic Ice Co. v. Franklin Electric & Ice Co.* 145 Ky. 32, 139 S. W. 1080, in which it was held that an agreement of an ice plant to sell to another ice plant its entire output, and not to sell otherwise, was in effect to remove competition, which made the contract one in restraint of trade, and violative of § 3915, Ky. Stat. This was necessarily so, because the intent and effect of the contract was to create a monopoly. The one party neither sold nor leased its plant; but, in consideration that it was given control of the ice business in the locality and the entire output of its rival in business, it agreed not to operate its plant in the territory affected. *Merchants' Ice & Cold Storage Co. v. Rohrman*, 138 Ky. 530, 30 L.R.A.(N.S.) 973, 137 Am. St. Rep. 390, 128 S. W. 599.

The same question was also raised in *Tuscaloosa Ice Mfg. Co. v. Williams*, 127

Ala. 110, 50 L.R.A. 175, 85 Am. St. Rep. 125, 28 So. 669. In that case one of two ice companies which were owned and being operated in Tuscaloosa agreed, for a stipulated sum, to be paid by the other, not to run its plant for five years at Tuscaloosa. Upon the other company's making default in the payment agreed on, suit was brought to enforce its collection. The defendant pleaded that the contract was void as being in restraint of trade and against public policy. On the other hand, the plaintiff contended that the contract was not void because it was limited both as to time and territory. The court, however, held the contract void, and in so holding in the opinion said: "Its purpose and effect are not to protect the covenantor in the legitimate use of something he has acquired from the covenantor, but to secure to him the legitimate use, or the use in an illegitimate way, of that which he already has, in respect of which there is no reason or occasion for the covenantor to assume any obligation of protection. Such an undertaking in restraint of trade, however limited as to time and place, would seem, upon all general principles, though we know of no case expressly and directly so deciding, to be necessarily unreasonable and vicious on the consideration alone that it is not entered into nor has it the effect of protecting some business, practice, trade, or interest which the covenantor has sold to the covenantor. The undertaking involved in this case is precisely of that class, and must fail upon the principle we have been discussing."

There is another line of cases which hold that a contract in partial restraint of trade will be upheld when it is an incident to and is in support of another contract or sale in which the covenantor has an interest which is in need of protection, but that contracts of this kind will be enforced only when the restraint is no more extensive than is reasonably required to protect the interest of the party in whose favor it is given, and is not so large as to interfere with the interests of the public. Among the cases included in the class last mentioned is that of *Barrone v. Moseley Bros.* 144 Ky. 698, 139 S. W. 869, and *Linneman v. Allison*, 142 Ky. 309, 134 S. W. 134. The instant case, however, is not controlled by the principle announced in the two cases last mentioned, but by that declared in *Clemons v. Meadows*, *Anderson v. Jett*, *Merchants' Ice & Cold Storage Co. v. Rohrman*; *Arctic Ice Co. v. Franklin Electric & Ice Co.*; *Tuscaloosa Ice Mfg. Co. v. Williams*; *Louisville & N. R. Co. v. Com.*; and *Com. v. Louisville & N. R. Co.*, — *supra*; for the contract is not one made for the

protection of a private right which it created with an incidental, partial, and reasonable restraint of trade, but is one made between common carriers without limit as to time, and with the direct purpose to restrain trade, and create a monopoly detrimental to the public good in favor of each of the contracting parties, which, if enforced, it would necessarily do. It therefore follows that, in adjudging it void, the circuit court did not err.

If correct in this view, it further follows that the circuit court did not err in refusing to rescind the contract, or to award appellants damages for its breach by appellees, for it is a well-recognized rule that the courts will not grant relief to the parties to an illegal contract, or allow a recovery of damages by either against the other for its breach. The contract being against public policy, and the parties *in pari delicto*, no right of action can be predicated thereon by either of them. They will be left by the court where their own conduct placed them. *Ratcliffe v. Smith*, 13 Bush, 172; *Chesapeake & O. R. Co. v. Maysville Brick Co.* 132 Ky. 643, 116 S. W. 1183; *Hancock v. Louisville & N. R. Co.* 145 U. S. 416, 38 L. ed. 757, 12 Sup. Ct. Rep. 969; *Harriman v. Northern Securities Co.* 197 U. S. 244, 49 L. ed. 739, 25 Sup. Ct. Rep. 493.

Judgment affirmed.

Petition for rehearing denied.

KENTUCKY COURT OF APPEALS.

J. P. HOSTETTER et al., Appts.,

v.
ATTILLA GREEN.

(159 Ky. 611, 167 S. W. 919.)

Judgment — denying divorce — effect on action for alienation of affections.

1. A judgment granting a wife a divorce for abandonment and denying one against her for that cause is no bar to a suit by her former husband against her parents for the alienation of her affections from him.

Note. — Conclusiveness as to third persons of decree in suit for divorce or annulment as to the facts adjudicated as distinguished from the status established.

The earlier cases on this question are discussed in the note to *Luke v. Hill*, 38 L.R.A. (N.S.) 559.

A judgment in an action for divorce in which the wife was awarded an absolute divorce on the ground of the husband's adultery with a co-respondent who is subsequently made a defendant in an action in

Evidence — record in prior suit.

2. The record upon which a divorce was granted to a woman against her husband is not admissible in an action by him against her parents for the alienation of her affections, if it contains no admissions tending to defeat his right of action.

Witness — divorced wife — action by husband against parents.

3. A woman who has secured a divorce from her husband is not precluded from testifying, in an action by him against her parents for the alienation of her affections, that the parents offered to provide a farm for the husband and wife to live on, by a statute providing that neither husband nor wife shall testify while the marriage exists, nor afterwards, concerning any communication between them during marriage.

(June 19, 1914.)

APPEAL by defendants from a judgment of the Circuit Court for Franklin County in plaintiff's favor in an action brought to recover damages for alleged alienation by defendants of his wife's affections from him. Reversed.

The facts are stated in the opinion.

Messrs. Forman & Forman, for appellants:

A decree in a divorce suit is a judgment *in rem* and binding not only upon parties and privies, but upon all the world as well.

2 Black, Judg. §§ 795, 803; Gleason v. Knapp, 56 Mich. 291, 56 Am. Rep. 388, 22 N. W. 865.

Refusal to permit the introduction of the proceedings in the divorce case was reversible error.

Bell v. Merrifield, 109 N. Y. 202, 4 Am. St. Rep. 436, 16 N. E. 55; Bergman v. Solomon, 143 Ky. 581, 136 S. W. 1010.

The refusal of the trial court to permit plaintiff's divorced wife to testify on their behalf was prejudicial error of the gravest character.

Short v. Tinsley, 1 Met. (Ky.) 397, 71 Am. Dec. 482; Storms v. Storms, 3 Bush, 77; English v. Cropper, 8 Bush, 293; Els-

wick v. Com. 13 Bush, 155; Com. v. Sapp, 90 Ky. 580, 29 Am. St. Rep. 405, 14 S. W. 834; Fay v. Guynon, 131 Mass. 31; Com. v. Griffin, 110 Mass. 181; Higbee v. McMillan, 18 Kan. 133; State v. Center, 35 Vt. 378; McCague v. Miller, 36 Ohio St. 595; Lyon v. Prouty, 154 Mass. 488, 28 N. E. 908; Mercer v. Patterson, 41 Ind. 440; Mitchell v. Mitchell, 80 Tex. 101, 15 S. W. 705; Metropolitan L. Ins. Co. v. Thomas, 32 Ky. L. Rep. 770, 106 S. W. 1175; Leucht v. Leucht, 129 Ky. 700, 130 Am. St. Rep. 486, 112 S. W. 845.

Mr. Ira Julian also for appellants.

Messrs. Scott & Hamilton, for appellee:

The error in refusing to permit the wife of appellee to testify was harmless because the facts sought to be proved by her were admitted by the appellee in the trial of the case.

Dickerson v. Wilson, 2 J. J. Marsh. 496; Long v. Douthitt, 142 Ky. 427, 134 S. W. 453; Farmers' Bank v. Wickliffe, 134 Ky. 627, 121 S. W. 498.

Turner, J., delivered the opinion of the court:

In February, 1903, appellee, Attila Green, was married to Miss Whitney Hostetter, daughter of appellants. The young people lived with the husband's parents on a farm adjoining that of appellants until early in the fall of 1909, when they moved to Alton; but shortly after the removal the wife was stricken with typhoid fever, and it was deemed best that she should be taken to the home of her parents, which was done. While there, differences arose between the husband and her parents which resulted in his leaving; he claiming that he had been forbidden the premises by her father. In February, 1910, he instituted an action against the appellants, the parents of his wife, seeking damages for their alleged alienation of his wife's affections. Upon the first trial he was awarded a judgment against them for \$1,500, which upon appeal to this court was reversed chiefly

damages for alienation of affections, is not binding upon such defendant in the action for alienation of affections, although she voluntarily appeared and demanded service of the complaint in the divorce action, where the judgment roll does not in any manner disclose that she became a party to the divorce action or appeared on the trial of the action and contested the allegations of adultery, and there is no evidence that she ever answered in the action, or that she was properly placed in default in not appearing upon the trial. Hendrick v. Biggar, 209 N. Y. 440, 103 N. E. 763. A statute involved in this case provided for service of a copy of the complaint in a divorce action in which the ground on which

the divorce is sought is adultery, upon the co-respondent named therein, and if no such service be made, any co-respondent may at any time before the entry of judgment appear either in person or by attorney in said action and demand of the plaintiff's attorney a copy of the summons and complaint, and giving such co-respondent the right to appear and defend such action so far as the issues affect him.

Under this statute, a co-respondent may, by appearing in the action, become bound by the judgment in the divorce proceedings. Hendrick v. Beggar, *supra*.

The decision in this case was approved in Raymond v. Williston, 213 Fed. 525.

W. A. E.

for errors in the instructions and the admission of evidence. *Hostetter v. Green*, 150 Ky. 551, 150 S. W. 652. In October, 1911, appellee's wife instituted an action against him for support and maintenance, in which action he answered and by way of counterclaim asked for an absolute divorce, charging abandonment, whereupon she amended her petition and prayed for an absolute divorce upon the same ground, and that alimony be awarded her. The circuit court granted her a divorce, and alimony at the rate of \$10 per month. The husband appealed to this court, complaining of the allowance of alimony, and the wife prosecuted a cross appeal because the lower court had refused to allow her a lump sum in full of alimony. This court, having no power to review the judgment of the circuit court granting the divorce, declined to pass upon whether or not it was properly granted, but, upon the question of alimony, considered the evidence and sustained the wife's contention, and directed that a lump sum be allowed her as alimony. *Green v. Green*, 152 Ky. 486, 153 S. W. 775. It will be observed, however, that this court in passing upon the question of alimony in that case did not undertake to pass upon the merits of the contentions between the parties, but held that, although the wife be partially in fault, yet, if there be equal or some fault upon the part of the husband and no moral delinquency upon the wife's part, she would nevertheless be entitled to alimony if she had no estate or income of her own. Upon the return of this case to the circuit court, it was retried, and the appellee obtained a verdict and judgment against appellants for \$2,500 in damages, and from that judgment this appeal is prosecuted.

Four grounds for reversal are relied upon: (1) That the lower court erred in refusing to permit to be filed an amended answer attempting to plead the judgment in the divorce case between appellee and his wife as a bar to this suit for alienation; (2) because the court refused to permit appellant to read in evidence in this case the record and proceedings and judgment in the divorce case; (3) because of the refusal by the lower court to permit appellant to prove by appellee's divorced wife certain things which are shown by aitals in the record; and (4) because the court on the trial refused to instruct the jury in substance that if the offers of appellee's wife to again live with him were made in good faith and refused by him they then should find for the defendant. These questions will be considered in the order named.

In the divorce case each of the parties relied upon the charge of abandonment and L.R.A.1915C.

sought a divorce upon that ground; and upon the return of this case to the circuit court, after the reversal, the defendants tendered an amended answer, setting up, in substance, that the plaintiff in this action had in the divorce case relied upon the same facts to establish his charge of abandonment as he relies upon in this action to establish his charge of alienation, and pleading that in the divorce case this issue had been determined against him and his wife granted a divorce, and that judgment is pleaded in bar of any right to recover in this action. The lower court refused to permit this pleading to be filed, and that action is urged as cause for reversal.

The argument for appellant is that a judgment in a divorce case is a judgment *in rem*, and therefore binding not only upon the parties thereto, but upon the whole world, and that, inasmuch as the evidence in that case and this was substantially the same, that issue is *res judicata* as to appellee, and he is precluded from again litigating it. But this contention is not sound; the appellants in this action were not parties to the divorce suit, and in the nature of things could not have been, nor is the wife a party to this suit; the judgment in the divorce suit is binding upon the appellants in this suit only in so far as it fixed the status of the parties to the divorce suit. While the evidence in the two actions may be substantially the same, the pleadings presented essentially different causes of action; in the divorce suit the issue was which party had abandoned the other, while in this suit is involved the issue whether the parents of the wife, prior to the abandonment, were guilty of such conduct and of exercising such influence over their daughter as alienated her affections from the appellee and thereby brought about the abandonment.

It does not follow that, if Green did abandon his wife, the abandonment might not have been forced upon him by reason of the hostility of the Hostettters to him, and their influence over their daughter, coupled with mistreatment of him, might have driven him to abandoning his wife when such abandonment would not have been necessary and would never have taken place except for their mistreatment of him and their conduct in prejudicing their daughter against him. Abandonment of a wife by the husband does not necessarily mean that her affections have not theretofore been alienated from him by other persons. The issue of abandonment in a divorce case between husband and wife, and the issue of alienation of affections between either of them and third parties in another and distinct case, are in no sense akin to

each other; and because the evidence in the two cases may be substantially the same is no reason why a judgment in one should be a bar to the other.

It is not inconceivable that, even if the evidence in the two cases were exactly the same, that it might not uphold a charge of abandonment in the one case, and the charge of alienation in the other. In the divorce case the appellee was barred by law from testifying, while in this case for the first time he was permitted by his own evidence to give his version of the differences between him and his wife and what brought them about. It would be unjust to appellee to deny him the right to be heard on the issues raised in this suit, where he may under the law testify, because in a previous action between him and another upon different issues, where he was barred from testifying, the same facts were held against him upon the issues there pending. He has not had his day in court as between him and appellants upon the issues between them, and for the first time in this case was permitted to testify about these facts.

This exact question has never been passed upon in this state, and so far as our investigation goes has not been directly passed upon elsewhere. We find, however, in 21 Cyc. page 1620, the general proposition laid down that a husband may recover for alienation of his wife's affections even though she had previously been granted a divorce.

The appellants rely upon the Michigan case of Gleason v. Knapp, 56 Mich. 291, 56 Am. Rep. 388, 22 N. W. 865, as sustaining their position; but that was a suit by Gleason against Knapp for criminal conversation with his wife, and the court merely held that, as Gleason had failed to plead his wife's adultery as a defense in a previous divorce suit between them, that he was estopped to assert his wife's adultery in the suit against Knapp. But, even if that might be held applicable here, it has since been modified and practically overruled by the Michigan court itself.

It is next contended by appellants that the lower court erred in refusing them the right to read in evidence the record in the divorce case, and they rely upon the case of Bergman v. Solomon, 143 Ky. 581, 136 S. W. 1010, as settling that question in their favor. In that case, however, the divorce record disclosed that the plaintiff in the alienation suit had filed an answer in the divorce suit, but had subsequently withdrawn it and thereby admitted the charges made against him by his wife, and the court merely held that the record was competent to show these admissions by him. But in this case there is no such state of

record; the record of the divorce case here shows no admissions of any kind by the appellee.

Before the last trial of this case a divorce had been granted to the wife of the appellee, and she was offered as a witness for the appellants, and the lower court declined to permit her to testify, and they are complaining of that action.

Section 606 of the Civil Code provides, among other things: "Neither a husband nor his wife shall testify while the marriage exists or afterwards concerning any communication between them during marriage. Nor shall either of them testify against the other."

It was avowed the witness, if permitted to answer, would state that in December, 1909, in her presence the appellant J. P. Hostetter stated to the appellee, Green, that he (Hostetter) and his family were going to move from Franklin county to Fayette county, and that Green might take his (Hostetter's) farm, rent free, and live there with his wife, and that Green declined said proposition, and left the place and never returned.

It is apparent from the express wording of the section of the Code quoted that neither the husband nor the wife is a competent witness to testify against the other during the existence of the marriage relation; but in this case it was sought, so far as that part of the avowal above referred to is concerned, to show by the divorced wife the conversation had between her father and her then husband which was in no sense a communication between her and her husband growing out of the marital relation. She heard the conversation between her father and Green just as any other witness might have heard it if present, and we are aware of no reason of public policy which denies to a litigant the right to introduce the evidence of his divorced wife against the husband, although the occurrence took place during their marriage, if it did not grow out of, and she did not acquire the knowledge through or by reason of, the marital relation. The evidence offered was in no sense a communication from the husband to the wife, and had no connection, whatever, with the marital relations between them; it was a transaction between her husband and another which only happened to take place in her presence.

The case of Com. v. Sapp, 90 Ky. 580, 29 Am. St. Rep. 405, 14 S. W. 834, was where the commonwealth offered to introduce the divorced wife as a witness against Sapp, who had been indicted, charged with attempting to poison her, and the court in discussing her competency as a witness

said: "If the proposed testimony violates marital confidence in the slightest degree, or tends, however slightly, to impair the rule for its protection, the highest considerations forbid its introduction. The word 'communication,' therefore, as used in our statute, should be given a liberal construction. It should not be confined to a mere statement by the husband to the wife or *vice versa*, but should be construed to embrace all knowledge upon the part of the one or the other obtained by reason of the marriage relation, and which, but for the confidence growing out of it, would not have been known to the party. The reason of this rule does not apply, however, to facts known to a surviving or divorced husband or wife, independent of the existence of the former marriage, although the knowledge was derived during its existence, and relates to the transactions of the one or the other; therefore, the rule should not be applied in such a case. What the state proposed to prove by the divorced wife in this case was not any communication or knowledge which can fairly be considered as having come to her by reason of her being then the wife of the accused."

The case of *Elswick v. Com.* 13 Bush, 155, was where a defendant charged with grand larceny offered to introduce his divorced wife as a witness, and the trial court refused to permit it. In reversing that judgment for that reason the court said: "Information coming to a husband or wife in consequence or by reason of the existence of the marriage relation is to be treated as confidential, and the confidence which the law creates while the parties remain in the most intimate of all relations cannot be broken even after that relation has been dissolved. . . . But the reason for this rule does not apply to facts known to a surviving or a divorced husband or wife independent of the previous existence of the marriage. Accordingly, in an action by a husband for criminal conversation with a wife from whom he had subsequently been divorced, she was held to be a competent witness to prove the charge laid in the husband's declaration."

It may be said to be settled in this state that a divorced husband or wife is a competent witness against his or her former spouse as to any matter occurring during the marriage relation which was not a confidential communication between them, and of which they did not acquire knowledge by reason of that relation. Only that part of the avowal referred to in this opinion, however, was competent.

Upon the trial below the appellant offered an instruction in substance that, if the offers of the appellee's wife to return to

and live with him were made in good faith and were refused by him, that they should find for the defendants; this instruction the lower court refused to give. It is sufficient to say in answer to this that not only was this idea embraced in the instructions given by the court, but that, if it was not, the former opinion of this court directed the instructions to be given, and is therefore conclusive.

For the reason given, the judgment is reversed, with directions to grant appellants a new trial, and for further proceedings consistent herewith.

Petition for rehearing denied.

KENTUCKY COURT OF APPEALS.

BEN H. AUBREY, Admr., etc., of James H. Aubrey, Deceased, Appt.,

v.

D. C. STIMSON.

(160 Ky. 563, 169 S. W. 991.)

Corporation — Liability of director for injury to employee.

The president of a corporation who is also a director is not personally liable for injury to an employee through the explosion of a boiler which was part of the plant of the corporation, if he had no active supervision of the plant, which was under control of persons employed for that purpose, of whose negligence he had no notice.

(October 28, 1914.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Daviess County in defendant's favor in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. Affirmed.

The facts are stated in the opinion.

Messrs. Louis I. Igleheart and Little & Slack, for appellant:

The directors of the corporation are personally responsible for the death of an employee of the corporation, occasioned by the explosion of a defective boiler, it being shown that by the exercise of ordinary care

Note. — *Personal liability of officer or director of corporation for personal injuries from torts in connection with its business.*

This note supplements the note to *Wines v. Crosby*, 39 L.R.A. (N.S.) 901, wherein will be found the earlier cases and references to annotation on kindred questions.

The earlier note shows that some of the cases accept the distinction between mis-

they could have known its defective condition.

Campbell v. Portland Sugar Co. 62 Me. 552, 16 Am. Rep. 503; 10 Cyc. 335; *Greenberg v. Whitcomb Lumber Co.* 48 Am. St. Rep. 926, note; *Cameron v. Kenyon-Connell Commercial Co.* 22 Mont. 312, 44 L.R.A. 508, 74 Am. St. Rep. 602, 56 Pac. 358, 5 Am. Neg. Rep. 647; *Murray v. Cowherd*, 148 Ky. 591, 40 L.R.A.(N.S.) 617, 147 S. W. 6; *Cincinnati, N. O. & T. P. R. Co. v. Robertson*, 115 Ky. 858, 74 S. W. 1061.

Messrs. Miller, Sandidge, & Malin, for appellee:

Before liability can attach it must be shown that the agent, whether director, superintendent, general manager, foreman, or common laborer, was under obligation to perform a particular duty and failed to perform it, and as the direct result thereof injury resulted to some person to whom the duty was owing.

Wines v. Crosby, 169 Mich. 210, 39 L.R.A.(N.S.) 901, 135 N. W. 96, Ann. Cas. 1913D, 1055; *Murray v. Cowherd*, 148 Ky. 591, 40 L.R.A.(N.S.) 617, 147 S. W. 6; 2 *Thomp. Corp.* § 1280.

Turner, J., delivered the opinion of the court:

Appellant's intestate, while an employee of the Owensboro Chair Manufacturing Company, was killed by the explosion of a boiler in its manufacturing plant, and this action was instituted against the company and the appellee, Stimson, seeking the recovery of damages.

A verdict was returned against the company, upon which judgment was entered, and from which judgment there has been no

appeal; but at the conclusion of the evidence the court directed a verdict for the appellee, and from that action of the court the plaintiff has appealed.

The allegation as against Stimson is that he was the president, director, superintendent, and general manager of the corporation; that the boiler was in a dangerous and defective condition prior to the explosion; and that this condition was known to Stimson, or could have been known to him by the exercise of ordinary care.

The evidence tended strongly to show that the boiler had been, previous to the explosion, in a dangerous condition, but wholly failed to show that appellee was either the superintendent or general manager of the company's plant. On the contrary, it shows that he was president of the company and a member of its board of directors, and had an office some distance from the plant, and exercised no active control or management over the operation of the plant; that the company provided a general manager, a foreman, and an engineer, the latter being in control of the engines and boilers. The evidence is that appellee visited the plant not oftener than once every week or two, and then only for a short time. There is a total failure to show that the appellee knew of the dangerous condition of the boiler. So that the only question presented is whether the president or director of a manufacturing corporation, who is not in active control of its manufacturing plant, is liable in damages to one who is injured by reason of the negligence of the corporation of which negligence the president or director had no notice.

The company had committed the opera-

feasance and nonfeasance which has sometimes been applied to the question of the liability of the servant to third persons for his own negligence. This test was repudiated in *Murray v. Cowherd*, 148 Ky. 591, 40 L.R.A.(N.S.) 617, 147 S. W. 6, involving the liability of the president and general manager of a telephone company for personal injuries caused by the fall of a defective pole. Although the court discusses the question for the most part from the standpoint of liability of an ordinary servant for his own negligence, it really places its decision upon the ground that the president and general manager had control of the telephone company's supplies, and that it was his duty to inspect and to maintain the poles in a sound condition, a duty which, according to some of the evidence, he did not discharge in this particular instance. The court, in reaching its conclusion, expressly indorses the doctrine that so far as the liability of the servant is concerned, it makes no difference whether he did something in an unlawful manner, or whether he failed to observe the duty that he owed L.R.A.1915C.

to third persons, and says that since the president in that case was expressly charged with the precise duty the nonperformance of which caused the injury, he was liable.

In *Marsh v. Usk Hardware Co.* 73 Wash. 543, 132 Pac. 241, the president and the secretary, who were also the trustees, of a powder manufacturing corporation which had no general manager, were held liable to a person for injuries inflicted by an explosion of powder manufactured by the corporation, and used by the plaintiff in reliance upon circulars making false claims as to its safety, the court saying that the issuance of the circular must be deemed in law the personal act of the defendants as a part of the management of the company, which, in the absence of a general manager, presumptively devolved upon them. Generally, as to liability of seller or manufacturer for personal injuries caused by article sold, see various notes cited in Index to L.R.A. Notes, "Negligence," § 15.

No other cases on the question appeared to have been decided since the preparation of the earlier note.

L. A. W.

tion of its plant to its general manager, foreman, and engineer, and it was the latter's duty to inspect the boiler, and, if it needed repairs, to report to those higher in authority that fact and what material was necessary to repair it; certainly it was not the duty of the president of the corporation to inspect it. Officers of corporations are not held liable for the negligence of the corporation merely because of their official relation to it, but because of some wrongful or negligent act by such officer amounting to a breach of duty which resulted in an injury.

In this case appellee did not owe the duty to the decedent to inspect the boiler, nor did he owe any duty to have it repaired until he had notice of its condition. To make an officer of a corporation liable for the negligence of the corporation there must have been upon his part such a breach of duty as contributed to, or helped to bring about, the injury; that is to say, he must be a participant in the wrongful act.

The case of *Murray v. Cowherd*, 148 Ky. 591, 40 L.R.A.(N.S.) 617, 147 S. W. 6, illustrates the distinction. In that case the president of a telephone company was also its general manager, and as such it was his duty to inspect the telephone poles, and he was there held liable for his failure to properly inspect the pole which injured the plaintiff. His failure to perform a duty brought about the injury; while in this case it has not been shown that the appellee failed to perform any duty which contributed to the death of plaintiff's intestate.

Responsible business men would hesitate to become officers of large corporations if they were held to be the insurers of the fidelity of its subordinate employees. 2 Thomp. Corp. 2, § 1280.

We are of opinion that the lower court properly directed the verdict for the appellee, and the judgment is affirmed.

MISSOURI SUPREME COURT.
(In Banc.)

STATE OF MISSOURI EX INF. THOMAS
B. HARVEY, Circuit Attorney,
v.

MISSOURI ATHLETIC CLUB.

SAME

v.

ST. LOUIS CLUB.

(— Mo. —, 170 S. W. 904.)

Intoxicating Liquors — furnishing by club — sale.

1. The furnishing by a club of liquor to one of its members from a common stock, L.R.A.1915C.

to be charged to his account, which was settled at stated periods, is a sale within the meaning of a statute forbidding a sale of liquor without license.

Same — implied power of club.

2. Authority to dispense intoxicating liquors to its members is not implied from the charter of a social club, where, under the statutes, a corporation cannot secure a license to sell such liquors.

Same — incorporation — statutory authority.

3. A social club with power to dispense liquors to its members cannot be organized under a statute providing for the formation of benevolent, religious, scientific, educational, and miscellaneous associations, or any association which tends to the public advantage in relation to any or several of the objects above enumerated, and whatever is incident to such objects.

Estoppel — of public — acting on judicial decision.

4. That a social club has been organized and expended money in furnishing and equipping its house, on the faith of a judicial construction of a statute that it would have a right to dispense liquors among its members without a license, which construction has been acquiesced in by the legislature for a period of years, does not estop the public officials from insisting that its charter shall be annulled because of illegal sale of liquors, and that the decision is erroneous.

(Graves, J., dissents in part.)

(October 27, 1914.)

ORIGINAL PROCEEDINGS by informant in the nature of quo warranto for the forfeiture of respondents' charters for an alleged sale of liquor to their members without a dramshop license. Conditional judgments of forfeiture entered.

The facts are stated in the opinion.

Note. — Applicability of liquor laws to social club dispensing liquors to members.

- I. In general, 877.
- II. Is serving liquor by a club to its members a "sale," 878.
- III. Does such serving conflict with a statute designed to regulate the "business" of selling liquor, 881.
- IV. Does such serving constitute the club a "barroom," "place of resort," etc., within the meaning of liquor laws, 881.
- V. Club as a "person," within the meaning of liquor laws, 884.
- VI. Organization not a bona fide social club, 884.

The earlier cases on this question are collected in the notes to *South Shore Country Club v. People*, 12 L.R.A.(N.S.) 519; *Cuzner v. California Club*, 20 L.R.A.(N.S.)

Messrs. Thomas B. Harvey and Richard P. Spencer, for informant:

The sale of intoxicating liquors is restricted to natural persons.

State ex rel. Jones v. County Ct. 66 Mo. App. 96; State ex rel. Crow v. Page, 107 Mo. App. 213, 80 S. W. 912; State ex rel. Howard v. Scott, 96 Mo. App. 620, 70 S. W. 736.

The respondent corporation has no express or implied authority to traffic in intoxicating liquors.

Richard Hanlon Millinery Co. v. Mississippi Valley Trust Co. 251 Mo. 575, 158 S. W. 359; Blair v. Perpetual Ins. Co. 10 Mo. 564, 47 Am. Dec. 129; Matthews v. Skinker, 62 Mo. 329, 21 Am. Rep. 425; Carroll v. Campbell, 108 Mo. 559, 17 S. W.

884; State ex rel. Laclede Gaslight Co. v. Murphy, 130 Mo. 24, 31 L.R.A. 798, 31 S. W. 594; State ex rel. Supreme Lodge, F. U. A. v. Orear, 144 Mo. 157, 45 S. W. 1081; State ex rel. Crow v. Lincoln Trust Co. 144 Mo. 503, 46 S. W. 593; Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. ed. 629; St. Louis Police Relief Asso. v. Tierney, 116 Mo. App. 460, 91 S. W. 968; Gould v. Fuller, 79 Minn. 414, 82 N. W. 673; State ex rel. Wear v. Business Men's Club, 178 Mo. App. 548, 163 S. W. 901; State ex rel. Hadley v. Meramec Rod & Gun Club, 121 Mo. App. 372, 98 S. W. 815; State ex rel. Hadley v. Delmar Jockey Club, 200 Mo. 51, 92 S. W. 185, 98 S. W. 539; State ex rel. Hadley v. Standard Oil Co. 218 Mo. 350, 116 S. W. 902.

1095; Manning v. Canon City, 23 L.R.A. (N.S.) 192; Ada County v. Boise Commercial Club, 38 L.R.A. (N.S.) 101.

I. In general.

Only an abstract of the case of Rothschild v. State, 12 Ga. App. 728 78 S. E. 201, appears, and in the fourth paragraph of this abstract it is stated that on the trial of an indictment for selling liquor, it is no defense that the accused sold the liquor as an employee of a social club to the members thereof; that intoxicating liquor cannot be sold in this state by an individual or a corporation as a beverage, and where a steward of a social club sells to the members of the club intoxicating liquors, he is guilty of a violation of what is known as a prohibition law, although in making the sale he is acting solely for the benefit of the club and receives no personal benefit from such sale.

In the first paragraph of the abstract of Cronin v. State, 13 Ga. App. 652, 79 S. E. 747, a trial of an indictment containing two counts, the first charging the accused with the offense of selling intoxicating liquors, and the second with keeping intoxicating liquors on hand at his place of business, where the defense relied upon was that he kept the liquors at a social club and furnished the same to members thereof, and had paid to the state the license tax, there was held to be no error in the charge of the court to the effect that the statute (referring to the tax act of 1909 as to clubs, Civil Code, § 933) does not permit any club, organization, or association to sell or barter for a valuable consideration alcoholic, spirituous, or intoxicating liquors; that the statute does not permit an organization or club or an association, either as an entity, as a corporation, or as a body of men, or as individuals, to keep on hand at the place selected by them for the use of the members, alcoholic, spirituous, or intoxicating liquors upon the payment of the license tax required by the general assembly, but that the liquor so kept on hand for such club, organization, or as L.R.A.1915C.

sociation must belong to the club, association, or organization, either as a body, or to the individual members composing such club, association, or organization, and that it is a violation of the law for such club, association, or organization, or any individual member thereof, to sell or barter for a valuable consideration alcoholic, spirituous, or intoxicating liquors.

While adhering to the general rule as announced in Texas, that a bona fide social club is permitted to sell intoxicating liquors to its members without taking a license so to do, the court in Trezevant v. State, — Tex. Crim. Rep. —, 145 S. W. 1191, holds that a sale to one not a member is prohibited, and that the secretary and manager is subject to prosecution for doing so. It was urged in this case that the information was defective in that it did not charge the accused with "pursuing the occupation" of selling intoxicating liquors, but it was held that the statute did not require such an allegation. It is stated further that the evidence in the case at bar showed that the sales were being made to all persons who desired to purchase on the occasion in question.

So, a sale to persons who made application for membership and had been recommended by a club member and by one not a member of the club, but whose application had never been acted upon by the club, was held not to come within the protection of the Texas rule that a sale to the members of the club could be made without a license. Baker v. State, — Tex. Crim. Rep. —, 167 S. W. 340. "This organization seems to smack too much of evasion and want of good faith," says the court.

The note, as indicated in its title, is confined to dispensing to members, however, and does not include, in general, cases of sales to nonmembers, as the above.

The Kansas City court of appeals in State v. Myers, 176 Mo. App. 66, 162 S. W. 768, followed the decision in State ex rel. Bell v. St. Louis Club, 125 Mo. 319, 26 L.R.A. 573, 28 S. W. 608, and held that a bona fide club conducted in a city where the dramshop law was in force might serve

Respondent's method of dispensing intoxicating liquors constitutes a sale.

Ada County v. Boise Commercial Club, 20 Idaho, 421, 38 L.R.A.(N.S.) 101, 118 Pac. 1086; Manning v. Canon City, 45 Colo. 571, 23 L.R.A.(N.S.) 192, 101 Pac. 978; Spokane v. Baughman, 54 Wash. 315, 103 Pac. 14; State ex rel. Young v. Minnesota Club, 106 Minn. 515, 20 L.R.A.(N.S.) 1101, 119 N. W. 494; South Shore Country Club v. People, 228 Ill. 75, 12 L.R.A.(N.S.) 519, 119 Am. St. Rep. 417, 81 N. E. 805, 10 Ann. Cas. 383; People ex rel. Stevenson v. Law & Order Club, 203 Ill. 127, 62 L.R.A. 884, 67 N. E. 855; State v. Easton Social, Literary, & Musical Club, 73 Md. 97,

10 L.R.A. 64, 20 Atl. 783; Conococheague Club v. State, 116 Md. 317, 81 Atl. 602; Beauvoir Club v. State, 148 Ala. 643, 121 Am. St. Rep. 82, 42 So. 1040; Marmount v. State, 48 Ind. 21, 1 Am. Crim. Rep. 447; Mohrman v. State, 105 Ga. 709, 43 L.R.A. 398, 70 Am. St. Rep. 74, 32 S. E. 143; Army & Navy Club v. District of Columbia, 8 App. D. C. 544; University Club v. Louisville, 92 Ky. 309, 17 S. W. 743; State v. Boston Club, 45 La. Ann. 585, 20 L.R.A. 185, 12 So. 895; State ex rel. Jackson v. Topeka Club, 82 Kan. 756, 29 L.R.A.(N.S.) 722, 109 Pac. 183, 20 Ann. Cas. 320; State v. Neis, 108 N. C. 787, 12 L.R.A. 412, 13 S. E. 225; United States v. Giller, 54 Fed.

liquors to its members for pay, but not for profit, and only as an incidental feature of its social object. But where the local option law is in force, even such a sale cannot be made. State v. Zehnder, 182 Mo. App. 170, 168 S. W. 666. And see STATE EX REL. HARVEY v. MISSOURI ATHLETIC CLUB, subsequently decided by the supreme court.

Notwithstanding the Texas rule that a bona fide social club has the right to dispense liquors to its members under certain circumstances without a license, a social club chartered in Oklahoma which has not complied with the laws of Texas by filing its charter and obtaining a permit to do business in that state cannot sell liquors without a license in Texas, at least not without proof that a club organized in Oklahoma under the charter it had secured would have the right to dispense liquor to its members in Oklahoma. Pace v. State, — Tex. Crim. Rep. —, 156 S. W. 1192. It is stated that a corporation chartered under the laws of one state, and undertaking to take up its habitation in another and there transact business, must show that it is authorized to do the character of business in the state where created, as well as authorized to do the business under the laws of the state where it seeks to locate, and it must conform to the laws of both states in the premises. After stating that the club in question did not show that it had the right to dispense liquor to its members in Oklahoma, the court continues: If it has no right under the law in Oklahoma, the place of its creation, it would not have such right in this state, even if it had secured a permit to do business in this state under such charter, unless authorized so to do by the terms of the permit or other law of this state.

In State v. Country Club, — Tex. Civ. App. —, 173 S. W. 570, it was held that the selling of liquor by a club to its members was in violation of a statute providing that "no person shall, directly or indirectly, sell . . . liquors . . . without taking out a license," etc., and might be enjoined.

It is stated that it is not necessary that the sale of liquor be the principal business L.R.A.1915C.

of the club, or that the sales be made at a profit, in order that it meet the condemnation of the law. The earlier Texas decisions are reviewed and held not to conflict with this decision. The earlier decisions are treated as passing upon collateral questions such as whether a license could be collected of a club, or whether the club was a "house for retailing spirituous liquors." Notwithstanding any distinctions that may be made of the earlier decisions, the rule was recognized in this state that a club might serve liquor to its members without a license and without violating the law. See Trezevant v. State; Baker v. State; and Pace v. State,—supra.

In State v. Country Club, supra, the right of a club to serve liquor to its members on election days was denied. Its right to do so on Sunday was also denied, but on the ground that this obliged its employees to labor on Sunday.

A statute which imposes a license upon every club or corporation keeping any intoxicating liquors, but which contains a proviso "that nothing in this section shall be construed to license or permit the keeping of any intoxicating liquors in any place now prohibited by law, or which may hereafter be prohibited by law," does not authorize a sale by a club which has paid the license tax. Deal v. State, 14 Ga. App. 121, 80 S. E. 537.

II. Is serving liquor by a club to its members a "sale."

For the earlier cases on this phase of the question, see notes to which reference is made above.

The question here annotated is governed largely by the particular form of the statute involved, and of particular phrases in the statutes. One point frequently urged is that a dispensing of liquors by a club to its members does not constitute a "sale." The practically uniform current of decision rendered during the time covered by the present note is that such dispensing does constitute a sale.

The dispensing of liquor to the members of a social club by the steward thereof,

636; *United States v. Alexis Club*, 98 Fed. 725; 64 Cent. L. J. p. 492; *State v. Mudie*, 22 S. D. 41, 115 N. W. 107; *Bachelors' Club v. Woodburn*, 60 Or. 331, 119 Pac. 339; *Rex v. Simmonds*, 44 N. S. 110; *Deal v. State*, 14 Ga. App. 121, 80 S. E. 537.

If the respondent corporation does not sell the liquor to its members, it stores and keeps it for them in violation of § 7226, Rev. Stat. 1909.

State v. Price, 229 Mo. 670, 129 S. W. 650; *State v. Finley*, 162 Mo. App. 134, 144 S. W. 120; *State v. Doerring*, 194 Mo. 409, 92 S. W. 489; *Lynch v. Murphy*, 119 Mo. 171, 24 S. W. 774; *Cox v. Hannibal & St. J. R. Co.* 174 Mo. 588, 74 S. W. 854;

O'Connor v. St. Louis Transit Co. 198 Mo. 637, 115 Am. St. Rep. 495, 97 S. W. 150, 8 Ann. Cas. 703; *State v. Rawlings*, 232 Mo. 544, 134 S. W. 530.

The doctrine of laches does not apply to suits brought by the state in its governmental capacity.

36 Cyc. 910; *Marion County v. Moffett*, 15 Mo. 604; *Ray County use of Common School Fund v. Bentley*, 49 Mo. 243; *Terre Haute & I. R. Co. v. State*, 159 Ind. 479, 65 N. E. 401; *United States v. Kirkpatrick*, 9 Wheat. 720, 6 L. ed. 199; *People v. Brown*, 67 Ill. 435; *Josselyn v. Stone*, 28 Miss. 753; *Haehnlen v. Com.* 13 Pa. 617, 53 Am. Dec. 502; *State v. Columbia*, — Tenn. —, 52 S.

upon payment of the price fixed by the regulations of the corporation, not for the purpose of making any profit, either directly or indirectly, but merely for the purpose of covering the outlay thereof by the corporation, and the expenses attendant upon the keeping and serving thereof at the clubhouse, is a sale of liquor within the meaning of a statute making it unlawful "for any person or persons to sell spirituous, fermented, or intoxicating liquors." *Conococheague Club v. State*, 116 Md. 317, 81 Atl. 602. The statute for the violation of which the club was indicted was one which provided for a license in addition to one required by an earlier statute under which the club had already taken out a license. It was provided in the later statute, however, that it was the intention that licensees to sell spirituous and fermented liquors under the earlier statute should be subject to the conditions, provisions, and penalties of the later act.

The dispensing of liquor by a club to its members, who pay therefor a sum which exceeds the cost of the liquor, which, together with other money received from the sale of liquor, is placed in the treasury of the club and becomes a part of the general funds of said club, and is expended for club usage for any purposes the club sees fit, is a sale within the meaning of a statute providing that "no person by himself, his agent or servant, directly or indirectly, shall sell any intoxicating liquors except as herein provided." *State v. Delaware Saengerbund*, — Del. —, 91 Atl. 290.

In the prosecution of the steward of a social, fraternal, unincorporated order, for keeping a place where intoxicating liquors were sold in violation of law, the dispensing by the order without profit either to the order or steward, of beer regularly purchased with lodge funds, and given to the members in exchange for tickets which they had previously purchased of the lodge, was held to be a sale of liquor within the meaning of a statute providing that any person who shall keep, run, or operate a place where intoxicating liquors are sold in violation of law shall be deemed guilty of a misdemeanor. *Givens v. State*, — Ind. —, 107 N. E. 78.
L.R.A.1915C.

The furnishing of liquor by an incorporated club to its members in exchange for coupons which are issued to the members for a consideration, and which entitle the holder to receive a certain quantity of any refreshments the club may have in stock, is a sale although no profit is made by the transaction. *Bachelors' Club v. Woodburn*, 60 Or. 331, 119 Pac. 339. See as to the bona fide character of the club, *infra*.

Nor is it a defense to a charge of unlawful disposal of liquor, for the seller to show that he sold it for less than it cost him. *Bachelors' Club v. Woodburn*, *supra*.

In *Deal v. State*, 14 Ga. App. 121, 80 S. E. 537, the liquor was dispensed to one not a member of the club, but introduced and registered by a member as a guest in accordance with rules and regulations of the club. A coupon book was obtained by the member and delivered to the guest upon payment by him of the price stated, and this coupon book was exchanged by the guest with one of the employees of the club for a quart of whisky. This was held to constitute a sale, and it was held immaterial whether or not a profit was made from the sale. It is also stated to be immaterial whether the club was incorporated, or a mere unincorporated voluntary association of persons.

This holding was approved in *Wright v. State*, 14 Ga. App. 185, 80 S. E. 544, where the members of the club were allowed to withdraw liquors from a common stock either by the drink or in larger quantities, paying for the same as it was withdrawn the amount demanded by the club. The scheme of distribution adopted is stated to have been similar to that pursued in the *Deal Case*.

The steward of an incorporated club, who has delivered to one of its members eight bottles of beer for the use of a party of eight, out of a case in the refrigerator tagged in the name of the club, in return for money given him by the member, is guilty of the keeping for sale of intoxicating liquors, contrary to a statute providing that "no person shall sell, or expose or keep for sale, . . . liquor, except as author-

W. 511; *State v. Sponaugle*, 45 W. Va. 415, 43 L.R.A. 727, 32 S. E. 283; *Ada County v. Boise Commercial Club*, 20 Idaho, 444, 38 L.R.A.(N.S.) 101, 118 Pac. 1086.

Messrs. E. T. Allen, C. B. Allen, and William C. Connett, for respondent Missouri Athletic Club:

The distribution of liquor to members by a bona fide social club is not a sale within the meaning of the dramshop law.

State ex rel. Bell v. St. Louis Club, 125 Mo. 308, 26 L.R.A. 573, 28 S. W. 604; *State v. Myers*, 176 Mo. App. 66, 162 S. W. 768; *State ex rel. Hadley v. Rose Hill Pastime Athletic Club*, 121 Mo. App. 81,

97 S. W. 978; *People v. Adelphi Club*, 149 N. Y. 5, 31 L.R.A. 510, 52 Am. St. Rep. 700, 43 N. E. 410; *Klein v. Livingston Club*, 177 Pa. 224, 34 L.R.A. 94, 55 Am. St. Rep. 717, 35 Atl. 606; *Cuzner v. California Club*, 155 Cal. 303, 20 L.R.A.(N.S.) 1095, 100 Pac. 868; *Moriarity v. State*, 122 Tenn. 440, 25 L.R.A.(N.S.) 1252, 124 S. W. 1016; *State v. Duke*, 104 Tex. 355, 137 S. W. 654, 138 S. W. 385; *Manassas Club v. Mobile*, 121 Ala. 561, 25 So. 628; *Adams v. State*, — Tex. Crim. Rep. —, 145 S. W. 940; *State ex rel. Boston Club v. Fitzpatrick*, 131 La. 1079, 43 L.R.A.(N.S.) 608, 60 So. 691; *State v. University Club*, 35

ized in the chapter." *Com. v. Woelz*, 219 Mass. 37, 106 N. E. 560.

That the serving of liquor by a club to its members is a sale is held also in *State v. Country Club*, — Tex. Civ. App. —, 173 S. W. 570.

The serving of liquor by the steward of a fraternal beneficiary secret association, incorporated under the state laws, to members of the lodge in the lodge room, in payment of which the steward punched on a card which was required to be purchased by the members, enough places to cover the price charged for the refreshments served, is a sale within the meaning of a local option law intended to prohibit all traffic in intoxicating liquors, which provided that it shall not be lawful for any person "to directly or indirectly sell, give away, or barter in any manner whatever, any kind of intoxicating liquors or beverages." *State v. Robinson*, 163 Mo. App. 221, 146 S. W. 456. The revenue derived from the sale of cards was used by the lodge to keep up the stock of liquors, to pay the steward, and to pay lodge expenses.

The serving of liquors to the members of a club, in payment of which a ticket previously purchased by the members is punched so as to destroy or diminish its purchasing power *pro tanto*, is a sale of such liquors, and both the person selling the ticket or other device, and the person dispensing the liquors, are equally guilty within the local option laws. *State v. Zehnder*, 182 Mo. App. 161, 168 S. W. 661.

See *State v. University Club*, 35 Nev. 475, 44 L.R.A.(N.S.) 1026, 130 Pac. 468, *infra*.

The court in *State v. Delaware Saengerbund*, — Del. —, 91 Atl. 290, states that when liquor is purchased by such club with the funds of the club, the liquor becomes the property of the club and so remains until it disposes of it; that in such property the club holds the legal title; if destroyed the loss is the loss of the club, and if insured the indemnity is payable to the club; that a member who resigns or is expelled from the club has no right to claim a portion of the liquor, nor upon his death or insolvency may his personal representative or trustee in bank- L.R.A.1915C.

ruptcy reach into and take as the member's property any part of the liquor so purchased and held; that when a member calls for, receives, and pays for, or promises to pay for, the liquor, there is a transaction between the club and the members resulting in a physical transfer of the liquor from the former to the latter; that the club becomes possessed of the money and the member becomes vested with the title in the liquor by virtue of a transaction which in its completeness and simplicity possesses every element of a sale. Similar reasoning appears in *State v. Country Club*, — Tex. Civ. App. —, 173 S. W. 570.

In *Bachelors' Club v. Woodburn*, 60 Or. 331, 119 Pac. 339, it is stated that the contention that the dispensing of liquor under the facts stated above was not a sale of liquor, since the liquor was the property of the members of the club, could not be sustained; that the club is a corporation and is itself an artificial person, and as such owns the liquors purchased by it, and that the act of taking a member's money in gross and allowing him to spend it for liquors in detail, as his appetite may require, does not alter the fact that in its ultimate analysis the transaction is a sale.

On the contrary, the superior court of Pennsylvania in *Com. v. Krotzer*, 51 Pa. Super. Ct. 411, followed the decision in *Klein v. Livingston Club*, 177 Pa. 224, 34 L.R.A. 94, 55 Am. St. Rep. 717, 35 Atl. 606, set forth in the note above referred to in 12 L.R.A.(N.S.) 520, and held that the steward of a bona fide unincorporated fraternal, beneficial, and social order was not guilty of making a sale of intoxicating liquors by simply distributing to the members of the order out of the common stock on hand such liquor as they required, receiving in return therefor, in 5-cent checks, its equivalent in value as determined by the room committee.

The fact that the manager of the buffet of a social club, whose business it was to purchase the liquors kept and replenish the stock from time to time, and who had charge of the money and knew of the method of dispensing the liquors by coupon books, was not present when liquor was dispensed by an employee of the club upon a coupon book, does not relieve him from

Neb. 475, 44 L.R.A.(N.S.) 1028, 130 Pac. 468; State v. Austin Club, 89 Tex. 20, 30 L.R.A. 500, 33 S. W. 113; Tennessee Club v. Dwyer, 11 Lea, 452, 47 Am. Rep. 298; Piedmont Club v. Com. 87 Va. 540, 12 S. E. 963; Barden v. Montana Club, 10 Mont. 330, 11 L.R.A. 593, 24 Am. St. Rep. 27, 25 Pac. 1042; State v. Boston Club, 45 La. Ann. 585, 20 L.R.A. 185, 12 So. 893; State ex rel. Columbia Club v. McMaster, 35 S. C. 1, 28 Am. St. Rep. 826, 14 S. E. 290; Seim v. State, 55 Md. 566, 39 Am. Rep. 419.

To overrule the St. Louis Club Case, and then declare acts committed before the de-

cision in the present case unlawful, which, under the St. Louis Club Case, were lawful at the time they occurred, would violate the crudest notions of justice.

St. Louis, O. H. & C. R. Co. v. Fowler, 142 Mo. 687, 44 S. W. 771; Erbaugh v. United States, 97 C. C. A. 663, 173 Fed. 435; Martin v. United States, 93 C. C. A. 484, 168 Fed. 202.

If the legislature had intended to regulate the use of liquor by clubs, they would easily have found appropriate language in which to express that purpose. By failing to do so, they indicated their purpose not to interfere therewith.

prosecution for the illegal sale. Deal v. State, 14 Ga. App. 121, 80 S. E. 537.

The Georgia statute involved in Deal v. State, supra, made it penal "for any person within the limits of this state to sell or barter for valuable consideration, either directly or indirectly, . . . any . . . intoxicating liquors."

But the secretary and treasurer of a social club charged with the duty of collecting the dues and fees from the members, and attending to the correspondence and such other clerical work as was necessary in the conduct of the club, is not guilty of a sale of intoxicating liquors made in the club, where he did not purchase any liquor for the club nor sell any of the liquor to members, nor have any connection with any sale, or aid or abet the sale in any way. Wright v. State, 14 Ga. App. 185, 80 S. E. 544.

In still other cases discussed above with reference to what constitutes a sale, the prosecution was against an officer or servant of the club, but this fact is not the basis of any distinction on the question of what constitutes a sale. See Givens v. State, — Ind. —, 107 N. E. 78, supra; Rothschild v. State, — Ga. App. —, 82 S. E. 913, infra; State v. Robinson, 163 Mo. App. 221, 146 S. W. 456; State v. Zehnder, 182 Mo. App. 161, 168 S. W. 661; State v. Myers, 176 Mo. App. 66, 162 S. W. 768; and Com. v. Krotzer, 51 Pa. Super. Ct. 411, supra.

In Wallace v. State, 8 Ala. App. 386, 62 So. 365, infra, the prosecution was against a member.

On the question of what constitutes a sale, it has been held that no distinction exists between statutes which prohibit and those which regulate. Conococheague Club v. State, 116 Md. 317, 81 Atl. 602; State v. Delaware Saengerbund, — Del. —, 91 Atl. 290. See also State v. Robinson and State v. Zehnder, supra.

A prohibitory law was involved also in Deal v. State, 14 Ga. App. 121, 80 S. E. 537, supra.

The city in which the order prosecuted in Givens v. State, supra, was located, was "dry" under the provisions of the local option law, but no point is made of this fact.

L.R.A.1915C.

III. Does such serving conflict with a statute designed to regulate the "business" of selling liquor.

For earlier cases on this phase of the question, see notes to South Shore Country Club v. People, 12 L.R.A.(N.S.) 519; Cuzner v. California Club, 20 L.R.A.(N.S.) 1095, and Ada County v. Boise Commercial Club, 38 L.R.A.(N.S.) 101.

Where the purpose of the statute involved, as indicated in its title, is to provide for a license upon the "business" of disposing liquors, a bona fide social club which disposes of liquors to its members and guests at a fixed charge, as an incident to the general purposes of the club, the profits of such sale going to pay the general expenses of the organization, is not subject to the regulations of such statute. State v. University Club, 35 Nev. 475, 44 L.R.A.(N.S.) 1026, 130 Pac. 468. The provisions of the statute in this case were that "every person, firm, or company, etc., manufacturing or selling either at retail or wholesale any . . . liquors, shall . . . take out a state liquor license as hereinafter provided." A section of the general revenue law provided that "any person or persons who may dispose of any spirituous, malt, or fermented liquors . . . shall, before the transaction of any such business, take out a license." This statute, as above indicated, was interpreted to be a statute regulating the "business" of selling liquors.

IV. Does such serving constitute the club a "barroom," "place of resort," etc., within the meaning of liquor laws.

For earlier cases on this phase of the question, see notes to South Shore Country Club v. People, 12 L.R.A.(N.S.) 519; Manning v. Canon City, 23 L.R.A.(N.S.) 192, and Ada County v. Boise Commercial Club, 38 L.R.A.(N.S.) 101.

The question whether the dispensing of liquor by a social club to its members meets the condemnation of various words or phrases in statutes has been passed upon frequently.

Thus, a social club which dispensed liquor to its members and nonresident guests

State ex rel. Bell v. St. Louis Club, 125 Mo. 308, 26 L.R.A. 573, 28 S. W. 604; State ex rel. Boston Club v. Fitzpatrick, 131 La. Ann. 1079, 43 L.R.A. (N.S.) 608, 60 So. 691; State v. Duke, 104 Tex. 355, 137 S. W. 654, 138 S. W. 385; Klein v. Livingston Club, 177 Pa. 224, 34 L.R.A. 94, 55 Am. St. Rep. 717, 35 Atl. 606; People v. Adelphi Club, 149 N. Y. 5, 31 L.R.A. 510, 52 Am. St. Rep. 700, 43 N. E. 410; Cuzner v. California Club, 155 Cal. 303, 20 L.R.A. (N.S.) 1095, 100 Pac. 868.

The official construction of this act does not apply to bona fide social clubs, and is controlling.

United States v. Cerecedo Hermanos y Compañía, 209 U. S. 338, 52 L. ed. 821, 28

Sup. Ct. Rep. 532; Timmonds v. Kennish, 244 Mo. 328, 149 S. W. 652.

Bills which were introduced for the specific purpose of including bona fide clubs within the dramshop law have been repeatedly defeated by the legislature.

Easton v. Courtwright, 84 Mo. 36.

After the legislature has re-enacted the law with the construction put upon it by the supreme court in the St. Louis Club Case, this court is bound by the meaning given to it in such decision.

Northcutt v. Eager, 132 Mo. 277, 33 S. W. 1125; Wilson v. Beckwith, 140 Mo. 381, 41 S. W. 985; State ex rel. McNamee v. Stobie, 194 Mo. 64, 92 S. W. 191; Reynolds v. Lee, 180 Ala. 76, 60 So. 101; Hope v. State, 5 Ala. App. 123, 59 So. 326; Adams

properly introduced, making a charge therefor, but seeking and making no profit thereon, was held in State ex rel. Boston Club v. Fitzpatrick, 131 La. 1079, 43 L.R.A. (N.S.) 608, 60 So. 691, not to be within the meaning of a statute regulating the conduct of a "barroom, cabaret, coffehouse, café, beer saloon, liquor exchange, drinking saloon, grogshop, beerhouse, or beer garden," and therefore not to be within the prohibition of such statute against opening the enumerated places within a specified distance of a church or school. Nor was it necessary for such a club to obtain the permission of the city council to conduct the same, as required by statute of the enumerated places. The first paragraph of the statute in question, after enumerating the places as enumerated above, continued with the words "or other place where spirituous, vinous, or malt liquors, or intoxicating beverages, bitters, or medicinal preparations of any kind, are sold directly or indirectly." The omission of these words from the section of the statute involved in the case was treated as indicative of the intention of the legislature to omit social clubs.

A social club in which the members have individual lockers in which intoxicating liquor purchased by the individual owner is kept for his own use in a room furnished for such purpose is within the meaning of a statute providing that "all places of resort where intoxicating liquors are kept, sold, given away, drank, or dispensed in any manner not provided by law are common nuisances." State v. Cumberland Club, 112 Me. 196, 91 Atl. 911. The court held such a club to be a "place of resort" within the meaning of the statute, since the club members resorted to it; that it was not necessary that it should be a place of public resort, open to everyone, but that it is enough if it be resorted to by a limited class. It was argued in this case that the phrase, "in any manner not provided for by law," in the statute, qualified and limited not only the word "dispense," which it immediately followed, but also the preceding words "kept," "sold," "given away," and L.R.A.1915C.

"drank," and that the phrase in that connection was equivalent to "in violation of law or unlawfully," so that the statute should be interpreted to mean that all places of resort where intoxicating liquors were unlawfully kept or unlawfully sold or unlawfully given away or unlawfully drank or unlawfully dispensed were common nuisances. And upon this premise it was argued that if the keeping, the drinking, or the giving away were lawful, the place where it was done was not a common nuisance. This argument was disapproved by the court by stating that the legislature, having named certain specific conditions which would render a place of resort a nuisance, deemed it wise to add a sweeping clause to cover all contingencies, and to say that all places of resort where intoxicating liquors are "dispensed in any manner not provided for by law" are nuisances.

An incorporated alliance, the avowed purposes of which are patriotic, social, and literary, which furnished liquor to its members from funds derived from dues and voluntary contribution, in a room rented by it in a hotel, is guilty of maintaining a common nuisance, under a statute declaring "all places where intoxicating liquors are . . . sold, bartered or given away in violation of law or where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage or where intoxicating liquors are kept for sale, barter or delivery in violation of the law . . . are hereby declared to be common nuisances." State v. Poggmeyer, 91 Kan. 633, 138 Pac. 593. It was insisted that the statutory phrase "permitted to resort" implied frequency of occurrence. The court did not decide whether coming into a place on one occasion for the purpose of drinking would be sufficient to sustain the charge, since the findings in the case showed that at four meetings of the alliance intoxicating liquors had been provided and used as a beverage.

A clubhouse in which intoxicating liquors were furnished on the Sabbath day, to be drunk on the premises where there were supplied, was held to be a "tippling house"

v. State, — Tex. Crim. Rep. —, 145 S. W. 943; Rex v. Younger, 5 T. R. 452, 2 Revised Rep. 638; Cota v. Ross, 66 Me. 161; Swift v. Wood, 103 Va. 496, 49 S. E. 643; Anable v. Com. 24 Gratt. 506; Tuxbury's Appeal, 67 Me. 267; Frink v. Pond, 46 N. H. 126; La Selle v. Whitfield, 12 La. Ann. 81; Cave Hill Cemetery Co. v. Gosnell, 156 Ky. 599, 161 S. W. 983; Indiana & C. R. Co. v. Guard, 24 Ind. 222, 87 Am. Dec. 327; Lewis v. State, 58 Tex. Crim. Rep. 351, 127 S. W. 808, 21 Ann. Cas. 656.

The circuit attorney is estopped by the solemn declarations of the courts and the legislature of this state, and by the laches of its executive officers for a period of ten years, from now seeking the forfeiture of

the charter of this respondent for its alleged violation of this law.

State ex rel. Crow v. Lincoln Trust Co. 144 Mo. 502, 46 S. W. 593; State ex rel. Jackson v. Mansfield, 99 Mo. App. 146, 72 S. W. 471; State ex rel. Brown v. Westport, 116 Mo. 582, 22 S. W. 888; State ex rel. White v. Small, 131 Mo. App. 476, 109 S. W. 1079; State ex rel. Chandler v. Huff, 105 Mo. App. 354, 79 S. W. 1010; State ex rel. Atty. Gen. v. Janesville Water Co. 92 Wis. 496, 32 L.R.A. 391, 66 N. W. 512; Com. ex rel. Atty. Gen. v. Bala & B. M. Turnp. Co. 153 Pa. 47, 25 Atl. 1105; Com. v. New York, L. E. & W. Coal & R. Co. 10 Pa. Co. Ct. 129; State v. Bailey, 19 Ind. 453; People v. Williamsburgh Turnp. Road & Bridge Co. 47 N. Y. 586; People

within the purview of § 381 of the Georgia Penal Code of 1910, in Rothschild v. State, — Ga. App. —, 82 S. E. 913.

The fact that the steward of a social club, who had general supervision and control over the club, was at the clubroom on Sunday serving to the members, in connection with the club's porter, liquor and beer which were kept in the club, together with the fact that a large number of the members of the club (using individual keys) had easy access to the room in which the intoxicating liquors were furnished, authorized a verdict of guilty in a prosecution of the steward for keeping open a tipping house on the Sabbath. *Ibid.*

The keeping by a member of a club for his individual consumption, of intoxicating liquors purchased without the state, in an individual locker, in an anteroom of the club, to which no person had access except the owner, is aiding and abetting in the keeping or maintenance of an unlawful drinking place, within the meaning of the statute making it unlawful for any person, firm, or corporation, directly or indirectly, to keep or maintain, or in any manner to aid or abet in keeping or maintaining, an unlawful drinking place, such as defined by the statute to be: "(1) Any place or resort where the prohibited liquors or beverages, or any of them are kept to be drunk upon or about the premises by persons resorting there for that purpose; (2) any clubroom or other place in which are received or kept for the purpose of barter or sale, or use, or gift as a beverage, or for distribution or division among or furnishing to or use by members of any club or association of persons by any means whatever the prohibited liquors and beverages, or any of them, referred to in § 1 of this act; (3) any clubroom or room of any association of persons in which said prohibited liquors or beverages, or any of them, are kept or stored for the purpose of being drunk or consumed by the members of such club or other association of persons or their guests or others on the premises, or at or near the place where such liquors or beverages, or any of them, are kept or L.R.A.1915C.

stored; (4) any place adjacent to or near the premises of any club, corporation or association, or other combination of persons to which members or their guests or others, by the permission of members, resort for the purpose of drinking the prohibited liquors and beverages, or any of them, that are kept at or near such place."

One of the purposes of the statute is stated evidently to be to discourage social drinking by making it unlawful for men to habitually congregate at one place for the purpose of drinking prohibited liquors, even though each should drink only his own liquor. *Wallace v. State*, 8 Ala. App. 386, 62 So. 365.

A statute forbidding the solicitation of orders for liquor was held violated in *Barnes v. State*, — Tex. Crim. Rep. —, ante, 101, 170 S. W. 548, where, upon the adoption of prohibition in a town, some of the members of a lodge at that place organized an auxiliary society the purpose of which was to obtain and keep for their own use intoxicating liquors; rented a place, installed barroom fixtures, employed a porter to fill the place of bartender in the ordinary saloon. No orders were solicited in words, but the members agreed amongst themselves that they would place a locked box upon the end of the bar counter, and each member who desired intoxicating liquor should write his name on a slip of paper, place in an envelop the amount of money he desired to expend that week for liquors, and drop the envelop in the box; the money was taken out of the box, the cost of rent, ice, etc., was figured and deducted from the amount, and beer ordered in bulk with the remainder; the members who had thus deposited their money were given tickets entitling them to twenty glasses of beer for each dollar deposited; the beer was dealt out to the holders of the tickets by the porter when called for. At first the secretary had charge of deducting the rent, etc., and ordering the beer, but subsequently the members of the club in turn performed this service. The member being prosecuted in this case was also held guilty of keeping

ex rel. *Platt v. Oakland County Bank*, 1 Dougl. (Mich.) 282; *State ex rel. Caldwell v. Lincoln Street R. Co.* 80 Neb. 333, 14 L.R.A. (N.S.) 336, 114 N. W. 422, 118 N. W. 326.

Messrs. A. Lee and J. F. Lee, for respondent St. Louis Club:

If there is no express grant of power to dispense wines or liquors, the respondent has an implied power so to do.

Richard Hanlon Millinery Co. v. Mississippi Valley Trust Co. 251 Mo. 575, 158 S. W. 359; 10 Cyc. 1098; *Flaherty v. Portland Longshoremen's Benev. Soc.* 99 Me. 255, 59 Atl. 58; 1 Cook, Corp. 7th ed. § 3; *Morawetz, Priv. Corp.* 2d ed. 362; *Central Ohio Natural Gas & Fuel Co. v. Capital City Dairy Co.* 60 Ohio St. 96, 64 L.R.A. 395, 53 N. E. 711; *State ex rel. Hadley v.*

Missouri P. R. Co. 237 Mo. 350, 141 S. W. 643.

Section 7226, Rev. Stat. 1909, is unconstitutional and void, because the title of the act did not clearly express the matter contained in the section; while the body of the act nowhere refers to persons "running order houses," it embraces persons of every class, whether engaged in running order houses or not.

State v. Burns, 237 Mo. 216, 140 S. W. 871; *State v. Rawlings*, 232 Mo. 544, 134 S. W. 530; *St. Louis v. Wortman*, 213 Mo. 131, 112 S. W. 520; *State v. Fulks*, 207 Mo. 26, 15 L.R.A. (N.S.) 430, 105 S. W. 733, 13 Ann. Cas. 732; *State v. Great Western Coffee & Tea Co.* 171 Mo. 634, 94 Am. St. Rep. 802, 71 S. W. 1011; *Witzmann v. Southern R. Co.* 131 Mo. 617, 33 S. W. 181;

and maintaining a cold storage, a place where intoxicating liquors were kept for others. The member claimed that he did all this as an accommodation, but it was held that the facts showed that he did so one week with the understanding that some other member of the society would do the same for the next, and another the week after; thus it was not merely an accommodation.

As to what constitutes a "keeping for sale," see *Com. v. Woelz*, supra, II.

V. Club as a "person," within the meaning of liquor laws.

As to the earlier cases on this phase of the question, see notes to *South Shore Country Club v. People*, 12 L.R.A. (N.S.) 519, and *Ada County v. Boise Commercial Club*, 38 L.R.A. (N.S.) 101.

An incorporated social club is a "person" within the meaning of a statute providing that "no person, by himself, his agent or servant, . . . shall sell any intoxicating liquors except as herein provided." *State v. Delaware Saengerbund*, — Del. —, 91 Atl. 290.

An incorporated social club is within the meaning of a license act making it unlawful for any "person or persons" to sell liquors until he shall have complied with the conditions of the act, among which are the conditions that the applicant be "a citizen of the United States," and that he shall furnish "a statement of the extent of his residence in the county," especially where it provides that a licensee under another act, under which the social club was licensed, should be governed by the provisions of the later act. *Conococheague Club v. State*, 116 Md. 317, 81 Atl. 602.

VI. Organization not a bona fide social club.

For earlier cases on this phase of the question, see the notes to *South Shore Country Club v. People*, 12 L.R.A. (N.S.) L.R.A.1915C.

519; *Cuzner v. California Club*, 20 L.R.A. (N.S.) 1095, and *Ada County v. Boise Commercial Club*, 38 L.R.A. (N.S.) 101.

It is apparent that under some conditions the fact that the "club" is not a bona fide organization to which the dispensing of liquor is merely incidental may deprive it of the protection to which it would be entitled if it were such an organization.

This is recognized in *Com. v. Krotzer*, 51 Pa. Super. Ct. 411, supra, and in a subsequent appeal of this case it was held that a club which furnishes liquor not as a mere incident to other purposes in its organization, but as the principal part of its business, distributing it at prices in excess of cost and expenses incident to the distribution, so as to derive a profit thereon, cannot claim protection as a social club to which the sale of liquor is merely incidental. 55 Pa. Super. Ct. 351.

A social club organized coincidentally with the voting "dry" of a municipality, which, so far as the evidence shows, did nothing beyond furnishing its members liquors, cigars, and soft drinks in exchange for coupons issued by the club, was held to have for its principal object the disposal of liquors to its members, and to be subject to prosecution under an ordinance making it unlawful "for any person," . . . club, or society, . . . to keep, sell, give, or furnish any spirituous, vinous, malt, liquors." *Bachelors' Club v. Woodburn*, 60 Or. 331, 119 Pac. 339.

It is stated to be the rule in a prosecution for maintaining a disorderly house, which was defined by the statute to be any house in which spirituous, vinous, or malt liquors are sold or kept for sale without first having obtained a license, that clubs not organized in good faith for purposes authorized by law, but merely as shifts, shields, or subterfuges, should be held to be disorderly houses, and as such be enjoined. *Soto v. State*, — Tex. Civ. App. —, 171 S. W. 279.

See *Baker v. State*, — Tex. Crim. Rep. —, 167 S. W. 340, supra, I. W. A. E.

State v. Persinger, 76 Mo. 346; State ex rel. Hixon v. Schofield, 41 Mo. 39.

Walker, J., delivered the opinion of the court:

The circuit attorney of the city of St. Louis has instituted two original proceedings in this court in the nature of quo warranto, for the purpose of forfeiting the charters of two corporations, the St. Louis Club and the Missouri Athletic Club, because of their alleged misuse and abuse of their respective franchises in having sold, without licenses as dramshop keepers, intoxicating liquors, and in having violated § 7226, Rev. Stat. 1909, in receiving, storing, keeping, or delivering, as agents or otherwise of any other person, intoxicating liquors without having licenses as dramshop keepers. The material issues in these cases being identical, varying only as to the manner in which the defenses are presented by counsel in each of the cases, they will be considered together.

These clubs were incorporated at different dates under what is now article 10 of chapter 33, Rev. Stat. 1909, the statute authorizing the incorporation of benevolent, religious, scientific, educational, and miscellaneous associations. This statute has not undergone any material change through legislation since the incorporation of these clubs. Incidentally, its latitude, measured by judicial interpretation, may not inappropriately be likened to that virtue which is figuratively said to cover a multitude of sins. 1 Peter, iv. 8.

No useful purpose will be served by setting out the pleadings at length. The informations formally charge the respondents with the abuse and misuse of their corporate powers in reference to the matters above stated, and ask a forfeiture of their charters. Their returns confess and avoid as to the charge of selling intoxicating liquors without license, and as to the alleged violation of § 7226, Rev. Stat. 1909, that it is invalid, as being unconstitutional. The buildings, appointments, conditions of membership, privileges, government, and exclusive restrictions of each club are set forth at length and with particularity. It is pleaded that the matter of the right of these clubs to sell liquor without license has been adjudicated by this court in State ex rel. Bell v. St. Louis Club, 125 Mo. 308, 26 L.R.A. 573, 28 S. W. 604, and that the right under this decision has uninterruptedly been exercised by them since the rendition of the opinion in that case in 1894; that efforts have been made at successive sessions of the general assembly to effect changes in the dramshop law which would require social clubs to take out dramshop

licenses, and the failure or refusal of the legislature to enact laws of this character is a construction of the dramshop law by the state, represented by its officials, authorizing sales of liquor without license by such clubs. Whereupon respondents plead that such failure or refusal on the part of the lawmaking power operates as an estoppel upon relator from claiming that the dramshop law applies to bona fide social clubs; that respondents, relying upon the fact that they have never heretofore been molested in the sale of liquors without license, or in the violation of § 7226, supra, have expended large sums of money in furnishing and equipping their clubhouses, and that relator, by reason of the nonaction of the legislature and the failure of the law officers to proceed against them for years after respondents had organized and were in operation as social clubs, should not be heard to complain against them.

Relator's reply in each case is a general denial, and in addition in one it is alleged that the suit pleaded in abatement by respondents (State ex rel. Bell v. St. Louis Club, supra) was brought by an unauthorized person and the proceedings therein were void, and that the facts in that and the instant cases are not identical, and that § 7226, supra, had not been enacted when the Bell Case was determined.

Agreed statements of facts detail the character of each club as a social organization, the nature and amount of its expenditures, including the expenditures for intoxicating liquors, the nature and amount of income, including that charged to members and their nonresident guests for intoxicating liquors, the manner in which the club is governed, and numerous other matters not necessary to be set out here. As to the dispensing of liquors, practically the same plan is pursued in each club. If a member desires liquor, he orders same, and it is served to him in the club. On receiving it, he signs a card acknowledging the receipt of same and stating the price. He makes payment for same within a stated time thereafter. Stress is laid in each statement upon the member receiving the liquor, and not paying for it at the time, and that he is not permitted, under the rules, to pay for the liquor when received, but subsequently when he pays for his supplies for the month, and as a part of such supplies; that the same prices are charged members for liquors as are required to be paid at licensed cafés and dramshops for like goods; that the money received by respondents for liquors is mingled with the other funds, and used in replenishing the stock of liquors and in purchasing other supplies; that no profit has ever been made by these clubs, or

paid to members. A complete statement of each club's entire accounts for the preceding year accompanies the recital of the agreed facts.

The questions confronting us are so interrelated that their discussion, with probably some prolixity, becomes necessary to a determination of the issues involved.

I. It is scarcely worth while at this day and time to consume space discussing the character of the liquor traffic, except to say that early in our judicial history Judge Napton, who may well be styled the Story of our jurisprudence, said, in *Austin v. State*, 10 Mo. 591, that "the sale of intoxicating liquors is by law illegal—is not a privilege of a citizen of this or any other state," and, "the right to sell same can only be acquired by complying with the law."

Thirty-five years later, with no adverse intimation in the interim, this court reiterated the doctrine announced in the *Austin Case*, supra, and in a *per curiam* opinion in *State ex rel. Troll v. Hudson*, 78 Mo. 302, said, in addition, that "the license fee exacted" of dramshop keepers "is not a tax," but "a price paid for the privilege of carrying on a business . . . detrimental to public morals, and which the legislature, in the exercise of the police power, has the right to prohibit altogether."

And *Burgees, J.*, in *State v. Seebold*, 192 Mo. loc. cit. 727, 91 S. W. loc. cit. 492, said: "It is fundamental that no one has a natural right to sell intoxicating liquor, because the tendency of its use is to deprave public morals, and to do so without a license from proper authority is unlawful,"—citing cases.

So, it was held in *Higgins v. Talty*, 157 Mo. 280, 57 S. W. 724, that a dramshop license was a mere permit, not a contract, between the state and the licensee, in which the latter has no vested rights, but is subject at all times to the police power, and is revocable at any time the state may see proper to do so for any violation of the dramshop law, whether the license so provides or not.

Other opinions of this court and the courts of appeals add such force to the doctrine announced as repetition and unvarying adherence give to any judicial declaration. The lost word on the subject has been so aptly said by *Woodson, J.*, speaking for this court, in *State v. Parker Distilling Co.* 236 Mo. loc. cit. 255, 139 S. W. loc. cit. 461, that it may be appropriately incorporated here as follows: "Those authorities also establish the fact that the liquor traffic is not a lawful business, except as authorized by express legislation of the state; that no person has the natural or inherent right to engage therein; that the liquor business

does not stand upon the same plane, in the eyes of the law, with other commercial occupations. It is placed under the ban of the law, and it is . . . differentiated from all other occupations, and is thereby separated or removed from the natural rights, privileges, and immunities of the citizen. The foregoing enunciations of the courts are based upon the well-known fact that intoxicating liquors and the traffic therein have brought intemperance, poverty, and misery upon many of our citizens, and have been a fruitful source of crime on every hand."

These observations and conclusions are quoted, not, as the great *Cham* of literature said, "to point a moral," but to throw light upon the view askance which has been taken by our courts of the traffic in intoxicants, and as a guide in determining what constitutes a sale of liquor within the meaning of the law. The statute relative thereto reads that "no person shall, directly or indirectly, sell intoxicating liquors in any quantity less than 3 gallons, either at retail or in the original package, without taking out a license as a dramshop keeper." Rev. Stat. 1909, § 7188.

Incidentally, it may be said in this connection, that while the statute, of which this section is a part, prescribes a penalty for its violation, and that penal statutes are, as a general rule, strictly construed, it has been held here and elsewhere that laws in regard to the sale of intoxicating liquors ought to be so construed as to carry out the true purpose of their enactment. *State v. Walker*, 221 Mo. loc. cit. 516, 108 S. W. 615, 120 S. W. 1198, affirming 129 Mo. App. loc. cit. 374, 108 S. W. 615. And in accomplishing this purpose they should be liberally construed. *Seattle v. Foster*, 47 Wash. 172, 91 Pac. 642; *Cox v. Burnham*, 120 Iowa, 43, 94 N. W. 265; *People ex rel. Kemmet v. Craig*, 128 App. Div. 908, 112 N. Y. Supp. 1142. Probably the rule in regard to the construction of this class of statutes is best stated in a New York case (*Mead v. Stratton*, 87 N. Y. 493, 41 Am. Rep. 386) in which it is said that "while a statute of this character should not be enlarged, it should be interpreted, where the language is clear and explicit, according to its true intent and meaning, having in view the evil to be remedied and the object to be attained."

In addition to the rule in this regard here and elsewhere, § 7222, Rev. Stat. 1909, gives us a definite guide as to the construction to be given our dramshop law. Aided by this rule of interpretation, the solution of the question as to what constitutes a sale of intoxicating liquors ought not to be a difficult matter. However, at the thresh-

hold of a consideration of this case, we are confronted with the ruling of this court in *State ex rel. Bell v. St. Louis Club*, 125 Mo. 308, 26 L.R.A. 573, 28 S. W. 604, in which it was held by division No. 2 that the sale of liquor by a bona fide social club not incorporated for profit, to a member, is not a sale within the inhibition of the dramshop law. Of this seeming lion in the path, more anon. Irrespective of this ruling for the nonce, what is a sale within the meaning of the statute? Our own courts have defined a sale of personal property to be a transfer of the absolute or general property in a thing for a price in money. *State v. Wingfield*, 115 Mo. loc. cit. 436, 37 Am. St. Rep. 406, 22 S. W. 363; *Barrie v. United R. Co.* 138 Mo. App. loc. cit. 653, 119 S. W. 1020. In acts prohibiting the sale of intoxicating liquors elsewhere, the word "sale" has been construed in a comprehensive sense to include what is known as barter and exchange. *James v. State*, 124 Ga. 72, 52 S. E. 295; *Howell v. State*, 124 Ga. 698, 52 S. E. 649; *Coulter v. Portland Trust Co.* 20 Or. 469, 26 Pac. 565, 27 Pac. 266. Justice Gray, of the United States Supreme Court, in *Iowa v. McFarland*, 110 U. S. 471, 28 L. ed. 198, 4 Sup. Ct. Rep. 210, said that "a sale, in the ordinary sense of the word, is a transfer of property for a fixed price in money or its equivalent."

And Benjamin, in his admirable treatise, has defined a sale by pointing out its prime essentials. To constitute a valid sale, there must, he says, be a concurrence of the following elements, *viz.*: (1) Parties competent to contract; (2) mutual consent; (3) a thing, the absolute or general property in which is transferred from the seller to the buyer; and (4) a price paid or promise therefor. Benjamin, *Sales*, §§ 1, 2.

Without unduly extending this discussion, what elements necessary to a sale do we find in the instant case? First, there are present the parties, a seller and a buyer,—the one an artificial entity, it is true, but having a legal existence, and capable of contracting; the other a natural person, and although he is buying from the artificial person, and is enabled to buy by reason of his membership, or as a shareholder, he has no such individualized ownership in the concrete property or the corporation as will enable him to legally appropriate it except by purchase; second, we find here a power and a purpose to sell on the one part, and a willingness to buy on the other, thus constituting all the requisites of mutual consent; third, liquor, the thing being sold, is never absent from the exchange, and, being personal property, is capable of transfer from the seller to the buyer; and, fourth, also ever present in the transaction, is the L.R.A.1915C.

price agreed to be paid by the buyer when he signs the steward's slip, receives the liquor, and agrees to pay for same when he settles for other supplies. In the face of the facts, it seems to us that the citation of authorities is not necessary to convince the impartial mind that here are embraced all the essentials of a valid sale. But a litigant is entitled at the hands of a court to a dignified consideration of every serious contention; and, although it may, to some minds, seem finical and trifling with words to claim that a club member to whom liquor is delivered under the facts stated is not a party to a sale, but is simply appropriating at his will a part of his own property, the contention is entitled to a review.

Light is sometimes thrown on a matter under investigation by an interrogatory, and we therefore ask: If the buyer here is simply appropriating his own property, and the club is not selling same, why follow the farcical formality of keeping an account of each transaction and requiring the purchaser to pay for what he has received at agreed intervals? If we mistake not, although it may not be in the record, a condition of membership requires payment for all supplies received. The easier and the simpler plan, and one which would doubtless be pursued if the liquor dispensed was the common property of the members, would be for each individual to order as he willed, without the then useless procedure incident to an ordinary sale. But, as a matter of fact, the property of an incorporated company, regardless of the article of the statute under which it is organized, is not held in common by the members or shareholders, but is owned by the artificial person which the law has permitted to be created, the prime purpose of whose creation is to enable it to contract and hold property in some form for some purpose. This seems too elementary to waste words in its discussion.

A few illustrations may, however, help to emphasize the unsoundness of this contention of respondents. Would it be seriously contended that a member of an incorporated religious organization could, at will, appropriate as his own the communion table or the vessels of the altar; or that a member of a library association could take as his own such books as suited his taste and as he deemed represented his interest in the institution; or that a shareholder in a manufacturing company could detach for his personal use such portions of the machinery as he willed to take; or that the owner of stock in a railroad company or other carrier, upon its passing its dividends, as sometimes occurs, after a series of lean years and adverse legislation, could appro-

priate such portions of its portable property as he deemed sufficient to cover his investment? None the less absurd is the contention that a member of an incorporated social club, although he contracts to buy and does buy, is not consummating a sale with the club when liquor is delivered to him under the facts detailed, but is simply appropriating to himself his portion of the common property. If, therefore, the foregoing reasoning is sound, and the illustrations are applicable, we are justified in the conclusion that the legal essentials of a sale of liquor are the same as in the transfer of other personal property, save that liquor can only be sold under the limitations prescribed by the statute. This conclusion finds ample support in other jurisdictions where statutes are in force substantially identical with that of Missouri.

In Alabama a transaction whereby a bona fide incorporated social club sells liquor to one of its members is held to be a sale, within the meaning of the law prohibiting the sale of liquors without license. *Beauvoir Club v. State*, 148 Ala. 643, 121 Am. St. Rep. 82, 42 So. 1040.

In Colorado it is held that a social club which dispenses liquor to its members at a price fixed by its managers violates a local ordinance prohibiting the sale of such liquors, even though they are provided simply as an incident to the entertainment of the members, the transaction being held to be a sale. *Manning v. Canon City*, 45 Colo. 571, 23 L.R.A.(N.S.) 192, 101 Pac. 978; *Lloyd v. Canon City*, 46 Colo. 195, 103 Pac. 288.

In the District of Columbia a like ruling under a similar state of facts has been made, the court observing that it is immaterial for what purpose the club was formed, or whether the sale was made for profit, or was but an incident to the cultivation of social relations between the members. *Army & Navy Club v. District of Columbia*, 8 App. D. C. 544.

In Georgia it is held that the admission only of members to clubrooms, and the fact that the selling and drinking of intoxicating liquors were only an incident, and not the main object, of the incorporation, will not make the place where the liquors are dispensed and drunk the less a tippling house, within the meaning of a statute making penal "the keeping open of tippling houses on Sunday." *Mohrman v. State*, 105 Ga. 709, 43 L.R.A. 398, 70 Am. St. Rep. 74, 32 S. E. 143.

In Illinois it is held to be immaterial that liquors are sold by a corporation club to its members for a price no more than sufficient to cover cost and service, or whether the organization is one in good faith or L.R.A.1915C.

a mere subterfuge to evade the statute, as in either case the transaction is a sale within the meaning of the statute requiring a license. *People ex rel. Stevenson v. Law & Order Club*, 203 Ill. 127, 62 L.R.A. 884, 67 N. E. 855. A later Illinois case (*South Shore Country Club v. People*, 228 Ill. 75, 12 L.R.A.(N.S.) 519, 119 Am. St. Rep. 417, 81 N. E. 805, 10 Ann. Cas. 883) is peculiarly appropriate in view of what we have said in regard to ownership. The court in that case said: "The liquor belongs to the corporation as a legal entity, and no member owns any share of the liquor, as a tenant in common . . . or otherwise. An association organized merely for social, literary, scientific, or political purposes, although not incorporated, is not a partnership. . . . A member of such an association has no individual . . . interest in the property, and owns no proportionate share of it, but only has a right to the joint use so long as he continues to be a member. Even if they were tenants in common, transfer of a specific part of the property to one for a stipulated price would be a sale."

In Maryland the law regulating the sales of liquors was held to apply to private clubs when liquor is sold to members, even without a profit. *Conococheague Club v. State*, 116 Md. 317, 81 Atl. 602.

In Michigan it is held that a law requiring that licenses should be obtained by retail liquor dealers, and taxing the business of liquor selling, wherever found or by whom carried on, reaches a clubhouse or private house, as well as a saloon or tavern, and includes all persons engaged in such business. *People v. Soule*, 74 Mich. 250, 2 L.R.A. 494, 41 N. W. 908.

In Minnesota, in a case which reviews a large number of authorities, it is held that a club or social organization chartered under the laws of the state is a "person" within the meaning of the license laws, and that the dispensing of liquors by it to a member constitutes a sale in violation of law, unless protected by license. *State ex rel. Young v. Minnesota Club*, 106 Minn. 515, 20 L.R.A.(N.S.) 1101, 119 N. W. 494.

The supreme court of Mississippi, in discussing a case involving the right of a social club to dispense liquor to its members, not for profit, but without license, said: "We unhesitatingly adopt as sound the views of those courts which have held that such a device as was resorted to by the appellant in disposing of . . . liquor was a violation of the law against unlicensed retailing. . . . It must be so, unless an association of persons may lawfully do what none of the individuals could; and it would be a reproach to the law if this were so."

Nogales Club v. State, 69 Miss. 218, 10 So. 574.

In New Jersey a club which disposes of liquors to its members, not to evade the law or to make a profit, is held to be subject to an ordinance imposing a penalty for selling liquor without license. The court said: "It is wholly immaterial, and not a legitimate subject of inquiry, whether an intention to . . . evade the law was present. . . . Intent constitutes no part of the offense; the simple question is presented whether the act expressly inhibited has been done. If so, the presumption of wrongful intent is absolute, and cannot be controverted." State, Newark, Prosecutor, v. Essex Club, 53 N. J. L. 99, 20 Atl. 769.

In Oregon the dispensing of liquors by a club to its members is held to be a sale. State v. Kline, 50 Or. 426, 93 Pac. 237; Bachelors' Club v. Woodburn, 60 Or. 341, 119 Pac. 339.

In Washington it is held that the transaction is a sale under an ordinance forbidding the sale or disposal of liquors without license, the court saying in effect that liquor owned by a club and transferred to a buyer for a consideration is a sale, and it is immaterial that the buyer is a member, and as such has an interest in the property. Spokane v. Baughman, 54 Wash. 315, 103 Pac. 14.

In West Virginia the disposal of liquors by a club to its members is within the statute requiring a license, the statute being held to be broad enough to permit no shift or device to defeat its purpose, no matter whether the club is social, literary, or otherwise. State v. Shumate, 44 W. Va. 490, 29 S. E. 1001.

Contra: In California (Cuzner v. California Club, 155 Cal. 303, 20 L.R.A. (N.S.) 1095, 100 Pac. 868); Massachusetts (Com. v. Baker, 152 Mass. 337, 25 N. E. 718; Com. v. Ewig, 145 Mass. 119, 13 N. E. 365); Montana (Barden v. Montana Club, 10 Mont. 330, 11 L.R.A. 593, 24 Am. St. Rep. 27, 25 Pac. 1042); New York (People v. Adelphi Club, 149 N. Y. 5, 31 L.R.A. 510, 52 Am. St. Rep. 700, 43 N. E. 410); Pennsylvania (Klein v. Livingston Club, 177 Pa. 224, 34 L.R.A. 94, 55 Am. St. Rep. 717, 35 Atl. 606); South Carolina (State ex rel. Columbia Club v. McMaster, 35 S. C. 1, 28 Am. St. Rep. 826, 14 S. E. 290); Tennessee (Tennessee Club v. Dwyer, 11 Lea, 452, 47 Am. Rep. 298; Moriarty v. State, 122 Tenn. 440, 25 L.R.A. (N.S.) 1252, 124 S. W. 1016); Texas (Finn v. State, 38 Tex. Crim. Rep. 75, 41 S. W. 1102), and in Virginia (Piedmont Club v. Com. 87 Va. 540, 12 S. E. 963), it is held, on the basis of the bona fides of the clubs, as in State ex rel. Bell v. St. Louis Club, 125 Mo. 308, 26 L.R.A. L.R.A. 1915C.

573, 28 S. W. 604, that the distribution of liquors only to members is not a sale within the meaning of the liquor laws.

In the foregoing we have, so far as possible, included for and against the right of sale only cases involving bona fide social clubs in states not under prohibition or local option laws, and not those in which the clubs were expressly prohibited from selling. The cases discussed disclose a lack of harmony in regard to what constitutes a sale; the majority being, as above indicated, against the doctrine announced in the St. Louis Club Case, *supra*, and others of like tenor. The contrariety of these opinions may be due, to some extent, to variant statutes or to differences in the facts. If this be true, it lessens their force, which with us is, at best, but persuasive, except as they support the conclusion reached in the St. Louis Club Case. The conclusion in this case we do not regard as sound or consistent in not requiring a fair and uniform enforcement of the law in regard to the sale of intoxicating liquors; and in so far as it holds that an incorporated social club is not a person within the meaning of the law in regard to corporations, and that the dispensing of liquors by it to its members is not a sale, it is overruled.

II. The dispensing of liquors by social clubs to their members having been by reason and precedent established as sales, under what authority can their dispensation be conducted in the absence of express authority therefor in the statute?

Respondents are corporations organized to advance, by social intercourse and athletic pursuits, the bodily and mental health of their members, and by friendly exchange of views and discussions to advance the commercial prosperity of the city of St. Louis, and to obtain a place for the common and friendly intercourse of such members with each other. So say their returns, supplemented by like declarations in the agreed statements of facts. That respondents have no express power to sell liquor is admitted, unless it be claimed that the ruling in the St. Louis Club Case operated to confer this power upon them as a species of judicial legislation. As we understand their contention, however, it is not so claimed, but that the construction given the dramshop law in that case simply emphasized an implied power which the clubs possessed, in the absence of an express prohibition.

The doctrine of implied power as applied to corporations demands our attention. It will be recalled that Chief Justice Marshall said in the Dartmouth College Case, 4 Wheat. 518, 636, 4 L. ed. 629, 659, among other things that have become maxims, that "a corporation, . . . being the mere crea-

ture of law, . . . possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence."

And the supreme court of Minnesota has held that the same rule is applicable to articles of incorporation which are analogous to a charter (*Gould v. Fuller*, 79 Minn. 414, 82 N. W. 673), so that by express judicial declaration the doctrine as to the limitation of the powers of a corporation within the instrument of its creation has been made to apply to every class of incorporated association, whether it be organized for business, moral, intellectual, or benevolent purposes, or to promote social intercourse. Incidental powers, as the term is employed by Chief Justice Marshall, mean such as are directly and immediately appropriate to the execution of the powers expressly granted, and exist only to enable the corporation to carry out the purpose of its creation. *Hood v. New York & N. H. R. Co.* 22 Conn. 1; *People ex rel. Peabody v. Chicago Gas & Trust Co.* 130 Ill. 268, 8 L.R.A. 497, 17 Am. St. Rep. 319, 22 N. E. 798; *State ex rel. Jackson v. Newman*, 51 La. Ann. 833, 72 Am. St. Rep. 476, 25 So. 408. Such powers are not invoked by respondents, however, and their discussion is superfluous. But the implied powers are of moment. They are defined to be those possessed by a corporation, not indispensably necessary to carry into effect others expressly granted, and comprise all that are appropriate, convenient, and suitable for that purpose, including as an incidental right a reasonable choice of the means to be employed in putting into practical effect this class of powers.

Broad as this definition seems, and it is the *résumé* of an exhaustive review of many cases by eminent text writers, we find it nowhere more lucidly and comprehensively considered than by Burgess, J., speaking for this court in *State ex rel. Crow v. Lincoln Trust Co.* 144 Mo. loc. cit. 583, et seq., 46 S. W. 593, where, after reviewing our own cases on this subject, as well as those of other jurisdictions, the substance of the court's conclusion is that it is a settled rule of construction that legislative grants of power to corporations, public or private, only include such rights and powers as are clearly comprehended within the words of the act of their creation, or may be derived therefrom by necessary implication, regard being had to the objects of the grant, and, if ambiguities or doubts arise, the terms used in the statute must be resolved in favor of the public; that if the powers conferred are expressly enumerated, this, under the maxim of *expressio unius*, etc., implies the exclusion of others not enumerat-

ed. Graves, J., speaking for this court in *Richard Hanlon Millinery Co. v. Mississippi Valley Trust Co.* 251 Mo. loc. cit. 575, 158 S. W. 359, said, in substance, that a corporation possesses only such powers as are expressed in, or that may be fairly implied from, the statute of its creation; that powers enumerated imply the exclusion of all others, and that any doubt or ambiguity respecting the possession of any particular power arising out of the terms of the statute is to be resolved against its possession, or, as Burgess, J., aptly said in the *Lincoln Trust Co.'s Case*, supra, "it must be resolved in favor of the public."

The respondents were incorporated, as shown by the pleadings and the agreed statement of facts, under that article of the law of corporations of this state (article 10, chap. 33, Rev. Stat. 1909) providing for the formation of benevolent, religious, scientific, educational, and miscellaneous associations. To the purist their incorporation under either of these classifications might seem to do violence to the usual and well-accepted meaning of the words; but judicial interpretation, which can and oftentimes does accomplish what derivation and usage cannot, has declared in *State ex rel. Henderson v. Leasueur*, 99 Mo. 552, 7 L.R.A. 734, 13 S. W. 237, that a social club organized as these were is included in one of the classes named, or may be incorporated under said article 10 of chapter 33, supra. To this article, therefore, we must look for the express or implied powers possessed by respondents. Section 3435 of article 10, supra, defines the purposes for which associations may be incorporated under said article, whose organization is clearly authorized thereunder, and they do not depend for their existence on judicial construction; but in the case of social clubs there is no declaration of express powers, and their incorporation having been authorized by judicial interpretation, resort must be had to that general knowledge necessarily possessed by the courts in common with individuals as to the nature and purpose of associations of this character, to enable the full extent of their powers to be determined. Guided, therefore, by this knowledge and the declarations as to respondents' purposes in their articles of incorporation, it may reasonably be concluded that they are clothed with power to do whatever may be necessary, not only to their existence, but to promote the prosperity of organizations of this character and the pleasure and improvement of the membership, not contrary to public policy or in violation of the law. So extended is this field that a speculation of the

powers included therein would be an impossibility.

Respondents contend that the dispensing of intoxicating liquors is included; and this upon the theory—regardless of what may have been said in cases so holding—that alcohol in one or all of its many forms as a beverage is necessary for the promotion of social intercourse, in that it tends, while loosening the reins of fancy, to strengthen the bonds of good fellowship. Its use at the festal board, or after the heat of the combat or the jousts of the tourney, or when “two auld cronies meet again,” or as a “wee dooch an doris,” has been chronicled in history, sacred and profane, and oftentimes told in story and in song. To say more would savor of pedantry.

Despite all of this, and leaving out of consideration any discussion as to its moral or hygienic effect, as out of place in a legal opinion, we find that the framers and interpreters of our law, from the dawn of our jurisprudence, both here and elsewhere, have regarded liquor as an Ishmaelite among the products of man's ingenuity, and have placed its sale under the ban of carefully worded restrictions. It no sooner creeps out of the still, the wine press, or the brewing vat than the excise man demands tribute for its being, and before it can be vended taxes ad valorem and for the privilege of sale must be paid; but this is not all; upon leaving the warehouse of the wholesaler, the retailer, before dispensing it, must take out a license as a dramshop keeper. Section 7188, *supra*. This is an individual privilege, which can only be granted to “a law-abiding, assessed tax-paying male citizen above twenty-one years of age.” Rev. Stat. 1900, § 7191; State ex rel. Jones v. County Ct. 66 Mo. App. loc. cit. 100; State ex rel. Crow v. Page, 107 Mo. App. loc. cit. 216, 80 S. W. 912. And it cannot be granted to a partnership (State ex rel. Howard v. Scott, 96 Mo. App. 620, 70 S. W. 736), nor to a corporation, because the latter does not possess the requisites expressly required of an applicant, *viz.*, age, character, and sex,—reaching its majority when its incorporation is effected, its age cannot be measured by years; being intangible, it can have no character; and for a like reason, more materially expressed, having no body to be kicked, it is sexless. It therefore lacks three out of the four statutory requisites essential to a qualified applicant for a dramshop license.

By necessary and inevitable exclusion, therefore, it being impossible, under the law, for social clubs to procure licenses, and the sale of liquor being a limited privilege, no implied or other power exists au-

thorizing corporations of this character to make sales. Further, an implied power in a corporation to do an unlawful act cannot exist; and if liquor be sold without license over a mahogany table, in glass of finest crystal, under a silken canopy in a palace, it is none the less a crime, under a fair and impartial interpretation of the law, than an unauthorized sale over a deal board in a hovel that would put “Shanahan's ould Shebeen” to shame.

The absence of express powers from the statute which has been held to authorize the incorporation of social clubs, under that portion of the law cited by respondents as giving color to an implied power to sell liquors, is wholly inapplicable to that class of associations. The supplemental clause of § 3435, *supra*, relied upon by respondents, after enumerating the specific classes that may be incorporated, provides (*italics are ours*) that “any association, society, company or organization which tends to the public advantage in relation to any or several of the objects above enumerated, and whatever is incident to such objects, may be created a body corporate.” The subjects of incorporation enumerated are, as we have seen, benevolence, religion, science, and education, and while it is nowhere expressly contended by respondents that social clubs partake of the nature of either of these classes, their incorporation having been authorized under the ruling in State ex rel. Henderson v. Lesueur, *supra*, it is reasoned by analogy that they may do whatever tends to the public advantage in relation to any of the objects above enumerated. This argument proceeds upon the covert assumption, which is carefully avoided in express terms, that a social club is organized for one of the purposes expressly mentioned, which it will require no argument to prove in the case of respondents to be a sophism, although the right to a charter was recognized in the Lesueur Case upon the ground that the applicant for corporate existence possessed educational features. Incidentally, and as a mere *dictum*, so far as the instant cases are concerned, may not the ruling in the Lesueur Case be properly limited to the incorporation only of such social clubs as are shown by their articles to possess some of the features characteristic of the classes named?

But we wander afield. To render respondents' contention applicable, it must be further assumed that the sale of liquors, concretely stated, is related to either benevolence, religion, science, or education, or that it is incident to one of such objects. A rather unusual relationship, to say the least, and if the sale of liquors is, as

claimed, "an incident to the maintenance of the clubs," then, as we have iterated and reiterated in the discussion of other phases of this question, they draw their substance, in part at least, from violations of the law.

III. Respondents contend that, the statute in regard to the sale of intoxicating liquors having received judicial construction by the highest court in this state, such construction became as much a part of the statute as if written into it at the time of its enactment. As a general proposition, this is a correct statement of the rule (*State v. Hamley*, 168 Mo. loc. cit. 194, 57 L.R.A. 846, 67 S. W. 620; *Sanders v. St. Louis & N. O. Anchor Line*, 97 Mo. loc. cit. 30, 3 L.R.A. 390, 10 S. W. 595; *Handlin v. Morgan County*, 57 Mo. loc. cit. 116), with this limitation: That the law as construed becomes a part of the original text only when such construction will not affect contract or property rights (*Douglass v. Pike County*, 101 U. S. loc. cit. 687, 25 L. ed. 971; *Green v. Neal*, 6 Pet. 297, 8 L. ed. 404; *Shelby v. Guy*, 11 Wheat. 368, 6 L. ed. 497; *Farrior v. New England Mortg. Secur. Co.* 92 Ala. loc. cit. 179, 12 L.R.A. 856, 9 So. 532). This limitation is a sufficient reason for the rule and attests its justice and wisdom. The case of *St. Louis, O. H. & C. R. Co. v. Fowler*, 142 Mo. loc. cit. 687, 44 S. W. 771, cited by respondent, is not at variance with this doctrine because it declares that the construction there placed on the statute was in the protection of certain rights. The facts in the matter here involved are not parallel. While it was held in the *St. Louis Club Case*, 125 Mo. 308, 26 L.R.A. 573, 28 S. W. 604, that the dispensing of liquor at retail by the club was not a violation of the dramshop law, the right to sell under this permissive construction of the statute did not involve any contract or vested right. The sale of liquor, being a mere privilege, conveys no such right until the law regulating same has been complied with and a license granted, when the right to the enjoyment of the privilege assumes the nature of a contract, which cannot be abrogated without sufficient cause. *State v. Parker Distilling Co.* 236 Mo. 219, 139 S. W. 453; *Higgins v. Talty*, 157 Mo. 280, 57 S. W. 724; *State ex rel. Shaw v. Baker*, 32 Mo. App. 98. There is no claim that any contract rights are impaired, but that any interference with the uninterrupted operation of the dramshop law as construed in the *St. Louis Club Case* will, in respondents' own words, "violate the crudest notions of justice." This conclusion, like that of Hamlet in his colloquy with Polonius in regard to the cloud (*Hamlet*, act 3, scene 2), is dependent wholly upon the vantage

L.R.A.1915C.

ground from which we view justice. If a social club existing only by judicial interpretation be entitled to rights and privileges not accorded to a natural person, and which the latter can acquire only under the limitations of a restrictive statute, then there may be some force in respondents' conclusion; otherwise not. While a proper regard should, at all times, be entertained for precedent when it does not violate principle, there should be no hesitancy in overruling one which, in our opinion, places a strained construction upon a plain statute, and thereby works manifest injustice. Respondents' plaint, reduced to its simples, is that the *St. Louis Club Case* should not be overruled, because thereunder respondents have enjoyed privileges not accorded to others. This view does not meet with our approval. Nor are we impressed with the soundness of the contention that because two decades or more of calendar time have elapsed since the rendition of the opinion in the *St. Louis Club Case*, and no succeeding legislature has sought to render the dramshop law more definite and inclusive, that this perforce is a legislative construction which estops the relator in these proceedings. The general rule, without further encumbering this opinion with authorities, is that a practical construction placed upon a law by legislative acquiescence therein will not be lightly questioned, provided it is not allowed to defeat the manifest purpose of the statute. This last, we have endeavored to make clear, has been done by the judicial construction of the dramshop law under which respondents exercise the privilege they are now contending for. As to subsequent legislative action, none was necessary, because the statute is sufficient, and only awaited enforcement to effect the purpose for which it was enacted.

In view of the foregoing, we would be slow to intimate, much less declare, especially in view of the facts in the instant cases, that legislative inaction would suffice to estop relator from the enforcement of a criminal statute. Generally there is no limit to the power of a legislature to enact laws regulating or prohibiting the sale of intoxicating liquors; neither the state nor the Federal Constitution attempts to narrow this discretion. And the action or inaction of one legislature, while it may be persuasive, has no binding force upon a succeeding one, and therefore should not influence the courts in construing the law. *Boyd v. Alabama*, 94 U. S. 645, 24 L. ed. 302; *Metropolitan Bd. of Excise v. Barrie*, 34 N. Y. 657; *Moore v. State*, 48 Miss. 147, 12 Am. Rep. 367.

The foregoing sustains the contention of relator that respondents in the sale of

intoxicating liquors have abused their corporate powers as social clubs, and any discussion as the application or validity of § 7226, Rev. Stat. 1909, is unnecessary. In view of what has been said, we are of the opinion that each of said respondents, to wit, the St. Louis Club and the Missouri Athletic Club, has, in the sale of intoxicating liquors, abused and misused the authority, franchises, and privileges conferred upon them by law, and that judgments of forfeiture be entered herein dissolving each of said associations,—the ousters to be suspended so long as said clubs in good faith desist from such sales.

And it is so ordered.

All concur except Graves, J., who concurs in first paragraph and the result.

Petition for rehearing denied November 17, 1914.

NEBRASKA SUPREME COURT.

OSCAR EISENTRAUT

v.

CHARLES E. MADDEN, Appt.

(— Neb. —, 150 N. W. 627.)

Trial — instructions — scope.

1. Instructions to a jury in a lawsuit should be confined to and be in accord with the evidence submitted upon the trial.

Assault — mutual combat — withdrawal.

2. The rule that when parties enter into

Headnotes by REESE, Ch. J.

Note. — *Withdrawal from combat as affecting civil liability for assault.*

As to the effect of the fact that a combat was by agreement or mutual consent of the parties upon civil liability for assault, see note to *Morris v. Miller*, 20 L.R.A.(N.S.) 907.

For the right of self-defense against an assault provoked by abusive language, see note to *Hixson v. Slocum*, 51 L.R.A.(N.S.) 838.

For civil liability of a member of a mob which makes hostile demonstrations against a person, see *Saunders v. Gilbert*, 38 L.R.A.(N.S.) 404, and the note thereto.

Withdrawal by plaintiff.

It is well established that one may recover damages for injuries inflicted upon him after he has withdrawn from a combat, even though he was originally the aggressor.

Thus, in *Watson v. Hastings*, 1 Penn. (Del.) 47, 39 Atl. 587, the court charged

a mutual combat, and the victim in good faith withdraws therefrom and is afterwards assaulted, he may recover damages for such assault, does not apply when one who is assaulted and severely beaten strikes his assailant immediately, in the heat of passion, upon escaping from his attack.

(January 2, 1915.)

APPEAL by defendant from a judgment of the District Court for Johnson County in plaintiff's favor in an action brought to recover damages for an alleged assault and battery. Reversed.

The facts are stated in the opinion.

Messrs. Neal & Armstrong, F. L. Dinsmore, and E. F. Warren, for appellant:

The degree of proof required of defendant upon the issue of self-defense was greater than the law required.

Jerolman v. Chicago G. W. R. Co. 108 Iowa, 177, 78 N. W. 855; *Rosenbaum Bros. v. Levitt*, 109 Iowa, 292, 80 N. W. 393; *Mitchell v. Hindman*, 150 Ill. 538, 37 N. E. 916; 7 Words & Phrases, 6335; *Thayer v. Boyle*, 30 Me. 475; *Campbell v. Burns*, 94 Me. 127, 46 Atl. 814; *Moore v. Stone*, — Tex. Civ. App. —, 36 S. W. 909; *Missouri, P. R. Co. v. Bartlett*, 81 Tex. 42, 16 S. W. 638; *Chapman v. McAdams*, 1 Lea, 500; *Territory v. Bannigan*, 1 Dak. 451, 46 N. W. 597; *State v. Dineen*, 10 Minn. 407, Gil. 325.

Any instruction that is calculated to impress upon a jury that more than a preponderance of the evidence is necessary to establish a fact is erroneous.

White v. Chicago, M. & St. P. R. Co. 1 S. D. 326, 9 L.R.A. 824, 47 N. W. 146; *West v. West*, 90 Iowa, 41, 57 N. W. 639; *Richmond & D. R. Co. v. Trammel*, 53 Fed.

the jury that a person cannot, "even when assaulted, follow up his assailant and attack him when in the act of retiring or retreating from the scene of the affray; such a course would not be in self-defense or justifiable on any ground."

In *Boren v. Bartleson*, 39 Ill. 43, although it appeared that plaintiff commenced the assault by striking or pushing defendant, the court took into consideration the fact that the assault had ended and that plaintiff had retreated a few steps when defendant rushed upon him and struck him with a pistol, as one of the elements in showing that defendant used more force than was necessary to repel the assault.

In an action against a railroad company for an assault committed by one of its servants upon plaintiff, it was held that even though plaintiff commenced the assault upon the servant, the latter would not be justified in following plaintiff and striking him from the rear as he was retreating, and in pushing or kicking him from the platform upon which the difficulty occurred. *Nesbit*

196; *Pittman v. Pittman*, 72 Ill. App. 500; *Brent v. Brent*, 14 Ill. App. 256; 38 Cyc. 1754.

Mere words are never a justification for an assault.

Langdon v. Clarke, 73 Neb. 516, 103 N. W. 62; *McMartin v. State*, 95 Neb. 292, 145 N. W. 702; *Haman v. Omaha Horse R. Co.* 35 Neb. 74, 52 N. W. 830; *Samuelson v. Gale Mfg. Co.* 1 Neb. (Unof.) 819.

A defendant is entitled to have the jury instructed that the plaintiff must establish his case by a preponderance of the proof.

Omaha Bottling Co. v. Theiler, 59 Neb. 257, 80 Am. St. Rep. 673, 80 N. W. 821; *Hanover F. Ins. Co. v. Stoddard*, 52 Neb. 745, 73 N. W. 291; *Yeoman v. State*, 81 Neb. 244, 115 N. W. 784, 117 N. W. 997; *Strubble v. DeWitt*, 81 Neb. 504, 116 N. W. 154; *McCook v. McAdams*, 76 Neb. 1, 106 N. W. 988, 110 N. W. 1005, 114 N. W. 596.

There is no evidence anywhere of any malice on defendant's part. He was trying to defend himself from what seemed an immediate renewal of the assault upon himself.

Hoover v. De Klotz, 89 Neb. 146, 130 N. W. 1052; *Fosbinder v. Svitak*, 16 Neb. 499, 20 N. W. 866; *Morris v. Miller*, 83 Neb. 218, 20 L.R.A.(N.S.) 907, 131 Am.

v. Chicago, R. I. & P. R. Co. — Iowa, —, 143 N. W. 1114.

In *Smith v. Fahey*, 63 W. Va. 346, 60 S. E. 250, where the circumstances of the assault are not fully stated, the court said that the case at most called only for an application of the rule that the doctrine of self-defense could not be successfully invoked where, after the assault had terminated and all danger was past, defendant struck or beat the aggressor by way of revenge.

Where one who wrongfully makes an assault discontinues it, retires and declines further combat, he may sue and recover for damages then inflicted, notwithstanding he may have been the original aggressor. *McNatt v. McRae*, 117 Ga. 898, 45 S. E. 248.

In *Chrisman v. Hunter*, 3 Dana, 83, where it appeared that after plaintiff and defendant had fought they separated, and later, upon meeting, the combat was renewed, and plaintiff sued for damages received in the second encounter, it was held that he might recover though he was himself the aggressor in the first fight, the two being separate and distinct, as, while the first battery might have mitigated the damages for the last, it could not have justified it.

In *Hanson v. European & N. A. R. Co.* 62 Me. 84, 16 Am. Rep. 404, 8 Am. Neg. Cas. 336, where it appeared from plaintiff's testimony that a dispute arose between him and defendant's brakeman as to the right of plaintiff's dog to ride upon a train, whereupon plaintiff took hold of the brakeman

St. Rep. 636, 119 N. W. 458, 17 Ann. Cas. 1047; *Beck v. Minneapolis Union R. Co.* 95 Minn. 73, 103 N. W. 746; *Germolus v. Sausser*, 83 Minn. 141, 85 N. W. 947.

Mr. E. B. Quackenbush also for appellant.

Messrs. S. P. Davidson and Hugh La Master for appellee.

Reese, Ch. J., delivered the opinion of the court:

This is an appeal from a judgment of the district court for Johnson county, wherein plaintiff, Eisentraut, recovered a judgment against defendant, Madden, for the sum of \$1,500 on account of personal injuries alleged to have been inflicted upon plaintiff by defendant by unlawfully, and without cause, striking plaintiff upon the back part of the head with a large, heavy, metal scoop shovel, whereby a lasting and permanent injury was suffered by plaintiff, the character and extent of the alleged injuries being fully set out in the petition, together with plaintiff's pain and suffering, physically and mentally. The amount sued for was \$10,000. The petition also contains a second cause of action, by which the expenses of the sickness and ailments, consisting of physicians' treatment and medicine, are alleged to the amount of \$300,

and forced him into a seat, holding him there until he said he would behave himself, whereupon plaintiff let him arise and turned around to go and resume his seat, when the brakeman assaulted him with a poker, it was held that the jury were authorized to find for plaintiff both in compensatory and punitive damages.

In *White v. Barnes*, 112 N. C. 323, 16 S. E. 922, it was held that, even if it had appeared that the plaintiff was a trespasser upon defendant's property at the time of the first assault by defendant and his son, a second and subsequent violent and unprovoked blow in the face given by defendant with a stick while plaintiff was held by the arms by an officer, and had been led away 10 or 15 feet from the scene of the first encounter, was, to say the least, attended with circumstances of aggravation and oppression which would authorize the awarding of punitive damages.

While *EISENTRAUT v. MADDEN* reaches a different result from the preceding cases, it does not adopt a different rule of law from the one applied in those cases, but, on the contrary, expressly recognizes it: the features of the assault which apparently led the court to refuse damages being that plaintiff did not voluntarily withdraw from his assault on defendant, and that defendant's retaliatory assault followed so closely that it might be considered as part of the same affray; while between the lines the opinion seems to indicate that, in the opinion of the court, plain-

making a total of \$10,300 damages alleged to have been suffered. Defendant answered: (1) By a general denial; (2) alleging that plaintiff first made an unlawful assault upon him, that he resisted the same only in self-defense, and that he used only such necessary force as was required from the assault and beatings inflicted upon him by plaintiff; (3) that at the time mentioned in the partition plaintiff, without lawful excuse or provocation, assaulted defendant, striking him, knocking him down, beating him when down, and inflicting a permanent injury to his right eye, by which the sight of his said eye was greatly and permanently impaired, and in addition to his pain, suffering, and mental anguish he has been compelled to undergo treatment for his eye at heavy expense, and that he has thereby been damaged in the sum of \$10,500, for which he asks judgment. Reply, a general denial. A jury trial was had, with the result above stated. Defendant appeals.

The evidence is conflicting in many respects; but, so far as the facts concerning the alleged assaults are concerned, there is practically an agreement. There was some difficulty between the parties, which seems to have been a trivial nature. Plaintiff was a school district officer, but, upon the

expiration of his term of office, was succeeded by defendant, who claimed there had been some slight irregularity in keeping the books of the office. Owing to some assertion by plaintiff as to his knowledge and ability to properly keep his accounts, defendant styled plaintiff as "Professor," which seemed to nettle him. At times harsher epithets were used by both parties, but this consisted of words only. On the 3d day of December, 1910, a neighbor was engaged in shelling corn, and these parties were called in to assist. Upon defendant's arrival at the place of the shelling, he passed near plaintiff, when he gave his apparently usual salute, "Hello, Professor." This angered plaintiff, who immediately ordered defendant to cease "calling him names." He approached defendant in a menacing manner, shaking his fists, and cursing violently, but to which defendant made little, if any, response, standing still, but holding his scoop shovel in such a position as to ward off and blows which plaintiff might attempt to inflict. Plaintiff succeeded in breaking defendant's guard, striking him in the face, knocking him down, and immediately sprang upon him, beating him about the face, in the course of which assault defendant received an injury to his eye which is claimed to be permanent.

tiff received no more at the hands of defendant than he justly deserved.

Withdrawal by defendant.

Although the assault for which damages are sought was commenced by defendant, if he attempted to withdraw therefrom in good faith, he may be entitled to the plea of self-defense for damages inflicted by him thereafter when followed up by plaintiff.

Thus, in *Beavers v. Bowen*, 20 Ky. L. Rep. 291, 80 S. W. 1165, an action by plaintiff against a father and son for assault and battery where the theory of the defense interposed by the son was that he interfered in a fight between his father and plaintiff, and, after overcoming plaintiff, he let him up from the ground, when plaintiff resumed the fight and commenced attacks upon the defendants, the court held that the son was entitled to an instruction that if, after having begun the assault on plaintiff, he in good faith quit it, and thereupon plaintiff assaulted him, he then had the same right to defend himself from the attack that he would have had if he had not first assaulted plaintiff.

And in *Jones v. Sutherland*, — Iowa, —, 122 N. W. 901, the court said that if defendant was attempting to withdraw from the affray which he started with plaintiff's brother, but was prevented from doing so by plaintiff, who seized and held him while his brother continued a retaliatory assault, no doubt defendant was excusable for using

violence in self-defense; but inasmuch as there was evidence from which the jury would have been justified in finding that defendant had not withdrawn from the affray, but was continuing his aggressions upon plaintiff's brother, threatening to injure him by a means of an open knife held in his hand, and that plaintiff did no more than to attempt to prevent this threatened violence, and that plaintiff's brother did not repeat his assault upon defendant with a club until it appeared that defendant was about to inflict injury upon plaintiff with his knife, the liability of the defendant should have been left to the jury, and a directed verdict was erroneous.

But the fact that plaintiff, upon being assaulted, uses force to repel the attack while he is endeavoring to retreat, will give his assailants no excuse for using like force while following him and continuing the attack. Thus, in *Brouster v. Fox*, 117 Mo. App. 711, 93 S. W. 318, where all the evidence showed that the plaintiff, a street car conductor, upon being assaulted by passengers, retreated from near the center of the car, striking right and left with the cash box which he held in his hand, while appellants and a number of their companions were following and beating him, it was held that they would have no right to follow him up and inflict a blow with a beer bottle, and claim justification on the theory of self-defense, and the court properly refused an instruction which embodied that

R. L. S.

Defendant, being unable to protect himself, called to his son, who was near by, to take plaintiff off, which he did. Up to this time plaintiff seems to have been the sole aggressor. Upon being taken off of defendant, he started to walk away, probably with his side to defendant. Upon being released, defendant picked up his scoop shovel and struck plaintiff upon the head with the bowl or under side of the shovel, inflicting a small flesh wound, and which felled plaintiff to the ground. The alleged injury to plaintiff appears not so much to be the superficial wound itself as the effect of the blow upon the nervous system. The injury to defendant is alleged to be a rupture to the muscles and membranes of the eye, involving the retina and other parts of the inner eye, caused by the blow on the eye when defendant was knocked down, or thereafter while he was on his back receiving the blows inflicted by plaintiff. From the testimony of physicians and surgeons, as well as other witnesses, it would seem that both parties received more or less serious injuries, from which complete recovery is, to say the least, in doubt.

There is practically no conflict in the evidence as to the beginning of this unfortunate affair. While it was not in good taste for defendant to be derisively calling plaintiff "Professor," yet it did not charge him with the commission of any offense against the laws of the state, nor to the United States, nor did it accuse plaintiff of the violation of public morals, nor in any way slander him, nor hold him up to public contempt, ridicule, or scorn. It was not intended as a pleasantry, perhaps, and yet could scarcely be considered so exasperating and defamatory as to excuse the assault which followed. The evidence shows that defendant committed no act which could be construed as a physical attack upon plaintiff, nor a desire to enter into a contest of that kind. Plaintiff was angry, and approached defendant in a menacing manner, using language which could not be approved in polite society in an ordinary parlor conversation. Prior to the striking of the blow by plaintiff, which felled defendant to the ground, defendant's actions were not aggressive, but rather indicated a desire to protect himself against the actual attack of plaintiff. Plaintiff could have withdrawn at any time before striking defendant, and the subsequent events would not have followed. He succeeded in striking defendant, knocking him down, when he sprang upon defendant and followed up the attack by striking and pounding him, until defendant, apparently becoming satisfied that, under the circumstances, he was no match for plaintiff, L.R.A.1915C.

called for help, and plaintiff was, by force, removed. It may be assumed that defendant was not in the most pleasant frame of mind by that time, and not calculated to act with cool judgment and deliberation. Upon being released, he seized the shovel and dealt the blow of which plaintiff complains, felling plaintiff to the ground. Plaintiff arose, declaring in emphatic and forceful language, but not elegant, that he could whip defendant; but this seems to have closed the incident for the time being.

It is contended by plaintiff that he had abandoned his attack and was moving away when he received the blow complained of; but, if so, the distance to which he had gone is not clearly stated. However, it seems quite clear that he was not far enough away to have given defendant sufficient time to do much in the way of reflection. Otherwise stated, the blow with the shovel was not so long after the castigation received by defendant as to justify holding it to be a separate transaction and not a part of plaintiff's attack. Plaintiff was the aggressor. He committed an unlawful assault upon defendant, the final result of which was evidently not satisfactory to him. To use a common expression, he "got the worst of it." The question then arises: "Can plaintiff, after assaulting defendant, knocking him down, and inflicting an injury upon him, recover damages for what he has suffered and is suffering, which are the natural result of his own act?"

We use the words "natural result," not in the sense of a resulting or necessary effect of previous conditions, but those which might be looked for or expected, when considering the natural effect the treatment, or punishment, suffered by defendant would have upon an ordinary human being. Defendant was smarting under the injuries which he had received. Plaintiff, apparently satisfied with what he had done, claims that he turned to move away, when defendant continued the affray by striking plaintiff.

A kindred question arose in *Fosbinder v. Svitak*, 16 Neb. 499, 20 N. W. 866, where we held that a plaintiff could not recover where he had been the original assailant, the first wrongdoer, and upon receiving injuries from the affray brought on by himself, transfer his cause from the battlefield to the courts. A somewhat similar question was presented in *Taylor v. Clendenen*, 4 Kan. 524, although not based upon exactly similar facts. In that case the plaintiff was held to be the aggressor, but his withdrawal from the affray was not as claimed in this case. The court says: "He cannot undertake to wreak a lawful ven-

geance upon his antagonist—pistol in hand—and, defeated, sue him for damages to the person, upon the basis of the instructions. He must run his own risk. Nor would it be an easy matter for the party, attacked in the manner narrated in the testimony of the defendant, to act with all the deliberation the instruction would seem to require. In the heat of blood he could hardly be expected to weigh his words or to measure or count his blows or shots very carefully."

At the request of plaintiff, the court gave to the jury the following instruction: "The court instructs the jury that the defendant alleges that he acted in self-defense. You are instructed that the law does not permit a person to voluntarily seek or invite a combat, or put himself in the way of being assaulted, so that when hard pressed he may have a pretext to injure his assailant. The right of self-defense does not imply the right of attack, and it will not avail in any case where the difficulty is sought for and induced by the party by any wilful act of his, or where he voluntarily and of his own free will enters into it. The necessity, being of his own creation, shall not operate to excuse him. Nor is anyone justified in using more force than is reasonably necessary to get rid of his assailant. Now, if you believe from the evidence in this case that the defendant, Madden, voluntarily sought or invited the difficulty in which the plaintiff, Eisentraut, was injured, if you believe from the evidence that he was injured, or that the defendant provoked or commenced or brought it on by any wilful act of his own, or that he voluntarily or of his own free will engaged in it, then and in that case you are not authorized to find for the defendant upon the ground of self-defense. In determining who provoked or commenced the difficulty, or made the first assault, you should take into consideration all the facts and circumstances in evidence before you."

As we view it, much of this instruction cannot be applied to the evidence in this case. Assuming that the words, "Hello, Professor," can be construed as offering a direct insult, one that would, ordinarily, cause anger on the part of plaintiff, we are yet met with the well-established rule that mere words cannot justify an assault upon the person using them. There was therefore no legal excuse which could justify the attack of plaintiff upon defendant, which the evidence clearly shows he made. Without any just cause or excuse he made such an attack, knocking defendant down. Plaintiff seems not to have been satisfied

with the injury thus inflicted, but followed up the advantage thus gained by springing upon defendant and administering further beatings until defendant called for help, and plaintiff was forcibly pulled off the prostrate body of his victim. We find nothing in the evidence showing that defendant did "voluntarily seek or invite a combat, or put himself in the way of being assaulted, so that when hard pressed he may have a pretext to injure his assailant."

Nor can we apply the direction that "the right of self-defense does not imply the right of attack, and it will not avail in any case where the difficulty is sought for and induced by the party by any wilful act of his, or where he voluntarily and of his own free will enters into it. The necessity, being of his own creation, shall not operate to excuse him."

The instruction also submits to the jury the proposition that if defendant voluntarily sought or invited the difficulty, or if defendant provoked or commenced or brought it on by any wilful act of his own, or if he voluntarily or of his own free will engaged in it, the jury would not be authorized to find for defendant upon the ground of self-defense. There may be no question but that the instruction is sound law when applied to a state of facts coming within the rule, but as we read the evidence there was nothing therein to which the rule could be applied, and we are persuaded that the instruction, as written, should not have been given. From an examination of the instructions given on the court's own motion, it is clear that the law was fairly and fully presented to the jury, and all well within the issues in the case, and should have been sufficient.

Substantially the same instruction was given and approved in *Morris v. Miller*, 83 Neb. 218, 131 Am. St. Rep. 636, 119 N. W. 458, 17 Ann. Cas. 1047, annotated in 20 L.R.A.(N.S.) 907, but there is a clear distinction between the two cases. In the *Morris* Case the parties to the affray voluntarily and mutually agreed to enter into the contest, and both were wrongdoers. Therefore the instruction was properly given in that case. As we have shown, the facts in this case were quite different. The rule stated in *Glassey v. Dye*, 83 Neb. 616, 119 N. W. 1128, is more clearly applicable to the facts of the case at bar than that of *Morris v. Miller*, *supra*.

While we recognize the established rule that if a plaintiff wrongfully assaults a defendant, and upon reflection, or for some other reason, voluntarily withdraws from the conflict, the person assaulted is not

justified in following up the withdrawing party, and after time for reflection inflict a new and counter assault, and he may in a proper case be held liable for any damage arising from his wrongful assault; but that rule must be applied in reason and with a proper consideration for the passions and infirmities of humanity. In this case the assault was committed by plaintiff with no legal justification or excuse. Had he voluntarily withdrawn from the contest after knocking defendant down, defendant might have been placed in the wrong had he deliberately followed plaintiff, as he retreated, and renewed the contest by a counter assault; but that is not this case. After striking defendant and knocking him down, he sprang upon him, following it up by beating and pounding defendant while down, until forcibly pulled off by others, who came to defendant's relief. He was certainly willing to continue the punishment of defendant until forcibly compelled to desist. Defendant, while suffering and smarting from the injuries which he had received, arose from the ground, picked up his shovel, which was not necessarily a deadly or dangerous weapon, and gave the blow of which plaintiff complains. Plaintiff is entirely willing to forgive and forget the injuries inflicted upon defendant, but seeks to recover a money compensation for the injury he received in the affray which he inaugurated and followed up until compelled by force to desist, and which was immediately followed by what he received.

We are constrained to believe that the instruction above quoted should not have been allowed. The judgment of the District Court is reversed, and the cause is remanded for further proceedings.

Letton and Rose, JJ., not sitting.

Sedgwick, J., concurring:

The majority opinion seems to hold that the evidence establishes that the blow of which this plaintiff complains was so connected with the affray which the plaintiff himself brought on that it must be regarded as a part of that affray. If this is the necessary conclusion from the evidence, of course the judgment is wrong. I think that the instruction set out in the opinion was not applicable to the evidence, and was therefore erroneous. It was highly prejudicial to the defendant. For this reason I concur in the reversal of the judgment.

Petition for rehearing denied.
L.R.A.1915C.

NEW MEXICO SUPREME COURT.

STATE OF NEW MEXICO EX REL. O.
LORENZINO, Appt.,

v.

BOARD OF COUNTY COMMISSIONERS
OF MCKINLEY COUNTY, Respt.

(— N. M. —, 145 Pac. 1083.)

Statute — construction — intention.

1. When the words of a statute are not explicit, the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt, and the objects and remedy in view; and the intention is to be taken or presumed, according to what is consonant to reason and good discretion.

Intoxicating liquor — license — village.

2. Section 1, chap. 115, Laws 1905, which prohibits the granting of a license for the sale of intoxicating liquor at any place, except within the limits of a city, town, or village containing at least 100 inhabitants, does not justify the issuance of such a license for the sale of liquor in an isolated building more than 1,800 feet distant from any other house in an unincorporated village; the building being located upon a patented homestead claim of 160 acres, upon which no other residences have been erected, save the applicant's, and beyond which there are no other buildings for some miles, as such building is not "within the limits" of such village.

(January 14, 1915.)

Headnotes by ROBERTS, Ch. J.

Note. — What is a village within statutes or ordinances in relation to intoxicating liquor.

A diligent search has disclosed no case directly discussing this question as does STATE EX REL. LORENZINO v. MCKINLEY COUNTY.

The case of Salt Lake City v. Wagner, 2 Utah, 400, involved the violation of a city ordinance providing for licensing and regulating the manufacture and sale of spirituous and fermented liquors. The defendant denied the right of the city to require him to take out a license and pay a charge of \$100 per quarter for selling beer, his place of business being situated at a distance from the settled portions of the city. In denying the authority of the city to exact the fee or license, the court said: "The city required the defendant to pay it \$100 per quarter. For this sum thus required of the defendant the city should grant an equivalent to defendant. It does not appear that any such equivalent is granted. Simply under a clause therefor of the charter authorizing the city 'to license, regulate, and restrain,' the business, the city is not authorized to exact the fee or duty speci-

APPEAL by relator from a judgment of the District Court for McKinley County, dismissing an alternative writ of mandamus to compel defendant to grant to relator a license to conduct and operate a saloon as a retail liquor dealer. Affirmed.

Statement by Roberts, Ch. J.:

O. Lorenzino, the relator and appellant herein, on the 26th day of December, 1913, made application to the assessor of McKinley county for a license to conduct and operate a saloon, as a retail liquor dealer, in the unincorporated village of Allison, said county. The said assessor filed the application with the board of county commissioners of said county, which board thereafter, on the 14th day of February, 1914, denied the application and refused to issue the license. Thereafter, on the 26th day of February, 1914, appellant filed his petition with the district court of said county, praying that an alternative writ of manda-

mus issue out of said court, directing and compelling the said board of county commissioners to grant and issue said license. The alternative writ was issued, and later the board filed its answer. The cause was submitted to the court, upon an agreed statement of facts, which, after showing the preliminary facts as to the application of the license, composition of the board, refusal to grant the license, etc., proceeded as follows:

"(5) The building in which the said O. Lorenzino, the relator herein, intends to run, operate, and conduct said saloon is 1,836.5 feet in a straight line from the last house in said village situated on the lands owned and operated by the Diamond Coal Company.

"(6) The relator O. Lorenzino, is a voter in precinct 17, McKinley county, New Mexico. The polling place of said precinct is in the village of Allison. Said O. Lorenzino received his mail at the postoffice in

fied, as the benefits to the parties must be reciprocal." As to the claim that such power was granted to the city as a part of its general police regulations, the court said: "As a general proposition, the sale of fermented liquors as a beverage is injurious to the public at large. It is not specially detrimental to a city over and above the general public, unless it be within the settled portions of the city, or so near thereto as to cast its influence over the city more than over the public generally. The influence of the sale of intoxicating liquors at any point in the territory is unwholesome to the public at large, but we could not be justified in saying that such influence was specially injurious to any particular locality unless it was contiguous, or very nearly so, to such locality. Unless we could say this we would not be justified in saying that the city could control it by reason of its general police powers. The defendant's place of business was remote from the populated parts of Salt Lake City. The Camp Douglas Military Reservation, 2 miles square, lay between it and the settled parts of the city, and no streets, lots, or blocks are in the neighborhood of his place of business, but farming and grazing lands surround it, and the ground is no part of that embraced in the 'town site' entry of the city. It does not appear that any supervision was taken over the place by the city except to claim the license fees or charges, and no bad effects of the business are shown to have extended to the city proper, and the locality is too remote for the court to conclude from the general bad character of the business that the bad effects extended more to the city than to the public generally."

The constitutionality of an act conferring authority upon a town to exact the payment of not more than \$300 from any person selling spirituous liquors by retail within L.R.A.1915C.

1 mile of the town was upheld in *Falmouth v. Watson*, 5 Bush, 660. The court in *Salt Lake City v. Wagner*, supra, distinguishes the *Falmouth* Case thus: "In that case [*Falmouth v. Watson*] it appears that the statute gave the city of Falmouth authority to control the business of selling intoxicating drinks within 1 mile of the city, and the court said that this law did not infringe any constitutional right, because the vending of ardent spirits was in such proximity to the town as to render its exercise liable to affect the good order or peace of the local community. But we do not think that said language could be used in the case at bar. [*Salt Lake City v. Wagner*.] It would be straining the law too much, but it would be necessary to say this in sustaining the judgment. We consider that the city would be affected as a part of the general public, and the general public had given him authority through the county court, from which he held his license. We therefore do not feel justified in saying that the city had the right to exact the fees or charges specified, the place of business being too remote from the settled portion of the city."

It will be noted that upon the question of the granting of a license the court, in *Salt Lake City v. Wagner*, supra, reasoned somewhat as does the court in *STATE EX REL. LORENZINO v. MCKINLEY COUNTY*, in concluding that by the term "village" the legislature intending to prohibit the licensing of the sale of intoxicating liquor in buildings not within the assemblage of houses used for business and residential purposes, reasonably contiguous to each other; that an isolated building more than 1,836 feet from any other building within such village is not "within the limits" of the village, within the meaning of said act.

The general question "What constitutes a village?" is discussed in note to *People v. McCune*, 35 L.R.A. 396.

J. D. C.

said town, has a postoffice box in said post-office, and trades at the store in the village. The public schoolhouse is situated in the village of Allison. Precinct 17, consisting of sections 7, 8, 17, 18, 19, and 20, is a part of the Gallup school district and the school taught in said village is under the supervision of the superintendent of the Gallup schools. The relator pays taxes in precinct No. 17. The postoffice, store, and voting place are located on section 18 of said precinct.

"(7) The Diamond Coal Company owns section 18 and all of the houses, buildings, and improvements thereon, excepting the schoolhouse already mentioned, which is public property and belongs to the Gallup school district, and except said saloon building of Lorenzino, which was erected at its present location without the permission of the Diamond Coal Company. Said houses for residents are arranged along regular streets, and a water system is maintained and operated by the Diamond Coal Company to furnish water to the houses, for domestic purposes and fire protection.

"(8) Directly north of the houses situated in section 18, it is some miles to any other building. In a northeasterly direction that are two houses situated about a half mile and a mile respectively from the nearest house on section 18. In a westerly direction it is about 2 miles from the nearest house, and on the south there is one house within about a mile, and another within about $\frac{3}{4}$ of a mile from the nearest house on section 18. Gallup is a little north and east of the southernmost house on section 18, and about $2\frac{1}{4}$ miles away. There is no building between the proposed saloon and the town of Gallup, about 2 miles away in an easterly direction.

"(9) O. Lorenzino has resided within precinct No. 17 at his home on the southern part of the northwest quarter of section 20 for about eighteen years, and has a patent to said land. Buildings on sections 8, 18, 19, and 20 are all within said precinct 17.

"(10) A blueprint, marked 'Exhibit A,' is attached to this statement of facts and made a part hereof. The location of all the buildings, water tanks, water mains, water and fire hydrants, and other improvements on section 18, 19, and 20, as shown thereon, are to be taken by the court as showing their true location and distances, except that the saloon building located at the extreme southwest portion of section 18 is shown on said blueprint only for the purpose of showing the distance between said building and the nearest building on section 18. Said distance is to be taken L.R.A.1915C.

as the true measurement between said buildings.

"(11) The owners of the Diamond Coal Company intended that the southern street of houses on section 18 should constitute the southernmost boundary of the village of Allison. The houses on section 18 are arranged along streets running east and west, and all the buildings belonging to the Diamond Coal Company on section 18 are supplied with water by a central water-plant with hydrants for domestic purposes and fire protection. The saloon building in question was not built until after the most of the houses on section 18 were completed. Said central water plant does not furnish water for fire protection or for domestic purposes to the said saloon building.

"(12) There are more than 100 inhabitants living on section 18. That Allison is an unorganized village."

The stipulated facts were adopted by the trial court as its findings, upon which it entered a judgment dismissing the alternative writ and denying the relief sought, from which judgment this appeal was taken.

Messrs. Alfred Ruiz and John Venable, for relator:

The territory embracing the Diamond Coal Camp, relator's saloon building and residence, is a village for the purpose of granting a license for the sale of malt, vinous, and spirituous liquors.

People v. McCune, 14 Utah, 152, 35 L.R.A. 396, 46 Pac. 658; State ex rel. Childs v. Minnetonka, 57 Minn. 526, 25 L.R.A. 755, 59 N. W. 972; State ex rel. Holland v. Lammers, 113 Wis. 398, 86 N. W. 677, 89 N. W. 501; Territory ex rel. Kelly v. Stewart, 1 Wash. 98, 8 L.R.A. 106, 23 Pac. 405; Toledo, W. & W. R. Co. v. Spangler, 71 Ill. 568; Illinois C. R. Co. v. Williams, 27 Ill. 48; State ex rel. Christie v. Meek, 26 Wash. 405, 67 Pac. 76; Enfield v. Jordan, 119 U. S. 680, 30 L. ed. 523, 7 Sup. Ct. Rep. 358; Ex parte Foley, 62 Cal. 508; Cooper v. Shelbyville, — Tenn. —, 57 S. W. 429; Denver v. Coulehan, 20 Colo. 471, 27 L.R.A. 751, 39 Pac. 425; Enterprise v. State, 29 Fla. 128, 10 So. 740.

The relator is within the limits of a village as contemplated under § 4124 of the Compiled Laws, of 1897, as amended by § 1, chapter 115, of the Laws of 1905.

People v. McCune, 14 Utah, 152, 35 L.R.A. 396, 46 Pac. 658.

Messrs. Manuel U. Vigil and M. E. Hickey, for appellee:

The saloon building is not within the village.

People v. McCune, 14 Utah, 156, 35

L.R.A. 396, 46 Pac. 658; Re Edgewood, 130 Pa. 348, 18 Atl. 646; 40 Cyc. 207.

An unorganized village is not necessarily as large as an organized village.

Toledo, W. & W. Co. v. Spangler, 70 Ill. 569.

Roberts, Ch. J., delivered the opinion of the court:

Section 4123, Comp. Laws 1897, provides for the steps to be taken by an applicant to secure a retail liquor license, where the license is to be used outside the limits of an incorporated town or city. Section 4124, Comp. Laws 1897, reads as follows: "Sec. 4124. Upon every license granted under the provisions of this act for the retail sale of malt, vinous and spirituous liquors there shall be collected before such license is issued, a tax as follows, viz.: For such license to do business in a precinct, village or town without the limits of any village, town or city having not more than five hundred inhabitants, and in such town or city having not more than five hundred inhabitants, \$100; in a precinct, village, town or city of not less than five hundred and not more than one thousand inhabitants, \$200; in a precinct, village, town or city having more than one thousand inhabitants, \$400."

In 1905, this section was amended by § 1, chap. 115, Sess. Laws 1905, by adding to it the following proviso: "Sec. 1. That § 4124 of the Compiled Laws of the territory of New Mexico of 1897, is hereby amended by adding thereto the following: 'Provided, that no license shall be granted for the sale of malt, vinous or spirituous liquors at any place in any county of this territory, except within the limits of a city, town or village containing at least one hundred inhabitants; and any officer authorizing or issuing a license contrary to this provision shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than \$100 nor more than \$500.'"

The controverted proposition in this case turns upon the question as to whether or not the building wherein liquor was to be sold at retail, under the license sought, was within the limits of the village of Allison.

The word "village" is defined in Bouvier's Law Dictionary to mean: "Any small assemblage of houses for dwellings or business, or both, in the country, whether they are situated upon regularly laid out streets and alleys or not."

In a case note to the case of *People v. McCune*, 35 L.R.A. 396, will be found a collection of cases from the various states, wherein the courts have defined the term, L.R.A.1915C.

and an examination of these cases will disclose that the meaning of the word is by no means fixed and unvarying. The editor of the case note says: "Questions as to its meaning most often arise in respect to the construction of statutes, and in such cases will, of course, depend upon the context as showing the intent of the legislature."

Prior to the act of 1905, liquor licenses for the sale of liquor at any place, whether within or without the limits of cities, towns, and villages, could be legally issued by boards of county commissioners.

The rule announced in Kent's Commentaries, *402, for the interpretation of statutes, and generally followed by the courts, is as follows: "When the words are not explicit, the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt, and the objects and the remedy in view; and the intention is to be taken or presumed, according to what is consonant to reason and good discretion."

In view of the statute law, under which a license could be obtained for the sale of intoxicating liquor at any place within the territory, however remote the building in which it was proposed to carry on business under the license might be from other habitations, prior to the enactment of the proviso of 1905, it was the evident intention of the legislature to restrict the issuance of such licenses to the more populous sections of the country. It is properly inferable, we believe, that the chief object which the legislature had in view was the restriction of the place of sale of intoxicating liquors to such buildings as were located in close proximity to other inhabited buildings, so that opportunities for the commission of crimes, the perpetration of which, as is well known and recognized, in many instances, is incited by strong drink, would not be thereby licensed. Experience has demonstrated that it is unwise to permit the sale of intoxicating liquor in buildings far removed from other habitations, for here there is absolutely no restraint, and, when reason is dethroned by drink, or where unscrupulous and criminal minds so elect, the laws of society are held for naught and indescribable orgies enacted, men robbed and even murdered, with but slight fear of apprehension and subsequent punishment. The above being true, this court would not be justified in placing such a construction upon the meaning of the term "village" as would impair the legislative intent.

In this case the stipulated facts show that the building in which appellant proposed to carry on the liquor business is

distant more than 1,836 feet from the nearest house in the village of Diamond; that it is located upon a tract of land embracing 160 acres patented as a homestead; that the village of Diamond is unorganized, and consists of more than 50 buildings used for residential purposes, together with a store building and a schoolhouse; that the buildings are arranged along regular streets and are situated from 60 to 120 feet apart; that the buildings above named were all constructed by the Diamond Coal Company, on its own land, for the use of its employees; that there are no houses beyond appellant's said house for some distance, in that direction; and that the country round about the main group of buildings within the village is very sparsely settled.

Appellant argued that, because the legislature, in 1912, provided (chapter 27, Sess. Laws 1912) "that the territory embraced in the proposed incorporated village shall not be less than 1 mile square nor more than 3 miles square, nor shall any such village be incorporated unless the same shall contain at least one hundred and fifty people," the legislature has construed the extent of the limits of a village, and that we should give to the term "village" used in the prior act the same construction as to boundaries; that is to say, that we should hold that an unorganized village embraces territory at least 1 mile square, and not more than 3 miles square. Very little consideration, however, will dispose of this contention. Suppose we should say that it embraces a scope of country at least 1 mile square, what point shall we select as the center of the square? Shall it be the store, the postoffice, the schoolhouse, or some other arbitrary monument? It is clear that the statute referred to affords no assistance in the interpretation of the act of 1905, here under consideration.

Appellant also quotes extensively from the case of *People v. McCune*, 14 Utah, 154, 35 L.R.A. 396, 46 Pac. 659, in support of his contention that his building in question was within the limits of the village of Allison. That case arose under a statute, making it an offense for any person to establish and maintain any corral, camp, or bedding place for the purpose of herding, holding, or keeping any cattle, horses, or sheep within 7 miles of any city, town, or village, where the refuse of filth from said corral, camp, or bedding place would naturally find its way into any stream of water used by the inhabitants of any city, town, or village for domestic purposes. It appeared from the evidence in the case that Plateau was a settlement, consisting of 14 families and a population of about 70 persons, and that they resided along Otter

creek for a distance of about 2½ miles, some of the residences being 40 rods from each other and some being a distance of 1 mile or more, and that their occupation was farming. The Utah court said: "From an examination of the act, which is amended by the section above quoted, it seems clear that by the use of the word 'village' the intent of the legislature was to include such settlements as the one in question, and there appears to be no reason why the people of such a settlement, who are using the water of a stream for domestic purposes, should not have extended to them the protection which the law affords."

From the above it will be seen that the court simply held that this settlement came within the purview of the act, because it was manifestly the intention of the legislature to protect the water supply of such a settlement. This case is only authority for the proposition that it is the duty of the court to ascertain the legislative intent, and give it effect, if it can be legally done.

Following the rule, we are compelled to conclude that by the term "village," in the act of 1905, the legislature intended to prohibit the licensing of the sale of intoxicating liquor in buildings not within the assemblage of houses used for business and residential purposes, reasonably contiguous to each other; that an isolated building more than 1,836 feet from any other building within such village is not "within the limits" of the village, within the meaning of said act.

Another reason might be advanced, were it necessary, in support of our conclusion, viz., the building owned by appellant is located, as was intended to be located, upon his patented homestead claim. The residents of the village, as stated, are all employed by the Diamond Coal Company, and are engaged in and about the mining of coal. The village was established and founded for coal mining purposes. All its residents have a common interest, while appellant, on the other hand, resides upon his patented claim, with divergent interests. He is not a coal miner, has no interest in common with the inhabitants of the village, is engaged in a different pursuit, and has no interest in the affairs of the village, further than to secure his mail, vote therein, and possibly trade at the store. If we were to include as residents of villages all those like circumstanced in those respects, there would be absolutely no limit upon the right to issue licenses for the sale of intoxicating liquor.

For the reasons stated, the judgment of

the District Court dismissing the petition will be sustained, and it is so ordered.

Hanna and Parker, JJ., concur.

UNITED STATES SUPREME COURT.

LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY of New York,
Plff. in Err.,

v.

BOARD OF ASSESSORS FOR THE PARISH OF ORLEANS et al.

(221 U. S. 346, 55 L. ed. 762, 31 Sup. Ct. Rep. 550.)

Constitutional law — due process of law — taxing property of nonresidents.

1. State taxation of the amounts due a foreign insurance company by its policy holders in the state for premiums on which

Note. — Situs, as between different states or countries, of personal property for purposes of property taxation.

- I. In general, 904.
- II. Tangible personalty.
 - a. At domicil, 908.
 - b. Actual situs, 909.
- III. Intangible personalty.
 - a. In general, 914.
 - b. Independent situs, 919.
 - c. Business situs, 923.
 - d. Bank deposits, 938.
 - e. Mortgage interest, 939.
 - f. Shares of corporate stock,
 1. Shares owned by resident in foreign corporation, 942.
 2. Shares in domestic corporation owned by nonresidents, 944.
 - g. Judgments, 947.

Scope.

This note, as indicated in its title, is confined strictly to the questions of situs as between different states or countries, and does not deal with situs as between different taxing districts within the same state or country. It is, moreover, confined strictly to the situs for purposes of property taxation, to the exclusion of transfer, inheritance, or succession taxes (as to which, see note in 46 L.R.A.(N.S.) 1167), and all forms of income, franchise, or excise taxation. Again, it is confined to cases dealing with taxes laid upon specific items or evidences of property, and does not include taxes laid upon the "capital stock" of a corporation (see note in 58 L.R.A. 513), or "capital" employed within the state. The situs for property taxation of "shares" of stock is, however, within its scope.

Questions relating to the power of the state to tax the property or agencies of the Federal government are beyond the scope L.R.A.1915C:

credit of thirty and sixty days had been extended does not take the property of the company without due process of law, contrary to U. S. Const., 14th Amend., even though such indebtedness is not evidenced by written instruments.

Same — excessive taxation.

2. Assessing in excess of actual indebtedness the amounts due a foreign insurance company by its policy holders in the state, on which credits have been extended, does not take the property of the company without due process of law, where proper opportunity was afforded for correction.

(May 15, 1911.)

ERROR to the Supreme Court of the State of Louisiana to review a judgment affirming a judgment of the Civil District Court for the Parish of Orleans dismissing a suit for the cancelation of a tax assessment. Affirmed.

The facts are stated in the opinion.

of the note, and questions of taxation as affected by the commerce clause of the Federal Constitution are also excluded, or referred to merely incidentally for purposes of comparison or contrast (on that general subject, see note in 60 L.R.A. 660); as are also questions as to taxation of imports or exports.

The note further proceeds upon the assumption that the domicil of the owner of the property is known, and it is therefore not concerned with questions relating to the determination of such domicil.

The question of situs to which this note is confined pertains to the constitutional power of taxation and to the general principles to be applied in the construction of taxing statutes that are not definite or explicit with respect to personal property owned by residents that is not within the state, or personal property of nonresidents that is within the state. Therefore, questions, depending upon the terms of particular statutes, as to the extent to which the power of taxation has been exercised or as to the applicability of exemption provisions, are not within the scope of the note. So, the question as to the time when the property must be within the state to become subject to taxation is not considered.

Again, as the note is concerned only with the situs of specific items of property, it does not purport to cover cases like *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305, and cases therein cited, as to the right to treat property of companies engaged in interstate business, like telegraph companies, express companies, railroad companies, sleeping car companies, etc., as a unit for the purposes of taxation, and assess the local tax at a certain proportion of the value of the entire property.

The question as to situs within the state for property taxation, of personal property

Messrs. Monte M. Lemann, Harry H. Hall, and J. Blanc Monroe, for plaintiff in error:

A state cannot legally impose an assessment and tax upon premiums due under open account by local policy holders to non-resident or foreign insurance companies. Such assessment and tax would be a taking of property without due process of law, in violation of the 14th Amendment of the Constitution of the United States.

St. Louis v. Wiggins Ferry Co. 11 Wall. 429, 20 L. ed. 194; Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 398, 47 L. ed. 513, 519, 23 Sup. Ct. Rep. 463; State Tax on Foreign-held Bonds, 15 Wall. 300, 21 L. ed. 179; Kirtland v. Hotchkiss, 100 U. S. 491, 25 L. ed. 558; United States v.

Erie R. Co. 106 U. S. 327, 27 L. ed. 151, 1 Sup. Ct. Rep. 223; Hagar v. Reclamation Dist. 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; New York L. E. & W. R. Co. v. Pennsylvania, 153 U. S. 628, 38 L. ed. 846, 14 Sup. Ct. Rep. 952; Savings & L. Soc. v. Multnomah County, 169 U. S. 421, 42 L. ed. 803, 18 Sup. Ct. Rep. 392; Dewey v. Des Moines, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379; New Orleans v. Sternpel, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110; Bristol v. Washington County, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585; Blackstone v. Miller, 188 U. S.

held by testamentary trustee or by executor or administrator, is treated in the note to Hemenway v. Milton, post, 949.

I. In general.

The power of taxation, however broad in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state. Cleveland, P. & A. R. Co. v. Pennsylvania, 15 Wall. 300, 21 L. ed. 179.

It is limited to persons, property, or business within the jurisdiction. Tappan v. Merchants' Nat. Bank, 19 Wall. 490, 22 L. ed. 189; New York, L. E. & W. R. Co. v. Pennsylvania, 153 U. S. 628, 38 L. ed. 846, 14 Sup. Ct. Rep. 952.

Property situated without the jurisdiction is beyond the state taxing power, and the exaction of a tax upon it is in violation of the 14th Amendment. Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499, affirming 115 La. 698, 9 L.R.A.(N.S.) 1240, 116 Am. St. Rep. 179, 39 So. 846.

The taxing power of the state does not extend to property which is neither actually nor constructively within the state. Maxwell v. People, 189 Ill. 546, 59 N. E. 1101.

A state can tax every person subject to its jurisdiction for all his property wherever situated, and can tax persons without its jurisdiction for all their property left by them within its jurisdiction, but the taxing power of the state necessarily stops at the state boundary: it cannot reach over into any other jurisdiction to seize upon persons or property for purposes of taxation. Augusta v. Kimball, 91 Me. 605, 41 L.R.A. 475, 40 Atl. 666.

The principles above stated, which in slightly different forms are repeated in many other cases, are not only rules of statutory construction to be observed in determining the territorial scope and effect of statutes enacted in the exercise of the taxing power, but, when rightly understood and within their proper limitations, are also constitutional limitations of the power of L.R.A.1915C.

taxation, which must be respected by the legislatures and courts of this country. Thus, in St. Louis v. Wiggins Ferry Co. 11 Wall. 423, 20 L. ed. 192, the court said that if there is jurisdiction neither as to person nor property, the imposition of a tax would be *ultra vires* and void. If the legislature of a state should enact that the citizens or property of another state or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in any other manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition. Jurisdiction is as necessary to valid legislative action as to valid judicial action.

These statements of general principles, however, as applied to personal property, must be interpreted in the light of the maxim or fiction that the situs of personal property follows the domicile of the owner,—a maxim which, though not always sufficient either to give personal property a situs for taxation at the domicile of the owner (see note in 36 L.R.A.(N.S.) 295), or to prevent it from acquiring such a situs elsewhere, is nevertheless of very extensive application and effect, and serves to extend the power of taxation of the state of the owner's domicile to many subjects that, in a physical sense at least, are beyond its limits, or are of an intangible nature, and not susceptible of locality in a physical sense.

Again, as applied to intangibles, the principle above stated, and the maxim as well, are limited in their scope and effect by the possibility that intangible property may, by the owner's use or treatment of it, be assigned a situs for taxation, or at least be subjected to taxation, in a state which is neither the domicile of the owner nor the locus of the property in a physical sense.

The most fundamental principle as regards the situs of personality for purposes of property taxation is that embodied in the maxim or fiction *Mobilia sequuntur personam*; at least, the domicile of the owner prima facie furnishes the situs of such property for taxation.

Thus, personal property, in the absence

189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277; State Assessors v. Comptoir National d'Escompte, 191 U. S. 388, 48 L. ed. 232, 24 Sup. Ct. Rep. 109; Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499; Buck v. Beach, 206 U. S. 407, 51 L. ed. 1114, 27 Sup. Ct. Rep. 712, 11 Ann. Cas. 732; Barber Asphalt Paving Co. v. New Orleans, 41 La. Ann. 1015, 6 So. 794; Liverpool & L. & G. Ins. Co. v. Board of Assessors, 44 La. Ann. 760, 16 L.R.A. 56, 11 So. 91; Bailey v. Board of Assessors, 44 La. Ann. 766, 11 So. 93; Clason v. New Orleans, 46 La. Ann. 1, 14 So. 306; State ex rel. Mechanics' & T. Ins. Co. v. Board of Assessors, 47 La. Ann. 1545, 18 So. 519; Bluefields Banana Co. v. Board of Assessors, 49 La. Ann. 43, 21 So. 627;

Parker v. Strauss, 49 La. Ann. 1173, 22 So. 329; Liverpool & L. & G. Ins. Co. v. Board of Assessors, 51 La. Ann. 1028, 45 L.R.A. 524, 72 Am. St. Rep. 483, 25 So. 970; Comptoir National d'Escompte v. Board of Assessors, 52 La. Ann. 1319, 27 So. 801; Williams v. Triche, 107 La. 92, 31 So. 926; Monongahela River Consol. Coal & Coke Co. v. Board of Assessors, 115 La. 566, 2 L.R.A.(N.S.) 637, 112 Am. St. Rep. 275, 39 So. 601; Metropolitan L. Ins. Co. v. Board of Assessors, 115 La. 698, 9 L.R.A.(N.S.) 1240, 116 Am. St. Rep. 179, 39 So. 846.

Assessments admittedly the result of mere guesswork, and so excessive as to exceed from ten to one hundred times the

of any law to the contrary, follows the person of the owner and has its situs at his domicil. Tappan v. Merchants' Nat. Bank, supra.

As a general rule, if one is domiciled in the state, his personal property, in contemplation of law, has its situs there and is taxable there. Hunt v. Turner, 54 Fla. 654, 45 So. 509.

However, there is an increasing tendency to reject the maxim *Mobilia sequuntur personam* as the ultimate exclusive test of situs of personalty for the purposes of property taxation.

The maxim has been frequently held to be but a fiction of law having its origin in consideration of great convenience and public policy, and it is not to be applied to limit and control the right of the state to tax property within the jurisdiction, it being intended to permit the owner to deal with his personalty according to the law of his domicil, and to make testamentary disposition of it according to the law where he is, rather than that of the situs of the property. It was intended for convenience, and not to be controlling where justice does not demand it. State Assessors v. Comptoir National d'Escompte, 191 U. S. 388, 48 L. ed. 232, 24 Sup. Ct. Rep. 109.

It must yield whenever the purposes of convenience or justice make it necessary to ascertain the fact concerning the situs of such property. Dundee Mortg. Trust Invest. Co. v. School Dist. 19 Fed. 359.

The rule *Mobilia sequuntur personam* is a fiction of law, not resting of itself upon any constitutional foundation, and gives away before express law destroying it in any given case where constitutional requirements do not stand in the way. Metropolitan L. Ins. Co. v. Board of Assessors, 115 La. 698, 9 L.R.A.(N.S.) 1240, 116 Am. St. Rep. 179, 39 So. 846.

The ancient rule indicated by the maxim *Mobilia sequuntur personam*, that personal property is to be regarded as subject to the *lex domicilii*, has never been of universal application in this country, and in modern times has seldom interfered with the power to levy taxes upon such property. L.R.A.1915C.

The origin of that doctrine dates from an ancient time when jewels and gold principally constituted the movable property, and they could be taken by the owner from one place to another; but such has not been the case in recent times, since, in the continued progress of the world, the accumulated wealth consists in large proportions of personal property, including not only jewels and gold, but also a great variety of other personal property, much of which is intangible. The consequently increasing variety of such property, perceptible and imperceptible, tangible and intangible, has caused the ancient rule expressed in the maxim to yield more and more to the *lex situs*; and while it is true that for many purposes personal property is subjected to the law of the place of the owner's domicil, still the law is well settled that, for the purposes of taxation and for other purposes, such property has its actual situs where it has been brought and used by its owner, and is subject to the law of that place. Hence, if the owner reside in one state and his movables are taken to another and used there, they become the subject of taxation in the latter state. Such property may be separated from its owner and he may be taxed because of it at the place where it is found, although not the place of his domicil. Union Refrigerator Transit Co. v. Lynch, 18 Utah, 378, 48 L.R.A. 790, 55 Pac. 639.

From the rejection of the maxim *Mobilia sequuntur personam* as a universal and exclusive test of situs of personalty for the purposes of property taxation, it follows that personalty is frequently subjected to property taxation in a state or country other than the domicil of its owner. The circumstances necessary to subject property to such taxation will be considered in subsequent subdivisions. It may be stated at this point that, even though personalty is otherwise subject to taxation in a state other than the owner's domicil, a nonresident is protected against discrimination as compared with a resident by fundamental constitutional provisions.

Thus, a statute taxing slaves belonging

admitted value of the thing assessed, are absolute nullities.

27 Am. & Eng. Enc. Law, 660 et seq.; *Geren v. Gruber*, 26 La. Ann. 694; *State ex rel. New Orleans City R. Co. v. Board of Assessors*, 30 La. Ann. 261; *Merchants' Mut. Ins. Co. v. Board of Assessors*, 40 La. Ann. 371, 3 So. 891; *Oteri v. Parker*, 42 La. Ann. 374, 7 So. 570; *Lyon v. Alley*, 130 U. S. 177, 32 L. ed. 899, 9 Sup. Ct. Rep. 480; *Cooley*, Taxn. 2d ed. p. 2; *Natalbany Lumber Co. v. Tax Collector*, 123 La. 174, 48 So. 879; *Union Oil Co. v. Campbell*, 48 La. Ann. 1350, 20 So. 1007; *Waggoner v. Maumus*, 112 La. 232, 36 So. 332; *Swift v. Board of Assessors*, 115 La. 321, 38 So. 1006.

The decision of the Louisiana supreme court, to the effect that the failure to file

these suits prior to the 1st of November, prevented plaintiff in error from averring the nullity or excessive character of the assessments complained of, would amount to a deprivation of plaintiff's property without judicial action and without due process of law.

Central of Georgia R. Co. v. Wright, 207 U. S. 138, 52 L. ed. 141, 28 Sup. Ct. Rep. 47; *Travelers' Ins. Co. v. Board of Assessors*, 122 La. 136, 24 L.R.A.(N.S.) 388, 47 So. 439.

Mr. Alexander C. King, also for plaintiff in error:

The state cannot, under the guise of a license tax, compel a foreign corporation to pay taxes on property not within the state.

to nonresidents at a higher rate than those belonging to residents was held to violate the provision of the Federal Constitution declaring that citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states, in *Wiley v. Farmer*, 14 Ala. 627.

So, property or business of a nonresident cannot be taxed in a different manner or at a different rate than that of a resident. *Kiowa County v. Dunn*, 21 Colo. 185, 40 Pac. 357 (cattle).

A nonresident cannot be taxed higher for personal property situate in the state than a resident owning like property under like circumstances, nor can he be compelled to pay taxes on such property, if like property, circumstanced the same, is exempt from taxation in the hands of a resident. *Sprague v. Fletcher*, 69 Vt. 69, 37 L.R.A. 840, 37 Atl. 239.

So, a state statute allowing to residents a deduction of debts without allowing such deduction to nonresidents is a denial of the equal privileges and immunities of citizens guaranteed by United States Const. art. 4, § 2. *Ibid*.

But the principle of uniformity in taxation is not violated by providing a mode of levying a tax against the goods of a merchant who, after the taxes for the year have been assessed, brings his stock into the state with the intention of disposing of it without engaging in business permanently, which is different from that employed in cases of resident merchants. *Nathan v. Spokane County*, 35 Wash. 26, 65 L.R.A. 336, 102 Am. St. Rep. 888, 76 Pac. 521.

In *Wilson v. Wiggins*, 7 Okla. 517, 54 Pac. 716, the court, without passing upon the question whether the legislature would be inhibited from discriminating between the property of resident and nonresident owners, in exempting cattle brought into the state for grazing purposes, construed the local statute so as to avoid such discrimination. While that construction was repudiated in *Collins v. Green*, 10 Okla. 244, 62 Pac. 813, the court still found it unnecessary to pass upon the validity of the result. L.R.A.1915C.

ing discrimination, since, if the exemption on account of the taxation or liability of the cattle to taxation in the other state failed because of the discrimination, it left the general rule of taxation in force, and therefore in either event the nonresident could not escape taxation on cattle within the territory for grazing purposes, because it had been returned for taxation in another state. To the same effect is *Half v. Green*, 10 Okla. 338, 62 Pac. 816.

Double taxation.

Recent cases, like *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493, and others cited in the note in 36 L.R.A.(N.S.) 295, go far toward establishing the proposition that tangible personal property, at least, cannot, conformably to due process of law, have a situs for taxation in more than one state at a given time, not because the specific constitutional provisions against double taxation apply to such a case, but because the facts necessary to give the property a situs for taxation in one state necessarily negative the requisites of a situs for taxation in another. But even if this be admitted, it is apparent that the fact that the property has been or is liable to be subjected to taxation in one state does not prevent it in another, where the circumstances exist which give it a situs in the latter; *non constat* but that its taxation in the former state was unconstitutional. See note to *Judy v. Beckwith*, 15 L.R.A.(N.S.) 142, "Taxation of property in different states or double taxation."

As said in *Western Assur. Co. v. Halliday*, 61 C. C. A. 271, 126 Fed. 257, affirming 110 Fed. 259, it is not an unusual spectacle to find laws which are based upon the doctrine *Mobilia sequuntur personam* subjecting to taxation negotiable public securities, corporate bonds, etc., which have an actual situs outside of the state, upon the ground that the owner is a resident of the state and his domicile is the situs of such obligations, while at the same time disavowing the fiction in respect to like

Southern R. Co. v. Greene, 216 U. S. 400, 416, 54 L. ed. 536, 541, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247; *Flint v. Stone Tracy Co.* 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; *Western U. Tele. Co. v. Kansas*, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190.

The most extreme point to which the decisions have heretofore gone in this court is to permit the taxation of capital invested in a state where it is evidenced by some concrete form.

New Orleans v. Stempel, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110; *Bristol v. Washington County*, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585; *State Assessors v. Comptoir National d'Escompte*, 191 U. S. 388, 403, 48 L. ed. 232, 238, 24

Sup. Ct. Rep. 109; *Metropolitan L. Ins. Co. v. New Orleans*, 205 U. S. 395, 403, 51 L. ed. 853, 856, 27 Sup. Ct. Rep. 499; *New York ex rel. New York C. & H. R. R. Co. v. Miller*, 202 U. S. 584, 50 L. ed. 1155, 26 Sup. Ct. Rep. 714; *Blackstone v. Miller*, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277; *Buck v. Beach*, 206 U. S. 392, 407, 51 L. ed. 1106, 1114, 27 Sup. Ct. Rep. 712, 11 Ann. Cas. 732.

Credits of the sort here sought to be assessed are taxable at the domicile of the creditors,—the various foreign fire insurance companies.

Kirtland v. Hotchkiss, 100 U. S. 491, 25 L. ed. 558.

Assessments of this character certainly

securities actually within the state which are owned by residents of other states.

So tangible personal property otherwise taxable in the state where it is found is not exempt from taxation merely because it has been taxed for the same year in another state or territory. *Hudson v. Miller*, 10 Kan. App. 532, 63 Pac. 21; *Spaulding v. Adams County*, 79 Wash. 193, 140 Pac. 367; *Spaulding Mfg. Co. v. Kendall*, 19 Okla. 345, 91 Pac. 1031; *Nathan v. Spokane County*, 35 Wash. 26, 65 L.R.A. 336, 102 Am. St. Rep. 888, 76 Pac. 521.

The fact that a stock of goods in Connecticut was subject to taxation in Massachusetts, the domicile of the owner, was held in *Shaw v. Hartford*, 56 Conn. 351, 15 Atl. 742, to be no objection to the tax under the Connecticut statute.

Personal liability of nonresident.

There is some apparent conflict among the cases, or at least uncertainty, in the decisions, as to the power of the state in which personalty of a nonresident has a situs for taxation, to subject the owner to a personal liability. In *New York v. McLean*, 57 App. Div. 601, 68 N. Y. Supp. 606, holding that the nonresident owner of stock in a national bank located in New York was not personally liable for the tax assessed against his shares, the opinion was expressed, after a somewhat extended discussion of the subject, that although a state has the power to levy a tax upon personal property of a nonresident situated within its boundaries and subject to its jurisdiction, and for that purpose may separate the situs of the owner from the actual situs of the property within the state, and subject it to taxation because it is within the state, "yet it can only enforce payment of that tax by virtue of its jurisdiction over the property, and it has not by virtue of that jurisdiction any power to subject the owner of it to a personal liability for the tax." Substantially the same position was taken by the court of appeals in affirming that decision (170 N. Y. 374, 63 N. E. 380). L.R.A.1915C.

So, in *Pendleton v. Com.* 110 Va. 229, 65 S. E. 536, it was said that the state has no jurisdiction to assess a tax as a personal charge against a nonresident.

Both the New York courts in the *McLean Case*, supra, relied upon *Dewey v. Des Moines*, 173 U. S. 195, 43 L. ed. 665, 19 Sup. Ct. Rep. 379. The actual holding in the latter case was that a state has no power to impose on a nonresident lot owner a personal liability for an assessment for a local improvement, but the court said: "The jurisdiction to tax exists only in regard to persons and property or upon the business done within the state, and such jurisdiction cannot be enlarged by reason of a statute which assumes to make a nonresident personally liable to pay a tax of the nature of the one in question. . . . The power to tax is, however, limited to persons, property, and business within the state, and it cannot reach the person of a nonresident."

In *Bristol v. Washington County*, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585, however, it was held that an allowance of a claim for personal property taxes against the estate of a nonresident decedent was not without due process of law. The court distinguished *Dewey v. Des Moines*, supra, upon the ground that in that case a citizen of one state was cast in a personal judgment in another state and an assessment levied on real estate for local improvement without service on him, or voluntary appearance, or any action on his part amounting to consent to the jurisdiction.

The New York appellate division in the *McLean Case*, supra, referring to the *Bristol Case*, said that the holding in that case was that the state had the right to levy a tax against the property of the deceased owner which was therein situated; that the question there was not as to the personal liability of the owner, but as to the liability of her property which was situated in the state, and which, by the express provisions of the statute of that state, was liable to the tax; that while Chief Justice Fuller did say that the tax was a claim against the estate, he did not say there was a claim against the owner personally; nor was there

are so radically null as to constitute the taking of property without due process.

Raymond v. Chicago Union Traction Co. 207 U. S. 20, 52 L. ed. 78, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757; First Nat. Bank v. Albright, 208 U. S. 548, 552, 52 L. ed. 614, 616, 28 Sup. Ct. Rep. 349; Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 435, 38 L. ed. 1031, 1039, 14 Sup. Ct. Rep. 1114; Fargo v. Hart, 193 U. S. 490-502, 48 L. ed. 761-766, 24 Sup. Ct. Rep. 498; Chicago, B. & Q. R. Co. v. Cole, 75 Ill. 591; Pacific Hotel Co. v. Lieb, 83 Ill. 609.

They do not lose their character as the taking of property without due process, because of the possibility of appeal to the state court, for there was that possibility in Raymond v. Chicago Union Traction Co.

anything in the case which could be construed as making such a holding.

However, in Corry v. Baltimore, 196 U. S. 466, 49 L. ed. 556, 25 Sup. Ct. Rep. 297, affirming 96 Md. 310, 103 Am. St. Rep. 364, 53 Atl. 942, it was held that due process of law was not denied a nonresident stockholder in a domestic corporation, by a Maryland statute imposing as a condition of such ownership a personal liability for the taxes upon his stock, to be enforced by a personal action brought against him by the corporation to recover the amount of the tax which it is compelled to pay. The court does not refer either to the Dewey Case or the Bristol Case. It observes that "a regulation of that character prescribed by a state, in creating a corporation, is not an exercise of the taxing power of the state over persons and things not subject to its jurisdiction. And we think, moreover, that the authority so possessed by the state carries with it the power to endow the corporation with a right of recovery against the stockholder for the tax which it may have paid on his behalf. Certainly, the exercise of such a power is no broader than the well-recognized right of a state to affix to the holding of stock in a domestic corporation a liability on a nonresident as well as a resident stockholder in *personam*, in favor of the ordinary creditors of the corporation." This suggests that the principle of the decision might not apply in the absence of a corporation.

A tax may be assessed against a foreign corporation doing business within the state upon its personal property therein, and it need not be assessed *in rem* against the particular articles of personal property to which it refers. Scollard v. American Felt Co. 194 Mass. 127, 80 N. E. 233. The court said that if the question was whether such a tax could be made the foundation of a personal judgment in an action at law against the owner, other considerations would be pertinent, referring to the Bristol, Dewey and McLean Cases. The statute in the Scollard Case provided that in the event of the refusal or omission of the corporation to pay the tax, it should be

207 U. S. 20, 52 L. ed. 78, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757.

The state court's decision cannot convert that into due process which is no due process.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.

The credits sought to be taxed have no situs in Louisiana.

State Tax on Foreign-held Bonds, 15 Wall. 300-319, 21 L. ed. 179-186; New Orleans v. Stempel, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110; Buck v. Beach, 206 U. S. 392, 51 L. ed. 1106, 27 Sup. Ct. Rep. 712, 11 Ann. Cas. 732.

The effect of the action of the taxing officers and of the decisions of the court is

restrained from doing business in the commonwealth until the tax shall have been paid.

II. Tangible personalty.

As to place where ships are taxable, see notes in 37 L.R.A. 518, and 29 L.R.A. (N.S.) 105.

a. At domicile.

While the maxim *Mobilia sequuntur personam*, which regards personal property as having its situs for the purposes of taxation at the domicile of the owner, is subject to many exceptions as applied to tangible personal property, yet it applies, at least as a prima facie rule, in the absence of facts showing an actual situs elsewhere, to tangible as well as intangible personalty.

The decisions denying the power of a state to tax the property of its citizens when it is permanently located in another jurisdiction do not apply to tangible personal property which, although physically outside the state of the owner's domicile, has not acquired an actual situs elsewhere. Hawley v. Malden, 232 U. S. 1, 58 L. ed. 477, 34 Sup. Ct. Rep. 201 (*obiter*).

The situs for purposes of taxation of tangible personal property temporarily in another state, but not permanently located there, is in the state of the owner's domicile. Com. v. American Dredging Co. 122 Pa. 386, 1 L.R.A. 237, 2 Inters. Com. Rep. 221, 9 Am. St. Rep. 116, 15 Atl. 443.

The statute under which Com. v. Hays, 8 B. Mon. 1, was decided, evidently excepted from taxation in the state of the owner's domicile personal property permanently situated in another state or country, and presumably constituting a part of the property taxable there; but it was held that slaves temporarily out of the state of the domicile were taxable, and that the exception did not apply to them.

Tangible personal property which has or has had its situs within New York, and is or has been sent from the state temporarily, is taxable in New York. People ex rel. Kurses Mfg. Co. v. Feitner, 32 Misc. 84, 66 N. Y. Supp. 179.

the taxing of property outside of the state, in violation of the 14th Amendment of the Constitution of the United States.

Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 357, 358, 49 L. ed. 1077, 1083, 1084, 25 Sup. Ct. Rep. 669; Selliger v. Kentucky, 213 U. S. 200, 206, 53 L. ed. 761, 764, 20 Sup. Ct. Rep. 449.

If the thing, on the value of which the assessment is made, and on which the tax is levied, exists as property outside of the state, and not within it, then the act of the state, through her taxing officers, in taxing it, is a taking of property by the state without due process of law, and a denial of the equal protection of the laws, in violation of the 14th Amendment of the Constitution of the United States.

Assuming that personal property of a domestic corporation which is located abroad or outside of the state is at all entitled to exemption, the change must be permanent, positive, and unequivocal. If such an exemption can be upheld at all, it cannot be sustained where the change is only for a season, uncertain and vacillating, and merely consists in the building of vessels which are owned by a corporation which has a location for the purposes of taxation within the state. *People ex rel. Pacific Mail S. S. Co. v. Tax & A. Comrs.* 64 N. Y. 541, affirming 5 Hun, 200.

It was assumed in *Spinney v. Lynn*, 172 Mass. 464, 52 N. E. 523, that partnership property situated in another state where the partners had a factory was taxable at their place of business within the state of Massachusetts, although it was not so taxable in the city where they resided, the place of business not being there.

As shown in the note to *Com. v. West India Oil Ref. Co.* 36 L.R.A. (N.S.) 295, the courts, recognizing the practical hardships in subjecting personality to taxation in two or more states for the same period, were, even before the decision of the United States Supreme Court in *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493, disposed, if possible, to construe taxing statutes of the state of the owner's domicile, even though phrased in broad terms, so as to exclude personality, especially tangible chattels, located in another state under such circumstances as to have acquired a situs for taxation there. The case referred to seems, in some situations at least, to have raised that rule of statutory construction to the ranks of a constitutional limitation. The note in 36 L.R.A. (N.S.) 295, is referred to for the cases holding, either as a matter of constitutional law or upon broad principles of statutory construction, that tangible chattels were not taxable at the domicile of the owner, where they had acquired a situs for taxation elsewhere. To those the following cases may be added:

Goods and chattels situated in another state, apparently belonging to residents of L.R.A.1915C.

Raymond v. Chicago Union Traction Co. 207 U. S. 26, 36, 52 L. ed. 81, 87, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757.

A state court may keep within the letter of the statute prescribing forms of procedure, and give parties interested the fullest opportunity to be heard, and yet its action may be a violation of the 14th Amendment of the Constitution of the United States.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226-241, 41 L. ed. 979-986, 17 Sup. Ct. Rep. 581.

The action of the taxing officers of the state is a denial to the owners of the equal protection of the law, and a taking of their property without due process of law.

Raymond v. Chicago Union Traction Co. supra.

New Jersey, were held in *State v. The Collector*, 24 N. J. L. 56, not to be taxable in New Jersey under a statute declaring that all personal estate "within this state" shall be liable to taxation, but the context showed that the phrase quoted applied only to property actually within the state, and did not include property which by a fiction might be regarded in the state.

And in *Colbert v. Leake County*, 60 Miss. 142, holding that cotton belonging to a resident of Mississippi, but situated in another state, was not subject to taxation in Mississippi, the court said that, as to tangible personal property, the law has prescribed that it shall be assessed where it is in fact, and not by fiction; and while it is true that the provision of the statute relates to personal property in the state, it is also true that, there is no provision for taxing personal property capable of having a locality, which is permanently out of this state, and has a situs in another state.

b. Actual situs.

It will be observed that the scope of the note, as outlined at the beginning, excludes from consideration cases in relation to tangible personality that turn upon the language of particular statutes, and involve no broad and fundamental principles for the determination of the situs of such property for the purposes of property taxation. So, of course, it excludes cases which merely involve the question of taxation of personal property belonging to a nonresident as affected by the time relatively to the tax day when it is brought within the state.

Notwithstanding the general maxim or fiction *Mobilia sequuntur personam*, it is established beyond question that tangible personal property may be taxed in the state where it has its actual situs, although the owner is domiciled elsewhere. (Many of the following cases which declare this rule actually involved intangibles, but recognized the rule as fundamental so far as tangibles are concerned, whatever might be the case as regards intangibles.) *St. Louis v. Wiggins Ferry Co.* 11 Wall. 423, 20 L. ed. 192;

Messrs. Harry P. Sneed, George H. Terriherby, and H. Garland Dupré, for defendants in error:

A reduction of an assessment will not be granted in a suit for cancelation, though the record disclosed the assessment to be excessive.

Travelers' Ins. Co. v. Board of Assessors, 122 La. 136, 24 L.R.A.(N.S.) 388, 47 So. 439; *New Orleans v. Stempel*, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110.

Mr. Justice Hughes delivered the opinion of the court:

This suit was brought by the Liverpool & London & Globe Insurance Company of New York, a foreign corporation doing busi-

ness in the state of Louisiana, to cancel an assessment made by the board of assessors for the parish of Orleans for the year 1906.

The assessment itself is not shown by the record, but, from the testimony, the supreme court of the state concluded "that the property intended to be assessed was the amount due plaintiff by its policy holders in this state for premiums on which credit of thirty and sixty days had been extended." Dealing with the case from this standpoint, that court affirmed a judgment dismissing the suit, giving as its reasons "that the said credits are due in this state, and have arisen in the course of the business of the plaintiff company done in this state, and are therefore part and parcel of the said business in this state, and as

Cleveland, P. & A. R. Co. v. Pennsylvania, 15 Wall. 300, 21 L. ed. 179; *Marye v. Baltimore & O. R. Co.* 127 U. S. 117, 32 L. ed. 94, 8 Sup. Ct. Rep. 1037; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *Bristol v. Washington County*, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585; *Buck v. Beach*, 206 U. S. 392, 51 L. ed. 1106, 27 Sup. Ct. Rep. 712, 11 Ann. Cas. 732; *Pullman's Palace Car Co. v. Twombly*, 29 Fed. 658; *Walker v. Jack*, 31 C. C. A. 462, 60 U. S. App. 124, 88 Fed. 576; *People v. Home Ins. Co.* 29 Cal. 533; *Re Fair*, 128 Cal. 607, 61 Pac. 184; *Irvin v. New Orleans, St. L. & C. R. Co.* 94 Ill. 105, 34 Am. Rep. 208; *Scripps v. Fulton County*, 183 Ill. 278, 25 N. E. 700; *Reat v. People*, 201 Ill. 469, 66 N. E. 242; *Rie- man v. Shepard*, 27 Ind. 288; *Herron v. Keeran*, 59 Ind. 472, 26 Am. Rep. 87; *Standard Oil Co. v. Combs*, 96 Ind. 179, 49 Am. Rep. 156; *Baldwin v. Shine*, 84 Ky. 502, 2 S. W. 164; *Ayer & L. Tie Co. v. Keown*, 122 Ky. 580, 93 S. W. 588; *Callahan v. Singer Mfg. Co.* 29 Ky. L. Rep. 123, 92 S. W. 581; *Com. ex rel. Alexander v. Haggins*, 30 Ky. L. Rep. 788, 99 S. W. 906; *Higgins v. Com.* 126 Ky. 211, 103 S. W. 306; *Liverpool & L. & G. Ins. Co. v. Board of Assessors*, 44 La. Ann. 760, 16 L.R.A. 56, 11 So. 91; *Holton v. Bangor*, 23 Me. 264; *Baars v. Grand Rapids*, 129 Mich. 572, 89 N. W. 328; *Crawford v. Koch*, 169 Mich. 372, 135 N. W. 339; *Re Jefferson*, 35 Minn. 215, 28 N. W. 256; *Colbert v. Leake County*, 60 Miss. 142; *St. Louis v. Wiggins Ferry Co.* 40 Mo. 580 (ferryboat); *State ex rel. Taylor v. St. Louis County Ct.* 47 Mo. 594; *People ex rel. Westbrook v. Ogdensburgh*, 48 N. Y. 390; *People ex rel. Orinoka Mills v. Barker*, 84 App. Div. 469, 83 N. Y. Supp. 33 (tangible); *Worthington v. Sebastian*, 25 Ohio St. 1; *Myers v. Seaberger*, 45 Ohio St. 232, 12 N. E. 396; *Com. v. American Dredging Co.* 122 Pa. 386, 1 L.R.A. 237, 2 Inters. Com. Rep. 221, 9 Am. St. Rep. 116, 15 Atl. 443; *Hardesty v. Fleming*, 57 Tex. 395 (cattle); *Hall v. Miller*, 102 Tex. 289, 115 S. W. 1168; *Waggoner v. Whaley*, 21 Tex. Civ. App. 1, 50 S. W. 153; *Jesse* L.R.A.1915C.

French Piano & Organ Co. v. Dallas, — Tex. Civ. App. —, 61 S. W. 942.

The United States Supreme Court in *Marye v. Baltimore & O. R. Co.* 127 U. S. 117, 32 L. ed. 94, 8 Sup. Ct. Rep. 1037, speaking of rolling stock, said: "It is quite true, as the situs of the Baltimore & Ohio Railroad Company is in the state of Maryland, that also upon general principles is the situs of all its personal property; but for purposes of taxation, as well as for other purposes, that situs may be fixed in whatever locality the property may be brought and used by its owner, by the law of the place where it is found."

When the owner of the legal title in personal property resides out of the state, express and unequivocal words are needed to subject the property, even if itself situated or used here, to the provisions of the general tax act. *Dallinger v. Rapello*, 14 Fed. 32.

The general rule is that personal property can be assessed to the owner only at the place where he resides; and if it is sought to tax it in another jurisdiction, because of its tangible character and its location there, the authority so to do must be plainly written in the statute. *Graham v. St. Joseph Twp.* 67 Mich. 652, 35 N. W. 808.

To acquire a situs in a state other than the domicile of the owner, tangible personalty must have a definite location there, accompanied by some degree of permanency, mere temporary or transient presence within the state not being sufficient. *Fennell v. Pauley*, 112 Iowa, 94, 83 N. W. 799.

Thus, a statute declaring that all real and personal estate within the state shall be subject to taxation does not apply to property of nonresidents when in the state temporarily; and in such case the situs for the purpose of taxation is at the domicile of the owner. *Com. v. Dun*, 126 Ky. 109, 10 L.R.A.(N.S.) 920, 102 S. W. 859.

So, tangible personal property that is passing through or is in the state for temporary purposes only, if it belongs to a non-resident, is not subject to taxation under a statute providing that all real and personal property in the state shall be assessed and taxed. The intention is to subject to

a consequence are taxable here." 122 La. 98, 47 So. 415.

The insurance company brings this writ of error, insisting that the premium accounts did not constitute property taxable in Louisiana, and that in consequence the assessment violated the 14th Amendment of the Constitution of the United States in depriving the company of its property without due process of law.

The assessment was laid under act 170 of 1898. Section 1 of this act, in defining property subject to taxation, includes "all rights, credits, bonds, and securities of all kinds; promissory notes, open accounts, and other obligations . . . and all movable and immovable, corporeal and incorporeal, articles or things of value, owned and held

and controlled within the state of Louisiana by any person, in any capacity whatsoever." Section 7 makes it the duty of the tax assessors to place upon the assessment list all property subject to taxation, and provides as follows:

"Provided further, that in assessing mercantile firms the true intent and purpose of this act shall be held to mean the placing of such value upon the stock in trade, all cash, whether borrowed or not, money at interest, open accounts, credits, etc., as will represent in their aggregate a fair average of the capital, both cash and credit, employed in the business of the party or parties to be assessed. And this shall apply with equal force to any person or persons representing in this state business interests

taxation only, property that is more permanently in the state at the time when required to be listed. *Irvin v. New Orleans*, St. L. & C. R. Co. 94 Ill. 105, 34 Am. Rep. 208.

In no case can personal property be subject to taxation against the consent of the owner, at the place of residence of a person who is wrongfully in possession of it. *Frankfort v. Illinois L. Ins. Co.* 129 Ky. 823, 130 Am. St. Rep. 499, 112 S. W. 924.

What degree of permanency the property within the taxing jurisdiction must have before it can be said to be no longer *in transitu*, and therefore liable to taxation, is more a question of fact than of law. *Griggsby Constr. Co. v. Freeman*, 108 La. 435, 58 L.R.A. 349, 32 So. 399.

The degree of permanency of location of tangible personal property in the state, in order to give it a situs for taxation, is difficult to define. It is impracticable to lay down any rule that shall govern in all cases. The ownership, and uses for which the property is designed, and the circumstances of its being in the state, are so various that it cannot be embraced in any general rule. *Irvin v. New Orleans*, St. L. & C. R. Co. *supra*.

The question as to when tangible chattels will be deemed to have a situs for property taxation apart from the domicile of the owner has been considered in other notes in this series, to which reference is now made. See notes to *Johnson v. DeBary-Baya Merchants' Line*, 37 L.R.A. 518, and *North American Dredging Co. v. Taylor*, 29 L.R.A. (N.S.) 105, as to situs of vessels for purposes of taxation; and note to *Eoff v. Kennefick*, 7 L.R.A. (N.S.) 704, as to local situs within the state of tangible personal property of nonresident for purposes of local taxation; and note to *Teagan Transp. Co. v. Board of Assessors*, 69 L.R.A. 431, 445, as to situs of railroad rolling stock. The cases dealt with in these notes will not be repeated here.

The principles to be applied in determining whether tangible personalty has a situs for property taxation in a state other than that of the owner's domicile are still further illustrated and exemplified by the following cases:

Irvin v. New Orleans, St. L. & C. R. Co. 94 Ill. 105, 34 Am. Rep. 208.

In *Tobey v. Kip*, 214 Mass. 477, 101 N. E. 998, the court said: "It is true, as has been argued in behalf of the defendant, that the personal property of a nonresident, though it be located within the commonwealth, is not liable to taxation here unless there is some statutory authority therefor [citing cases]. But we have here such authority, and the validity of the statute is not now open to dispute."

Machinery in a mill in Connecticut belonging to a nonresident, though regarded as personal property is subject to taxation under a Connecticut statute declaring generally that all real and personal property shall be liable to taxation, and including in the description of the property so liable to be taxed "mills." *Sprague v. Lisbon*, 30 Conn. 18.

A nonresident transacting business in Connecticut is within the statute of that state declaring that the interest of any trading, mercantile, or manufacturing business shall be assessed in the company or corporate name in the town, city, or borough where the business is carried on; the average amount of goods kept on hand for sale during the year, or any portion of it, where the business has been carried on for a year previously to the 1st of October, to be the rule of assessment and taxation. *Shaw v. Hartford*, 56 Conn. 351, 15 Atl. 742.

Hogs slaughtered and packed at a packing house in Indiana for shipment to the state of the owner's domicile in another state where he conducts a provision trade are subject to taxation in Indiana. *Rieman v. Shepard*, 27 Ind. 288.

One having in his possession property of a nonresident need not have authority to sell it to be taxable thereon, under a statute providing for a tax on any person having in his possession, with authority to sell the same, any personal property purchased with a view to its being sold, or which has been consigned to him to be sold, within the state, or to be delivered or shipped by him within or without the state.

that may claim a domicile elsewhere, the intent and purpose being that no nonresident, either by himself or through any agent, shall transact business here without paying to the state a corresponding tax with that exacted of its own citizens; and all bills receivable, obligations, or credits arising from the business done in this state are hereby declared assessable within this state, and at the business domicile of said nonresident, his agent or representative."

In construing this statute, the supreme court of Louisiana in *Metropolitan L. Ins. Co. v. Board of Assessors*, 115 La. p. 708, 9 L.R.A. (N.S.) 1240, 116 Am. St. Rep. 179, 39 So. 840, said: "There can be no doubt that the 7th section of the act of 1898 . . . announced the policy of the state

touching the taxation of credits and bills of exchange representing an amount of the property of nonresidents equivalent or corresponding to said bills or credits which was utilized by them in the prosecution of their business in the state of Louisiana. The evident object of the statute was to do away with the discrimination theretofore existing in favor of nonresidents as against residents, and place them on an equal footing." Again, in *General Electric Co. v. Board of Assessors*, 121 La. 116, 46 So. 122, where open accounts arising on the sale of merchandise were the subject of the assessment, the court said: "There can be no serious question but that the legislature has provided that credits due upon open accounts arising out of business done in this

Merchants' Transfer Co. v. Des Moines, 128 Iowa, 732, 2 L.R.A. (N.S.) 662, 105 N. W. 211, 5 Ann. Cas. 1016.

Whisky belonging to nonresidents stored in a bonded warehouse is subject to taxation in Kentucky. *Com. v. Gaines*, 80 Ky. 489; *Com. ex rel. Woodford County v. Greenbaum*, 139 Ky. 138, 129 S. W. 555, modification not affecting this point in 140 Ky. 221, 130 S. W. 982.

The Massachusetts statute providing for the taxation of goods or stock employed in the manufacture, where the owner hires or occupies manufactories, stores, shops, or wharves, was held in *Leonard v. New Bedford*, 16 Gray, 292, to apply notwithstanding that the owner was a nonresident, although the language of a preceding section of the statute is that "all property, real and personal, of the inhabitants of this state, not exempted by law from taxation, shall be subject to taxation in the manner provided in this chapter."

In *Flanders v. Cross*, 10 Cush. 514, the court said that if a building placed on leased land by the tenant was regarded as personal property, it would not be taxable in the state, the tenant being a nonresident of the state, but that its situs for taxation would be at the domicile of the owner—*personalia personam sequuntur*. This, however, appears to have been on the ground that the taxing statute did not cover such property, rather than upon an inherent lack of power to reach it.

Personal property consigned to a person in this state for sale by a resident of another state, and not for the sole purpose of being stored or forwarded, is taxable in the state. *McCormick v. Fitch*, 14 Minn. 252, Gil. 185.

Agricultural machinery manufactured in another state by a nonresident, but brought into and stored in Minnesota in a warehouse for the convenience of distribution thereof in supplying customers and selling orders, is subject to taxation in Minnesota. *State v. William Deering & Co.* 56 Minn. 24, 57 N. W. 313. The court observed that it was no defense to this tax that the same property had been taxed in the state L.R.A.1915C.

of Illinois, where the owners were domiciled.

Property which is in transit through the state, or which has been sent within the state simply for the purposes of sale, is not to be considered as having a situs within such state for the purposes of taxation. *State, Detmold, Prosecutor, v. Engle*, 34 N. J. L. 425.

The mere fact that a nonresident owner of tangible personal property, who has purchased it in the state, intends to remove it, does not relieve it from liability to local taxation. *Carrier v. Gordon*, 21 Ohio St. 605.

Cash is undeniably a tangible, movable subject of taxation, and taxable where it is found, although belonging to a nonresident. *Liverpool & L. & G. Ins. Co. v. Board of Assessors*, 44 La. Ann. 760, 16 L.R.A. 56, 11 So. 91; *Liverpool & L. & G. Ins. Co. v. Board of Assessors*, 51 La. Ann. 1028, 45 L.R.A. 524, 72 Am. St. Rep. 483, 25 So. 970 (*obiter*).

But money collected by attorneys and others for nonresident clients does not become taxable in Michigan, merely because it is in their hands on the date fixed for assessment, under a Michigan statute providing that personal property under the control of a trustee or agent may be assessed to him in the township where he resides. *Howell v. Gordon*, 127 Mich. 517, 86 N. W. 1042.

Money and credits belonging to nonresidents were held not subject to taxation in *St. Paul v. Merritt*, 7 Minn. 258, Gil. 198, for the reason that under the statutes the only provision for taxation elsewhere than at the residence of the owner was limited to goods, wares, and merchandise kept for sale, stock employed in mechanic arts, and capital and machinery employed in any branch of manufacture or other business. The court said that the provision of the Constitution that laws shall be passed taxing all money, credits, investments in bonds, and all real and personal property, according to its true value in money, was perhaps broad enough to authorize the legislature to levy a tax even upon the personal

state by nonresidents shall be taxed. . . . The state imposes this tax because of her need of the revenue to be derived from it; she extends to the business the protection of her laws, and seeks to make the business bear its just proportion of the burden of taxation. The situation would be, we repeat, unfortunate, not to say deplorable, if the state were left no choice between having to forego this needed revenue, or else handicapping with this tax the business of her own citizens and home corporations in their competition with foreigners for the business to be done here." And his decision was followed in the present case.

This court has had repeated occasion to consider the validity of taxes imposed under the Louisiana act. The case of New Orleans

v. Stempel, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110, arose under chapter 106 of the Statutes of 1890, but the pertinent features of the act were the same. There it appeared that the assessed credits were evidenced by notes secured by mortgages on real estate in New Orleans; that these notes and mortgages were in that city, in the possession of an agent, who collected the proceeds and the interest as it became due, and deposited the same in a bank in New Orleans to the credit of the plaintiff, the guardian of infant owners, who, like herself, were domiciled in the state of New York. The tax was sustained. In *State Assessors v. Comptoir National d'Escompte*, 191 U. S. 388, 48 L. ed. 232, 24 Sup. Ct. Rep. 109, the question arose under the stat-

property, or rather upon the money and credit, of nonresidents; but the conclusion was that the legislature had not exercised that power.

The decision in *Shaw v. Hartford*, 56 Conn. 351, 15 Atl. 742, that a horse and wagon belonging to a nonresident, but apparently used in connection with a business conducted in the state, were not subject to taxation, was not upon the ground that they could not be given a situs for taxation in the state, but that the statute made the average amount of goods kept on hand for sale, the basis of assessment.

So, the average amount of live stock which cattle dealers have each week, although they are usually sold within one day after they are received, and most of them are brought from other states, constitutes property within the state which can be taxed under Maryland Code, art. 81. *Myers v. Baltimore County*, 83 Md. 385, 34 L.R.A. 309, 55 Am. St. Rep. 349, 35 Atl. 144.

Cattle belonging to a nonresident who owned a ranch near the border line, which were in the state for about five months, including the 1st of January, were held in *Hardesty v. Fleming*, 57 Tex. 395, under the circumstances of the case, to be situated in Texas so as to be subject to taxation there. In reply to the contention of the owner that the cattle drifted across the line against his desire, the court observed that the inquiry naturally arose why, if the owner did not desire the cattle to come into the state, he established the line of sign riders 8 miles from the boundary; adding that these circumstances doubtless influenced the court below, and that at any rate it appeared that the cattle were in the state for about five months, including the 1st of January, and that they were not passing through the state nor brought there for the purposes of trade.

For cattle or sheep belonging to a nonresident, but kept within the state for a more or less extended period for grazing or fattening purposes, not merely as an incident of interstate commerce, see cases cited in opinion in *Eoff v. Kennefick*, 7 L.R.A.(N.S.) 704, and note thereto. L.R.A.1915C.

As pointed out in the opinion in *Eoff v. Kennefick*, supra, in commenting upon the reversal by the United States Supreme Court in *Kelley v. Rhoads*, 188 U. S. 1, 47 L. ed. 359, 23 Sup. Ct. Rep. 259, of the decision of the Wyoming supreme court in 9 Wyo. 352, 87 Am. St. Rep. 959, 63 Pac. 935, holding, in accordance with a previous decision in the same case (7 Wyo. 237, 39 L.R.A. 594, 51 Pac. 593), that a herd of sheep driven through the state is not exempt from taxation as personal property if the purpose of driving is not merely transportation, but comprehends also that of grazing and feeding them upon the natural grasses, not as a mere necessary incident of the travel, but as one of the purposes of the movement,—a new element is introduced when it appears that the main purpose of the presence of the live stock in the state is interstate transit, and grazing a mere incident, and that element brings the case within the commerce clause of the Federal Constitution and invalidates the tax, without, however, impairing the right of the state to assign a local situs for taxation when the live stock is in the state for grazing or fattening purposes, and not as an incident of interstate transit.

At this point it is to be observed that the question whether property belonging to a nonresident is within the state merely as an incident of interstate commerce, and so immune from taxation under the commerce clause of the Federal Constitution, is closely associated with the question whether the circumstances attending the presence of a nonresident's property within the state are such as to give it a local situs for taxation upon general principles in relation to taxation. Indeed, the two questions are so blended in the cases that no attempt has been made in this note to set out the cases that involved the question under the commerce clause, for their bearing upon the question of situs under the general principles of taxation. For these cases the reader is referred to the notes in 60 L.R.A. 641; 2 L.R.A.(N.S.) 662; 13 L.R.A.(N.S.) 800; (44 L.R.A.(N.S.) 586, and *Lehigh & W. B. Coal Co. v. Junction*, 15 L.R.A.(N.S.) 514),

ute of 1898. In that case, a foreign banking company did business in New Orleans and there made loans through a local agent. The loans were made upon collateral security, the customer drawing his check, which was treated as an overdraft and held as a memorandum of the indebtedness. The court decided that the credits so evidenced, created in the Louisiana business, were taxable in that state. In *Metropolitan L. Ins. Co. v. New Orleans*, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499,—also arising under the act of 1898,—the validity of a similar tax was upheld. That case was one of loans made through the local agent of the insurance company, a New York corporation doing business in Louisiana, to its policy holders upon the security of their

policies. The course of business was that, on the approval of a loan at the home office of the company, the company forwarded to the agent a check for the amount, with a note to be signed by the borrower. The agent procured the note to be signed, and forwarded both note and policy to the home office. The agent collected and transmitted the interest, and when the notes were paid, it was to the agent to whom they were sent to be delivered back to the makers. At all other times the notes and the policies securing them were kept at the home office in New York. In *Board of Assessors v. New York L. Ins. Co.* 216 U. S. 517, 54 L. ed. 597, 30 Sup. Ct. Rep. 385, the so-called credit consisted, in fact, of a payment to the policy holder of a portion of the amount

with the suggestion that many of the cases there cited, for example, the case of *Coe v. Errol*, 62 N. H. 303, in the state court, illustrate the double bearing of the circumstance that the property is in transit through the state at the time of its taxation, first, in that it negatives an actual situs within the state for taxation, and secondly, that it brings the property within the protection of the commerce clause. In affirming this case (116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475), the United States Supreme Court conceded that the mere fact that the owner was a nonresident would not have protected the property from local taxation.

III. Intangible personality.

a. In general.

Domicil of creditor.

The maxim *Mobilia sequuntur personam* embodies the general principle in relation to situs for the purposes of property taxation of intangible personality; and while, as subsequently shown, intangibles, such as bonds, notes, mortgages, etc., may in some circumstances acquire a situs for taxation in a state other than the owner's domicil, and according to some cases, at least, may even lose a situs for taxation at such domicil, the general rule of very extensive application is that the situs of intangibles for the purpose of property taxation is at the domicil of the creditor. (In some of these following cases that recognize the principle stated the credits were held by virtue of the facts to have a situs for taxation elsewhere.) *Walker v. Jack*, 31 C. C. A. 462, 60 U. S. App. 124, 88 Fed. 576, reversing 79 Fed. 138; *Re Fair*, 128 Cal. 607, 61 Pac. 184; *Mackay v. San Francisco*, 113 Cal. 392, 45 Pac. 696; *Wright v. Southwestern R. Co.* 64 Ga. 783 (bonds and other evidences of debt); *Goldgart v. People*, 106 Ill. 25; *Scripps v. Fulton County*, 183 Ill. 278, 55 N. E. 700; *Hayward v. Christian County*, 189 Ill. 234, 59 N. E. 601; *Matzenbaugh v. People*, 194 Ill. 108, 88 Am. St. Rep. 134, L.R.A.1915C.

62 N. E. 546; *Reat v. People*, 201 Ill. 469, 66 N. E. 242; *Re Borden*, 208 Ill. 369, 70 N. E. 310; *Forseman v. Byrne*, 68 Ind. 247; *Baldwin v. Shine*, 84 Ky. 502, 2 S. W. 164; *Johnson County v. Hewitt*, 76 Kan. 816, 14 L.R.A.(N.S.) 493, 93 Pac. 181; *Thomas v. Mason County Ct.* 4 Bush, 135; *Com. v. Hays*, 8 B. Mon. 1; *Com. ex rel. Alexander v. Haggin*, 30 Ky. L. Rep. 788, 99 S. W. 906; *Re Jefferson*, 35 Minn. 215, 28 N. W. 256; *Horne v. Green*, 52 Miss. 452; *Finch v. York County*, 19 Neb. 50, 56 Am. Rep. 741, 26 N. W. 589.

Myers v. Seaberger, 45 Ohio St. 232, 12 N. E. 396, cites *Welch, J.*, in *Worthington v. Sebastian*, 25 Ohio St. 8, as follows: "Intangible property has no actual situs. If, for purposes of taxation, we assign it a legal situs, surely that situs should be the place where it is owned, and not the place where it is owed. It is incapable of a separate situs, and must follow the situs either of the creditor or the debtor. To make it follow the residence of the latter is to tax the debtor, and not the creditor."

A debt, though evidenced by bonds secured by a mortgage upon real property in another state, which declares that it is made under, and in all respects is to be construed by, the laws of that state, has a situs for taxation at the domicil of the owner. *Kirtland v. Hotchkiss*, 100 U. S. 491, 25 L. ed. 558.

Bonds issued by a foreign railroad company and secured by a mortgage on property outside the state are within a statute declaring that all property in the state shall be taxed in proportion to its value, and describing the word "property" to include money, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership. *Mackay v. San Francisco*, 113 Cal. 392, 45 Pac. 696.

The rule stated at the beginning of the subdivision applies to public debts of one state or a municipality thereof, owned by a resident of another state and such debts therefore have a situs for taxation in the state of the owner's domicil. *Bonaparte v. Appeal Tax Ct.* 104 U. S. 592, 26 L. ed.

for which the company was bound by its policy. It was found that, despite the fact that notes were given, there was no personal liability but simply a deduction in account. As there was no loan, there was no credit to be taxed; and a decree in the circuit court restraining the collection of the tax was affirmed.

Here an indebtedness actually existed. This is assumed in the objections to the assessment. The indebtedness had its origin in the course of business transacted by the foreign corporation in Louisiana under the laws of that state. If the Louisiana policy holders had given notes for the premiums, which were to be collected through the local agents, there could be no question as to the validity of the tax. The difference between

notes given for loans on policies, and notes given for premiums, could not be regarded as a material one so far as the taxing power of the state is concerned. In both cases, the obligations to pay would represent returns to the corporation upon business conducted within the state; in the one, for the moneys loaned, with compensation for their use; in the other, for the contracts of insurance. Nor would the power to tax depend on the presence of the notes within the state. *Metropolitan L. Ins. Co. v. New Orleans, supra*; *Bristol v. Washington County*, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585. The notes, in these cases, had been removed to the creditor's home; and, despite this removal, they were attributed to the place of origin. Further,

845, affirming 50 Md. 354. It has been so held even upon the assumption that the debts are exempted from taxation by the state issuing them. *Ibid.* That, however, is a question not within the scope of this note.

In *Murray v. Charleston*, 96 U. S. 432, 24 L. ed. 760, the court, without a passing on the question whether a state can tax a debt due by one of its citizens or municipalities to a nonresident creditor, held that a municipal ordinance directing that a tax assessed by it on its stock (that is, its indebtedness evidenced by certificates) shall be retained by its treasurer out of the interest due on it to its holders was void as impairing the obligation of the contract.

Of course, the rule does not apply where one has ceased to be domiciled or to reside in the state. *Barber v. Potter*, 8 R. I. 15; *Pendleton v. Com.* 110 Va. 229, 65 S. E. 536. The question, however, as to when one has lost his domicile or residence in the state, so as to withdraw his intangibles from the taxing power thereof, is not within the scope of the note.

The question whether intangibles that have acquired a situs for taxation in a state other than the owner's domicile lose their situs for taxation at that domicile is discussed in the note to *Com. v. West India Oil Ref. Co.* 36 L.R.A.(N.S.) 295. The affirmative of that question is sustained in many of the cases cited in that note and also by a subsequent case. *Com. v. B. F. Avery & Sons*, — Ky. —, 174 S. W. 518. However that may be, it is obvious that the mere fact that the evidences of intangibles are present in another state not under such circumstances as to give them a situs for taxation there does not deprive them of a situs for taxation at the owner's domicile.

The court, in *Johnson County v. Hewitt*, 76 Kan. 816, 14 L.R.A.(N.S.) 493, 93 Pac. 181, while conceding, for the sake of the argument, that the legislature did not intend to cover the notes if the circumstances were such as to give them a business situs in Missouri, held that promissory notes belonging to a resident of Kansas, given by residents of Missouri and se-

cured by a trust deed of real estate in Missouri, though never brought into Kansas, but left for safe-keeping only in a vault of a bank in Missouri, were personal property in Kansas subject to taxation there, the circumstances not being sufficient to give them a situs in Missouri.

So, the fact that a note and mortgage belonging to a resident are held in another state as collateral security does not deprive them of a situs for taxation in the state of the owner's residence. *Gibbins v. Adamson*, 5 Kan. App. 90, 48 Pac. 871, affirmed in 58 Kan. 818, 51 Pac. 1101.

So, notes owned by a resident, but kept in another state merely for safe-keeping, and not for investment, are subject to taxation in Iowa, under a statute declaring that "all other property, real and personal, within this state, is subject to taxation in the manner directed." *Hunter v. Board of Supers.* 33 Iowa, 376, 11 Am. Rep. 132. The court conceded, for the sake of the argument at least, that money and credits under the control or management of an agent in another state, belonging to a resident of Iowa, with a view to being invested, loaned, or used for pecuniary profits by such agent, would not be the subject of taxation in Iowa.

In *Scripps v. Fulton County*, 183 Ill. 278, 55 N. E. 700, credits owned by a resident of Illinois were held taxable in that state, although they were apparently held to be possessed by an agent in Iowa, where the debtors resided. The report does not show whether the circumstances attending the presence of the credits in Iowa were such as to give them a business situs there for the purpose of taxation.

In *Re Borden*, 208 Ill. 369, 70 N. E. 310, it was held that an affidavit to the effect that credit, stocks, and bonds belonging to a resident of Illinois were in the hands of his agent in New York, to transact all business relating thereto in that state, was not sufficient to negative a situs in Illinois for the purposes of taxation.

Bonds of the state of Georgia, purchased and placed on deposit with the treasurer of that state as an indemnity to secure the ful-

if there had been no notes, but the premium accounts had been otherwise evidenced by written instruments, they would have been equally taxable. The "checks" in *State Assessors v. Comptoir National d'Escompte*, supra, were only memoranda of indebtedness or vouchers. "While called 'checks,' and so referred to in the record and by the parties in their dealings, the instrument delivered to the Comptoir, in form an ordinary check, as though drawn for payment on presentation from moneys deposited, had no such function. The money was paid to the customer upon the security of the collateral, and the so-called check taken and held as a memorandum of the indebtedness to the Comptoir." (pp. 400, 401.)

But it is said that the state of Louis-

iana had no power to tax the credits here in question because they were not evidenced by written instruments. The contention is thus stated in the petition of the insurance company in the state court. "Premiums due on open account to a foreign corporation cannot be taxed. The legislature has not the power to localize an abstract credit away from the domicile of the creditor, the state's power of taxation being limited to persons, property, or business within its jurisdiction. The levying of a tax upon incorporeal things, such as abstract credits, not in so-called 'concrete' form, and without tangible shape, violates the 14th Amendment of the United States Constitution."

The asserted distinction cannot be main-

filment of an insurance company's risks in that state, are taxable at the domicile of the company in Louisiana. *State ex rel. Mechanics & T. Ins. Co. v. Board of Assessors*, 47 La. Ann. 1544, 18 So. 519. The court, referring to the statement in *State Tax on Foreign-held Bonds*, 15 Wall. 300, 21 L. ed. 179, that securities consisting of state and municipal bonds and circulating notes of banks are treated as property in the place where they are found, though removed from the domicile of the owner, said that that statement applied only to bonds and other circulating notes which are operated in market and are bought and sold; and in this connection it cited the statements in *Burroughs on Taxation*, p. 60, that when a person who resides in one state has an agent in another state who loans or invests money for him, on notes or other evidences of debt, and then reinvests the proceeds of the loans in the same state, such notes or evidences of debt are taxable in the latter state. As to whether bonds in such circumstances have situs for taxation in the state in which they are on deposit, see *infra*, III. c, "Specific instances."

That bonds belonging to a resident of Pennsylvania have been pledged as collateral security for a debt to a resident of New York, and are physically held in that state, does not relieve them from taxation under the Pennsylvania statute imposing a tax upon the value of all bonds "owned, held or possessed" by residents of the state. *Com. v. Buffalo & L. E. Traction Co.* 233 Pa. 79, 81 Atl. 932.

So, bonds and stocks issued by foreign corporations, owned by a resident of Virginia, although in the vault of a safety deposit company of another state, are subject to taxation in Virginia, at the domicile of the owner. *Com. v. Williams*, 102 Va. 778, 47 S. E. 867, 1 Ann. Cas. 434.

And promissory notes were held in *Bullock v. Guilford*, 59 Vt. 516, 9 Atl. 360, to be taxable at the domicile of the owner, notwithstanding that they were secured by mortgages upon land in another state, and that the notes and mortgages were in the custody of an agent in that state, and the

mortgages were taxed in that state as an interest in real property. The exemption was claimed under a statute which purported to exempt "personal estate owned by inhabitants of this state situated and taxed in another state." The court was of the opinion that in the circumstances the property, i. e., the debt or credit, was not situated "in the other state."

And money and notes secured by mortgages upon lands in another state, in the hands of an agent in that state, to be loaned and reloaned, are property in the state of the owner's domicile, and subject to taxation there. *State ex rel. Dwinell v. Gaylord*, 73 Wis. 316, 41 N. W. 521. It was apparently so held even upon the assumption that the property had a situs for taxation in the other state. But see note in 36 L.R.A. (N.S.) 295, 298, on this point.

In *Connor v. Wilson*, 6 Ohio Dec. Reprint, 941, notes and mortgages belonging to a resident of Ohio were held taxable in that state notwithstanding that they were in Indiana under the control and management of an agent who had authority to invest and reinvest the money represented thereby, and the loans in question were made to citizens of Indiana and secured by mortgages on real property in that state. The court said that the fact that the property had been taxed in the state of Indiana did not affect in anywise the right of Ohio to tax it. It is not clear from the opinion, however, whether the court assumed that the circumstances were such as to give the securities a proper situs for taxation in Indiana.

After the amendment of the New York statute referred to in the note in 36 L.R.A. (N.S.) 300, it was held in *People ex rel. United Verde Copper Co. v. Feitner*, 54 App. Div. 217, 66 N. Y. Supp. 769, affirmed in 165 N. Y. 645, 59 N. E. 1129, that deposits by a New York corporation in a foreign bank, and bills and accounts receivable due from nonresidents, payable at the general office of the corporation in New York, except such as for its own convenience it had caused to be made payable in Chicago to be deposited there in banks subject to its

tained. When it is said that intangible property, such as credits on open account, have their situs at the creditor's domicile, the metaphor does not aid. Being incorporeal, they can have no actual situs. But they constitute property; as such they must be regarded as taxable, and the question is one of jurisdiction.

The legal fiction expressed in the maxim *mobilia sequuntur personam* yields to the fact of actual control elsewhere. And in the case of credits, though intangible, arising as did those in the present instance, the control adequate to confer jurisdiction may be found in the sovereignty of the debtor's domicile. The debt, of course, is not property in the hands of the debtor; but it is an obligation of the debtor, and is of value to the creditor, because he may be

compelled to pay; and power over the debtor at his domicile is control of the ordinary means of enforcement. *Blackstone v. Miller*, 188 U. S. pp. 205, 206, 47 L. ed. 444, 445, 23 Sup. Ct. Rep. 277. Tested by the criteria afforded by the authorities we have cited, Louisiana must be deemed to have had jurisdiction to impose the tax. The credits would have had no existence save for the permission of Louisiana; they issued from the business transacted under her sanction within her borders; the sums were payable by persons domiciled within the state, and there the rights of the creditors were to be enforced. If locality, in the sense of subjection to sovereign power, could be attributed to these credits, they could be localized there. If, as property, they could be

checks, were subject to taxation in New York.

But a note belonging to a resident and citizen of Missouri that had never been in that state and that evidenced a debt created in Alaska, payable in Alaska, by a resident of Alaska, and secured upon real property and deposited in a bank there, was held in *Leavell v. Blades*, 237 Mo. 695, 141 S. W. 893, not to be taxable in Missouri, under the Missouri statute which provides *inter alia*, that all notes, bonds, and other evidences of debt "made taxable by the laws of this state, held in any state or territory other than that in which the owner resides, shall be assessed in the county where the owner resides," and requires the taxpayer to take an oath that he has not sent or taken, or caused to be sent or taken, any property, money, or bills, bonds or notes, or other securities or evidences of debt out of the state to avoid taxation. The decision was put upon the ground of statutory construction, and the court observed that, notwithstanding the requirements of the Constitution that taxes should be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, it did not follow that the legislature might not, if it saw fit, enact a statute making the situs of choses in action, intangible personal property, the same as the domicile of the owner, for taxation; that such a law might be unjust in cases easily put, but nevertheless it might be a valid law.

And property in New York consisting of gold and United States treasury notes, and stocks in incorporated companies outside the state of Alabama, were held in *Varner v. Calhoun*, 48 Ala. 178, not to be within a statute enumerating as subjects of taxation all money hoarded or kept on deposit subject to order, either in or out of the state; and all investments in the stocks of any company or corporation out of the state. It is stated in the headnote, though it does not so expressly appear in the opinion, that the owner was a citizen of Alabama.

L.R.A.1915C.

Debtor's domicile.

For reasons of practical convenience and justice, the courts have finally adopted the view that a debt has a situs for the purposes of attachment or garnishment at the domicile of the debtor, or at least that it is subject to attachment or garnishment there, although the creditor is a nonresident. See note to *Goodwin v. Claytor*, 67 L.R.A. 209. This doctrine rests upon the practical consideration that in the ordinary and usual course of events, if it becomes necessary to appeal to the courts to enforce and collect the debt, recourse will be had to the courts of the debtor's domicile, and not to those of the creditor's domicile, rather than upon any theory that the property right is deemed to be at the debtor's domicile. For the purposes of property taxation, however, it is settled, both as a matter of constitutional law and statutory construction, that a debt or credit cannot be assigned a situs for property taxation in a particular state or country, other than the domicile of the creditor, merely because the debtor is domiciled there, though, as subsequently shown, it may by reason of other circumstances have a situs there for taxation. *State Tax on Foreign-held Bonds*, 15 Wall. 300, 21 L. ed. 179; *Collins v. Miller*, 43 Ga. 336 (note); *Williams v. Mandell*, 44 Ga. 26; *Goldgart v. People*, 106 Ill. 25; *Scripps v. Fulton County*, 183 Ill. 278, 55 N. E. 700; *Hayward v. Board of Review*, 189 Ill. 234, 59 N. E. 601; *Foresman v. Byrns*, 68 Ind. 247; *Barber Asphalt Paving Co. v. New Orleans*, 41 La. Ann. 1015, 6 So. 794; *Liverpool & L. & G. Ins. Co. v. Board of Assessors*, 44 La. Ann. 760, 16 L.R.A. 56, 11 So. 91 (premiums due on insurance policies); *Liverpool & L. & G. Ins. Co. v. Board of Assessors*, 51 La. Ann. 1028, 45 L.R.A. 524, 72 Am. St. Rep. 483, 25 So. 970 (insurance premium); *Appeal Tax Ct. v. Patterson*, 50 Md. 354 (bonds).

The principle applies to foreign corporations as well as to nonresident natural persons. This is expressly declared in *Barber Asphalt Paving Co. v. New Orleans*, 41 La.

deemed to be taxable at all, they could be taxed there.

The decision in *State Tax on Foreign-held Bonds*, 15 Wall. 300, 21 L. ed. 179, is not in point. There the tax was on the interest on bonds made and payable out of the state, and issued to and held by non-residents of the state. See *Savings & L. Soc. v. Multnomah County*, 169 U. S. p. 428, 42 L. ed. 805, 18 Sup. Ct. Rep. 392; *New Orleans v. Stempel*, supra, pp. 319, 320; *Blackstone v. Miller*, supra, p. 206. Nor was the question determined in *Murray v. Charleston*, 96 U. S. 432, 24 L. ed. 760, where a city attempted to tax its corporate stock, or public debt, owned by non-residents, and the court limited its opinion to the holding "that no municipality of a

state can, by its own ordinances, under the guise of taxation, relieve itself from performing to the letter all that it has expressly promised to its creditors." p. 448.

In *Kirtland v. Hotchkiss*, 100 U. S. 491, 25 L. ed. 558, it was held that the Federal Constitution does not prohibit a state from taxing her own citizens upon bonds belonging to them, although they were made by debtors resident in other states and secured by mortgage on real estate there situated. The sole inquiry was with respect to the validity of the statute of Connecticut, where the creditor was domiciled. As the court said in *New Orleans v. Stempel*, supra (p. 321), in referring to the *Kirtland Case*: "It was assumed that the situs of such intangible property as a debt evidenced by

Ann. 1015, 6 So. 794, and in many of the other cases previously cited the principle was applied to debts to foreign corporations.

The weight of authority is that a debt due or to become due should be taxed at the place of the residence of the creditor or owner, and that the situs of the debt is that of the owner, and that it is not property in the state of its debtor. *Mackay v. San Francisco*, 128 Cal. 678, 61 Pac. 382.

As is stated in *Goldgart v. People*, 106 Ill. 25, it is "credits," and not "debts," that is the subject of taxation.

Debts of every kind and nature due from persons having a domicile in Indiana to persons not domiciled in that state, on the day named in the statute, unless in the hands of an agent doing business in the state, have no situs in the state, but their situs is where the creditor has his domicile, and they are not taxable in Indiana. *Foresman v. Byrns*, 68 Ind. 247.

A debt to a nonresident of a state is not liable to be taxed by the state in which he does not reside, although the debtor resides therein. The creditor cannot be taxed because he is not within the jurisdiction; and the debt cannot be taxed in the debtor's hands through any fiction of the law which is to treat it as being for this purpose the property of the debtor. Debts are not property of the debtor in any sense; they are the obligations of the debtor, and only possess value in the hands of the creditor. *Liverpool & L. & G. Ins. Co. v. Board of Assessors*, 44 La. Ann. 760, 16 L.R.A. 56, 11 So. 91.

So, the mere right of a nonresident to receive of a city within the state the principal or interest on stock issued by it is a right personal to him, and is not subject to taxation in the state. *Baltimore v. Hussey*, 67 Md. 112, 9 Atl. 19.

Credits owned by a nonresident of the state are not taxable here unless they are held within the state by a guardian, trustee, or agent of the owner, by whom they must be returned for taxation. *Grant v. Jones*, 39 Ohio St. 506.

Bonds issued by a railroad company, but owned by nonresidents, are not taxable in L.R.A.1915C.

the state in which the corporation is domiciled. *South Nashville Street R. Co. v. Morrow*, 87 Tenn. 406, 2 L.R.A. 853, 11 S. W. 348; *Com. v. Chesapeake & O. R. Co.* 27 Gratt. 344.

Intangible personal property has no independent situs, but follows that of its owner, and can be taxed only where the owner resides. The debts of a corporation, like those of an individual, are the property of its creditors, and can have no locality severed from the person to whom they are due. *State v. Clement Nat. Bank*, 84 Vt. 167, 78 Atl. 944, Ann. Cas. 1912D, 22.

Nor does the fact that a debt due a nonresident is secured by a mortgage upon real property at the debtor's domicile give the debt a situs for property taxation at the debtor's domicile. As to whether the mortgage as an interest in real property may be taxed there, see *infra*, III. e.

Bonds of a railroad company belonging to a nonresident are not subject to taxation in the state of which the railroad company is a corporation, although secured by a mortgage upon real property in that state, which transfers no title, but merely creates a lien upon the property. *Cleveland, P. & A. R. Co. v. Pennsylvania*, 15 Wall. 300, 21 L. ed. 179. To the same effect is *South Nashville Street R. Co. v. Morrow*, supra.

The locality of a debt for the purpose of taxation is not affected by the fact that it is secured by a mortgage upon real estate situated in Illinois. *Kirtland v. Hotchkiss*, 100 U. S. 491, 25 L. ed. 558. The question was whether the owner, who was domiciled in Connecticut, was subject to taxation in that state.

A debt due to a nonresident of Arizona, from a resident thereof, although secured by a mortgage upon real property in Arizona, is not subject to taxation there. *Territory v. Delinquent Tax List*, 3 Ariz. 179, 24 Pac. 182.

The mere fact that a debt is secured by a mortgage upon real property within the state does not give it a situs for taxation within the state, where it is owed to a non-

bond was at the domicile of the owner. There was no legislation attempting to set aside that ordinary rule in respect to the matter of situs. On the contrary, the legislature of the state of Connecticut, from which the case came, plainly reaffirmed the rule, and the court in its opinion summed up the case in these words (p. 499): 'Whether the state of Connecticut shall measure the contribution which persons resident within its jurisdiction shall make by way of taxes, in return for the protection it affords them, by the value of the credits, choses in action, bonds, or stocks which they may own (other than such as are exempted or protected from taxation under the Constitution and laws of the United States), is a matter which concerns

only the people of that state, with which the Federal government cannot rightfully interfere.' See also *Kidd v. Alabama*, 188 U. S. 730, 47 L. ed. 669, 23 Sup. Ct. Rep. 401.

But, as we have seen, the jurisdiction of the state of his domicile, over the creditor's person, does not exclude the power of another state in which he transacts his business, to lay a tax upon the credits there accruing to him against resident debtors, and thus to enforce contribution for the support of the government under whose protection his affairs are conducted. And that the jurisdiction of the latter state rests upon considerations which are more fundamental than that notes have been given, or that the credits are evidenced in any

resident of the state. *State v. Smith*, 68 Miss. 79, 8 So. 294.

The fact that credits owned by a non-resident are secured by mortgage on real estate within the state does not change the rule that credits are to be taxed at the residence of the creditor, and not of the debtor. *Grant v. Jones*, 39 Ohio St. 506.

That a debt is secured by a mortgage upon real estate does not subject it to taxation within the state, if it is owed to a nonresident. *Myers v. Seaberger*, 45 Ohio St. 232, 12 N. E. 396.

Credits evidenced by notes, mortgages, etc., are subject to taxation where the owner resides, and not where the debtor resides. *Lee v. Dawson*, 8 Ohio C. C. 365, 4 Ohio C. D. 442.

In *Maltby v. Reading & C. R. Co.* 52 Pa. 140; *Pittsburg, Ft. W. & C. R. Co. v. Com.* 66 Pa. 73, 5 Am. Rep. 344, and *Susquehanna Canal Co. v. Com.* 72 Pa. 72, the power of a state to tax interest on bonds, whether owned by residents or nonresidents, issued by a corporation chartered in the state, and secured by property in the state, was upheld; and in *Pittsburg, Ft. W. & C. R. Co. v. Com.* supra, it was declared in effect that the fact that part of the bonds were secured by mortgage, and others not, had no bearing, since the road on which the whole debt was secured was protected by the state.

These cases, however, were overruled by *State Tax on Foreign-held Bonds*, 15 Wall. 300, 21 L. ed. 179, holding a tax under a statute of Pennsylvania substantially like that under which those cases were decided was invalid, for the reason that the situs of the debts evidenced by the bonds was at the domicile of the creditor, and not of the debtor.

In *New York, L. E. & W. R. Co. v. Pennsylvania*, 153 U. S. 628, 38 L. ed. 846, 14 Sup. Ct. Rep. 952, which held a Pennsylvania statute requiring a New York railroad company paying interest upon its indebtedness held by residents of Pennsylvania, to deduct from the interest so paid the amount assessed upon bonds and money, capital in the hands of such residents, was L.R.A.1915C.

unconstitutional, because an impairment of the obligation of a contract with that road, the court observed that if the case involved any question as to the authority or duty of the company to deduct anything from the interest paid on its scrip, bonds or certificates of indebtedness when held by non-residents of Pennsylvania, the case of *State Tax on Foreign-held Bonds* would be decisive against the state.

Delaware & H. Canal Co. v. Pennsylvania, 156 U. S. 200, 39 L. ed. 396, 15 Sup. Ct. Rep. 358, is to the same effect.

b. Independent situs.

Obiter statements are not infrequently found, especially in the more recent cases, indicating a tendency on the part of the courts to regard bonds, notes, and other forms of commercial paper as constituting not merely evidence of property, but as property itself, thus assimilating them to tangible chattels susceptible of an actual situs determined by their physical locality.

Thus, Justice Holmes in *Blackstone v. Miller*, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277, a case involving a succession tax, and not a property tax, and so not strictly in point in the present note, speaking of bonds and commercial paper, said that the debt is inseparable from the paper which declares and constitutes it, by a tradition which comes down from more archaic conditions; and employed similar language in *Wheeler v. Sohmer*, 233 U. S. 434, 58 L. ed. 1030, 34 Sup. Ct. Rep. 607, also involving a succession, and not a property, tax.

In *Walker v. Jack*, 31 C. C. A. 462, 60 U. S. App. 124, 88 Fed. 576, reversing 79 Fed. 138, Judge Taft said in effect, though his remarks were *obiter*, that one exception to the general rule that intangible personal property can be taxed only at the domicile of the owner is in case of a chose in action represented by a negotiable bond, property in which passes by delivery; in such case the evidence of title is in such form, and is so important an element of the value of what it represents, as to make it closely

particular manner, was clearly brought out in the concluding statement of the opinion in the case of the Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 402, 51 L. ed. 856, 27 Sup. Ct. Rep. 499. There the court said: "Moreover, neither the fiction that personal property follows the domicile of its owner, nor the doctrine that credits evidenced by bonds or notes may have the situs of the latter, can be allowed to obscure the truth. *Blackstone v. Miller*, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277. We are not dealing here merely with a single credit or a series of separate credits, but with a business. The insurance company chose to enter into the business of lending money within the state of Louisiana, and

employed a local agent to conduct that business. It was conducted under the laws of the state. The state undertook to tax the capital employed in the business precisely as it taxed the capital of its own citizens in like situations. For the purpose of arriving at the amount of capital actually employed, it caused the credits arising out of the business to be assessed. We think the state had the power to do this, and that the foreigner doing business cannot escape taxation upon his capital by removing temporarily from the state evidences of credits in the form of notes. Under such circumstances, they have a taxable situs in the state of their origin." Equally, then, had the state the power to tax the premium ac-

analogous to tangible property, and to give it a situs for taxation where the negotiable evidence of its existence actually is, even though the owner may live elsewhere.

So, in *Blain v. Irby*, 25 Kan. 501, holding that promissory notes and mortgages are goods and chattels within the meaning of the tax law, and may be levied upon as such under a tax warrant, the court observed that they have such an independent situs that they may be taxed where they are situated.

The opinion in *People ex rel. Westbrook v. Ogdensburgh*, 48 N. Y. 390, holding that notes, bonds, and money due on contracts for the sale of real property, the papers being in the hands of a general agent of the nonresident owner, were subject to taxation in New York, apparently implies that the notes, bonds, and other contracts for the payment of money are to be treated in law as personal property having a situs where they may be found. In this connection the court said that, while for some purposes in law, by a legal fiction, such property follows the person of the creditor and exists where he may be found, yet it has been settled that for the purposes of taxation this legal fiction does not to the full extent apply, and that such property belonging to a nonresident creditor may be taxed in the place where the obligations are held by his agent, citing among other cases *Catlin v. Hull*, 21 Vt. 152. It does not appear in this case that the credits in question were used in the connection with the business of loaning and reloaning money, nor do other circumstances appear which would be sufficient to give them a business situs according to the cases cited *infra*, III. c.

It is settled that for the purposes of taxation of promissory notes and similar instruments for the payment of the money, where the "debt is inseparable from the paper which declares and constitutes it," the situs is the place where it is actually and physically held. *People ex rel. Burke v. Wells*, 184 N. Y. 275, 12 L.R.A. (N.S.) 905, 121 Am. St. Rep. 840, 77 N. E. 19. This case was affirmed by the United States Supreme Court in 208 U. S. 14, 52 L. ed. 370, 28 Sup. Ct. Rep. 193. L.R.A.1915C.

In *State v. Fidelity & D. Co.* 35 Tex. Civ. App. 214, 80 S. W. 544, the court expressed the opinion that municipal bonds and securities, when properly executed, assume a concrete form which gives them a tangible status and situs for taxation.

Notwithstanding these statements and others which might be referred to, it is believed that few, if any, cases can be found in which the result necessarily depended upon the ascription of an independent situs for property taxation to commercial paper; in other words, in which a situs in a particular locality was affirmed solely because of the physical presence of such paper, or denied because of its absence, though in many cases the physical location of the paper has been of more or less importance, in connection with other circumstances, in determining whether the credits represented thereby had a local or "business situs" for taxation apart from the domicile of the creditor.

The cases generally cited in support of the view that such paper, like tangible chattels, has an independent situs of its own determinable by its physical locality, are those holding that certain credits evidenced by notes or other commercial paper have a situs for taxation in a state other than the domicile of the owner. In many of these cases, the fact that the notes or other securities were physically present in the taxing state is mentioned, and not infrequently emphasized, as a relevant fact; and occasionally there are intimations that the paper was regarded as property of a tangible or quasi tangible character. But it will be found in nearly, if not quite, all the cases in which a local situs for property taxation was affirmed, that the credits evidenced by the paper were used in connection with a local business involving the investment and reinvestment of funds; and that it was that fact, and not merely the physical presence of the paper, that gave the credits their local situs; and when the facts necessary to show the use of the credits in such a local business were lacking, it will uniformly be found that local situs for taxation was denied, even though the notes or other securities representing the credits

counts here involved. They were not withdrawn from its constitutional authority, either by reason of the fact that they were payable in consideration of insurance, instead of loans or goods sold, or by the circumstance that the credits were not evidenced by written instruments. They were none the less enforceable credits arising in the local business.

It is also urged that the assessment was excessive. This question was not suitably presented in the state court, for the suit was brought for the cancelation of the entire assessment upon the ground that, as a whole, it was without warrant of law, or, if within the statute, was beyond the power of the legislature to authorize. It is

said that, so far as the assessment was in excess of the actual credits, it was a nullity, as one of property not in existence. The subject of the assessment, however, was a class of credits which was within the taxing power, and the question is one of amount. Proper opportunity was afforded for its correction if it was too great; and if the plaintiff in error had seasonably sought a reduction, availing itself of the remedy that was open to it under the state law, it could have obtained appropriate relief. *Orient Ins. Co. v. Board of Assessors*, 124 La. 872, 50 So. 778. In no aspect of the case can it be said that there was want of due process of law.

The judgment is affirmed.

were physically present. See, for example, cases cited *infra*, III. c, which deny a local situs to credits evidenced by notes or other securities held in a state for collection and remittance of proceeds, and with a view to reinvestment.

It may, perhaps, be said that some, at least, of the cases just referred to, do not necessarily negative the view that such paper may, like tangible chattels, have an independent situs determinable by physical locality, since its location within the state was merely temporary or transient, and not of a character sufficient to give even tangible chattels a situs apart from the owner's domicile. But, however that may be, it is clear that the cases cannot properly be regarded as affirmative authority for the view. And this is still clearer when it is observed that other cases in which it appeared that the credits were used in the state in a local business involving investment or reinvestment of funds, a local situs was assigned to them, notwithstanding that the notes or other paper evidences thereof were not physically present in the taxing state, but were held at the domicile of the owner. See, for example, *Travelers' Ins. Co. v. Board of Assessors*, 122 La. 129, 24 L.R.A. (N.S.) 388, 47 So. 439, *infra*; *Metropolitan L. Ins. Co. v. New Orleans*, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499. Or even though the credits had not been reduced to a concrete form at all. *LIVERPOOL & L. & G. INS. CO. v. BOARD OF ASSESSORS*.

There is an intimation in *Blackstone v. Miller*, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277, that the decision in *State Tax on Foreign-held Bonds*, 15 Wall. 300, 21 L. ed. 179 (the leading case in support of the doctrine that the situs of a debt for property taxation is at the domicile of the creditor, and not of the debtor), has been cut down by later cases to the point that bonds and negotiable instruments, which are more than mere evidences of debts, are not subject to taxation when they are not separated from the possession of the owner; and the opinion in the *Blackstone Case* seems to assume that the decision in the case referred to rested upon the ground

that the debt was inseparable from the paper (bonds) which declared and constituted it. This, however, seems to involve a misapprehension of the ground of that decision. The opinion by Justice Field in *State Tax on Foreign-held Bonds* squarely places the decision, not upon the ground that the situs followed the paper, but upon the ground that the situs was at the creditor's domicile. Indeed, he expressly negatives the idea that the situs of the debts in question was determined by the place where the bonds might be. After stating that public securities consisting of state bonds, and bonds of municipal bodies and circulating notes of banking institutions, have acquired the character of, and are treated as, property in the place where they are found, he said: "But other personal property, consisting of bonds, mortgages, and debts, generally has no situs independent of the domicile of the owner," and added, obviously merely as a matter of caution, "and certainly can have none where the instruments, as in the present case, constituting the evidences of debts, are not separated from the possession of the owner."

Nor do the cases of *Savings & L. Soc. v. Multnomah County*, 169 U. S. 421, 42 L. ed. 803, 18 Sup. Ct. Rep. 392, and *New Orleans v. Stempel*, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110, which Justice Holmes cites in support of his statement that the decision in *State Tax on Foreign-held Bonds* had been cut down to the point indicated by him, support that view. The first case merely held that a nonresident mortgagee's interest under a mortgage securing the debt may be subjected to local taxation; and the second, that credits may be subjected to taxation in a state other than the owner's domicile under circumstances sufficient to give them a business situs.

The question whether commercial paper is, like tangible chattels, susceptible of an independent situs, is perhaps not of as great importance as might at first appear, for the reason that even if it were to be conceded that such paper is to be regarded not merely as evidence of property, but as property itself, and so, like tangible

NEBRASKA SUPREME COURT.

CLAY ROBINSON & COMPANY

v.

DOUGLAS COUNTY et al., Appts.

(88 Neb. 363, 129 N. W. 548.)

Tax — foreign partnership — credits.

1. The credits of a partnership engaged in the live stock commission and money loaning business, that maintains but one office in Nebraska, are subject to taxation in the county, township, precinct, city, and school district where that office is located.

Same — doctrine of movables.

2. The doctrine that movables follow the person will not be applied so as to defeat

Headnotes by Root, J.

chattels, susceptible of an independent situs determined by physical locality, still, even upon the principles applicable to tangible chattels, in order to assign a local situs to the paper apart from the domicile of the owner, there must be some degree of permanency in its location, its presence for a temporary or transient purpose not being sufficient. Considering the class of property to which it belongs, the facts invoked to negative a mere transient or temporary presence would often be sufficient to establish a "business situs" sufficient to subject the credits to taxation independently of the theory of independent situs. Probably in some cases, however,—possibly when the paper is held merely for collection,—the adoption of the theory of an independent situs might give the paper an independent local situs for taxation, although the other circumstances were not sufficient to give it a "business situs." But, as already stated, there is very little except *obiter dicta* in support of the theory, at least as applied to property taxation.

In *Kirtland v. Hotchkiss*, 100 U. S. 491, 25 L. ed. 558, Mr. Justice Harlan observed that a bond, wherever actually held or deposited, is at best only evidence of the debt, not the debt itself; that the bond may be destroyed, but the right—the right to demand the repayment of the money loaned with the stipulated interest—remains. In this case, however, the question was merely whether the bond had a situs for taxation at the domicile of the owner, notwithstanding that it was secured by a mortgage upon real property in another state. The report did not show where the bond itself was physically held, and nothing turned on that point.

In *Wheeler v. Sohmer*, 233 U. S. 434, 58 L. ed. 1030, 34 Sup. Ct. Rep. 607, it was held by a majority of the court that a transfer tax upon promissory notes left by a nonresident testator in a safe deposit box in New York, although such notes were made either by a resident of Chicago, secured by mortgages of Chicago land to Illinois trustees, or by a Virginia corporation, was not contrary to due process of law. L.R.A.1915C.

the taxation of partnership credits evidenced by promissory notes executed by residents of Nebraska and payable in Chicago to a partnership transacting business in this state, where it appears that the payee for many years has maintained and still maintains an office and a place of business in Nebraska in charge of an agent, through whom the loans evidenced by the notes were negotiated, and at which place an extensive commission business is transacted by the partnership.

(January 24, 1911.)

A PPEAL by defendants from a judgment of the District Court for Douglas County vacating an order of the County Board of Equalization which increased the as-

The opinion of Mr. Justice Holmes apparently treats the question in the same way as if the tax were on property rather than on a transfer, and takes the position that negotiable paper has such tangibility as to be of itself a taxable entity apart from the debt it represents. A majority of the court, however, were opposed to that view, at least as applied to a tax upon property. Mr. Justice McKenna, while concurring in the result, expressly repudiated the view that negotiable paper had such tangibility as to be of itself a taxable entity for the purposes of property taxation. Mr. Justice Pitney concurred in his opinion; and the chief justice and Mr. Justice Van Devanter went further and held that the view taken in Justice McKenna's opinion as to property taxation applied even to an inheritance and transfer tax.

In reviewing former decisions of the court as to the situs of debts for taxation, Justice McKenna said: "It was the situs of the debt which determined the legality of the taxation in all of the cases, and united them under the principle expressed in *Metropolitan L. Ins. Co. v. New Orleans*, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499, that the law regards the place of the origin of negotiable paper as its true home, to which it will return to be paid, and its temporary absence can be left out of account. They do not support the broad proposition that to negotiable paper can be ascribed such tangibility and entity as to make it a taxable object of itself in a jurisdiction other than that of the obligation it represents. This broad generality is necessary to sustain the tax in the present case if it can be regarded a direct tax on property, for Illinois, not New York, is the situs of the debts of which the notes taxed are the evidence and of the mortgages which secured them."

That the mere physical presence of evidences of debts, at least of notes, within a jurisdiction, will, apart from other facts tending to give them a local situs, subject them to taxation, is denied in *Buck v. Beach*, 206 U. S. 392, 51 L. ed. 1106, 27 Sup. Ct. Rep. 712, 11 Ann. Cas. 732, re-

assessed valuation of plaintiff's credits. Reversed.

The facts are stated in the opinion.

Messrs. James P. English and Alfred G. Ellick, for appellants:

A foreigner engaged in the money loaning business in this state cannot escape taxation upon his capital by removing temporarily from the state the evidences of the credits in the form of notes and chattel mortgages.

Finch v. York County, 19 Neb. 50, 56 Am. Rep. 741, 26 N. W. 589; Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499; Travelers' Ins. Co. v. Board of Assessors, 122 La. 129, 24 L.R.A.(N.S.) 388, 47 So. 439; National F. Ins. Co. v. Board of Assessors, 121 La.

108, 126 Am. St. Rep. 313, 46 So. 117; General Electric Co. v. Board of Assessors, 121 La. 116, 46 So. 122; New England Mut. L. Ins. Co. v. Board of Assessors, 121 La. 1068, 26 L.R.A.(N.S.) 1120, 47 So. 27.

Messrs. Crofoot & Scott, for appellee:

In the absence of a statute which, in plain terms, fixes a different situs, intangible property, such as a claim for money loaned, has a situs only at the domicile of its owner.

1 Desty, Taxn. 326; Worthington v. Sebastian, 25 Ohio St. 10; People v. Eastman, 25 Cal. 601; Boyd v. Selma, 96 Ala. 144, 16 L.R.A. 729, 11 So. 393; Barber Asphalt Paving Co. v. New Orleans, 41 La. Ann. 1015, 6 So. 794; Babcock v. Board of Equalization, 65 Iowa, 110, 21 N. W. 207; Hayne

versing 164 Ind. 37, 108 Am. St. Rep. 272, 71 N. E. 963. It is intimated, however, that the result might be different as to public securities consisting of state bonds, bonds of municipal bodies, and circulating notes of banking institutions. This intimation is in accordance with a similar intimation in State Tax on Foreign-held Bonds, 15 Wall. 300, 21 L. ed. 179.

And so, in *Re Fair*, 128 Cal. 607, 61 Pac. 184, holding that railroad bonds belonging to a resident, though never physically present in California, but kept in the city of New York or elsewhere in the East, not, however, in the course of a business, were subject to taxation at the domicile of the owner, the court in reply to the argument that the bonds in question had been assimilated to corporeal chattels, and acquired the character of tangible, visible property with reference to taxation, said that it could not accede to the proposition in its generality; that there is a great difference between such bonds and tangible goods; if a domestic animal perishes, or if a ship is lost, that much property has ceased to exist, and the owner is poorer by the value of the same; if, however, the bonds evidencing a debt are destroyed, the debt is not affected; the owner may still collect both principal and interest thereof; not the paper writing, but the obligation to pay expressed by it, is the thing of value, and in the nature of things this can have no actual locality.

In *Hunter v. Board of Super.* 33 Iowa, 376, 11 Am. Rep. 132, the court, in sustaining the power of the state of the owner's residence to tax notes kept in another state, said: "Now, while it is true that promissory notes are personal property, it is not this property in the notes which is required to be assessed, but the 'money, property, or labor due' thereon. The money due on the notes is personal property, distinct from the property in the notes. The notes may be destroyed without impairing or destroying the debt. The notes are but the evidences of the debt, and as such are personal property. They are not, however, the debt, the thing the law L.R.A.1915C.

requires to be assessed for taxation. While they are the best, they are not the only evidence of the debt. If the notes constituted the sole property or right, a destruction of the notes would be a destruction of the property, as in the case of a horse or a wagon. But the notes may be destroyed and the right still subsist unimpaired: So, also, the right may be perfect without the existence of notes. It is the 'money, property, or labor due on contract,' that constitutes the property the law requires to be assessed, and it makes no difference whether the contract be in writing or rests in parol. The 'credit' or the debt due is the property to be taxed, and not the evidence thereof, although such evidence, if in writing, may be personal property. The property in the evidence of the debt is not taxable, and hence, whether the 'credit' or 'debt due' was or was not subject to taxation at the time cannot be determined alone by the situs of the evidence."

The doctrine that the debt evidenced by a note or secured by a mortgage is the substantial element of the owner's taxable property, that the note or mortgage is merely evidence, and that generally the debt and its evidence have no independent situs of their own, is now so strong in its own credit that it needs no sureties by way of citation of authorities. *Johnson County v. Hewitt*, 76 Kan. 816, 14 L.R.A.(N.S.) 493, 93 Pac. 181.

So, it was said in *Bullock v. Guilford*, 59 Vt. 516, 9 Atl. 360, that "a debt simply can have no locality separate from that of the party to whom it is due. State Tax on Foreign-held Bonds, *supra*. The situs of a debt is not affected by the locality of the security [in this case a promissory note and mortgage]; it is still with the owner." And see to the same effect *Johnson v. Oregon City*, 3 Or. 13.

c. Business situs.

Notwithstanding the general principle stated, *supra*, III. a, to the effect that the situs of credits for the purposes of prop-

v. Delieesseline, 3 M'Cord, L. 374; Davenport v. Mississippi & M. R. Co. 12 Iowa, 539; New Albany v. Meekin, 56 Am. Dec. 523, note; South Nashville Street R. Co. v. Morrow, 87 Tenn. 438, 2 L.R.A. 853, 11 S. W. 355; State Tax on Foreign-held Bonds, 15 Wall. 323, 324, 21 L. ed. 188.

Where a claim for money loaned is evidenced by promissory notes or bonds which are actually within the jurisdiction of the taxing power by being placed with a local representative having full power over the same, a theoretical local situs may exist under the provisions of a statute enacted with that object in view.

Boyd v. Selma, 96 Ala. 144, 16 L.R.A. 729, 11 So. 393; People use of Christian County v. Davis, 112 Ill. 272; Finch v.

York County, 19 Neb. 50, 56 Am. Rep. 741, 26 N. W. 589; People ex rel. Westbrook v. Ogdensburg, 48 N. Y. 390; Walker v. Jack, 31 C. C. A. 462, 60 U. S. App. 124, 88 Fed. 578; Aachen & M. F. Ins. Co. v. Omaha, 72 Neb. 522, 101 N. W. 3; Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499; Bristol v. Washington County, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585.

Root, J., delivered the opinion of the court:

This is an appeal from a judgment of the district court vacating an order made by the board of equalization of Douglas county which increased the assessed valuation of the plaintiff's credits.

erty taxation is at the domicile of the creditor, and its corollary that a situs apart from the creditor's domicile cannot rest alone upon the fact that the debtor is domiciled, or that the evidences of the debt are present, within the taxing state, it is well established that in some circumstances, which may or may not include the facts just referred to, credits may be assigned a situs for property taxation in a state other than the creditor's domicile.

It is impossible to formulate in comprehensive and precise terms a general rule, inclusive and exclusive, which will accurately embody the facts and circumstances necessary to give credits a situs for property taxation apart from the creditor's domicile. There are, however, certain combinations of circumstances upon which such a situs, commonly known as a "business situs," may be predicated. Thus, as stated in the note to Mononogahela River Consol. Coal & Coke Co. v. Board of Assessors, 2 L.R.A.(N.S.) 637, it is within the power of the legislature of a state to assign a local situs for the purposes of property taxation to credits belonging to nonresidents which have been reduced to concrete form, and evidences of which are held within the state in the hands of an agent for investment and reinvestment, or for use in a business conducted within the state (see cases cited in note in 2 L.R.A.(N.S.) 637).

A few variations of the general statement of the rule follow.

In *State Assessors v. Comptoir National d'Escompte*, 191 U. S. 388, 48 L. ed. 232, 24 Sup. Ct. Rep. 109, Mr. Justice Day, referring to earlier cases decided by that court, said: "From these cases it may be taken as the settled law of this court that there is no inhibition in the Federal Constitution against the right of the state to tax property in the shape of credits, where the same are evidenced by notes or obligations held within the state in the hands of an agent for the owner for the purpose of collection or renewal, with a view to new loans and carrying on such transactions as a permanent business." L.R.A.1915C.

In *Goldgart v. People*, 106 Ill. 25, the rule is stated thus: "If the owner is absent, but the credits are in fact here, in the hands of an agent for renewal or collection, with the view of reloading the money by the agent as a permanent business, they have a situs here for the purpose of taxation, and there is jurisdiction over the thing."

An exception to the general rule that the taxable situs of credit is the domicile of the owner arises when the instruments which evidence the right of the owner to receive the indebtedness which constitutes the credit are in the hands of an agent of the owner for the purpose of enabling such agent to transact the business of the owner, in which business the credit constitutes, as it were, the subject-matter or stock in trade of such business. *Matzenbaugh v. People*, 194 Ill. 108, 88 Am. St. Rep. 134, 62 N. E. 546. To the same effect is *Reat v. People*, 201 Ill. 469, 66 N. E. 242.

The rule as to business situs is thus formulated in *Re Jefferson*, 35 Minn. 215, 28 N. W. 256: "A credit, which cannot be regarded as situated in a place merely because the debtor resides there, must usually be considered as having its situs where it is owned,—at the domicile of the creditor. The creditor, however, may give it a business situs elsewhere, as where he places it in the hands of an agent for collection or renewal, with a view to reloading the money and keeping it invested as a permanent business."

It is thus expressed in *Adams v. Colonial & U. S. Mortg. Co.* 82 Miss. 263, 17 L.R.A.(N.S.) 138, 100 Am. St. Rep. 633, 34 So. 482: "Wherever the money of a lender in one state is by the principal intrusted to the control of an agent in another state, for the purpose of being kept in the latter state and loaned out, collected, and reloaned, or habitually kept on deposit for safety merely, as held in *Re Romaine*, 127 N. Y. 80, 12 L.R.A. 408, 27 N. E. 759, so as thus to remain through a course of dealing, so long as to become localized as a part of the whole mass of personal property in the latter state, such money ac-

The facts are that the plaintiff is a partnership composed of five persons, all non-residents of Nebraska. It maintains an office in South Omaha, and transacts business at no other point in the state, but its principal place of business is in Chicago. The plaintiff buys and sells live stock upon commission, and loans money to live stock men. The plaintiff's South Omaha office is in charge of a Mr. Reed, and this gentleman is vested with great discretion in making loans, which are always evidenced by promissory notes payable at the plaintiff's Chicago office. Whenever a loan is negotiated, Reed draws a draft on the plaintiff in Chicago, and deposits it to the partnership credit in a bank in South Omaha where it keeps an account. The draft is

forthwith honored, and a check is drawn upon that bank payable to the borrower. The note and any collateral security given by the borrower are immediately transmitted to Chicago, and there remain until the debt is paid, whereupon they are returned to Reed for the debtor. Notes are not sent to South Omaha for collection, but Reed accepts payments thereon, deposits the collections, and immediately transmits the proceeds to Chicago. Occasionally a payment is applied to satisfy a pending application for a loan. The plaintiff also transacts an extensive live stock commission business in South Omaha. The plaintiff admitted that during the year involved in this inquiry its average capital, loaned as aforesaid to residents of Nebraska, equaled \$25,000, the

quires what is known as a 'business situs' for the purpose of taxation, as well as for certain other purposes not necessary to be dealt with here."

And in *Billingshurst v. Spink County*, 5 S. D. 84, 58 N. W. 272, it is said a non-resident who sends money into this state, and surrenders its possession and control to agents fully authorized to loan, invest, and manage the same, thereby subjects such property to the jurisdiction of this state for the purposes of taxation; and the fiction as to the situs of the property yields to the requirement of justice, and the actual situs is the place where the property is actually situated.

In *Catlin v. Hull*, 21 Vt. 152, the court said: "We think it entirely just and equitable that, if persons residing abroad bring their property and invest it in this state for the purpose of deriving profit from its use and employment here, and thus avail themselves of the benefits and advantages of our laws for the protection of their property, their property should yield its due proportion towards the support of the government which thus protects it."

While the foregoing statements, and other similar statements of the principle that recognizes a "business situs" for credits apart from the creditor's domicile, are sufficiently comprehensive and definite to furnish a specific rule for many cases, they are not exhaustive as to the circumstances which will suffice to create such a "business situs;" nor may they be accepted without qualification so far as they imply that the facts and circumstances which they embody are indispensable conditions of such a situs.

A particular case is apt to present so many facts and circumstances bearing more or less on the question of local situs that it is impossible from a study of the case alone to determine precisely which are regarded as decisive and indispensable, and which merely incidental. Even when the court emphasizes a particular circumstance, as, for example, the presence of the evidences of the debt within the taxing jurisdiction, or the fact that the foreign owner

was represented by an agent in the taxing state, it does not necessarily follow that the absence of such fact or circumstance in another case will require a different result.

Before dealing with the cases in detail, an effort has been made to indicate somewhat generally and abstractly, after a comparative study of the cases, some of the elements that seem to be indispensable to a "business situs," and some which, though very often present in the cases in which such a situs has been affirmed, and not infrequently incorporated in the court's statement of the rule as though they were necessary elements of such situs, appear, when the cases are considered as a whole, not to be indispensable in all cases.

Continuity; isolated transactions.

The term "business situs," frequently employed by the courts to indicate a situs for credits apart from the creditor's domicile, though not very precise or accurate in its import, does suggest an indispensable condition of such a situs, that is, the necessity of something like a general, or more or less continuous, course of business or series of transactions within the state, as distinguished from mere sporadic and isolated transactions (see cases already cited in this subdivision).

In *Metropolitan L. Ins. Co. v. New Orleans*, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499, affirming 115 La. 698, 9 L.R.A. (N.S.) 1240, 116 Am. St. Rep. 179, 39 So. 846, the court said: "We are not dealing here merely with a single credit or a series of separate credits, but with a business."

In *State Assessors v. Comptoir National d'Escompte*, 191 U. S. 388, 48 L. ed. 232, 24 Sup. Ct. Rep. 109, the court emphasized the fact that the business was continuing in its character.

In *Vicksburg v. Armour Packing Co.* — Miss. —, 24 So. 224, the court observed that the question as to what constitutes a business situs was a difficult one, but from the reports on the subject it would seem that a business situs is connected with the idea of more or less permanency of loca-

amount of the assessed valuation in dispute. The plaintiff contends that its domicil is in Chicago, that the situs of its choses in action follows its person to that domicil, and that the board had no power to separate that situs from the plaintiff's ownership so as to establish a situs in Nebraska for the purposes of taxation.

Section 1 of article 9 of the Constitution provides that "the legislature shall provide such revenues as may be needful by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property and franchises, the value to be ascertained in such manner as the legislature shall direct." Section 2, chap. 77, art. 1, Comp. Stat. 1909, declares that "the

tion of the credits, or with a purpose to incorporate them when collected into the mass of property of the state.

In *Bertron v. New Orleans*, 131 La. 73, 59 So. 19, speaking of the case of *Metropolitan L. Ins. Co. v. New Orleans*, supra, the court said that the doctrine has been approved by the Supreme Court of the United States in a number of cases on the ground that the tax was on the business, and not on a single credit or series of separate credits.

While the last statement goes too far if construed to mean that the business, and not the credits, is the subject of the tax,—for in practically all the cases cited in this note the tax was laid upon the credits, or at least upon the net amount of credits, not upon the business as such,—it embodies a very important limitation of the rule in relation to business situs of credits, when construed, as it was doubtless intended to be construed, as emphasizing the necessity that the credits which are the subject of the tax be related to something in the nature of a business, or at least to an agency or course of dealing, of a more or less continuous or permanent character.

Mere custody.

Another limitation of the rule as to "business situs," which naturally follows from the point discussed under the preceding heading, is that the mere presence of the evidences of the credits within a state for safe-keeping, or their mere custody by one acting in a clerical capacity, is insufficient to give them a situs for property taxation apart from the owner's domicil.

Thus, bonds temporarily left in the state for safe-keeping by a nonresident owner are not subject to taxation within the state. *Herron v. Keeran*, 59 Ind. 472, 26 Am. Rep. 87.

To establish a business situs, the element of separation from the domicil of the owner and through permanent attachment to some foreign locality should appear, together with some business use of the property or some power of manag-

term 'personal property' includes every tangible and intangible thing which is the subject of ownership and not real property as defined in § 1 of this act." Section 12 provides: "All property in this state not expressly exempt therefrom shall be subject to taxation," etc. Section 28 commands every resident adult to list for taxation all of his "moneys, credits, bonds, or stocks, shares of stock, . . . and all other personal property," and to likewise list "all moneys and other personal property invested, loaned or otherwise controlled by him as the agent or attorney, or on account of any other person or persons, company, or corporation whatsoever, and all moneys deposited subject to his order, check or draft, and credits due from any person," etc. Sec-

ing, controlling, or dealing with it in a business way. A merely transitory presence in a foreign state or a naked custody for safe-keeping is not enough. *Johnson County v. Hewitt*, 76 Kan. 816, 14 L.R.A. (N.S.) 493, 93 Pac. 181.

It does not necessarily follow that property owned by a nonresident principal, in the possession of a resident agent, is subject to assessment or taxation in the state. Whether it is so or not depends upon how and for what purpose it is in the possession of the agent. When it is attempted to assess property in the possession of a person who is not the real owner of it, but who is merely holding it as agent or bailee or in some fiduciary capacity, the petition or statement should set out in a general way facts showing the liability of the agent or bailee or fiduciary for the tax on the property. *Com. v. Green*, 150 Ky. 339, 150 S. W. 353.

The point that mere local custody of the evidences of the credits is not sufficient to give them a business situs is well illustrated by the history of the following case: In deference to the decisions of the state supreme court, it was held in *Walker v. Jack*, 31 C. C. A. 462, 60 U. S. App. 124, 88 Fed. 576, reversing 79 Fed. 138, that money and credits belonging to a nonresident in the hands of an agent in Ohio for investment were subject to taxation in that state, under a statute providing that all moneys, credits, investments of persons residing in this state shall be subject to taxation, and that every person shall list all money invested, loaned, or otherwise controlled by him as agent. The case was disposed of as if it had arisen on demurrer. Subsequently it was heard on the evidence, and it was then held by the circuit court (96 Fed. 578, affirmed in 40 C. C. A. 689, 100 Fed. 1006), that the property was not subject to taxation, because it did not appear that the agent was in possession and control of it for investment and reinvestment; his connection with the loans being rather in the way of a clerical aid, than as agent in possession and control for investment and reinvestment.

tion 29 provides that personal property, with certain exceptions not applicable to the plaintiff's case, shall be listed and assessed "in the county, precinct, township, city, village, and school district where the owner resides. . . . The capital stock and franchise of corporations and persons . . . shall be listed and taxed . . . where the principal office or place of business of such corporation or person is located within this state. If there be no principal office or place of business in this state, then at the place in this state where any such corporation or person transacts business." Section 44 provides: "The property of banks or bankers, or other companies, and merchants except as hereinafter specifically provided shall be listed and

taxed in the county, township, precinct, city, village and school district where the business is done."

A partnership is an entity distinct and separate from that of its members, and is recognized in law as a person. *Richards v. Leveille*, 44 Neb. 38, 62 N. W. 304; *Campbell v. Farmers' & M. Bank*, 49 Neb. 143, 68 N. W. 344. By establishing an office in South Omaha and by transacting business at that point for many years, the plaintiff acquired a domicile in this state for all practical purposes, became amenable to its laws, and subject to taxation upon at least so much of its property as it employed and controlled within the state. The plaintiff does not contend that its capital invested in Nebraska loans has been taxed in a sister

In *Carmody v. Clayton*, — Tex. Civ. App. —, 154 S. W. 1067, the court was of the opinion that, irrespective of the domicile of the owner, moneys, notes, and securities had a permanent situs for taxation in Texas, because they were kept in a bank vault there and were removed only temporarily and for the purpose of avoiding taxation. It is to be observed in this case, however, that the owner spent much of his time in Texas, and as a matter of fact the court held that he was domiciled there at the time in question, so that it was not really necessary to assign an independent situs to the property in question in order to subject it to taxation.

But it has been held that property belonging to a nonresident in the hands of an agent within the state for investment does not lose its situs for taxation upon the death of the owner and consequent termination of the agency, for the time it remains in the state subject to local administration, although its removal to the domiciliary jurisdiction may have been delayed by an improper appointment of the agent as ancillary executor. *Dorris v. Miller*, 105 Iowa, 564, 75 N. W. 482; *Black Hawk County v. Dorris*, 116 Iowa, 446, 90 N. W. 89.

Mere authority to collect.

The rule seems to be that mere authority to collect debts and remit the proceeds to the nonresident owner is not sufficient to give credits a local situs, where, although the transactions in question are not so isolated or sporadic as to negative a business situs if the authority included the power to reinvest, they yet represent occasional transactions by agents *pro hac vice*, rather than transactions referable to a regularly organized business conducted for a nonresident by an agent in his general employment. As applied to the latter situation, there is authority for the view that lack of power to reinvest without remitting to the foreign owner is not fatal to a local business situs.

Merely leaving notes and mortgages in the state for collection and remission, but L.R.A.1915C.

without any authority on the part of the agent to reinvest the proceeds, is not sufficient to give them a local situs in the state for taxation. *Reat v. People*, 201 Ill. 469, 66 N. E. 242.

Promissory notes and accounts belonging to a nonresident which are in the hands of an attorney within the state for collection and remission of the moneys collected to the owner in the state of his residence are not subject to taxation, under a statute declaring "that all personal property within this state, owned by persons not residing within this state," subject to certain exceptions not pertinent to the case, shall be subject to the taxation. *Herron v. Keeran*, *supra*.

The court said that the statute could not be taken in its broadest sense, that there must be a restriction or limitation of its literal meaning by construction; otherwise bills, notes, and bonds in the possession of a temporary visitor in the state, in fact, those in possession of a traveler passing through it, might be taxable in it; they would be within the state and come within the letter of the statute. But such could not have been the intention of the legislature.

See also *infra*, *Myers v. Seaberger*, 45 Ohio St. 232, 12 N. E. 396.

But see *New Orleans v. Stempel*, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110; *Monongahela River Consol. Coal & Coke Co. v. Board of Assessors*, 115 La. 564, 2 L.R.A.(N.S.) 637, 112 Am. St. Rep. 275, 39 So. 601; *Hall v. Miller*, 102 Tex. 289, 115 S. W. 1168, and *German Trust Co. v. Board of Equalization*, 121 Iowa, 325, 96 N. W. 878, and *infra*, under the heading, "Specific instances."

Domicil of debtor.

As has already been seen, *supra*, III. a, the mere fact that a debtor is domiciled in a particular state is not sufficient of itself to give credits a situs for property taxation there, if the creditor is domiciled elsewhere. However, in many, indeed in most, of the cases in which a local situs apart from

state, so that no equities intervene to deter the application of our revenue laws. The plaintiff engages in an extensive and profitable business within this commonwealth, and asserts the right to escape its just share of the burdens of taxation by a course of business which, however much it might protect a natural person, in our judgment, presents no obstacle in the instant case to the enforcement of the taxing laws of this state. Text writers reason, and courts quite generally hold, that the property of a partnership should be taxed at the place where its business is carried on. *Cooley, Taxn.* 3d ed. 659; 1 *Desty, Taxn.* p. 299; *School Dist. v. Bowman*, 178 Mo. 654, 77 S. W. 880; *Louisville v. Tatum*, 111 Ky. 747, 64 S. W. 836; *Spinney v. Lynn*, 172 Mass. 464, 52 N. E. 523. Since the plaintiff has but one place of business in Nebraska, there is no question of conflicting locations to cloud the issue. Nor does the fact that all of its members reside without the state, and

that its principal place of business is in Chicago, render uncertain the right of the assessor to tax the property in dispute. The plaintiff's person, although intangible, is within the state of Nebraska, and, in so far as the doctrine that movables follow the person of their owner applies, it holds the credits in dispute within this state. We do not presume to say that all of the plaintiff's credits, without regard to the place where they originated or heedless of the state where the capital they represent is invested, should be taxed in Nebraska, but only that these credits forming part of the plaintiff's capital invested in Nebraska should be taxed according to the plain provisions of the Constitution and of the statutes just referred to.

The judgment of the District Court, therefore, is reversed, with directions to reinstate the assessment of the County Board.

the creditor's domicile has been assigned, it appears that the debtors were domiciled in the taxing state. That fact, however, while undoubtedly relevant on the question as to whether there has been such a localization of the business or transactions to which the particular credits pertain as to give them a business situs, is not an indispensable condition of such localization. *147 Ind. 586*, 37 L.R.A. 384, 62 Am. St. Rep. 436, 45 N. E. 647, 47 N. E. 8; *Buck v. Beach*, 164 Ind. 37, 108 Am. St. Rep. 272, 71 N. E. 963; *Marshall-Wells Hardware Co. v. Multnomah County*, 58 Or. 469, 115 Pac. 150. The decision in *Buck v. Beach*, supra, was reversed by the United States Supreme Court (206 U. S. 392, 51 L. ed. 1106, 27 Sup. Ct. Rep. 712, 11 Ann. Cas. 732), but, as pointed out in the note in 14 L.R.A.(N.S.) 493, the reversal was not upon the ground that the debtors were not domiciled within the taxing state.

Necessity of presence of evidences of debt.

The question whether bonds and negotiable instruments are, like tangible chattels, susceptible of an independent situs for property taxation determinable by their locality, has already been discussed (supra, III. b). A different question is presented by the point whether the localization of the business or transactions to which the credits pertain, necessary to create a business situs apart from the creditor's domicile, can be established without the presence in that state of the evidences of the debts. In a majority of the cases in which such a situs has been affirmed, the credits involved had been reduced to a concrete form, and the evidences thereof were physically within the taxing state; and it is apparent from the cases previously cited in this subdivision that such facts are frequently embodied in the general statements of the L.R.A.1915C.

rule in relation to "business situs," and sometimes emphasized by the courts as though they were necessary and indispensable conditions of such a situs.

So, in *People use of Christian County v. Davis*, 112 Ill. 272, it was said that before a nonresident owner can be taxed in Illinois it must be shown that his credits are actually at the place where they are assessed; it is not enough to show merely that an indebtedness to him evidenced by a promissory note which may be in his hands was negotiated through an agent at that place. In order to subject the credits to taxation, they must be under the control of an agent or attorney residing in the state, and such control must be an actual control in the state.

And in *Liverpool & L. & G. Ins. Co. v. Board of Assessors*, 51 La. Ann. 1028, 45 L.R.A. 524, 72 Am. St. Rep. 483, 25 So. 970, it was held that a debt due a nonresident still in nonconcrete form has its situs at the domicile of the creditor, and not at the domicile of the debtor. But this case, so far as it implies that a debt not reduced to a concrete form cannot have a business situs apart from the owner's domicile, seems to have been overruled by later cases in the state. See especially *General Electric Co. v. Board of Assessors*, 121 La. 116, 46 So. 122.

The principle *Mobilis sequuntur personam* in matters of taxation does not cover movable property in concrete form, such as bills or notes and other paper taken in course of business, used here and collected here. *Monongahela River Consol. Coal & Coke Co. v. Board of Assessors*, 115 La. 564, 2 L.R.A.(N.S.) 637, 112 Am. St. Rep. 275, 39 So. 601.

So, in *Walker v. Jack*, 31 C. C. A. 462, 60 U. S. App. 124, 88 Fed. 576, reversing 79 Fed. 138, the court said that the circumstance that the agent has in his pos-

KENTUCKY COURT OF APPEALS.

HILLMAN LAND & IRON COMPANY,
Appt.,
v.

COMMONWEALTH OF KENTUCKY, by
Arthur E. Hopkins, Revenue Agent.

(148 Ky. 331, 146 S. W. 776.)

Tax — mistake in list — effect.

1. The deficiency cannot escape taxation by the fact that a taxpayer in listing his land for taxation by honest mistake states the number of acres too low.

Same — presumption as to valuation.

2. A large tract of land will not be presumed to have been assessed at its full valuation if the acreage stated by the taxpayer's list is only about one half of what the tract contains.

Same — valuation by witness — form of question.

3. A witness to fix the value for taxation of land omitted from the tax list should

session the evidence of the indebtedness is regarded as important.

But that the presence of the evidences of debt within the taxing state, while it may aid other circumstances relied upon to establish the localization necessary to a business situs, and may doubtless under some conditions be the turning point, is not always indispensable to such a situs, is apparent from the following cases and others cited under the heading, "Specific instances," in which a situs has been assigned to credits which had not been reduced to a concrete form, or to credits the evidences of which were not within the taxing state, but were with the owner at his domicile.

Thus, in *LIVERPOOL & L. & G. INS. CO. v. BOARD OF ASSESSORS*, it is held that amounts due to a foreign insurance company by its policy holders in the state, for premiums on which a credit of thirty and sixty days has been extended, may be subjected to taxation in the state, even though the indebtedness is not evidenced by written instruments. In answering the contention that the state of Louisiana had no power to tax the credits in question, because they were not evidenced by written instruments, the court said that the fact that the jurisdiction rests upon considerations which are more fundamental than that notes had been given, or that the credits are evidenced in any particular manner, was clearly brought out in the concluding statement of the opinion in *Metropolitan L. Ins. Co. v. New Orleans*, 205 U. S. 402, 51 L. ed. 856, 27 Sup. Ct. Rep. 499, where the court observed that neither the fiction that personal property follows the domicile of the owner, nor the doctrine that credits evidenced by bonds or notes may have the situs of the latter, can be allowed to obscure the truth.

So, state taxation of credits arising out of loans made in the regular course of

be required to state the fair cash value of the land, estimated at the price it would bring at a fair voluntary sale, where that is the valuation for taxation provided by the Constitution.

Same — money sent into state by non-resident.

4. Money sent by a nonresident into the state to pay debts or meet the expenses of a business under the control of an agent, for which the income from the business is not sufficient, acquires no situs there for purposes of taxation.

Same — adding omitted property — questioning levy.

5. The validity of a tax levy cannot be questioned in a proceeding to add omitted property to the list.

(May 14, 1912.)

APPEAL by defendant from a judgment of the Circuit Court for Lyon County in favor of the Commonwealth in a proceeding to assess for taxes property which

business by the local agent of a foreign insurance company to its policy holders is not forbidden by the 14th Amendment, where the loans were negotiated, the notes signed, security taken, the interest collected, and the debts paid within the state, because the promissory notes which are the evidences of such credit are kept at the home office at all times when not needed in the state. *Metropolitan L. Ins. Co. v. New Orleans*, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499, affirming 115 La. 608, 9 L.R.A.(N.S.) 1240, 116 Am. St. Rep. 179, 39 So. 846.

Loans made by a foreign insurance company to its policy holders, residents of Louisiana, as part of its business done in that state, are taxable there, though evidenced by notes held abroad. *Travelers' Ins. Co. v. Board of Assessors*, 122 La. 129, 24 L.R.A.(N.S.) 388, 47 So. 439. The court conceded in this case that if the money advanced to the policy holder could not be demanded from him, but could only be deducted from the value of the policy, the transaction in question would not amount to a loan, but referred to the provision of the document evidencing the loan, expressly stipulating that the company may demand the repayment of the loan at its maturity, and by reason of that stipulation distinguished the case from *New York L. Ins. Co. v. Board of Assessors*, 158 Fed. 462.

Investments by a nonresident are subject to taxation when made by a resident agent employed to invest and reinvest money, at whose office the loans are made payable, and who retains the mortgages, and to whom the notes taken for the loans are returned from time to time whenever required for the purposes of renewal, collection, or foreclosure of securities, notwithstanding the fact that the notes are sent out of the state to the principal, and

was alleged to have been omitted from the lists. Reversed in part.

The facts are stated in the opinion.

Messrs. N. W. Utley, Berry & Grassham, with C. C. Grassham, for appellant:

Even though the acreage was improperly and incorrectly stated, if the land assessed had no greater fair cash value, estimated at the price it would bring at a fair voluntary sale at the time the law required it to be assessed, than what it was assessed for, then it was all assessed in contemplation of law, and nothing was omitted in contemplation thereof.

12 Enc. Ev. 324; Kenson v. Gage, 34 Tex. Civ. App. 547, 79 S. W. 605; McMickle

v. Rochelle, — Tex. Civ. App. —, 125 S. W. 74.

That which the state taxes is the property of the claimant, not the land nor the acreage.

Eastern Kentucky Coal Lands Corp. v. Com. 127 Ky. 667, 106 S. W. 260, 108 S. W. 1138.

The assessment estops the county from further inquiry into such valuation.

Citizens' Nat. Bank v. Com. 118 Ky. 51, 80 S. W. 479, 81 S. W. 686.

In an action to assess property as omitted property, the state cannot reassess the property because it has been undervalued.

Ibid.; Com. v. American Tobacco Co. 29 Ky. L. Rep. 745, 96 S. W. 466; Com. v.

the agent has no authority to execute satisfaction of mortgages. Bristol v. Washington County, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585.

In General Electric Co. v. Board of Assessors, supra, the court expressly repudiated the idea that the presence of the evidences of the debt within the taxing state is a condition of a business situs.

The impression apparently entertained in some quarters that the presence of evidences of the indebtedness within the taxing state is an indispensable condition of a business situs is probably due in part to the fact that in many cases, especially the earlier cases, the evidences of a debt were within the taxing state, and that fact was naturally embodied in the general statements of the rule; and in part to the rather vague and indefinite notion that bonds and negotiable paper are to be regarded as more than mere evidences of debt, and susceptible, like tangible chattels, of an independent situs (as to this point, see supra, III. b).

Necessity of local agent.

In most of the cases which have affirmed a "business situs," the local business to which the credits pertained had been conducted through a resident agent. Apart from the requirements of the local statutes, however, the existence of such an agent within the state does not seem to be indispensable in all cases. See Buck v. Miller, 147 Ind. 586, 37 L.R.A. 384, 62 Am. St. Rep. 436, 45 N. E. 647, 47 N. E. 8, infra.

But the Mississippi statute providing that every person, resident or nonresident, and the agent of such nonresident, having money loaned at interest in this state, or employed in the purchase or discount of bonds, notes, bills, checks, or other securities for money, or employed in any kind of trade or business, shall be taxable for the same in the county where such person may reside or have a place of business, or be temporarily located at the time of the assessment,—does not apply where the creditor resides beyond the limits of the state, and has no agent in the state, and no place of business, but loans money upon the se-

curity of real property within the state, the application for the loan being transmitted to points beyond the state, and the money being forwarded from without the state. State v. Smith, 68 Miss. 79, 8 So. 294.

In Tazewell County v. Davenport, 40 Ill. 197, the statute purported to tax all real or personal property, including credits of persons residing in the state, "or used or controlled by persons residing in this state," and it was therefore necessary, in order to bring the credits within the statute, to establish the residence of the agent in the state. It was held that under the circumstances he was a resident of the state, within the meaning of the statute, although domiciled in another state.

Specific instances: "business situs" affirmed.

Under the following circumstances, upon principles previously discussed, a situs, commonly known as a "business situs," for property taxation, in a state other than that of the creditor's domicil, has been assigned to—

—notes and mortgages, the owner of which was domiciled in another state, kept within the state by an agent who collected the interest and principal as it became due and deposited the same in a bank in New Orleans to the credit of the owner. So far as the report shows the securities were kept in Louisiana only for the purposes of collection; it does not appear whether the agent had the power to reinvest the fund. New Orleans v. Stempel, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110.

—credits arising out of loans on collateral security, made by the local agent of a foreign corporation, who retained the collateral and as evidence of the indebtedness took the customer's so-called check, which was regarded as an overdraft, upon which the customer was charged interest and which was finally sent to the home office, to which the money when repaid, unless reloaned by the local agent, was remitted by an exchange transaction; the statute declared that all property shall be assessed

J. M. Robinson, N. & Co. 146 Ky. 218, 142 S. W. 406.

The bank balances were mere debts owing by the banks to the appellant, and were therefore choses in action, or intangible property, assessable only in St. Louis, Missouri.

2 Am. & Eng. Enc. Law, 93; Keene v. Collier, 1 Met. (Ky.) 417; Pyle v. Brenne-man, 60 C. C. A. 409, 122 Fed. 787; Pacific Coast Sav. Soc. v. San Francisco, 133 Cal. 14, 65 Pac. 16; Grundy County v. Tennessee Coal, Iron & R. Co. 94 Tenn. 295, 29 S. W. 116; Com. v. Peebles, 134 Ky. 121, 23 L.R.A.(N.S.) 1130, 119 S. W. 774, 20 Ann. Cas. 724; Com. v. West India Oil Ref. Co. 138 Ky. 826, 36 L.R.A.(N.S.) 295,

129 S. W. 301; Com. v. Kentucky Distilleries & Warehouse Co. 143 Ky. 314, 136 S. W. 1032; Ky. Stat. § 4020.

Mr. M. J. Holt, for appellee:

The property of Hillman Land & Iron Company, including deposits in Lyon County banks, has acquired a business situs distinct from the domicile of the owner, and is subject to assessment for taxation in this state.

Com. v. Dun, 126 Ky. 108, 10 L.R.A.(N.S.) 920, 102 S. W. 859; Com. v. West India Oil Ref. Co. 138 Ky. 828, 36 L.R.A.(N.S.) 295, 129 S. W. 301; Blackstone v. Miller, 188 U. S. 204, 47 L. ed. 444, 23 Sup. Ct. Rep. 277; New Orleans v. Stempel, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct.

in proportion to its value, and that property for such purposes shall include "all personal property, . . . all rights, credits, bonds and securities, . . . promissory notes, open accounts and other obligations, all cash, . . . all money loaned at interest, and . . . all movable and immovable, corporeal and incorporeal articles or things of value, owned and held and controlled within the state of Louisiana by any person in any capacity whatsoever," State Assessors v. Comptoir National d'Escompte, 191 U. S. 388, 48 L. ed. 232, 24 Sup. Ct. Rep. 109.

—credits arising out of loans made in the regular course of business by the local agent of a foreign insurance company to its policy holders, the loans being negotiated, the security taken, the interest collected, and the debts paid within the state, although the evidences of such credits are kept at the home office at all times when not needed in the state, Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499, affirming 115 La. 698, 9 L.R.A.(N.S.) 1240, 116 Am. St. Rep. 179, 39 So. 846.

—amounts due a foreign insurance company by its policy holders in the state, for premiums on which credit of thirty and sixty days had been extended, although not evidenced by written instruments, Liverpool & L. & G. Ins. Co. v. BOARD OF ASSESSORS, affirming 122 La. 98, 47 So. 415.

—premiums due a foreign insurance company on open account, though charged to the company's local agents, instead of to the policy holders, Orient Ins. Co. v. Board of Assessors, 221 U. S. 358, 55 L. ed. 769, 31 Sup. Ct. Rep. 554, affirming 124 La. 872, 50 So. 778. See also Metropolitan L. Ins. Co. v. New Orleans, supra, and Bristol v. Washington County, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585, supra, "Necessity of presence of evidences of debt."

—notes and accounts belonging to a foreign corporation which had a place of business in the state, the notes being forwarded to the principal office and paid either there or through the Georgia agency, the amounts collected in Georgia on the L.R.A.1915C.

notes and accounts being immediately sent to the principal office, Armour Packing Co. v. Clark, 124 Ga. 369, 52 S. E. 145; Armour Packing Co. v. Augusta, 118 Ga. 552, 98 Am. St. Rep. 128, 45 S. E. 424.

—notes and securities belonging to a non-resident in the hands of a local agent for the purpose of enabling him successfully and conveniently to continue the prosecution of the business of loaning money, Matzenbaugh v. People, 194 Ill. 108, 88 Am. St. Rep. 134, 62 N. E. 540.

—notes belonging to a nonresident, representing loans made for her by her sister as agent in Indiana, secured by mortgages upon land in that state, the notes and mortgages being retained by the agent in Indiana, the agency having extended over a number of years, and the agent having the power of attorney "to collect, receive, and receipt for all moneys due . . . [to the principal], make and execute all contracts in relation to my property, and especially to sign my name to all papers and documents affecting my business, the agent apparently being accustomed to reloan money collected on previous loans, Hathaway v. Edwards, 42 Ind. App. 22, 85 N. E. 28.

—moneys and securities retained in Indiana in the business of buying and selling property, including bonds, stocks, notes, and mortgages, and in making loans and investments, collecting and reloaning from year to year, Buck v. Miller, 147 Ind. 586, 37 L.R.A. 384, 62 Am. St. Rep. 436, 45 N. E. 647, 47 N. E. 8. It was so held irrespective of the debtor's domicile, and notwithstanding that the local business was conducted by the owner without an agent.

—money under the control and management of an agent in the state, who loaned the same for pecuniary profit in behalf of his principal, a nonresident, Hutchinson v. Board of Equalization, 66 Iowa, 35, 23 N. W. 249. In this case the facts brought the property fairly within the statute, and the question was simply as to the power of the legislature to pass the statute.

—notes and mortgages taken by a trust company and assigned to nonresidents, with a reservation, however, of the right to interest accumulated up to the time of

Rep. 110; Liverpool & L. & G. Ins. Co. v. Board of Assessors, 221 U. S. 354, 357, 55 L. ed. 767, 768, 31 Sup. Ct. Rep. 550; Bristol v. Washington County, 177 U. S. 141, 142, 44 L. ed. 705, 706, 20 Sup. Ct. Rep. 585; Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499; State Assessors v. Comptoir National d'Escompte, 191 U. S. 388, 48 L. ed. 232, 24 Sup. Ct. Rep. 109; Buck v. Beach, 206 U. S. 392, 51 L. ed. 1106, 27 Sup. Ct. Rep. 712, 11 Ann. Cas. 732; People ex rel. Keppler & Schwarzmann v. Parker, 155 N. Y. 661, 49 N. E. 1102; Bluefields Banana Co. v. Board of Assessors, 49 La. Ann. 43, 21 So. 627; Re Houdayer, 150 N. Y. 37, 34 L.R.A. 235, 55 Am. St. Rep.

642, 44 N. E. 718; Gray, Limitations of Taxing Power, 91, 93; Re Phipps, 77 Hun, 325, 28 N. Y. Supp. 330; Dos Passos, Inheritance Tax Law, 182, 183.

Appellant simply failed to list 6,292 acres of land.

National Bank v. Licking Valley Land & Min. Co. 15 Ky. L. Rep. 212, 22 S. W. 881; Lockhard v. Com. 133 Ky. 370, 118 S. W. 331; Ky. Stat. §§ 4020, 4025, 4056, 4058, 4064; Paducah Street R. Co. v. McCracken County, 105 Ky. 472, 49 S. W. 178; Weyerhaeuser v. Minnesota, 176 U. S. 557, 558, 44 L. ed. 586, 587, 20 Sup. Ct. Rep. 485; Adams v. Clarke, 80 Miss. 150, 31 So. 216; Coulter v. Louisville Bridge Co. 114 Ky. 42, 70 S. W. 20.

the sale, the company to retain the possession of the securities and look after the insurance of property covered by the mortgages, and in case of sale of any of the mortgaged lands for delinquent taxes bid them in for the protection of the security, even though it did not appear that the trust company had power to reloan or re-invest the moneys collected on the securities. The statute required any person acting as the agent of another, and having in his "possession or under his control or management, any money, notes, creditors or personal property belonging to such other person, with a view to investing or loaning or in any other manner using or holding the same, for pecuniary profit for himself or the owner, shall be required to list the same." German Trust Co. v. Board of Equalization, 121 Iowa, 325, 96 N. W. 878. This case was followed on a very similar state of facts in Heinz v. Board of Equalization, 121 Iowa, 445, 96 N. W. 967.

—notes, mortgages, and bonds owned by a nonresident, but in the hands of a resident fiduciary or agent for the purpose of controlling, managing, and investing, Higgins v. Com. 126 Ky. 211, 103 S. W. 306. The rule rests upon the ground that the property in the hands of such fiduciary enjoys the protection of the laws of the place where he resides, and he is enabled, through and under them, to protect the property in his care, and such securities should bear their just proportion of the burden of government.

—accounts receivable representing business in territory tributary to branch offices maintained in several different states by a corporation engaged in the manufacture and sale of agricultural implements, distinct records of the accounts receivable for the territory tributary to the respective offices being kept there, and the sums raised from sales being deposited in local banks. Com. v. B. F. Avery & Sons, — Ky. —, 174 S. W. 518. As a matter of fact the decision in this case was that the accounts and deposits pertaining to the branch offices in the different states had no situs for taxation in Kentucky, where the corporation was domiciled; but it rested L.R.A.1915C.

upon the principle discussed in the note to Com. v. West India Oil Ref. Co. 36 L.R.A. (N.S.) 295, that a situs for taxation in another state negatives a situs for taxation at the domicile, and so the immunity from taxation at the domicile in this instance was predicated upon the existence of a situs for taxation in the other states.

—money in the bank and unpaid claims against customers incident to a business in charge of a nonresident's agent, although the custom was to forward surplus accumulation to the principal monthly, Com. v. Dun, 10 L.R.A.(N.S.) 920. The statute purported to subject to taxation all real and personal estate within the state. See also Carmody v. Clayton, — Tex. Civ. App. —, 154 S. W. 1067, supra, "Mere custody."

—the average amount of debts due on open account to a foreign insurance company, from an agent on account of premiums on business done within the state, National F. Ins. Co. v. Board of Assessors, 121 La. 108, 126 Am. St. Rep. 313, 46 So. 117. The court said: "There can be no doubt that a state has not the right to tax property not situated within its borders, and for the nonce it may be conceded that isolated or transitory credits may be taxed only at the residence of the creditor; but between an assessment of an isolated or transitory credit and an assessment of the average credits standing on open account in a permanent business, and representing that much capital permanently invested in the business, the later jurisprudence has established a distinction."

—notes given by resident borrowers of a foreign insurance company for loans which expressly provided that the company might demand repayment at maturity, notwithstanding that the notes were kept at the home office, and the usual custom in case of nonpayment was simply to cancel the policy and deduct the amount of the notes from the surrender value, Travelers' Ins. Co. v. Board of Assessors, 122 La. 129, 24 L.R.A.(N.S.) 388, 47 So. 439. The case of Board of Assessors v. New York L. Ins. Co. 216 U. S. 517, 54 L. ed. 597, 30 Sup. Ct. Rep. 385, was distinguished upon the ground that in that case there was no

Carroll, J., delivered the opinion of the court:

This was a proceeding instituted by a revenue agent for the purpose of having assessed for the years 1905-1909, as omitted property, 6,292 acres of land owned by the appellant company, a foreign corporation, and situated in Lyon county, and for the purpose of having assessed for the same years, as omitted property, money on deposit to the credit of the appellant company in banks located in Lyon county. Upon hearing the case, the circuit court ordered to be assessed for the years mentioned, as omitted property, the land as well as the deposits in banks. From the

judgment of the circuit court, this appeal is prosecuted.

Taking up first the question of the assessment of the land, it appears from the record that the appellant company in 1901 purchased a large body of land situated in Lyon and adjoining counties. The deed to the appellant company for this land does not describe the number of acres in the tract, but refers to other deeds for a description of the property conveyed. It is not, however, denied that during each of the years mentioned the company owned in Lyon county 13,292 acres of this land, and it is admitted that it only assessed during these years 7,000 acres of land in that county. Conceding these facts, it re-

provision that the repayment might be enforced at maturity.

—credits belonging to a foreign insurance company which had a local agent to whom applications were made, and who issued policies which were paid for in cash or upon monthly bills rendered by the local office, *Standard Marine Ins. Co. v. Board of Assessors*, 123 La. 717, 29 L.R.A. (N.S.) 59, 49 So. 433. The contention in that case seems to have been that they were not taxable credits at all, or that the assessment was made on a wrong basis, rather than that they had no local situs.

—non-negotiable notes taken by an agent of a foreign corporation in the course of a continuing business in Louisiana, and kept by him until maturity, when they were either taken up by payments in money by the debtors or through exhaustion of the collateral pledged therefore the money so received being reinvested in other loans, *Comptoir National d'Escompte v. Board of Assessors*, 52 La. Ann. 1319, 27 So. 801. In reply to the claim that the foreign corporation never sent its own money into the state for loaning, but that the moneys loaned were obtained through foreign drafts or bills of exchange, the court said that the particular manner or instrumentality by which the money used by the corporation in the course of its continuing business in Louisiana was received was a matter of no moment or significance in the consideration of the question.

—credits represented by ducbills payable on demand, received by a local agent upon selling coal for a corporation and retained by him within the state until they were collected, which was sometimes three or four weeks after their issuance, the proceeds being deposited in bank and forwarded through the bank to the home company, *Monongahela River Consol. Coal & Coke Co. v. Board of Assessors*, 115 La. 564, 2 L.R.A. (N.S.) 637, 112 Am. St. Rep. 275, 39 So. 601.

—the average amount of open accounts due a foreign corporation by reason of credits extended in connection with its business in Louisiana, *General Electric Co. v. Board of Assessors*, 121 La. 116, 46 So. L.R.A.1915C.

122. While it appeared in this case that the company had a local agent in Louisiana, credit sales were made only to customers designated by the home office in another state, it being no part of the agent's function to receive payments, but if payments were tendered him he received them, but at once transmitted the money. If payment was by check, he transmitted the same check that was given him, even though on a local bank. This decision was reaffirmed in *Liverpool & L. & G. Ins. Co. v. Board of Assessors*, 122 La. 98, 47 So. 415, affirmed in *LIVERPOOL & L. & G. Ins. Co. v. BOARD OF ASSESSORS*. But see *Liverpool & L. & G. Ins. Co. v. Board of Assessors*, 51 La. Ann. 1023, 45 L.R.A. 524, 72 Am. St. Rep. 483, 25 So. 970, *supra*, "Necessity of presence of evidences of debt."

—average capital employed by a copartnership composed of residents of New York carrying on a brokerage business in New Orleans through a resident agent, all moneys and credits arising from the business being valued for the purpose of arriving at the amount of capital actually employed therein. The circumstance that all moneys received by the agent were forthwith remitted to the owners in New York did not affect the amount of the capital in one form or another actually employed in the conduct of the business in Louisiana, *Bertron v. New Orleans*, 131 La. 73, 59 So. 19.

—bonds and notes belonging to a non-resident secured by mortgages on land in Minnesota, the investments having been made through an agent residing in that state, who had authority to collect and reloan the money, *Re Jefferson*, 35 Minn. 215, 28 N. W. 256.

—credits belonging to a foreign corporation extensively engaged in making loans within the state at the time it became insolvent and went into liquidation, and held at the time of assessment by agents appointed with the approval of the foreign court, who had power to collect the company's obligations sell its real estate, protect its foreclosures, but no power to make any new loans save for the protection of investments already made, *State v. London*

sists the effort of the commonwealth to have assessed as omitted property the 6,292 acres of land, upon the ground that its agent in Lyon county did not know the number of acres of land it owned in Lyon county, and that the value at which it assessed the land—believing that it contained 7,000 acres—was a fair value, although there may have been in the tract assessed 13,292 acres in place of 7,000 acres; the argument being that, if the amount at which it assessed the land was the fair assessable value of all the land it owned in Lyon county, it is not a matter of material importance whether it described accurately or not the number of acres in the tract assessed. On the other hand, it is the contention of the commonwealth that

the company knew that it owned the number of acres it now admits it did own, and that it purposely omitted from assessment the excess over 7,000 acres now sought to be assessed.

The resident agent of the appellant, who gave in the land for assessment, testifies that he did not know how many acres of land was contained in the body, and that he assessed it at 7,000 acres, believing that this was a fair estimate of the number of acres, and that there was no intention upon his part, or on the part of the company, to purposely omit from assessment any land owned by it. Of course, the resident agent in assessing the land acted on behalf of his principal, the company, and, although he may not have known how many acres the

& N. W. American Mortg. Co. 80 Minn. 277, 83 N. W. 339.

—credits of a foreign corporation doing business within the state, represented by contracts for the sale of land in Minnesota and other states, *State v. Northern P. R. Co.* 95 Minn. 43, 103 N. W. 731.

—notes and mortgages belonging to a nonresident, placed in the hands of an agent in the state for the purpose of collecting and reloaning the money, using and controlling it, without any special directions from his principal, *Finch v. York County*, 19 Neb. 50, 56 Am. Rep. 741, 26 N. W. 589.

—partnership credits evidenced by promissory notes executed by residents of Nebraska and payable in Chicago, to a partnership transacting business in Nebraska, it appearing that the payee for many years had maintained and still maintained an office and a place of business in Nebraska in charge of an agent, through whom the loans evidenced by the notes were negotiated, and at which place an extensive commission business was transacted by the partnership, *ROBINSON v. DOUGLAS COUNTY*.

—deposits in New York banks to the credit of a foreign corporation doing business in New York, representing the proceeds of sales of liquor in original packages, and kept for the payment of the expenses of the New York office, and duties on goods subsequently to be imported or sold, *People ex rel. Burke v. Wells*, 184 N. Y. 275, 12 L.R.A.(N.S.) 905, 121 Am. St. Rep. 840, 77 N. E. 19. In this case, however, the tax purported to be laid upon "capital" invested in the state, and not upon specific items of property and so, as indicated at the beginning of the note, the case is not strictly within its scope.

—covenants for the purchase money on land contracts owned by a nonresident, kept by an agent within the state who had power to sell the land and execute covenants for title and collect the money, *Redmond v. Rutherford*, 87 N. C. 122.

—choses in action, book accounts, promissory notes, and the like, of foreign corporations, kept in the state and arising

out of the corporate business transacted there, under a statute providing that the officers of every joint stock company, whether incorporated by any law of the state or not, shall list for taxation all the personal property, which shall be held to include credits of such company or corporation within the state, *Hubbard v. Brush*, 61 Ohio St. 252, 55 N. E. 829. In this case the corporation, though organized in West Virginia, had its principal office in Ohio and all its business was transacted there, and presumably, as the court said, choses in action, whether consisting of promissory notes, book accounts, or other evidences of indebtedness, were kept at its office in the state. It was so held notwithstanding the concession that doubtless the legal situs of the intangible property for most purposes was that of the residence of the corporation, which in law is within the state by whose authority it was created.

—accounts arising from a branch business conducted by a nonresident concern in Oregon, the only evidence concerning them being in the hands of the local manager, and being collectable by him, whether the debtors reside in or out of the state, *Marshall Wells Hardware Co. v. Multnomah County*, 58 Or. 469, 115 Pac. 150.

—money, notes, and mortgages belonging to a nonresident, but in the hands of resident agents engaged in a general banking business on their own account, and in loaning and collecting money of the nonresident, *Billinghurst v. Spink County*, 5 S. D. 84, 58 N. W. 272. The statute purported to cover all credits, whether money, property, or labor, due from solvent debtors on contracts or in judgment.

—notes owned by a nonresident, representing the proceeds of sales of real property in Texas by nonresidents through local agents in that state, who held the notes there for collection, and, when collected, deposited the proceeds in a local bank to the credit of the nonresidents, who from time to time withdrew the same, *Hall v. Miller*, 102 Tex. 289, 115 S. W. 1168. The court said that the actual, physical location or

tract contained, it is hardly probable that the company did not know, approximately at least, the number of acres it owned in Lyon county. The discrepancy in the number of acres assessed and the number of acres actually owned is too large to be entirely accounted for upon the theory of inadvertence or mistake. So far, however, as this proceeding is concerned, it is not important why this large acreage of land was omitted from assessment. If it was liable to assessment, the fact that it was omitted by mistake or inadvertence would not excuse the company from now paying taxes upon it; and if it was intentionally omitted, the situation would be the same. If the taxpayer, believing in good faith that he is the owner of only 500 acres of land,

assesses that number of acres, when in fact he owns 550 acres, of course 50 acres have been omitted from taxation; and so if he knows he has 550 acres, and intentionally assesses only 500 acres, 50 acres have been omitted. In either event, it is an omission, and the good faith or bad faith of the taxpayer does not affect the question of the assessability of the omitted acreage.

Section 4056 of the Kentucky Statutes provides in part that "persons listing their estates with the assessor shall state separately the tracts of land, the number of acres in each tract [the price per acre], and the improvements thereon, the name of the nearest resident thereto, and where situated, giving election precinct in which

situs of the notes was in Texas, and that there was no fact absent from the case that was present in the case of *New Orleans v. Stempel*, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110, except the authority of the agents to reinvest or lend the money when collected; and that that fact was not necessary to establish a definite situs, place, or location of the notes, but would be evidence tending to establish the permanency of that situs, if there was a doubt about it. The court added that in the case at bar there was no pretense that the notes were to be removed from the state before payment, but they were left there for the purpose of being enforced, and had the full benefit and protection of the laws of the state in every sense that property of that kind can be protected. The court added that the presence of the notes in Texas was the dominant factor in the case.

—notes owned by nonresidents representing the purchase price of pianos sold by a foreign corporation in Texas, where the corporation had a branch store, the pianos being sometimes taken from the branch store and sometimes shipped directly from outside the state; the notes, which were secured by chattel mortgages on the pianos, were payable at different points in Texas; from the proceeds of the notes sufficient sums were retained at the branch house to pay all expenses thereof, the balance being sent to the home office; the notes were kept for collection at the branch office in Texas, *Jesse French Piano & Organ Co. v. Dallas*, — Tex. Civ. App. —, 61 S. W. 942.

—notes and choses in action against residents of Vermont payable to a nonresident, in the hands of a local agent who had power to collect them and reloan the proceeds as should be most beneficial to the owner; the notes in question having originally belonged to the parents of the owner, and never having been removed from the state, *Catlin v. Hull*, 21 Vt. 152. In this case the phrase, "held in trust," in the statute defining subjects of taxation, was construed to include and cover property owned by one person and in possession and

control of another, although the legal title was not in the latter so as to create technically a trust, especially as the statute, in describing the person by whom the property may be held in trust, uses not only the term "trustee," but also the term "agent."

—bonds deposited by a foreign insurance company with the state as required by law, as a condition of doing business and as security for claims, *Scottish Union & Nat. Ins. Co. v. Bowland*, 196 U. S. 611, 49 L. ed. 619, 25 Sup. Ct. Rep. 345; *Western Assur. Co. v. Halliday*, 61 C. C. A. 271, 126 Fed. 257, affirming 110 Fed. 259; *People v. Home Ins. Co.* 29 Cal. 533; *British Commercial L. Ins. Co. v. Tax Comrs.* 18 Abb. Pr. 130; *State v. Fidelity & D. Co.* 35 Tex. Civ. App. 214, 80 S. W. 544. But in *Frankfort v. Illinois L. Ins. Co.* 129 Ky. 823, 130 Am. St. Rep. 499, 112 S. W. 924, where a foreign life insurance company purchased the assets of a domestic company, including securities on deposit with the state treasurer for the benefit of policy holders, and the treasurer wrongfully refused to permit the withdrawal of those securities, it was held that they were not subject to local taxation during the time they were so wrongfully withheld against the protest of the foreign corporation.

Contracts for the sale of land in New York in possession of a resident agent for certain trustees, who, with the *cestui que trust*, were nonresidents, were held not to fall within the provision of the New York statute that when any bond, mortgage, note, contract, account, or other demands belonging to a nonresident shall be sent to the state for collection, or shall be deposited in the state for the same purpose, it shall be exempt from taxation, and that nothing contained in the chapter shall be construed to render any agent of such owner liable to be assessed for or taxed for such property. *People ex rel. Young v. Willis*, 133 N. Y. 383, 31 N. E. 225. The decision is upon the ground that the exemption is confined to capital transmitted for investment by the foreign capitalist.

it is situated. . . . " In the schedule the taxpayer must sign and verify in giving in a list of his taxable property. Items 12, 13, 14, and 15 require that he shall state in separate items the number of acres of land owned by him, the value per acre, the nearest resident thereto, the election precinct in which it is situated, and the valuation of each tract with improvements.

It is obvious that the purpose of requiring the taxpayer to give the number of acres of land is to enable the assessor and the board of supervisors, whose duty it is to revise and correct assessments, to know how many acres of land the taxpayer owns, so that they may have the aid of this information in fixing the value at which it should be assessed. Under the statute,

as well as under the prevailing custom, farming land is valued, not by the tract or body, but by the acre, and, although the number of acres is assessed at a lump sum, it is of course easy when the acreage is given to ascertain the price per acre at which it is assessed. The taxpayer is presumed to know the number of acres that he owns, and this information the assessor and the assessing authorities generally obtain from his sworn statement. It is true they could, in nearly every instance, by an examination of the records, learn the number of acres of land owned by each taxpayer; but the almost universal rule is to accept the statement of the taxpayer as to the number of acres of land owned by him. The assessing officers seldom know the num-

—"business situs" denied.

A situs for property taxation apart from the creditor's domicile has been denied under the following circumstances:

—where loans were made by a foreign life insurance company to its policy holders, which, though represented by notes, were in fact charged against the reserved value of the borrower's policy, under an agreement for the extinguishment of the debt by deducting the amount of the loans, with interest, from the amount of any claims under the policies, *Board of Assessors v. New York L. Ins. Co.* 216 U. S. 517, 54 L. ed. 597, 30 Sup. Ct. Rep. 385, affirming 158 Fed. 462. The decision, however, was not upon the ground of lack of situs, but upon the ground that the so-called liability of the policy holders never existed as a personal liability, that it never was a debt, but merely a deduction from the sum that the insurance company ultimately must pay. This decision was followed in *Fidelity Mut. L. Ins. Co. v. Fitzpatrick*, 125 La. 976, 135 Am. St. Rep. 359, 52 So. 118.

—where notes and mortgages owned by a nonresident were in possession of a person in the state rather in the way of clerical aid than as agent in possession and control for investment and reinvestment, *Jack v. Walker*, 96 Fed. 578, affirmed in 40 C. C. A. 689, 100 Fed. 1006;

—where a nonresident had an agent in the state to receive applications for loans and transact other business, and came to Illinois at regular intervals, but only temporarily, for the purpose of transacting business with reference to the credits, there being no proof that the notes, mortgages, etc., which evidenced the credits, were actually in Illinois, *Hayward v. Christian County*, 189 Ill. 234, 59 N. E. 601.

—where notes and mortgages were left in the state merely for the convenience of collection without a view to reinvestment, *Reat v. People*, 201 Ill. 469, 66 N. E. 242.

—where the assessment was upon the receipts on business within the state of a foreign casualty company, which may have been absorbed by losses or transmitted to L.R.A.1915C.

the home office of the company in another state before the tax day, *Fidelity & C. Co. v. Cook County*, 264 Ill. 1, 105 N. E. 704. See also *People use of Christian County v. Davis*, 112 Ill. 272, supra, "Necessity of presence of evidences of debt."

—where notes and accounts of a nonresident in the hands of an attorney were within the state simply for collection and remission of proceeds, and bonds were left temporarily in the state for safe-keeping, *Herron v. Keeran*, 59 Ind. 472, 26 Am. Rep. 87.

—where credits resulting from loans by a nonresident, evidenced by promissory notes, were held by him in another state, but secured by mortgages upon real estate of the debtors in Indiana, where the debtors resided, *Sennour v. Ruth*, 140 Ind. 318, 39 N. E. 946. The Indiana statute declared that all property within the jurisdiction of the state not expressly exempted should be subject to taxation; another section of the statute provided that personal property of nonresidents of the state should be assessed to the owner or to the person having control thereof, in the township or city where the same may be, except where such property is in transit to some place within the state.

—where notes owned by a nonresident, payable at bank in Indiana, and mortgages upon real estate in Indiana, representing loans made to residents of Indiana through an attorney in the latter state engaged in the business of loaning money generally, were sent to the owner and kept by him until the loans were due, when they were forwarded to the bank for collection, the proceeds being deposited to his account with the bank, and from time to time drawn upon when new loans were made, the attorney having authority to check on the account for such purposes; in most instances the application for the loan was expressly approved by the nonresident lender before the loan was made, but about 20 per cent of the loans were made by a local attorney without consulting the lender; this, however, was only in case of emergency, and the loans were then made subject to the approval of

ber of acres that a taxpayer owns, but as a rule they do know the value of land per acre in the neighborhood in which he lives; and it is practically altogether on this knowledge of the value per acre that they decide whether or not the value fixed by the taxpayer is correct. So, if the taxpayer owns 500 acres, and assesses it at say \$10 an acre, the assessor and board of supervisors can easily determine whether it is a fair valuation; but if he owns 525 or 550 or 600 acres, and reports 500 acres, the assessor and the board of supervisors will, as a rule, value the land according to the number of acres that he has listed, and the land he has not listed will escape taxation, as these authorities would not take into account in placing a valuation upon the land

listed the land that had been omitted. In view of these facts, it is apparent that the taxpayer should be required to state with reasonable certainty the number of acres of land he owns, as, if he gives in a less number of acres than he owns, the effect as a rule is to mislead or deceive the assessing authorities as to the value at which his land should be assessed.

Nor will the valuation fixed on the number of acres listed be treated as a fair valuation of a larger number of acres, unless there is strong proof to support it, for the simple reason that the presumption is that the acreage not listed was not taken into account in the assessment of the property. It is not to be presumed that a taxpayer who assesses 500 acres of land at \$10 an

the lender, and on the understanding that if the loans were not approved by him the money represented by them should be refunded; the abstracts of title were kept by the attorney until the loans were paid and were then delivered to the borrowers, Theobald v. Clapp, 43 Ind. App. 191, 87 N. E. 100.

—where notes which were given by residents in Missouri and secured by trust deeds of real estate in that state had never been brought into Kansas, but were left for safe-keeping only in a vault in a bank in Missouri; it being held that they had no situs in Missouri for taxation, and therefore did have a situs in Kansas, the creditor's domicile, it being assumed, at least for the sake of the argument, that a situs in Missouri would have negatived a situs in Kansas. *Johnson County v. Hewitt*, 76 Kan. 816, 14 L.R.A. (N.S.) 493, 93 Pac. 181.

—where tax sales certificates issued on sales of real estate in the state for delinquent taxes, to a nonresident of the state, were sometimes kept at his domicile and sometimes at the office of an agent in Kansas, it appearing that the owner was merely an investor, and not a dealer in such property, and did not embark in any form of business enterprise in Kansas, *Mcartney v. Caskey*, 66 Kan. 412, 71 Pac. 832. The court, however, said that the legislature might express a purpose to regard the presence in the state of tax sale certificates belonging to a nonresident as a submission of them to the jurisdiction, and therefore require a contribution upon them to the support of the government, but that no such legislative declaration had been made in Kansas.

—where credits and mortgages representing loans made by a foreign corporation to residents of Kentucky were kept at the company's office in Kentucky, presumably for the purpose of collection when due, *Com. ex rel. Auditor v. Northwestern Mut. L. Ins. Co.* 32 Ky. L. Rep. 790, 107 S. W. 233. It was affirmed in this case that the notes and other evidences of debts were in the hands of a resident agent, and when col-

lected were reloaned in Kentucky. The opinion states, however, that it was not claimed that money was sent to Kentucky, or that the company ever had money in Kentucky, and that the papers were kept in the state presumably for the purpose of collection when due. The court implies that it would be within the legislative power to tax such credits, but that they could not be regarded as "within this state," within the meaning of the statute declaring that all real and personal estate within the state shall be taxable.

—where money was sent by a nonresident into the state to pay debts or meet the expense of business under the control of an agent, for which the income from the business was not sufficient, *HILLMAN LAND & IRON Co. v. Com.* See also *Com. v. Green*, 150 Ky. 339, 150 S. W. 353, *supra*, "Mere custody."

—where a Pennsylvania corporation solicited contracts in Louisiana, completed by acceptance in Pennsylvania, and took notes in part payment which were forwarded to the home office, *International Text-Book Co. v. Fitzpatrick*, 133 La. 102, 62 So. 490. The Louisiana act of 1908, in force when this case was decided, provided that mortgages, notes, and indebtedness, and all evidence of indebtedness, should be taxable only at the situs and domicile of the holder or owner thereof. It was construed, however, to apply to all kinds of indebtedness, and not only to mortgage notes.

—where notes and mortgages belonging to a nonresident were in the hands of an agent in Michigan, who had continuously for a number of years made loans for the principal under a power of attorney, and kept the securities in his possession except when he sent them out of the state in order to avoid taxation, *Baars v. Grand Rapids*, 129 Mich. 572, 89 N. W. 328. This, however, was not on constitutional grounds, but upon the grounds that the authority to tax personal property belonging to a nonresident must be plainly written in the statute.

—where notes and mortgages were temporarily in the hands of an agent, through whom the loans represented thereby were

acre has included in the valuation 600 acres of land. The fair and reasonable presumption is that he has only valued the number of acres that he has assessed. Consequently, when the taxpayer seeks to avoid taxation on omitted acreage as shown by the record or by admission, it is incumbent upon him to establish by convincing evidence that the omitted acreage was taken into consideration by him in fixing a valuation on the acreage that he listed, and that the value fixed was a fair value for the entire body, although it contained a greater number of acres than was specified in the assessment. And this rule should be applied whether the discrepancy in the number of acres returned by the taxpayer and the number owned is great or small.

negotiated for a nonresident, *Howell v. Gordon*, 127 Mich. 517, 86 N. W. 1042.

—where an English corporation having an agency in Tennessee, but no office or place of business in Mississippi, made loans evidenced by notes dated in Mississippi, but payable in Tennessee, secured by mortgages upon land in Mississippi, upon applications forwarded to the Tennessee agency, sometimes by a Mississippi attorney who was furnished with forms by the company for that purpose, and sometimes directly by the applicants, the papers being prepared at the Tennessee agency, and when executed immediately sent there and thence returned to the home office in England, where they remained until the maturity of the debt, *Adams v. Colonial & U. S. Mortg. Co.* 82 Miss. 263, 17 L.R.A.(N.S.) 138, 100 Am. St. Rep. 633, 34 So. 482. It was so held notwithstanding the provision in the trust deeds to the effect that the contract embodying the conveyance, and the notes secured thereby, should be construed according to the law of Mississippi, "where the same is made." The court said in effect that such provision did not localize the debts in Mississippi so as to subject them to taxation there, the contracts having in fact been made in another state. See also *State v. Smith*, 68 Miss. 79, 8 So. 294, *supra*, "Necessity of local agent."

—where credits were due a foreign corporation which had a place of business in the state with a manager to whom it shipped meat to be sold either for cash, or on thirty days' time as cash, according to the custom of merchants in the city; the money, when collected, being remitted daily to the home office of the corporation outside of the state, and none of it being invested within the state, *Vicksburg v. Armour Packing Co.* — Miss. —, 24 So. 224. The court said that, upon the facts of the case, it did not think there was enough of the quality of permanency in the location of the credits to give them a business situs within the state, so as to render them taxable there.

—where mortgage securities were in the hands of an agent of a nonresident, who had power to make collection and trans-

There are few landowners who do not know with reasonable accuracy the number of acres they own. At any rate, when they return for assessment less than they own as shown by the record or by admission, the burden should be on them to show that the discrepancy did not affect the value at which the land owned should have been listed. No injustice or hardship is imposed on the landowner in requiring him to return the number of acres he owns, while, on the other hand, great injustice would be done the state and county and taxing districts if he should be exempted from taxation on omitted acreage on the mere unsupported statement that he did not know how much he owned, or that the value given

mit the same, but no power to make investments or reinvestments, *Myer v. Seaberger*, 45 Ohio St. 232, 12 N. E. 396. The statute required every person to list for taxation "all moneys invested, loaned, or otherwise controlled by him as agent or attorney, or on account of any other person or persons."

So, the state of Indiana cannot, consistently with due process of law, tax debts evidenced by notes given and payable in Ohio by residents of that state, to a resident of New York, for loans made in Ohio on lands there situated, merely because, in the attempt to escape proper taxation in Ohio, such notes, together with mortgages securing them, were sent to an Indiana agent of the payee, there to be held by him until they were needed in Ohio to have payments of interest indorsed, or to be delivered up if the principal was paid. *Buck v. Beach*, 206 U. S. 392, 51 L. ed. 1106, 27 Sup. Ct. Rep. 712, 11 Ann. Cas. 732, reversing 164 Ind. 37, 108 Am. St. Rep. 272, 71 N. E. 963.

The situs of debts for taxation cannot be fixed by a board; it is determined by the facts. *Adams v. Colonial & U. S. Mortg. Co. supra*.

The tangible property of a nonresident is taxable in the state, but until the legislature provides for the taxation of intangible property, and gives it a situs, it is not liable to assessment. *Callahan v. Singer Mfg. Co.* 29 Ky. L. Rep. 123, 92 S. W. 581.

d. Bank deposits.

As shown in *Com. v. West India Oil Ref. Co.* 36 L.R.A.(N.S.) 295, and the note thereto, there is some authority for the view that even intangible personalty which has acquired a situs for taxation in another state loses its situs for taxation at the owner's domicile, and, if that principle is sound, it would seem that it might in some circumstances apply so as to prevent the state of the creditor's domicile from taxing a deposit in a bank in another state. However that may be, it is clear that bank deposits are in general taxable at the domi-

was a fair value for the listed as well as the omitted acreage.

It is suggested that we should lay down some rule permitting a certain per cent of the land owned to be omitted without burdening the taxpayer with the necessity of responding to a proceeding to have the acreage omitted assessed as omitted property. But this cannot in justice, or without ignoring the Constitution, be done. There is much land in the state worth \$100 and \$200 an acre, and manifestly it would be unjust to hold that, unless the discrepancy was say 10 per cent, it should be treated as of no moment. Under such a rule, the owner of valuable land would escape taxation on a material part of his property. But, aside from this, to lay down

such a rule would be to authorize and encourage owners of valuable land to omit the per cent of the acreage allowed, and moreover, would be a palpable violation of the Constitution, which requires that all property shall be assessed. Upon no theory can the exemption of a certain per cent be legally or justly authorized. But when the burden is put upon the taxpayer to show that the value of the land returned included the value of all, whether the discrepancy is great or small, and without regard to the value of the land, no inequality and no injustice will be done. Nor is it at all probable that under this rule the landowner who makes only a trifling mistake will be subjected to annoyance or expense.

In *Com. v. J. M. Robinson, N. & Co.* 146

cil of the owner, although the bank is in another state.

Thus, a general deposit to the credit of a domestic corporation in a bank in another state is subject to taxation at the domicile of the corporation. *Pacific Coast Sav. Soc. v. San Francisco*, 133 Cal. 14, 65 Pac. 16.

So, deposits to the credit of a resident of Florida, with banks in Illinois or with brokers in that state for the purpose of speculation, are subject to taxation in Florida. *Hunt v. Turner*, 54 Fla. 654, 45 So. 509.

The fact that money deposited in Illinois by a resident thereof was the proceeds of a sale of notes and mortgages on land in California, and that upon the sale of such mortgages the owner discounted 2 per cent for six months for payment of taxes in California, the statute of which makes a mortgage an interest in real property and taxable as such, although the holder is a nonresident, does not entitle the deposit to exemption under the Illinois statute providing that the owner of personal property moving into the state from another state between the 1st of April and the 1st of June, shall list the property owned by him on the 1st of April, and that if he has been, and can make it appear that he is, held for the tax of the current year on the property in another state, he shall not be again assessed for the same year. *Cook v. Kane County*, 195 Ill. 36, 62 N. E. 877. Three grounds are given for the decision: First, because the owner did not come within the description of the proviso, because he did not move into the state between the 1st of April and the 1st of June, but was already a resident thereof; second, because the property taxed in California was the mortgage, and the property taxed in Illinois was the deposit, and they were not the same; and third, because the proof of the discount was insufficient to show that the owner had been assessed for taxes in California.

The question whether a bank deposit to the credit of a nonresident is subject to local property taxation is considered in the note to *New England Mut. L. Ins. Co. v. Board of Assessors*, 26 L.R.A.(N.S.) 1120, and it is necessary to add here only that L.R.A.1915C.

the case of *New York L. Ins. Co. v. Board of Assessors*, 158 Fed. 462, cited in that note, denying, in the circumstances there appearing, a local situs to a deposit in a local bank to the credit of a nonresident, has since been affirmed by the United States Supreme Court in 216 U. S. 517, 54 L. ed. 597, 30 Sup. Ct. Rep. 385. The latter court, without passing upon the constitutional possibility of taxing a person outside the jurisdiction of the state for a bank deposit that became his, or came into existence as property, only at the moment of beginning a transit to him, and that thereafter left the state forthwith, held that, in the absence of a state decision so construing its statutes, such effect would not be given to them; and it was accordingly held that the Louisiana tax law would not be construed as taxing bank deposits of a foreign life insurance company made solely for transmission to its home office, and not used or drawn against by anyone in Louisiana. The decision in *Board of Assessors v. New York L. Ins. Co.* 216 U. S. 517, 54 L. ed. 597, 30 Sup. Ct. Rep. 385, was followed by the Louisiana supreme court in *Fidelity Mut. L. Ins. Co. v. Fitzpatrick*, 125 La. 976, 135 Am. St. Rep. 359, 52 So. 118, as to similar loans by a foreign insurance company.

So, the power of the state to tax deposits in a national bank located in the state, made by nonresidents, in the absence of any circumstances other than the location of the bank to give them a local situs for taxation, was denied in the *State v. Clement Nat. Bank*, 84 Vt. 167, 78 Atl. 944, Ann. Cas. 1912D, 22, a case decided since the note in 26 L.R.A.(N.S.) 1120.

e. Mortgage interest.

As shown supra, III. a, "Domicil of creditor," a credit does not lose its situs for taxation in the state in which the creditor is domiciled merely because it is secured by a mortgage upon real property in another state.

And so it has been held that a mortgage owned by a resident of New Jersey upon land in another state, where a tax upon the

Ky. 218, 142 S. W. 406, we ruled that revenue agents could not reassess or re-value property that had been listed at an undervaluation, but that they could only have property assessed that had been omitted from assessment. So that, if the question here was merely an undervaluation of the property, and not an omission, the proceeding by the revenue agent to have it assessed could not be sustained. The question of undervaluation, however, is not presented in this record. The theory upon which counsel for appellant proceeds is that the valuation of \$5.30 an acre, or \$37,100, at which the company listed 7,000 acres of land, was in fact a fair valuation for the entire 13,292 acres owned by it. And to

this phase of the case we will now address ourselves.

We acknowledge the force of the argument of counsel for the appellant that, when the taxpayer has placed a fair valuation on his property, it is not a matter of great importance whether he has described it accurately or not, as the state has not lost anything by the misdescription, and we will now take up this argument to see how the case for the appellant stands. It assessed for each of the years named 7,000 acres of land in Lyon county at a total valuation of \$37,100, or \$5.30 an acre, and now insists that, although it owns 13,292 acres, \$37,100 was a fair valuation for the whole tract during these years. Or, to state it differently, the effect of the

land has been paid within the preceding twelve months, is taxable in New Jersey. State, Darcy, Prosecutrix, v. Darcy, 51 N. J. L. 140, 2 L.R.A. 350, 16 Atl. 160.

As has already been shown (supra, III. a, "Debtor's domicile"), the fact that a debt due a nonresident is secured by a mortgage upon real property in the state does not alone give the credit or debt as such a local situs for property taxation, though, as shown supra, III. c, other circumstances may give it such a situs.

Nor is a real estate mortgage owned and controlled by a nonresident of the state subject to taxation as "property in the state."

Holland v. Silver Bow County, 15 Mont. 460, 27 L.R.A. 797, 39 Pac. 575. The court observed that under the law of Montana a mortgage, for the purposes of taxation, is nothing more than a collateral security, depending upon some outside obligation to secure which it is given, and that the mortgage belongs to the owner of the debt, and passes with the debt to any lawful holder thereof. To the same effect are *People v. Eastman*, 25 Cal. 602, and *Davenport v. Mississippi & M. R. Co.* 12 Iowa, 539.

In the last-mentioned case the court observed that while it was true that the situs of the property mortgaged was within the jurisdiction of the state, the mortgage itself was personal property, a chose in action, attached to the person of the owner. It will be observed that in this case there was no attempt by the legislature to declare the mortgage an interest in real property and taxable as such.

The interest of nonresidents in a mortgage on real property in New Jersey, which ran to nonresidents and to a resident (not jointly but severally), was held in *State, Crispin, Prosecutor, v. Vansyckle*, 49 N. J. L. 388, 8 Atl. 120, not to be taxable against them in New Jersey; the resident's interest, however, being assessable to him according to the value of his interest.

In the absence of special circumstances, neither the bond of a domestic corporation nor a mortgage on real property in Kentucky securing the same, belonging to a L.R.A.1915C.

nonresident, is subject to taxation in Kentucky. *Frankfort v. Fidelity Trust & Safety Vault Co.* 111 Ky. 667, 64 S. W. 470, followed in *Callahan v. Singer Mfg. Co.* 29 Ky. L. Rep. 123, 92 S. W. 881. The court conceded, or at least did not deny, that the legislature might give a situs to mortgages owned by nonresidents as property within the state, but said that until it had undertaken to do so, there was no occasion for the court to depart from the long-recognized rule to tax mortgaged real estate to the mortgagor, and to treat the mortgage itself, when owned and controlled by a nonresident of the state, as personal property, to be taxed like other choses in action at the domicile of the creditor. And see *Adams v. Colonial & U. S. Mortg. Co.* 82 Miss. 263, 17 L.R.A.(N.S.) 139, 100 Am. St. Rep. 633, 34 So. 482, infra.

But, a state may subject a nonresident's interest in a mortgage to taxation as an interest in real property, notwithstanding that by the local law a mortgage does not convey the legal title to the mortgagee, but creates only a lien or encumbrance as security for the mortgage debt, the right of possession, as well as the legal title, remaining in the mortgagor, both before and after condition broken, until foreclosure. *Savings & L. Soc. v. Multnomah County*, 169 U. S. 421, 42 L. ed. 803, 18 Sup. Ct. Rep. 392, affirming 60 Fed. 31. The statute involved in this case expressly declared that the mortgage, together with the debt secured, shall, for the purposes of assessment and taxation, be deemed and treated as land or real property.

A state may tax the mortgagee's interest in land located within its borders, although both mortgagor and mortgagee are nonresidents, especially where the mortgagee is vested with a legal estate in the land. *Allen v. National State Bank*, 92 Md. 509, 52 L.R.A. 760, 84 Am. St. Rep. 517, 48 Atl. 78. The court said that, conceding, for the sake of the argument, that the interest of the mortgagee is in the nature of a chose in action, the general rule that its situs for taxation is the residence of the owner is a mere fiction of law, and yields when-

contention is that its entire body of land should only have been assessed during these years at \$2.65 an acre. If this conclusion should be accepted as sound, and the statement of its agent that he did not know that the body of land contained over 7,000 acres be accepted as true, the appellant would be placed in the attitude of having assessed this 7,000 acres at twice its assessable value during each of these years. To agree that \$37,100, the valuation fixed by it on 7,000 acres, was a fair valuation for 13,292 acres, we would have to believe that it assessed the land it thought it owned in these years at practically double its value.

But, passing this curious situation, if the evidence clearly and convincingly

showed that appellant assessed at its fair value all the land owned by it, the discrepancy between the number of acres given in and the number of acres owned would not warrant the reassessment of the omitted acreage as omitted property, because in this state of case no property would in fact have been omitted or indeed undervalued. But the burden was on appellant to show by clear and convincing evidence that the valuation at which it returned the 7,000 acres was a fair valuation for the 13,292 acres that it owned; and this, the evidence does not do.

The witnesses for the appellant testified that the fair cash value of the land, estimated at the price it would bring at a fair voluntary sale at the assessing period, was not over \$2 an acre; while the witnesses

ever it is necessary for the purposes of justice that the actual situs of a thing should be examined, and whenever the legislative intent is manifest that this legal fiction should not operate. The court observed further, however, that in Maryland it has long been held that a mortgagee takes something more than a mere lien, and that his interest is treated by courts of law as real estate so far as it may be necessary in order to protect the mortgagee, and to give him the full benefit of his security.

The interest of nonresident mortgagees was included in the Maryland statute imposing a tax on the annual interest covenanted to be paid by the mortgagors to the mortgagees or their assigns. *Ibid.*

Mortgages of land in Maryland owned and held by citizens of other states, as well as of Maryland, may rightly be taxed in the counties of Maryland where the land is situated, though the tax be levied upon the interest, and not directly upon the mortgaged debt. This is only another method of taxing the latter, and the rate of taxation is determined by the percentage of interest. *Musgrove v. Baltimore & O. R. Co.* 111 Md. 629, 75 Atl. 245.

A mortgage upon real estate is sufficiently an interest in land to make it taxable in the state where the land is situated, although the mortgage is owned by a nonresident. *Detroit v. Board of Assessors (Detroit v. Rentz)* 91 Mich. 78, 16 L.R.A. 59, 51 N. W. 787. The statute in this case purported to impose a tax upon mortgages as interest in real estate, and the court on this ground distinguished the case from the case of *State Tax on Foreign-held Bonds*, pointing out that the court was there dealing with a statute which attempted to tax credits distinctively as such, and not with a statute imposing a tax upon a mortgage interest in land. The court in the *Rentz* Case said that while it is true that the mortgage is a mere security for the debt, yet it conveys a qualified property in the land; that while it is not an estate which entitles the mortgagee to possession before foreclosure, it is nevertheless an estate or L.R.A.1915C.

interest in land which is fully protected by the registration law.

The court in *Adams v. Colonial & U. S. Mortg. Co.* supra, while holding that under the existing statute the mortgagee's interest could not be taxed as real estate, for the reason that the statute treated loans secured by mortgage, according to the general rule of law, as being taxable at the domicile, declared it to be beyond controversy that the interest of a mortgagee in the land mortgaged, whether it be, as in Mississippi, a mere right to sell the land to pay the debt,—a chose in action,—or whether it be, as held by the United States Supreme Court and many state courts, an actual estate in the land itself, is in either case a sufficient interest therein, in constitutional law, to empower the legislature to tax it, by express enactment, as an estate in land; and therefore the legislature has the undoubted power to pass a law subjecting the interest of every mortgagee in land in the state, though a nonresident of the state, to taxation here, legislatively fixing the situs of that interest in the state for the purposes of taxation by the state which protects the mortgagee, and furnishes him the sole means for enforcing his claim. Chief Justice Whitfield, who wrote the opinion, not only asserted the power of the state in the premises, but strongly urged that such power be exercised by the legislature.

The court in *Mumford v. Sewall*, 11 Or. 67, 50 Am. Rep. 402, 4 Pac. 585, not only upheld the power of the state to declare that a mortgage of real property shall, for the purposes of taxation, be deemed real property, and to assess the mortgage as such to the nonresident owner, but further held that a statute taxing such mortgages previously executed did not involve any impairment of the obligation of contracts.

In *Dundee Mortg. Trust Invest. Co. v. School Dist.* 19 Fed. 359, the court accepted as the law of the case the decision of the state court upholding the power of the state to tax a nonresident mortgagee's interest as an interest in real property; but held that the statute was in violation of the provision of the state Constitution

for the commonwealth said that it was worth from \$6 to \$8 an acre. But as some of the witnesses for the commonwealth were not asked what was the fair cash value of the land estimated at the price it would bring at a fair voluntary sale at the assessing periods, it is urged that no weight should be attached to the evidence of the witnesses who were asked this question. The Constitution and the statute both provide that property shall be assessed at "its fair cash value, estimated at the price it would bring at a fair voluntary sale." This, of course, is the test that should be applied in determining the value of property for the purpose of assessment and taxation; and when it is attempted to show the value of property by witnesses, they should be asked this question. The

fact, however, that the answer to this question furnishes the test of the assessable value of property, does not make inadmissible or incompetent questions that may be asked for the purpose of showing how the witness arrived at this value, or for the purpose of illustrating his knowledge of the value of the land, or the theory upon which he bases his opinion as to its assessable value. For the purpose of getting information that will either discredit or support the statement of the witness upon the test question, he may be asked any other relevant pertinent questions. If, however, we should put aside the evidence of the witnesses for the commonwealth who were not asked the test question, we think there is sufficient evidence in the record,

requiring uniformity and equality in taxation, in that it applied only to mortgages on lands wholly within one county, and exempted mortgages upon land in more than one county.

In *Cleveland, P. & A. R. Co. v. Pennsylvania*, 15 Wall. 300, 21 L. ed. 179, Justice Field declared that where, as in Pennsylvania, a mortgage transfers no title, but creates only a lien upon the property, the right has no locality independently of the party in whom it resides, and this is stated evidently as a constitutional principle; but in this case the legislature had attempted to tax the bonds secured by the mortgage, and had not attempted to tax the mortgage, as an interest in real estate.

f. Shares of corporate stock.

1. Shares owned by resident in foreign corporation.

This note, being concerned only with basic principles of constitutional law and fundamental principles of taxation, does not purport to deal with questions arising from the particular terms of the taxing statutes, as to the extent to which the power to tax shares of stock owned by residents in foreign corporations has been exercised, or as to the scope and effect of exemption provisions in that regard. As to those questions, see note in 58 L.R.A. 578 et seq.

It is well established, both as a principle of constitutional law and as a rule of construction for statutes employing general terms, that shares of stock in foreign corporations have a situs at the domicile of their owner, which subjects them to property taxation there. *Hawley v. Malden*, 232 U. S. 1, 58 L. ed. 477, 34 Sup. Ct. Rep. 201; *State v. Kidd*, 125 Ala. 413, 28 So. 480, overruling on this point *Varner v. Calhoun*, 48 Ala. 178; *Stanford v. San Francisco*, 131 Cal. 34, 63 Pac. 145; *Lockwood v. Western*, 61 Conn. 211, 23 Atl. 9; *Porter v. Rockford*, R. I. & St. L. R. Co. 76 Ill. 561; *Seward v. Rising Sun*, 79 Ind. 351; *Darnell v. State*, 174 L.R.A. 19150.

Ind. 143, 90 N. E. 769; *Holton v. Bangor*, 23 Me. 264; *Great Barrington v. Berkshire County*, 6 Pick. 572; *Graham v. St. Joseph Twp.* 67 Mich. 652, 35 N. W. 808; *Bacon v. State Tax Comrs.* 126 Mich. 22, 60 L.R.A. 321, 86 Am. St. Rep. 524, 85 N. W. 307; *State, Fish, Prosecutor, v. Branim*, 23 N. J. L. 484; *Newark City Bank v. Fourth Ward Assessor*, 30 N. J. L. 13; *Mechanics' & T. Bank v. Bridges*, 30 N. J. L. 112; *Worth v. Ashe County*, 82 N. C. 420, 33 Am. Rep. 692, subsequent appeal in 90 N. C. 409; *Worthington v. Sebastian*, 25 Ohio St. 1; *Bradley v. Bauder*, 36 Ohio St. 28, 38 Am. Rep. 547; *Lee v. Sturges*, 46 Ohio St. 153, 2 L.R.A. 556, 19 N. E. 560; *McKeen v. Northampton County*, 49 Pa. 519, 88 Am. Dec. 515; *Whitesell v. Northampton County*, 49 Pa. 526; *Dyer v. Osborne*, 11 R. I. 321, 23 Am. Rep. 460; *Allen v. Com.* 98 Va. 80, 34 S. E. 981.

The rule, of course, does not apply to shares of stock in national banks, as the authority of the state to tax such shares is derived wholly from the act of Congress (*New York ex rel. Williams v. Weaver*, 100 U. S. 539, 25 L. ed. 705), and Congress has extended the right only to the state in which the bank is located (U. S. Rev. Stat. § 5219, Comp. Stat. 1913, § 9784). Questions in relation to situs of shares of stock in national banks, however, are not within the scope of the present note.

That the taxation of a resident upon shares of stock held by him in foreign corporations which do no business and have no property within the state does not take his property without due process of law has been reaffirmed in the recent case of *Hawley v. Malden*, 232 U. S. 1, 58 L. ed. 477, 34 Sup. Ct. Rep. 201, affirming 204 Mass. 138, 90 N. E. 415, notwithstanding the contention based on *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493, and other cases cited in the note in 36 L.R.A. (N.S.) 295, that a state has no right to tax the property of its citizens when permanently located in another jurisdiction.

In the *Hawley Case* Mr. Justice Hughes

together with the presumption that should be indulged in against appellant, to support the finding of the trial judge that the 6,292 acres should be treated as omitted property, and that the value for purposes of assessment of the land omitted was the same per acre as the value of the land that was assessed. The trial judge fixed the value of the 6,292 acres omitted at \$5.30 per acre, this being the value placed by appellant on the 7,000 acres that it assessed, as shown by its assessment, and we concur in the judgment of the lower court upon this point.

Taking up now the assessment of the deposits in bank, we find a close and difficult question. The evidence upon this branch of the case is substantially this: The appel-

lant company has its home office and principal place of business in St. Louis, Missouri. The land owned by it in Lyon and other counties in this state was thought to be valuable for the minerals it contained, and it was chiefly for the purpose of developing the supposed mineral resources that the land was bought. Previous to 1905, it was discovered that the mineral resources were of little value, and, after the expenditure of a large amount of money in an effort to develop these resources, the scheme was abandoned, and since its abandonment the land has been used chiefly for farming and grazing purposes; but even for these purposes the venture has not been a success. The evidence shows that the expense of the appellant in its business and

said: "Whether, in the case of corporations organized under state laws, a provision by the state of incorporation, fixing the situs of shares for the purpose of taxation by whomever owned, would exclude the taxation of the shares by other states in which their owners reside, is a question which does not arise upon this record, and need not be decided."

Shares of stock in a foreign corporation held by a domestic corporation are taxable as the property of the latter, under the mandate of the Georgia Constitution that "all taxation shall be uniform upon the same class of subjects, and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws," which is carried out in the Georgia statute authorizing a tax on all the taxable property of the state, and requiring taxpayers to return the number of shares of stock in foreign corporations which they own. *Wright v. Louisville & N. R. Co.* 195 U. S. 219, 49 L. ed. 167, 25 Sup. Ct. Rep. 16, reversing 54 C. C. A. 672, 117 Fed. 1007.

The situs of the stock at the domicile of the owner is not destroyed by the fact that the property of the foreign corporation is in another state. *Ibid*; *Dyer v. Osborne*, 11 R. I. 321, 23 Am. Rep. 460; *State v. Travelers' Ins. Co.* 70 Conn. 590, 66 Am. St. Rep. 138, 40 Atl. 465; *Greenleaf v. Morgan County*, 184 Ill. 226, 75 Am. St. Rep. 168, 56 N. E. 295.

Nor by the fact that its capital or property is subject to taxation in another state. *San Francisco v. Fry*, 63 Cal. 470; *Thrall v. Guiney*, 141 Mich. 302, 113 Am. St. Rep. 528, 104 N. W. 646; *Dwight v. Boston*, 12 Allen, 316; *Bradley v. Bauder*, 36 Ohio St. 28, 38 Am. Rep. 547.

Nor by the fact that it is subject to a license fee or franchise tax in the state of its incorporation. *Rhode Island Hospital Trust Co. v. Tax Assessors*, 25 R. I. 355, 55 Atl. 877.

Nor does the fact that the shares of stock themselves are subject to taxation in another state deprive them of a situs for L.R.A.1915C.

taxation at the owner's domicile. *Judy v. Beckwith*, 15 L.R.A.(N.S.) 142, and cases cited in note.

Shares of stock belonging to a resident of Alabama in foreign railroad corporations having no property within the state were held subject to taxation in Alabama in *State v. Kidd*, 125 Ala. 413, 28 So. 480, under a general provision declaring subject to taxation "all other property, real and personal, not otherwise specified," notwithstanding an express exception of railroad companies from the provisions of a statute declaring that every share of any corporation organized under the laws of the state or any other state should be assessed in the county where the corporation has its chief or home office in the state. The court took the view that a reasonable interpretation of that provision confined it to shares in corporations having taxable property in the state, and that the exception was no broader than the class from which it was taken, and so did not apply to shares of stock in foreign corporations having no taxable property within the state.

The case of *Wright v. Southwestern R. Co.* 64 Ga. 783, however, announced as the law of that state that the situs of stock in a foreign railroad corporation whose road was located outside of Georgia was in the state where the road was located, and that therefore the stock was not taxable in Georgia. That case was, however, abrogated as an authority by the act of October 20, 1885, which gave such stock a situs for the purposes of taxation in Georgia. See *Georgia R. & Bkg. Co. v. Wright*, 124 Ga. 590, 53 S. E. 251.

And shares of stock owned by a resident of New York in foreign corporations were held not taxable under the New York statute subjecting to taxation all personal property "within this state." *People ex rel. Trowbridge v. Tax & A. Comrs.* 4 Hun, 595, affirmed without opinion in 62 N. Y. 630; *Peole ex rel. Pacific Mail S. S. Co. v. Tax Comrs.* 5 Hun, 200, affirmed in 64 N. Y. 541. The decisions seem to be upon the ground that shares of stock do not represent distinct property rights or subjects of

farming operations in this state during the years 1905-1909 was more than its income, and that it carried on the business at a loss. It is also shown that all the money received as income from this property was at once forwarded to the home office at St. Louis, and that the money in bank sought to be assessed was sent from the home office in Missouri to the resident agent in this state to be used by him in paying overdue and current expenses, and that a good deal of it was sent shortly before the assessing periods in the years named. It is further shown that no part of this money was sent to this state to be kept here on deposit, or for investment, or to be loaned in any manner whatever. In short, the evidence shows that the money on deposit sought to be as-

sessed was only in the state for the temporary purpose of defraying the current expenses of appellant company in the conduct of its business in this state, and that the income of the business here was not sufficient to carry it on.

Upon this state of facts, was this money a proper subject for taxation? To state the question in another way, if a foreign corporation engaged in business in this state sends money to its resident agent in this state for the sole purpose of defraying the current expenses of its business in this state,—the income from which is not sufficient to meet expenses,—and it is used for this purpose alone, has it a situs in this state for taxation?

The attorney for the commonwealth, in

taxation, as distinguished from the property of the corporation which they represent.

So, in *People ex rel. Edison Electric Light Co. v. Campbell*, 138 N. Y. 543, 20 L.R.A. 453, 34 N. E. 370, holding that stock in companies organized outside the state, taken in consideration of a grant of the right to use patents which constituted the original capital of a domestic corporation, was not "employed within the state" so as to be taxable under the act of 1880, chap. 542, the court observed that those stocks had no situs in New York, and were not taxable there under any system of taxation which had ever existed in the state.

Equality; discrimination; double taxation.

The equal protection of the laws is not denied by a statute providing for the taxation of stock owned by residents in foreign railroad companies, because of its exemption of stock in domestic railroad companies and in others that list substantially all their property for taxation in the state. *Kidd v. Alabama*, 188 U. S. 730, 47 L. ed. 669, 23 Sup. Ct. Rep. 401; *State v. Nelson*, 107 Minn. 319, 119 N. W. 1058.

Taxing shares of foreign corporations when owned by the inhabitants of the state does not deny the owner the equal protection of the laws, because, in the case of domestic corporations, it is the property, and not the shares, which is taxed. *Darnell v. State*, 226 U. S. 390, 57 L. ed. 267, 33 Sup. Ct. Rep. 120, affirming 174 Ind. 143, 90 N. E. 769; *Georgia R. & Bkg. Co. v. Wright*, 124 Ga. 596, 53 S. E. 251, subsequent appeal in 125 Ga. 589, 54 S. E. 52; *Bacon v. State Tax Comrs.* 126 Mich. 22, 60 L.R.A. 321, 86 Am. St. Rep. 524, 85 N. W. 307.

Nor does the taxation of shares in foreign corporations owned by inhabitants of the state, while the shares in domestic corporations are taxable only when the property of the corporation is not exempt, and not taxable to the corporation itself, violate the commerce clause of the Federal Constitution. *Darnell v. State*, supra. L.R.A.1915C.

Nor is such system of taxation in violation of the constitutional requirement that all taxation shall be uniform on the same class of subjects. *Wright v. Louisville & N. R. Co.* 195 U. S. 219, 49 L. ed. 167, 25 Sup. Ct. Rep. 16; *Georgia R. & Bkg. Co. v. Wright*, supra.

In *Wright v. Louisville & N. R. Co.* supra, the court, speaking of the taxation by Georgia of shares owned by residents in a foreign corporation, observed that a tax in another state is no tax for the purposes of the state of Georgia.

And in *State v. Nelson*, supra, the court said that the fact that the corporation paid taxes on its property in the state of its origin was no bar to the taxation of the stock owned by a resident of Minnesota.

2. Shares in domestic corporation owned by nonresidents.

Questions as to shares of stock owned by nonresidents in national banks located within the state are not within the scope of the present note. On that subject, see notes in 45 L.R.A. 743, and 3 L.R.A.(N.S.) 584.

Although, as shown in supra, III. f, 1, it is within the power of a state to tax shares of stock owned by residents in foreign corporations, it seems to be equally well settled that it is within the power of the state in which a corporation is organized to tax the shares of stock owned by nonresidents. Thus, in *Corry v. Baltimore*, 196 U. S. 467, 49 L. ed. 557, 25 Sup. Ct. Rep. 297, although no question was raised as to the power to establish a local situs for the taxation of shares owned by nonresidents in domestic corporations, the court said: "That it was rightly determined that it was within the power of the state to fix, for purposes of taxation, the situs of stock in a domestic corporation, whether held by residents or nonresidents, is so conclusively settled by the prior adjudications of this court that it is not open for discussion."

And in a recent case, *Hawley v. Malden*, 232 U. S. 1, 58 L. ed. 477, 34 Sup. Ct. Rep. 201, the same court declares that the state

support of the proposition that these deposits were proper subjects for assessment and taxation, relies upon the case of *Com. v. Dun*, 126 Ky. 109, 10 L.R.A. (N.S.) 920, 102 S. W. 859. It appears from the opinion in that case that the home office and principal place of business of Dun & Company was in New York, but it had an established agency and office in this state, and had transacted business in this state for many years; that at the assessing periods in 1900-1904, it had on deposit in banks in this state money that was sought to be assessed, as in this case, as omitted property. It is stated in the opinion that "there was due to the Louisville office from subscribers (or persons transacting business with appellee) on each of the above

assessing dates about \$5,000. The income from the Louisville office for each of the years named was about \$40,000, which was deposited in the banks, on which the manager drew checks for all current expenses, and at the end of each month, if there was any substantial balance on deposit, he would remit to the New York office. It is conceded that the money deposited in the banks, and the amounts due at the assessing dates referred to, were omitted from assessment and taxation; but appellee claims that the situs of these deposits and the debts due appellee on the above-named assessing days, for the purpose of taxation, must be deemed and considered to exist in New York, the home of Dun's heirs, devisees, and trustees managing the estate."

in which a corporation is organized may provide in creating it for the taxation in that state of all its shares, whether owned by residents or nonresidents.

And the power of the state in which a corporation is organized to tax shares of stock owned by nonresidents is upheld or recognized in other cases. *Corry v. Baltimore*, 196 U. S. 466, 49 L. ed. 556, 25 Sup. Ct. Rep. 297; *State v. Travelers' Ins. Co.* 70 Conn. 590, 66 Am. St. Rep. 138, 40 Atl. 465; *Whitney v. Ragsdale*, 33 Ind. 107, 5 Am. Rep. 185; *Faxton v. McCosh*, 12 Iowa, 527; *Baltimore v. Baltimore City Pass. R. Co.* 57 Md. 31; *American Coal Co. v. Allegany County*, 59 Md. 186; *South Nashville Street R. Co. v. Morrow*, 87 Tenn. 406, 2 L.R.A. 853, 11 S. W. 348; *St. Albans v. National Car Co.* 57 Vt. 68; *McKennon v. McFall*, 127 Tenn. 393, 155 S. W. 158; *Abingdon Bank v. Washington County*, 88 Va. 293, 13 S. E. 407; *Union Bank v. Richmond*, 94 Va. 310, 26 S. E. 821; *Scandinavian-American Bank v. Pierce County*, 20 Wash. 155, 55 Pac. 40.

There are other cases not cited here, like *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490, 22 L. ed. 189, upholding or assuming the power of the state in which a national bank is located to tax shares therein owned by nonresidents.

Corry v. Baltimore, 196 U. S. 466, 49 L. ed. 556, 25 Sup. Ct. Rep. 297, affirming 96 Md. 310, 103 Am. St. Rep. 364, 53 Atl. 942, not only assumed the power of the state to tax shares of stock in domestic corporations owned by nonresidents, but held that due process of law is not denied a nonresident stockholder in a domestic corporation by the imposition, as a condition of such ownership, of a personal liability for the taxes upon his stock, to be enforced by a personal action brought against him by the corporation to recover the amount of the tax which it is compelled to pay on his behalf; nor is there any violation of due process of law because there is no provision for notice to the nonresident stockholder of the assessments of taxes on his stock, nor opportunity for contest by him as to the correctness of the valuation, the statute being L.R.A.1915C.

construed by the state court as constituting the corporation, in legal effect, the agent of the stockholders to receive notice and represent them in proceedings for the correction of the assessment. This was a suit by a nonresident stockholder to restrain the corporation from complying with the demands of the taxing officers for the payment of the tax assessed against the stock. To the same effect is *St. Albans v. National Car Co.* 57 Vt. 68.

No unconstitutional discrimination against nonresident stockholders of a domestic corporation is made by a statute providing for the assessment of such stock at its market value with no deduction on account of real estate held by the corporation, although the statute provides for such deduction in assessing resident stockholders, since nonresident stockholders pay no local taxes, but simply contribute to so much of the general expense of the state, while the resident stockholders pay no taxes to the state, but only to the municipality in which they reside. *Travelers' Ins. Co. v. Connecticut*, 185 U. S. 364, 46 L. ed. 949, 22 Sup. Ct. Rep. 673, affirming 73 Conn. 255, 57 L.R.A. 481, 47 Atl. 299.

But a Massachusetts statute requiring domestic corporations to reserve from each dividend one fifteenth of that portion thereof due and payable to its stockholders residing out of the commonwealth, and to pay the same as a tax or excise on such estate or commodity, was held to be beyond the power of the legislature, and among other reasons given for the decision was that the statute violated the provision of art. 4, § 2, of the Federal Constitution, which secures to the citizens of each state all the privileges and immunities of citizens of the several states. *Oliver v. Washington Mills*, 11 Allen, 268.

There is some authority for the view that it is beyond the power of the state to give a local situs for property taxation to shares of stock owned by nonresidents in domestic corporations. See, besides the cases subsequently cited herein, the discussion of the subject in note in 58 L.R.A. 580 et seq.

After stating that the money in bank and the debts due by Dun & Company were personal estate subject to taxation under the statute, the opinion proceeds: "This court, however, in construing this statute, has determined that it does not apply to the property of nonresidents when in this state temporarily; that in such a case the situs for the purpose of taxation is at the domicile of the owner. . . . But this court has never held that when a nonresident of this state establishes a business in this state, from which money is derived and other property is accumulated, such property should be relieved from taxation. In our opinion the accumulations from the business of appellee are not temporarily in this state, in the meaning of the decisions referred to. In this case we have a nonresident with an established business, agents residing here who managed it, and an income of over \$40,000 annually." In the Dun Case, the decision that the deposit in bank was subject to taxation was put

upon the ground that the deposit accrued from business carried on by Dun & Company in this state through an established agency in this state. In this case the evidence shows that the money on deposit was not earned or accumulated in this state, but was sent here from another state for the purpose of being checked out to pay debts due by the nonresident. It was not the profit or accumulations of any business done in this state. If this money on deposit was the proceeds of the farming or business operations of the appellant in this state, then this case would be controlled by the Dun Case.

The case of *Bluefields Banana Co. v. Board of Assessors*, 49 La. Ann. 43, 21 So. 627, is also relied on by the commonwealth; but in that case, as in the Dun Case, the money on deposit that was taxed was accumulated from business transacted by the nonresident in New Orleans. As stated in the opinion: "The foreign corporation had an agent here where it received and where

In *Minot v. Philadelphia, W. & B. R. Co.* 18 Wall. 206, 21 L. ed. 888, Justice Field said in effect that it was unnecessary to decide whether shares of stock treated as the property of the owners can be regarded as so far severable from the property to which they relate as to be taxable independently of the latter, since, in any aspect, if, as in the case at bar, the provision for taxation of the shares at the locality of the company be made in its charter, their taxability at such locality is annexed as an incident to the shares, and it does not matter where the domicile of the owner may be.

In *Union Nat. Bank v. Chicago*, 3 Biss. 82, Fed. Cas. No. 14,374, the court, in holding that a law of Illinois assessing shares of stock in a national bank conflicted with the state Constitution, because it directed taxes to be assessed in the county or town where the bank was located without regard to the residence of the owner or the situs of the shares, said that shares of stock are incorporeal personal property, and as such are held incapable of having any situs save at the domicile of the owner.

In *San Francisco v. Mackey*, 22 Fed. 602, the court, without going so far as to deny the constitutional power of the state to tax shares of stock in one of its corporations belonging to a nonresident, none of the property of the corporation being within the state, held that such shares were not taxable under the California statute providing that all property "in the state" shall be taxed. The decision was strongly influenced by the principle that the situs of personal property for taxation is at the domicile of the owner.

In *North Carolina R. Co. v. Alamance*, 91 N. C. 454, the decision of a nonresident holder of shares of stock in a domestic corporation is not subject to taxation in North Carolina, was placed upon fundamental L.R.A.1915C.

constitutional grounds, and was regarded as a logical deduction from the holding in other North Carolina cases that a resident of North Carolina was taxable in respect of shares of stock held in foreign corporations.

In *Union Bank v. State*, 9 Yerg. 480, the court was of the opinion that the state in which a corporation is organized has no power to tax stock owned by a nonresident. The court said: "Bank stock is not a thing in itself capable of being taxed on account of its locality, and any tax imposed upon it must be in the nature of a tax upon income, and of necessity confined to the person of the owner; and if he be a nonresident, he is beyond the jurisdiction of the state, and not subject to her laws."

But see *contra*, *South Nashville Street R. Co. v. Morrow*, 87 Tenn. 406, 2 L.R.A. 853, 11 S. W. 348.

In *Com. v. Chesapeake & O. R. Co.* 27 Gratt. 344, it was said to be well settled by judicial decisions that the stocks or bonds of a corporation of the state, which are owned and held by inhabitants of another state, are not liable to taxation here. The property actually involved, however, was bonds, and the statement is *obiter* so far as stock is concerned.

In *Wright v. Louisville & N. R. Co.* 236 U. S. 687, 59 L. ed. —, 35 Sup. Ct. Rep. 475, the court said that "the railroads, not being domiciled in Georgia, are not taxable there for stocks and bonds of other companies merely appearing to be owned by them." Apparently, however, the corporations by which the stocks and bonds were issued, as well as the corporations appearing to own them, and against which they had been assessed, were foreign corporations.

Assuming the power to tax shares owned by nonresidents in domestic corporations,

it sold fruit and received the price for the same. Part of the proceeds were withheld in the hands of the agents for purposes incidental to the prosecution of its business, and part deposited to the credit of the company subject to the check of its local agent, also for the prosecution of its business here and for such other purposes as the company might direct it to be applied to. The company transacted business in New Orleans precisely as did resident business men and firms. It received all the advantages to be derived from the state and city governments which residents received, and we see no reason why it should not be taxed as claimed in this proceeding, unless there be insuperable legal objections in the way."

In case of *Re Houdayer*, 150 N. Y. 37, 34 L.R.A. 235, 55 Am. St. Rep. 642, 44 N. E. 718, the question before the court was whether an inheritance tax could be imposed by New York on the succession to a deposit in a New York bank to the credit of a nonresident who had died. In hold-

ing that it was subject to the tax, the court in the course of the opinion said: "The decedent brought his money into this state, deposited it in a bank here, and left it here until it should suit his convenience to come back and get it. While the commingling of funds may complicate administration, it does not change the facts as thus stated. If he had deposited in specie, to be returned in specie, there can be no doubt that the money would be property in this state subject to taxation. But, instead, he did as business men generally do,—deposited his money in the usual way, knowing that not the same, but the equivalent, would be returned to him upon demand. While the relation of debtor and creditor technically existed, practically he had his money in the bank and could come and get it when he wanted it. It was an investment in this state, subject to attachment by creditors. If not voluntarily repaid, he could compel payment through the courts of this state. The depositary was a resi-

questions as to the extent to which the power has been exercised, and as to the construction and effect of exemption provisions in the taxing statutes, are not within the scope of this note. As to those questions, see note in 58 L.R.A. 580.

g. Judgments.

In *Kingman County v. Leonard*, 57 Kan. 531, 34 L.R.A. 810, 57 Am. St. Rep. 347, 46 Pac. 960, the court, while declaring that it perceived no valid objection to the power of the legislature to tax all judgments by domestic courts whether owned by citizens of the state or of other states or foreign countries, provided the rate of taxation be the same as that imposed on other forms of property belonging to citizens of the state, held that a judgment rendered by the court of Kansas in favor of a nonresident was not taxable in the county of its rendition, under the general terms of the taxing statute declaring that all property in the state, real and personal, not expressly exempt therefrom, shall be subject to taxation, although judgments are by the express provision of another section of the statute included in the term "personal property." The result was influenced by the fact that the taxing statute does not assign an independent situs to judgments in favor of residents, but taxes them at the residence of the owner. The court observed that if the legislature wishes to change the rule and establish a situs for taxation of all judgments rendered by the courts of the state, it ought to employ language expressive of its purpose to do so.

And so a personal judgment and decree of foreclosure directing the sale of real property in Kansas were held in *Dykes v. Lockwood Mortg. Co.* 2 Kan. App. 217, 43 Pac. 268, affirmed in 57 Kan. 410, 46 Pac. L.R.A.1915C.

711, to have no situs for taxation in Kansas. The court observed in this case that it was unnecessary to determine whether the legislature may provide that, for the purposes of taxation, real estate mortgages and judgments for foreclosure thereon may be treated as an interest in land, as it is held by the courts of Michigan and Oregon, since no such statute had been passed.

Subsequently a statute was passed in Kansas attempting to subject to taxation personal property owned by nonresidents as well as residents, but the statute was held unconstitutional in *Hamilton v. Wilson*, 61 Kan. 511, 48 L.R.A. 238, 59 Pac. 1069, for reasons not affecting the residence or domicile of the owners of the judgment. The question as to the situs of a judgment owned by a nonresident was raised, but the court deemed it unnecessary to enter into a discussion of the question.

In *People v. Eastman*, 25 Cal. 603, it is declared generally that the situs for taxation of a judgment foreclosing a mortgage is at the domicile of the judgment creditor, and the judgment is not taxable in the county where it was recovered and where the mortgaged land is situated. This, however, was simply a question as to situs as between different counties in the same state, and is therefore not within the scope of the note.

In *Meyer v. Pleasant*, 41 La. Ann. 645, 6 So. 253, it is declared generally that a judgment is merely the highest form of evidence of a debt, and is within the principle that the situs of a debt is at the domicile of the creditor, and not at the domicile of the debtor, though recovered at the latter's domicile. The creditor in this case, however, was domiciled in the state, and so the case is not within the scope of the note.

G. H. P.

dent corporation, and the receiving and retaining of the money were corporate acts in this state. . . . Conceding that it was intangible, still it was property in this state for all practical purposes, and in every reasonable sense, within the meaning of the transfer tax act."

In the Dun Case; Bluefields Banana Co. Case; Houdayer Case; Blackstone v. Miller, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277; New Orleans v. Stempel, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110; Buck v. Beach, 206 U. S. 392, 51 L. ed. 1106, 27 Sup. Ct. Rep. 712, 11 Ann. Cas. 732; Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499; State Assessors v. Comptoir National d'Escompte, 191 U. S. 388, 48 L. ed. 232, 24 Sup. Ct. Rep. 109; Liverpool & L. & G. Ins. Co. v. Board of Assessors, 221 U. S. 346, 55 L. ed. 762, 31 Sup. Ct. Rep. 550; Com. v. Peebles, 134 Ky. 121, 23 L.R.A.(N.S.) 1130, 119 S. W. 774, 20 Ann. Cas. 724; Com. v. West India Oil Ref. Co. 138 Ky. 828, 36 L.R.A.(N.S.) 295, 129 S. W. 301; and in many other cases decided by this and other courts,—it has been firmly settled that money or intangible property of a nonresident is subject to taxation in the state in which it has an actual situs for business purposes, as when it is in the custody of an agent or fiduciary within the state who manages and controls it by lending it out, investing it, collecting the interest, and the like, or when it is the accumulation or income from the business done in the state, or when it has been placed permanently on deposit. But the principle applied in this class of cases does not reach the question we have before us. If the money sought to be taxed had been sent to this state to remain here on deposit, or was on deposit for permanent purposes, or if it was the accumulation or income derived from the business done in this state, or if it was sent here for the purpose of being invested, there would be no difficulty in holding that it was subject to taxation. But the uncontradicted evidence shows that no one of these conditions existed with respect to this money. It was the custom and practice of the resident agent of appellant to forward to it at St. Louis, as soon as received, all money collected by him from business in this state, and the custom and practice of the St. Louis office to send to the resident agent from time to time such amounts of money as were needed to defray current expenses, which was more than the amount derived from income in this state. Under this custom and practice, the money collected in this state only

remained on deposit in this state until in ordinary course of banking it could be forwarded to the St. Louis office, and the money received from the St. Louis office only remained on deposit here until it was paid out to defray expenses, which was usually only a short time. None of the money thus transmitted to this state was invested here, or lent out or kept here, except for the time and purpose stated.

It should be stated as a very pertinent and material fact that there is no charge that this practice and custom was resorted to or followed with the purpose of evading the tax laws of the state. It was simply the method the appellant had adopted to carry on its business, a method made necessary in part by the failure of the income to meet expenses. The commonwealth places its right to tax this money in bank solely upon the ground that, as the appellant was engaged in business in this state, having a resident agent here, the money on deposit to its credit in the banks in this state was subject to taxation to the same extent as if it was the money of an actual resident of this state who had it on deposit for the purpose of paying his current expenses. Of course, if this rule should be applied, the money should be taxed as deposits in bank are the subject of taxation. They are mentioned as one of the items of taxable property in the schedule the taxpayer is to sign, and are assessable like other property, and if these deposits had been placed in the bank to the credit of a resident owner, they would undoubtedly be subject to taxation except to the extent that they were diminished by outstanding checks. But under the undisputed facts, our conclusion is that the situs of this money for purposes of taxation was not in this state, but at the residence of the owner in St. Louis. We do not think the right to tax the money of a nonresident that is in this state for the mere temporary purpose of paying debts due in this state, or defraying expenses incurred in this state, could be sustained upon the ground that it had a situs in this state. The exception to the general rule that money and intangible property has only a situs for taxation at the residence of the owner is put distinctly upon the ground that the owner, by his conduct in relation to it or his manner of doing business with it, has given it what may be termed a permanent situs in some other state or locality. It is the permanent feature of the thing that gives the property its situs for taxation in some locality or state other than the residence of the owner.

But, in ruling that this money was not.

subject to taxation, we do not depart in any particular from the principle laid down in the *Dun Case*. If it was shown by fact or circumstance that the income here exceeded the expenses of the business, or that the practice of sending out of this state the money derived from business done in this state, and the returning to defray expenses of money to take the place of that sent out, was a device or scheme to evade the tax laws of the state, we would have no hesitation in holding the money subject to taxation. If a nonresident doing business in this state could evade taxation upon money in bank by merely adopting a course of business by which all the money collected here should at once be remitted to him, and in turn he would forward to this state the money to conduct the business, such scheme, if successful, would furnish an easy and simple method of escaping taxation on deposits. But it is scarcely necessary to add that such a scheme would not accomplish the purpose intended.

It is further suggested that the levy made by the fiscal court of Lyon county for each of the years 1905-1909 was void, because in making the levy the court did not observe the requirements of § 180 of the Constitution, providing in part that ". . . every ordinance and resolution passed by any county, city, town, or municipal board or local legislative body, levying a tax, shall specify distinctly the purpose for which said tax is levied, and no tax levied and collected for one purpose shall ever be devoted to another purpose." The levy made by the fiscal court recited that it was made "to defray the current expenses, such as salaries, maintenance of paupers, building of bridges, working of roads," and we think it was a sufficient compliance with the Constitution. *Pulaski County v. Watson*, 106 Ky. 500, 50 S. W. 861. But, aside from this, the question of the validity of the levy is not involved in this case. If no levy at all had been made for the years named, or if the levy made was fatally defective, it would not interfere with the assessment of property. The validity of the levy can only be assailed when it is sought to collect taxes under it. This proceeding is merely for the purpose of having the property assessed.

The judgment of the lower court, in so far as it assessed the land, is affirmed; in so far as it assessed the money on deposit, it is reversed. On the whole case, the judgment is reversed, with directions to proceed in conformity with this opinion.

Petition for rehearing denied.
L.R.A.1915C.

MASSACHUSETTS SUPREME JUDICIAL COURT.

AUGUSTUS HEMENWAY et al., Trustees,
v.
INHABITANTS OF MILTON.

(217 Mass. 230, 104 N. E. 362.)

Tax — testamentary trust — securities on nonresident's property.

The tax upon securities held by trustees, which were substituted for real estate located in another state, and which passed under a will of a person who died domiciled within the state, for beneficiaries also so domiciled, should, where the securities are actually in the state and the general trustees under the will are domiciled there, be assessed at the domicile of the beneficiaries, under a statute providing that personal property held in trust by a trustee, the income of which is payable to another person, shall be assessed to the trustee in the town in which such other person resides; and, although the trustees also secured an appointment under the clause of the will disposing of the foreign real estate, by the courts of the state where it was located, the tax cannot be assessed under the clause of the statute providing for the tax where the trustee is not an inhabitant of the state.

(February 28, 1914.)

Note. — Situs for property taxation as between different states or countries of personal property held by testamentary trustees or by executor or administrator.

Scope.

As suggested by the title, this note is confined to property taxation to the exclusion of succession, inheritance, or transfer taxes (as to such taxation, see note to *Re Helena*, 46 L.R.A.(N.S.) 1167). As the note is concerned only with the question whether the property has a situs in a particular state, it is not concerned with cases dealing merely with the question of situs as between different taxing districts of the state (for such cases, see note to *Academy of Richmond County v. Augusta*, 20 L.R.A. 151). While the same considerations that affect the question of the situs of such property for the purposes of property taxation as between different states or countries frequently affect the question of situs as between different taxing districts in the same state or country, it is obvious that the former question relates to the power of the state, and involves fundamental principles of constitutional law and taxation, whereas the latter relates to mere legislative or administrative detail with respect to a matter assumed to be within the power of the state.

Generally, as to situs, as between different states or countries, of personal property for purposes of property taxation,

R EPORT by the Superior Court for Norfolk County, upon an agreed statement of facts, for the determination of the Supreme Judicial Court of an appeal by complainants from the refusal of the town assessors to abate a tax assessed to them as trustees under the will of Augustus Hemenway, deceased. Judgment for defendant.

The facts are stated in the opinion.

Mr. Fred T. Field, for complainants:

The tax in question must be sustained, if at all, under Stat. 1909, chap. 490, pt. 1, § 23, clause 5th, as amended.

Nichols, Taxation in Massachusetts, § 36; City Nat. Bank v. Charles Baker Co. 180 Mass. 40, 61 N. E. 223; Boston Invest. Co. v. Boston, 158 Mass. 461, 33 N. E. 580; Tobey v. Kip, 214 Mass. 477, 101 N. E. 998.

see note to Liverpool & L. & G. Ins. Co. v. Board of Assessors, ante, 903.

Generally; domicil of trustee, executor, or administrator.

As a general principle, unless modified by statute, an executor, administrator, or testamentary trustee is regarded as the owner, for the purposes of property taxation, of the personal property which he holds by virtue of his office, and is taxable in the state in which he is domiciled. Nor, in the absence of statute, is such situs affected by the fact that the beneficiaries are nonresidents; or by the fact that the decedent was domiciled in, and the executor, administrator, or trustee, as the case may be, received his authority from the court of, another state, assuming in the latter event that the property is actually in his possession at his domicil. The trend of the cases, however, in the absence of statutory provisions, seems to be toward the position that the mere domicil of the executor, administrator, or trustee in a state will not give the property a situs for property taxation if he received his authority solely from a court of another state, and the property in question is not in his actual possession at his domicil, but is in another state. But the mere absence of the personal property or the evidences thereof will not prevent its having a situs within the state where the trustee, executor, or administrator is domiciled if the decedent was also domiciled there.

The general rule is that personal property in the hands of the trustee is to be assessed to him at the place of his domicil. Mackay v. San Francisco, 128 Cal. 678, 61 Pac. 382, citing Cooley, Taxn. 2d ed. 375, Burroughs, Taxn. 224. The court said that the reasons were that the trustees are the representatives of the fund, and the fund contributes to the support of the state through the trustee.

Shares of stock of foreign corporations belonging to the estate of a decedent who was domiciled in California, the certificate L.R.A.1915C.

Complainants were not taxable thereunder upon the property held by them as trustees under the 6th clause of the will.

Dorr v. Boston, 6 Gray, 131; Ricker v. American Loan & T. Co. 140 Mass. 346, 5 N. E. 284; Williams v. Boston, 208 Mass. 497, 94 N. E. 808; Greene Foundation v. Boston, 12 Cush. 54; Northampton v. Hampshire County, 145 Mass. 108, 13 N. E. 388; Putnam v. Middleborough, 209 Mass. 456, 95 N. E. 749; Gray v. Lenox, 215 Mass. 598, 102 N. E. 1097; Jenkins v. Lester, 131 Mass. 355; Emery v. Batchelder, 132 Mass. 452.

An executor or administrator cannot be sued in his representative capacity in this commonwealth unless he is appointed here.

Whiton v. Balch, 203 Mass. 576, 89 N. E.

of shares being physically present in possession of the executrix in California, are subject to taxation there. Stanford v. San Francisco, 131 Cal. 34, 63 Pac. 145.

The general rule is well settled that, in the absence of a statute to the contrary, the law looks upon a trustee as the owner of personal property, and his domicil as the place of assessment for taxation. State v. Willard, 77 Minn. 190, 79 N. W. 829.

A trustee who is a resident of Rhode Island is liable to taxation for property belonging to the trust held by him within the state, notwithstanding that he was appointed in another state, under a will of a nonresident of Rhode Island, and the *cestuis que trustent* are nonresidents of Rhode Island. Re Ailman, 17 R. I. 362, 22 Atl. 279.

For the purpose of fixing the locality in which personal property is liable to taxation, the holder of the legal title thereto is deemed the owner. Hall v. Fayetteville, 115 N. C. 281, 20 S. E. 373.

It is said in HEMENWAY v. MILTON that the fact that the legal title to property is in trustees who are residents of the state is enough to support a tax even though the beneficiaries live elsewhere, and the testator is a nonresident.

Under a statute providing in effect that an accumulating fund for the future benefit of heirs or other persons shall be assessed to such heirs or persons if within the state, otherwise to the persons having charge of the fund, it was held in Davis v. Macy, 124 Mass. 193, that where part of the beneficiaries were residents and part nonresidents, the tax as to the latter should be on the trustee in proportion to the interest of the respective beneficiaries.

A tax on credits in the hands of resident trustees holding absolute legal title in trust for nonresidents of the state is within the power of the legislature to impose. Detroit v. Lewis, 109 Mich. 155, 32 L.R.A. 439, 66 N. W. 958.

Inhabitants of a state whose credits of every kind are taxed by a statute include resident trustees holding the absolute legal title to choses in action for the benefit of nonresidents. Detroit v. Lewis, 109 Mich.

1045; *Vaughan v. Northup*, 15 Pet. 1; *Goodsite v. Lane*, 72 C. C. A. 281, 139 Fed. 593, 2 Ann. Cas. 849; *Com. v. Peebles*, 134 Ky. 121, 23 L.R.A.(N.S.) 1130, 119 S. W. 774, 20 Ann. Cas. 724; *Hawk v. Bonn*, 6 Ohio C. C. 452, 3 Ohio C. D. 535; *Lewis v. Chester County*, 60 Pa. 325; *Guthrie v. Pittsburgh, C. & St. L. R. Co.* 158 Pa. 433, 27 Atl. 1052.

The statute is unconstitutional if construed to tax testamentary trustees who are not appointed within the commonwealth.

Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 47 L. ed. 513, 23 Sup. Ct. Rep. 463; *Delaware, L. & W. R. Co. v. Pennsylvania*, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669; *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 50 L. ed. 150, 26

155, 32 L.R.A. 439, 66 N. W. 958 (involving a contractual trust).

A sinking fund raised and owned by a foreign corporation, but held and managed by trustees, who are taxable inhabitants of the state of New York, is subject to taxation in that state. *People ex rel. Western R. Corp. v. Board of Assessors*, 40 N. Y. 154.

An instrument executed by a nonresident, conveying and transferring to a trust company, a domestic resident corporation, a large amount of real and personal estate in trust to invest and reinvest and to collect the rents, issues, and profits, and after paying the expenses of administration to pay one half of the net income to the creator of the trust and the other half to her mother during the latter's lifetime, with a reservation of the right to revoke, by and with the consent of the beneficiaries, creates not a mere agency, but a trust, and passes the title to the property to the trustee so as to subject the personal property to taxation in the state. *People ex rel. Van Norden Trust Co. v. Wells*, 118 App. Div. 881, 103 N. Y. Supp. 874, affirmed without opinion in 192 N. Y. 552, 85 N. E. 1114.

The fact that bonds in possession of an executor, a resident of Ohio, under a foreign will, are subject to taxation in the foreign country, does not prevent their taxation in Ohio. *Tafel v. Lewis*, 75 Ohio St. 182, 78 N. E. 1003.

In *Lewis v. Chester County*, 60 Pa. 325, a resident of Pennsylvania who was trustee under the will of a testator domiciled in New York, she having received her appointment in the latter state, was held taxable in Pennsylvania in respect of trust money which she invested in a bond and mortgage in Pennsylvania, but not in respect of similar investments in Delaware and Maryland. The court observed that as to the money in Pennsylvania and as to the value of those securities, she clearly held her investments not by the law of New York, but by a personal contract protected solely by the law of Pennsylvania; but, as to the other funds, never brought into and not in fact held and invested under the L.R.A.1915C.

Sup. Ct. Rep. 36, 4 Ann. Cas. 493; *Liverpool & L. & G. Ins. Co. v. Board of Assessors*, 221 U. S. 346, 55 L. ed. 762, 31 Sup. Ct. Rep. 550.

Mr. George Chandler Colt, for defendant:

The trust fund is taxable in Massachusetts.

Hunt v. Perry, 165 Mass. 287, 43 N. E. 103.

The word "inhabitant," as used in the statute, refers to the domicil of the individual, and not to the situs of his appointment.

Borland v. Boston, 132 Mass. 89, 42 Am. Rep. 424.

For purposes of taxation, a trustee is an inhabitant of the state in which he has his

laws of Pennsylvania, the situs remains in New York; though the court conceded that Delaware and Maryland would have the right to tax the property brought within their borders and invested there. The court said that the fact that she was personally in Pennsylvania did not make her a trustee there, or amenable to its jurisdiction for property not brought there and subjected by her act to the operation of its laws.

In *Westchester School Dist. v. Darlington*, 38 Pa. 157, the court, though apparently doubting the justice and policy of taxing personal property of nonresident minors for the benefit of the school district in which their guardian may happen to reside, held that the property was so taxable, under statutes making taxable under the school law any property in the school district taxable for state and county purposes, and general statutory provisions requiring county commissioners to assess and tax all real and personal property held, owned, used, or invested by any person of trust for the use, benefit, or advantage of any other person. It appears in this case that the guardian received his appointment from a court of Pennsylvania, although that is not referred to as a necessary condition or limitation of the decision.

The situs of personal property of a testator in the hands of an executor for purposes of administration is at the domicil of the executor, although some of the beneficiaries under the will are nonresidents. *Gallatin v. Alexander*, 10 Lea, 475. In this case the testator was domiciled in Tennessee, where the executor was also domiciled.

In *Clark v. Powell*, 62 Vt. 442, 20 Atl. 597, holding that as none of the beneficiaries of the trust resided in the state, the trust funds were not taxable in the town where the testator was last domiciled, the trustee being domiciled in another town, it was assumed that under the statute the funds were taxable in the latter town, although all of the beneficiaries were non-residents.

Personal property within the state, in possession of a trustee who is domiciled

domicil, without regard to the situs of his appointment.

Putnam v. Middleborough, 209 Mass. 456, 95 N. E. 749; Dallinger v. Rapello, 14 Fed. 32, 15 Fed. 434; Augusta v. Kimball, 91 Me. 605, 41 L.R.A. 475, 40 Atl. 666; Lewis v. Chester County, 60 Pa. 325; Ailman's Petition, 17 R. I. 362, 22 Atl. 279; Hess v. Reynolds, 113 U. S. 73, 28 L. ed. 927, 5 Sup. Ct. Rep. 377.

Rugg, Ch. J., delivered the opinion of the court:

The plaintiffs are residents of Massachusetts, but not in Milton. They have been appointed by the probate court for Norfolk county trustees generally under the will of a testator who died a resident of Massa-

chusetts. They also have been appointed by the appropriate court of the state of New York trustees under the 6th clause of the will whereby the testator disposed of all his "land and real estate lying in the state of New York." As trustees they hold certain personal property acquired in substitution for a part of this real estate. The bonds and other securities, part of which are notes secured by mortgage upon real estate in New York, physically were in this commonwealth. The trustees have kept separate accounts touching the property held under the 6th clause, and consistently have treated it as not a part of the residuary trust created by the 7th clause. The beneficiaries under the two clauses are substantially the same, but the provisions as to

within the state, is subject to taxation although the *cestuis que trustent* are non-residents. Price v. Hunter, 34 Fed. 355.

In McClellan v. Jo Daviess County, 200 Ill. 116, 65 N. E. 711, credits in the control of an executor and trustee domiciled in Illinois, the testator also having been domiciled in that state, were held subject to taxation there, notwithstanding that the beneficiaries were nonresidents, and that the funds may have been loaned by the executor beyond the jurisdiction of the state, through agents appointed in other states, and the securities, notes, and mortgages therefor taken may remain for a time in the possession of such agents. It was apparently assumed in this case that the showing was not sufficient to establish that the credits had a situs elsewhere.

Certificates of stocks and bonds of foreign corporations, belonging to the estate of a decedent who was domiciled in California, but which, prior to his death, were in New York, pledged as collateral security for a loan, and still remain there, so pledged, are assessable in California against the executrix of the estate, although they have never been in her possession in California. Stanford v. San Francisco, 131 Cal. 34, 63 Pac. 145.

So, the fact that bonds belonging to a trust were on deposit in a New York bank in the joint names of the trustees did not, as to the one-half interest of the trustee who was a resident of California, deprive them of a situs for taxation in the latter state. Mackay v. San Francisco, 128 Cal. 678, 61 Pac. 382.

But the mere fact that a trustee resides in Ohio does not give the trust estate a situs for taxation there, if none of the trust property is in Ohio, and the trustee received his appointment in another state, and all the beneficiaries of the trust are nonresidents. Goodsite v. Lane, 72 C. C. A. 281, 139 Fed. 593, 2 Ann. Cas. 849. The court said that in the case of a trustee, he must be exercising his office of trustee within the state, and be enjoying, as trustee, privileges of value to the estate, for which it is just the estate should pay; the L.R.A.1916C.

court further said that an examination of the cases would show that where the tax has been sustained against the trustee, either the trust estate or the beneficiary or the trustee, as such, was receiving benefits from the state for which it was only fair the trustee should pay.

So, stocks in a foreign corporation, owned by a foreign testator, are not taxable in the hands of a resident executor, who was appointed by the court of testator's domicil, and has not qualified under the laws of his residence, nor physically removed the stocks to his domicil. Com. v. Peebles, 134 Ky. 121, 23 L.R.A.(N.S.) 1130, 119 S. W. 774, 20 Ann. Cas. 724.

Notes and bank stock in Vermont belonging to the estate of a resident of that state, were held in Rand v. Pittsfield, 70 N. H. 530, 49 Atl. 88, not to be taxable in New Hampshire, where the administrator, appointed in Vermont, resided. The decision was upon the ground that the property was rightfully taxed in Vermont, and that property held in trust forms no exception to the general rule which exempts property rightfully taxed in another state from taxation in New Hampshire.

That the removal of a guardian with her ward from the state may have been ground for the discharge of the guardian does not prevent their removal from being effective to prevent the taxation of the personal property in the state. Maxwell v. People, 189 Ill. 603, 59 N. E. 1098.

But the fact that bonds and certificates issued by foreign corporations, belonging to a resident of Virginia, were not in the state at the time of her death, but were in the vault of a safety deposit company in another state, and were still there at the beginning of the year following the decedent's death, does not prevent their taxation in Virginia against the executor under the will, although they were subject to administration in New York, and the executor obtained ancillary letters in that state, and by virtue of them removed the stock and bonds and brought them to Virginia subsequently to the tax day. The executor was apparently a resident of Virginia.

termination of the trusts are different. The two beneficiaries, the tax upon whose shares is now in question, reside in Milton.

The point to be decided is whether this personal property was taxed rightly to the trustees in the town of residence of the beneficiaries under Stat. 1909, chap. 490, pt. 1, § 23, cl. 5, which is as follows:

"Personal property held in trust by an executor, administrator or trustee, the income of which is payable to another person, shall be assessed to the executor, administrator or trustee in the city or town in which such other person resides, if within the commonwealth; and if he resides out of the commonwealth it shall be assessed in the place where the executor, administrator or trustee resides; and if there are two or

more executors, administrators or trustees residing in different places, the property shall be assessed to them in equal portions in such places, and the tax thereon shall be paid out of said income. If the executor, administrator or trustee is not an inhabitant of the commonwealth, it shall be assessed to the person to whom the income is payable, in the place where he resides, if it is not legally taxed to an executor, administrator or trustee under a testamentary trust in any other state."

It is plain that the words of this clause of the statute, interpreted literally, cover the facts of the present case. The trustees, being residents of the commonwealth, hold personal property in trust the income of which is payable to other persons resident

Com. v. Williams, 102 Va. 778, 47 S. E. 867, 1 Ann. Cas. 434.

And bonds belonging to the estate of a decedent who was domiciled in the District of Columbia, given in trust to a resident and citizen of Pennsylvania to pay an annuity to the widow, a resident of the District of Columbia, and the balance of the income to residents of Pennsylvania, were held liable in *Guthrie v. Pittsburgh, C. & St. L. R. Co.* 158 Pa. 433, 27 Atl. 1052, to taxation in Pennsylvania although they were kept in Washington, under the Pennsylvania statute providing for the taxation of personal property when held or possessed by a person in his or her own right or as active trustee, etc., for use, benefit, and advantage of any other person. The bonds in this case were issued by a Pennsylvania corporation; but the only materiality of that fact was that it brought into operation the statute requiring the corporation to deduct the amount of the taxes from the interest on the bonds.

The decision in *People ex rel. Brodie v. Cox*, 14 N. Y. S. R. 632, that funds pertaining to a trust created by the will of a New York testator for the benefit of certain persons, all of whom were nonresidents of the state, the funds being in the hands of the county treasurer as depository of the court, the trustee named in the will having resigned the trust and paid the proceeds thereof into court, were not taxable, was upon the ground that such depository was not a trustee within the statute requiring the assessment of persons in the towns where they reside for personal estate in their possession or under their control as agent, trustee, guardian, executor, or administrator, etc.

When both resident and nonresident trustees.

Bonds deposited in another state in the name of joint trustees, one of whom is a resident of California and the other a nonresident, are not in their entirety subject to taxation in California, but an undivided one half, representing the title of L.R.A.1915C.

the resident trustee, is so subject. *Mackay v. San Francisco*, 128 Cal. 678, 61 Pac. 382. The trust in this case was created by a will of a resident of California, and the estate was there administered.

In *Appeal Tax Ct. v. Gill*, 50 Md. 377, it appearing that two of the three trustees resided in Maryland and one in New York, it was held that only two thirds of the securities owned by them as part of the trust should be assessed for taxation in Maryland. It does not appear in this case where the securities were actually held.

In *People ex rel. Darrow v. Coleman*, 119 N. Y. 137, 7 L.R.A. 407, 23 N. E. 488, securities in the actual possession and control of one of three trustees, who was a nonresident, the beneficiaries also being nonresidents, were held not "due or owing to persons residing within the state" so as to be subject to taxation therein, although the other two trustees were residents thereof. It was conceded in effect in this case that if the trustees residing in New York had had possession of the securities, they could have been assessed for them as trustees in possession, even though there were other trustees nonresidents.

And upon the authority of the last case it was held in *People ex rel. Day v. Tax Comrs.* 17 N. Y. Supp. 923, that securities in the hands of nonresident trustees were not taxable in New York, although one of the trustees resided therein, under statutes providing that all personal property within the state shall be liable to taxation, and that every person shall be assessed for all personal estate "in his possession" or "under his control" as trustee.

In this case the court said that the fact that the trustees met and took action in relation to the trust in the city of New York was immaterial.

The *Coleman* Case was also followed in *People ex rel. Day v. Barker*, 135 N. Y. 656, 32 N. E. 252, holding that securities constituting a trust fund that were with a safe deposit company in New Jersey, the beneficiaries of the trust and two of the three trustees being nonresidents, were not subject to taxation in New York, although

in Milton in this commonwealth. It is equally plain that this state has the power to tax such personal property. The legal title to it is in the trustees who are residents here, and the beneficial interest is also in residents of this state. This is enough to support the exercise of the taxing power. It even has been held that the interest of a beneficiary is subject to taxation here, where the trust fund was created by the will of a testator who resided and died in another state, and whose will there alone was proved and allowed, and the trustees were appointed by and lived within that jurisdiction. *Hunt v. Perry*, 165 Mass. 287, 43 N. E. 103. That case goes much

one of the trustees was a resident of that state, notwithstanding that an attempt to distinguish the *Coleman Case* was made on the ground that in that case the nonresident trustee had possession of the securities in the city where he resided, while in the *Day Case* none of the trustees had the custody or physical control of the securities, and none of them resided in the city where the securities were deposited, the fact being that access to the trust securities was permitted to any two of the trustees, or to one of them when in company with their secretary. It was further held that the fact that the securities consisted of bonds secured by mortgages upon New York real estate did not affect the question.

Subsequently to the decisions in the *Coleman* and *Barber* cases the New York statute was amended by providing that personal property for purposes of taxation shall include, *inter alia*, "an obligation for the payment of money due or owing to persons residing within this state, however secured or wherever such security shall be held;" and that every person shall be taxed in the tax district where he resides for all personal property owned by him or under his control as agent, trustee, guardian, executor, or administrator; and that when taxable personal property is in the possession or under the control of two or more agents, trustees, guardians, executors, or administrators residing in different taxing districts, each shall be taxed for an equal portion of the value of such property so held by them. Under this amended statute it was held in *People ex rel. Beaman v. Feitner*, 168 N. Y. 360, 61 N. E. 280, that where two of the three trustees under the will of a New Jersey testator were domiciled in New York, the third being a nonresident, each of the resident trustees was assessable in the taxing district in which he resided, upon one third of the trust fund, consisting of securities on deposit in a safe deposit company in New Jersey, the beneficiaries being nonresidents of New York.

So, an assessment jointly against two trustees, one a resident and one a nonresident of the state, is void as to the nonresident, and the resident is assessable L.R.A.1915C.

further in upholding the taxing power of the state than it is necessary to go in order to sustain the present tax.

The legal title to the property is in the trustees, who are residents here. This has been held to be enough to support a tax even though the beneficiaries lived elsewhere, and the testator was a nonresident. *Ailman's Petition*, 17 R. I. 362, 22 Atl. 279. See *Hess v. Reynolds*, 113 U. S. 73, 28 L. ed. 927, 5 Sup. Ct. Rep. 377; *Lewis v. Chester County*, 60 Pa. 325; *Augusta v. Kimball*, 91 Me. 605, 41 L.R.A. 475, 40 Atl. 666. It was said in *Putnam v. Middleborough*, 209 Mass. 456, at 457, 95 N. E. 749, that "our laws subject to taxation not only all

only to the extent of one half the value of the assets of the trust. *People ex rel. Kellogg v. Wells*, 182 N. Y. 314, 74 N. E. 878, reversing 101 App. Div. 600, 92 N. Y. Supp. 5. From the report of the case below it would appear that the trust was created by the will of a resident of New York, but that the trust securities were in New Jersey at the time of the assessment, and not in New York.

In *People ex rel. McHarg v. Gaus*, 169 N. Y. 19, 61 N. E. 987, it was held in effect that in case some of the executors are residents there is to be no deduction from the total assessment on account of the nonresidence of one or more of such executors where the property upon which the assessment is based is actually within the state. In this case there being four executors, three of whom were residents of New York and one of Connecticut, it was held the refusal to reduce the assessment on the amount of property which the assessors were justified in finding was in New York by deducting the one-fourth equal portion upon account of the nonresidence of one of the executors was proper. In this case, however, it appearing that \$10,000 of the total taxable assets were represented by chattels situated in Connecticut, the assessment was reduced by that amount. There seems to have been no objection to this reduction, although it would seem that under the statute and decisions there might be a question whether the deduction should not have been limited to one fourth of the \$10,000, or at least that there would have been such a question if the \$10,000 in question had represented intangible rather than tangible property.

The entire value of securities belonging to a trust created by the will of a resident of New York, which securities are in New York, where two of the three trustees reside, is assessable for taxation in New York, and the fact that one of the trustees is a nonresident does not reduce the value for local taxation to two thirds of the total sum. *People ex rel. Farmers' Loan & T. Co. v. Wells*, 94 App. Div. 463, 87 N. Y. Supp. 745, 88 N. Y. Supp. 1113 (affirmed in 179 N. Y. 566, 71 N. E. 1136.)

In *People ex rel. Campbell v. Tax & A.*

the property, real and personal, situated within the commonwealth, but also all personal property of its inhabitants, wherever situated, unless by reason of some specific exemption."

There is nothing about the words of the statute to indicate that their natural meaning should not be applied to the circumstances of this case. The testator was domiciled here and his will was proved here and his general trustees were appointed by our probate court. Apparently the only reason for ancillary administration in New York was in order to affect the title to the real estate there located with the testamentary disposition. See *Rackemann v.*

Taylor, 204 Mass. 394, 397, 90 N. E. 552. Every condition points to the propriety of a tax being levied in this commonwealth.

The counsel for the plaintiff has argued very ingeniously that because the courts of New York have appointed them trustees under the will of the testator so far as concerned the real estate devised by the 6th clause, thereby the sole taxing jurisdiction is drawn to that state, and he seeks to establish a distinction between the legal and official residence of the trustees, and to maintain that because the trustees acquired possession of the property in the first instance by virtue of an appointment by a New York court, they are not "an

Comrs. 38 Hun, 536, an assessment against executors and trustees under the will of a New York testator was upheld under the New York statute declaring that every person shall be assessed in the town or ward where he resides when the assessment is made for all personal estate owned by him, including all personal estate in his possession or control as agent or trustee, notwithstanding that the acting executor and trustee resided out of the state, and averred that he had sole possession and control of the property and assets of the estate. It was apparently assumed that this averment was not sufficient to negative such possession and control by the resident executors and trustees as would subject the property to taxation in the state.

In *Johnson v. Oregon City*, 3 Or. 13, holding that notes and other choses in action belonging to a decedent's estate were taxable in the city where the executor who had the personal care and management of the estate resided, although a coexecutor was a nonresident of the state, the court said that the case would be treated as if the resident executor were the sole executor, or as if both executors were residents of the city. It appears that until a short time before the assessment the securities were kept within the city, and while they were removed before the assessment, it does not appear that they were taken out of the state. It does not appear where the decedent was domiciled, nor in what state the executors received their letters testamentary.

That one of the two executors and trustees under the will of a New York testator is domiciled in Ohio does not subject one half or any other proportion of the personal property, consisting of securities held in New York, to taxation in Ohio. *Hawk v. Bonn*, 6 Ohio C. C. 452, 3 Ohio C. D. 535.

So, in *State, Endicott, Prosecutor, v. Corson*, 50 N. J. L. 381, 13 Atl. 265, holding invalid an assessment of the personality of an estate in the township where the testator died and the will was probated, upon the ground that, under the statute, it was assessable in another township in which one of the executors resided, it was assumed L.R.A.1915C.

that the personalty, apparently its entire value, was taxable in the latter township, the resident executor having the actual possession of it there, excepting the household goods in the homestead occupied by the widow, of which he had the legal control, notwithstanding that there was another executor who was a nonresident of the state.

State of ancillary administration; "business situs."

Personal property within the state in the hands of an ancillary administrator of the estate of a nonresident decedent is subject to taxation even though it is not loaned or invested in the state; at least, if taxes have not been paid upon it at the place of principal administration. *Dorris v. Miller*, 105 Iowa, 564, 75 N. W. 482.

Credits belonging to the estate of a nonresident, which, prior to his death, were in Iowa, in the hands of an agent, under such circumstances as to render them taxable in Iowa, remain subject to taxation there after the decedent's death, and while in the hands of the former agent, who had been appointed ancillary administrator; nor does the fact that his appointment was an error, or that he delayed the local or ancillary administration, affect the question. *Ibid.*; *Blackhawk County v. Dorris*, 116 Iowa, 446, 90 N. W. 89.

In *Baldwin v. Shine*, 84 Ky. 502, 2 S. W. 164, notes and bonds in charge of an ancillary administrator in Kentucky, and to be distributed through a court of that state, were held subject to taxation in Kentucky, although the decedent was domiciled in Ohio, and the distributees were non-residents of Kentucky. The court said: "Here the estate was taken in charge by the Kentucky administrator; the legal title was in him; the estate followed him, and was annexed to his person, thereby having an actual situs in this state, by the law of which it was protected. Moreover, it was under the charge of, and had to be distributed through, the court of this state."

In *Boske v. Security Trust & S. V. R. Co.* 22 Ky. L. Rep. 181, 56 S. W. 524, holding that an administrator with the will an-

inhabitant of the commonwealth" as those words are used in the last sentence of the statute. But this contention is not sound as applied to the circumstances of this case. There is no firm foundation for the suggestion that "inhabitant" here is used in any other than its natural sense. No intimation is to be found in the taxing laws that there is any distinction between an official and a legal residence of a trustee. The facts in *Vinton v. Sargent*, 195 Mass. 133, 80 N. E. 826, *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493, and *Goodsite v. Lane*, 72 C. C. A. 281, 139 Fed. 593, 2 Ann. Cas. 849, are so different

that these decisions can have no bearing upon the issue here depending.

Tax laws are enacted for practical ends. They must be administered in large part by the plain citizens who are elected assessors from time to time in the various municipalities. They should be construed and interpreted as far as possible so as to be susceptible of easy comprehension, and not likely to become pitfalls for the unwary. In the respect now under consideration the words used are clear. There is no reason for giving to them a strained or unusual meaning.

Judgment for the defendant.

nexed, appointed in Kenton county, whose office and place of business was Fayette county, could not be compelled to list in Kenton county personal property, consisting of stock, bonds, and choses in action, belonging to the estate of a decedent, a nonresident, the estate being still unsettled, and the beneficiary under the will, who was domiciled in Kenton county, not being entitled to the property—it seems to have been assumed that the property was taxable in Fayette county.

No, bonds coming into Ohio in possession of a resident executor, who derives his authority under the will by appointment of the probate court of the county of his residence, are taxable in Ohio, notwithstanding that the will was executed and probated in a foreign country, where the testator was domiciled at the time of his death, and all the beneficiaries are likewise nonresidents of Ohio, under the Ohio statute providing that property, including bonds, held by persons residing in the state, whether for themselves or others, shall be subject to taxation, and that the property of every estate of a deceased person shall be listed by the executor or administrator. In reply to the contention that the bonds should not be taxed in Ohio because the property rights in them passed to the testator's heirs instantly at his death, and as they resided out of the state, their property was not subject to the Ohio tax laws, the court said that no fact in support of that assumption appeared by the petition, and that it was not shown or claimed that the specific bonds were bequeathed to anybody; hence the title vested in the executor, and the question attempted to be made by the proposition was not fairly in the case. *Tafel v. Lewis*, 75 Ohio St. 182, 78 N. E. 1003.

Bonds issued by a Missouri corporation belonging to the estate of a nonresident, and transferred to the possession of an administrator appointed in Missouri for the purpose only of ancillary administration, are subject to taxation in Missouri, whose statutes require the listing of all moneys, notes, or bonds in hand or on deposit, owned by the taxpayer, or under his charge or management. *State ex rel. Tay-* L.R.A.1915C.

lor v. St. Louis County Ct. 47 Mo. 594. In this case the property seems to have been taxed at the domicile of the ancillary administrator, and that fact is referred to in *State ex rel. Hickman v. Lewis*, 256 Mo. 98, 165 S. W. 319, in distinguishing the case at bar, which involved the right to tax the property in the county where the ancillary administration was granted although the ancillary administrators were not residents of the county, and the choses in action were not present there.

That choses in action belonging to the estate of a nonresident have been subjected to taxation in the state of the decedent's domicile does not prevent their taxation in another state where ancillary administration is pending. *State ex rel. Taylor v. St. Louis County Ct. supra.*

In *State ex rel. Hickman v. Lewis*, supra, the court, while conceding the power of the legislature to tax the property of the estate of a decedent in the process of ancillary administration in the courts of Missouri when represented by tangible property or by quasi-tangible property, such as bonds, mortgages, and other securities physically present in the state, held that the Missouri statute in relation to the taxation of personal property in the county in which administration is granted did not apply to promissory notes secured by mortgages upon real property in various counties of the state, which belonged to the estate of a nonresident, but after his death were taken possession of by ancillary administrators appointed in Missouri, neither of whom resided in the particular county in question, although both were residents of the state. The decision was placed upon the construction of the statute and in view of the fact that if the statute were construed to cover such property, it would be so lacking in uniformity, considering some of its provisions, as to be invalid.

In *Re Adams*, — Iowa, —, 149 N. W. 531, notes and mortgages belonging to a nonresident decedent were held to have a business situs in Iowa so as to become subject to the collateral inheritance tax therein, it appearing that they represented loans made by agents within the state, who had authority to loan and reloan the money,

and who kept the securities within the state until a few days before the death of the owner, at which time they were deposited in a bank for safe-keeping in a place just over the state line, where they were at the time of the death. It was conceded in this case that circumstances were such as to give them a business situs in Iowa, at least up to the time of the removal of the securities, and it was held that such situs was not destroyed by the removal under the circumstances above stated. While the tax in this case was a collateral inheritance tax, and the case is therefore not strictly within the scope of the note, it seems to have been assumed that in the circumstances the securities would have had a situs for the purposes of property taxation in Iowa as well as for the purposes of the collateral inheritance tax.

State of decedent's domicile: domiciliary administration.

It will be observed that the cases cited under this heading, which denied a situs in the state of the decedent's domicile or of the domiciliary administration, proceeded upon the assumption that the executor, administrator, or trustee was a nonresident. Of course, if, as is generally the case, the executor, administrator, or trustee resides in the state in which the decedent was domiciled, especially if the property is actually in his possession, it will have a situs for property taxation there.

In *Mackay v. San Francisco*, 128 Cal. 678, 61 Pac. 382 (see *supra*, "when both resident and nonresident trustees"), the court repudiated the contention that property belonging to a trust, created by the will of a resident of California but on deposit in New York, was taxable in California because of a provision of the statute that where any trust has been created by or under any will, to continue after distribution, the superior court shall not lose jurisdiction of the estate except by final distribution, but shall retain jurisdiction thereof for the purpose of the settlement of the accounts under the trust. This case seems in effect to negative the idea of an official, as distinguished from an actual, domicile of the trustee.

So, property which a resident of California has in his hands as ancillary executor in that state, belonging to the estate of a decedent who was domiciled in Massachusetts, is not subject to taxation in Massachusetts, although he is also the domiciliary executor, and has in his possession in Massachusetts certain personal property formerly belonging to the decedent. *Putnam v. Middleborough*, 209 Mass. 450, 95 N. E. 749. The court observed that property which the petitioner, a resident of California, had in his possession in that state as ancillary executor merely, is not in his possession or control as principal executor of the same testatrix in Massachusetts.

L.R.A.1915C.

And notes belonging to the estate of a decedent domiciled in Massachusetts, but in the hands of an ancillary administrator in another state, where they were situated at the time of the decedent's death, are not subject to taxation in Massachusetts. *Gray v. Lenox*, 215 Mass. 598, 102 N. E. 1097. The court said that as the ancillary administrator was duly appointed under the authority and jurisdiction of the state where the property was found, and the notes came to his hands by virtue of such appointment, he acquired the full and exclusive title to them under the long-established rule of the common law. It is further held in this case that the provision of a statute that personal property of the deceased persons shall be assessed to the executor or administrator for three years, or until it has been distributed and notice of such distribution given to the assessors, did not apply, since the Massachusetts executors never had the possession or ownership of the notes nor control of their distribution. In this case the court observed that the ancillary administrator was in no sense the agent of the Massachusetts executors.

In *Dallinger v. Rapello*, 14 Fed. 32, the court, without passing upon the constitutional question, held that under the Massachusetts statute personal property of a deceased inhabitant of Massachusetts is not taxable after the appointment of an executor and before distribution, when the property is not within the commonwealth and neither the executor nor any person having any interest in or right to receive the property has a domicile or residence therein. One of the provisions of the statute under which the case was decided was to the effect that personal estate of a deceased person shall be assessed at the place where the deceased last dwelt; and that after the appointment of an executor or administrator, it shall be assessed to such executor or administrator until he gives notice to the assessors that the estate has been distributed and paid over to the parties interested therein. The court, however, was of the opinion, in view of other provisions of the statute, that the legislature did not contemplate a case in which the property itself is out of the state, and is held by an executor or administrator residing out of the state. In a subsequent hearing in this case (*Dallinger v. Rapello*, 15 Fed. 434) it was held that property, not shown to be within the state, held by an executor not shown to be domiciled in the state, in trust to pay the income to certain inhabitants of the state, was not subject to the tax.

But in *Com. v. Camden*, 142 Ky. 365, 134 S. W. 914, the court expressed the opinion that the estate of a decedent in the hands of his personal representative for settlement, and before distribution, is, or should be made, assessable to the personal representative at the place of his official residence; and that this is true whether the personal representative resides in the state or out of it. In this case the court observed

that it is both convenient and just to the beneficiaries of the estate as well as the taxing authorities that the personal representative in whose custody the estate is, and who for the time being takes the place of the decedent, should list the estate for assessment and taxation at the domicile of the decedent. In this case, however, the question was simply as to whether the share of a beneficiary, a resident of Kentucky, under a will of a West Virginia testator, was subject to taxation in Kentucky while the property was in possession of an executor who was domiciled in West Virginia, the estate not having been settled.

And so the theory of an official, as distinguished from a personal, residence, seems to have been adopted in *Gallup v. Schmidt*, 154 Ind. 196, 56 N. E. 443, holding that a resident of New Hampshire who qualified in Indiana as executor under the will of an Indiana decedent was, in his official capacity, a resident of the county in which the will was probated within the meaning of the taxing statute providing for the addition of omitted property to the tax duplicate upon notice to the person claiming the property, if he resides in the county. The decision in this case was affirmed by the United States Supreme Court in 183 U. S. 300, 46 L. ed. 207, 22 Sup. Ct. Rep. 162, upon the ground that, in any event, the executor had had an opportunity to question the validity of the assessment before it had become finally fixed.

In *McKennon v. McFall*, 127 Tenn. 393, 155 S. W. 158, the court, while declaring it to be within the power of the legislature to apply the fiction or maxim that the situs of personal property follows the domicile of the owner so as to fix for taxation in Tennessee the situs of all intangible property of a decedent who was domiciled in that state, irrespective of the place where the property was located, or of the question whether it would be validly subject to taxation in another state, held that a fair construction of the Tennessee act with reference to the taxation of the property of a decedent's estate was that the power to tax is withheld as to such intangible property of a decedent as is held outside of the state's territory, and, being in the other sovereign's jurisdiction, is there within the power of its legislature to validly assign to it a local situs for taxation purposes. The statute in question declares in effect that all property held by executors and administrators shall be assessed in the county in which the decedent resided at the time of his death until such estate shall have been distributed; but if the deceased lived in another state, then the property shall be assessed where the personal representative resides.

The court, however, repudiated the contention that merely because the executors under the will of a Tennessee decedent had qualified in Mississippi, all the personal assets there held and controlled by them, and which, by the laws of Mississippi, they were required to administer in that state, L.R.A.1915C.

lost their situs for taxation in Tennessee, irrespective of other circumstances tending to give them a local situs in Mississippi; and held that notes, the residences of the makers of which did not appear, and deposits in Mississippi, were held subject to taxation in Tennessee, where the decedent was domiciled, notwithstanding that they pertained to the Mississippi estate, and by the law of Mississippi must be administered in that state, the executors having taken out letters there as well as in Tennessee. Shares of bank stock in a Mississippi banking corporation, however, were held not to be taxable in Tennessee for the reason, as the court said, that it was competent for the taxing power of Mississippi to fix a taxing situs therefor at the corporation's domicile in that state.

State of domicile of beneficiaries.

As has already been seen, the fact that the beneficiaries of a trust are nonresidents will not deprive the property subject to the trust of a situs for property taxation in the state in which the trustee is domiciled.

In determining whether the property has a situs for taxation in the state where the *cestui que trust* resides, a distinction has been made in some cases between an assessment against the trustee and an assessment against the beneficiary.

Thus, nonresident trustees cannot be taxed for so much of the estate as is held by them in trust to provide annuities for residents of Maine, the securities being out of the state, under a statute providing for the assessment of trustees in the place where the person to whom the income is payable is an inhabitant, notwithstanding that the trustees derived their title from a devise under a Maine will, through confirmation by a Maine probate court to which they have agreed to render account. *Augusta v. Kimball*, 91 Me. 605, 41 L.R.A. 475, 40 Atl. 666. The court observed, however, that it did not hold that the assessors could not assess a tax directly against the annuitants resident in the state for their annuities or other interests arising out of the property or trust. Two of the judges dissented upon the ground that the official residence of the trustees is where the trust is under administration.

So, a trustee, resident in another state, who has no property in Rhode Island belonging to the trust, is not liable to taxation in Rhode Island, although his *cestuis que trustent* reside therein, under the Rhode Island statute declaring that all property held in trust, the income of which is to be paid to any other person, shall be assessed against the trustee in the town where such other person resides; but if such person resides out of the state, then in the town where the trustee resides. *Anthony v. Caswell*, 15 R. I. 159, 1 Atl. 290. The court observed that the statute follows the common-law rule and clearly recognizes executors, administrators, and trustees as

the owners, for the purposes of taxation, of the property held in trust by them.

But in *Selden v. Brooke*, 104 Va. 832, 52 S. E. 632, holding that intangible personal property, kept by a nonresident trustee in his personal possession outside the state, in the income of which a resident of Virginia had a life interest, was taxable in Virginia in the county or corporation in which the beneficiary resided, under the Virginia statute declaring that if property is the separate property of a person over twenty-one years of age, it shall be listed and taxed "to the trustee," if any, and if there is no trustee, to the person himself, and that in either case it shall be listed and taxed in the county or corporation where the person resides,—the court said that the contention that such construction would render the statute unconstitutional proceeded upon the hypothesis that the tax was against the nonresident trustee, whereas he was personally unaffected by the imposition, and was but the conduit through the medium of which the property of a citizen passed into the state treasury.

The rule that trust property is taxable to the holder of the legal title in the jurisdiction of his residence, or where the property is situated, and not to the person having the beneficial interest, was applied in *Berry v. Windham*, 59 N. H. 288, 47 Am. Rep. 202, holding that a deposit in a Massachusetts savings bank to the credit of one who was apparently a resident of New Hampshire was not taxable in the latter state; the court saying that when the money was deposited the legal title became vested in the bank as trustee for the beneficial owner.

But the fact that the corpus of a trust fund is held by trustees who live out of the state, and who hold under a will proved and allowed out of the state, does not take away the power of the legislature to subject the interest of the *cestui que trust*, who lives in the state, to taxation. *Hunt v. Perry*, 165 Mass. 287, 43 N. E. 103. And see *supra*, *Selden v. Brooke*.

The Massachusetts statute providing in respect to personal property held in trust that "if the executor, administrator or trustee is not an inhabitant of the commonwealth it shall be assessed to the person to whom the income is payable in the place where he resides" applies to a case where the trust was created by the will of a testator who lived and died in another state, and whose will was proved and allowed in such other state, and was never proved in Massachusetts. *Hunt v. Perry*, *supra*.

An unmarried woman domiciled in Massachusetts was held in *Dorr v. Boston*, 6 Gray, 131, not taxable for shares of stock of corporations not domiciled in Massachusetts, or for the income of such shares, the legal title to which was vested in trustees residing in New York, and held by them "in trust to pay over the income, dividend, or interest thereon," to her. The court said that it was clear that the plaintiff was not taxable as for stock in corporations without the state, because she was not the

legal owner of such stock; nor as for income from any profession, trade, or employment, or from an annuity, because the income from the foreign stock held by her trustees was not derived from either of those designated sources of taxable income. With respect to a provision of the statute that all personal property held in trust, the income of which is to be paid to any married woman, shall be assessed to the husband of such married woman, in the town of which she is an inhabitant; but if such married woman or other person resides out of the state, the same shall be assessed to the executor, administrator, or trustee in the town where he resides, the court said that it was clear from the history of the legislation, if not from the terms of the provision, that it did not include property out of the state, held by trustees residing out of the state.

In *HEMENWAY v. MILTON* it will be observed that the asserted power of the state to tax the property was not predicated upon the mere fact that the beneficiaries were residents, but upon the fact that both trustees and beneficiaries were residents.

In *Kinehart v. Howard*, 90 Md. 1, 44 Atl. 1040, it was said that the guardian being a resident of Washington city, and the property (stocks and bonds) being also located there, there was no doubt that the situs for taxation was in that city. It seems to have been assumed, however, that the property might have been assessed for taxation in Maryland, if the ward had been a resident of that state, under the express provision of the Maryland statute that all personal property in which any resident of the state has an equitable interest, with a legal title to the same in some other person who is a nonresident, shall be valued and assessed for taxation to the equitable owner thereof in the county or city in which he or she resides, and such equitable owner shall pay taxes thereon. The assessment in this case purported to be against the ward.

The beneficiary under the will of a nonresident is not required to list for taxation at the place of his residence the intangible personal estate bequeathed to him by the will while such personal estate is in the custody and possession of the foreign executor for the purpose of settling and distributing the estate under the will and laws of the state where the will was admitted to probate. *Com. v. Camden*, 142 Ky. 365, 134 S. W. 914. It expressly appeared in this case that the time for the settlement of the estate had not expired. The court said that the provision of the Kentucky statute that the situs of intangible personal property for purposes of taxation shall be at the residence of the real or beneficial owner, and not at the residence of the fiduciary or agent having the custody or possession of the same, has reference to a state of case in which the share of the beneficiary has been set apart to him, or he is entitled to receive it, and not to a state of case in which the estate, including the interest of the beneficiary, is in process of settlement.

G. H. P.

UNITED STATES SUPREME COURT.

T. B. COPPAGE, Plff. in Err.,
v.
STATE OF KANSAS.

(236 U. S. 1, 59 L. ed. —, 35 Sup. Ct. Rep. 240.)

Constitutional law — due process of law — liberty to contract.

1. Whatever either employer or employee has the right, under the due process of law clause of U. S. Const., 14th Amend., to treat as sufficient ground for terminating the employment, where there is no stipulation on the subject, he has the right to provide against by insisting that a stipulation respecting it shall be a *sine qua non* of the inception of the employment or of its continuance, if it be terminable at will.

Same — police power.

2. A statutory provision which is not a legitimate police regulation cannot be

Note. — Constitutionality of statute forbidding employer to exact an agreement from employee not to join labor union.

This note is supplementary to the note to *People v. Marcus*, 7 L.R.A.(N.S.) 282.

In *COPPAGE v. KANSAS*, the Supreme Court of the United States, though not without a strong dissent by three of the justices, has taken a position in accord with that taken by the inferior Federal courts and state courts of last resort which have considered this question, excepting the district court for the eastern district of Kentucky (see 152 Fed. 737; reversed in effect, in *Adair v. United States*, *infra*), and the supreme court of Kansas, in this case, below (87 Kan. 752, 125 Pac. 8), and in the case of *State v. Ackenhausen*, 87 Kan. 792, 125 Pac. 14, submitted therewith,—that a statute is unconstitutional which purports to forbid an employer's exacting from an employee, as a condition of securing or retaining employment under him, an agreement that the employee shall not become or remain a member of any labor organization. Moreover, the supreme court of Kansas had previously, in the case of *Coffeyville Vitrified Brick & Tile Co. v. Perry*, 69 Kan. 297, 66 L.R.A. 185, 76 Pac. 848, 1 Ann. Cas. 936, cited in note in 7 L.R.A.(N.S.) 282, taken a position in accord with the other courts. And accordingly, with the reversal of the supreme court of Kansas by the Supreme Court of the United States, in the present case, the law seems to be well settled against the validity of such statutes.

So, in *State ex rel. Smith v. Daniels*, 118 Minn. 155, 136 N. W. 584, it was held, following *Adair v. United States*, *infra*, that a state statute which made it unlawful for any employer to require any person, as a condition of securing or retaining employment with him, to agree not to join, or to

made such by being placed in the same act with a police regulation, or by being enacted under a title that declares a purpose which would be a proper object for the exercise of that power.

Same — relation of statute to declared purpose.

3. To punish an employer or his agent for simply proposing certain terms of employment under circumstances devoid of coercion, duress, or undue influence, has no reasonable relation to a declared purpose, in a statute, of repressing coercion, duress, or undue influence.

Same — public welfare.

4. The several states are debarred by U. S. Const., 14th Amend., from striking down personal liberty or property rights, or materially restricting their normal exercise, excepting so far as may be incidentally necessary for the accomplishment of some other and paramount object, and one that concerns the public welfare. The mere restriction of liberty or of property rights cannot, of itself, be denominated public wel-

come or remain a member of, any lawful labor organization, was unconstitutional and void as an invasion of the personal rights of the employer guaranteed by § 1 of the 14th Amendment of the Federal Constitution.

And in *Goldfield Consol Mines Co. v. Goldfield Miners' Union*, 159 Fed. 500, which was a suit by a mine owner against a labor organization and certain members thereof, for an injunction restraining the defendants from obstructing the operation of the plaintiff's mines, from intimidating its employees, congregating on and picketing its works, maintaining an illegal boycott against it or its agents or employees, etc., in which case the defendants alleged that the plaintiff had unlawfully conspired with others against the defendants by entering into an agreement (among other things) to require each person presenting himself to any party to the agreement for employment, to sign, as a condition of such employment, an agreement that he was not, and during the period of his employment would not become, a member of the defendant organization,— it was held that a Nevada statute making it "unlawful for any person, firm, or corporation to make or enter into any agreement, either oral or in writing, by the terms of which any employee of such person, firm, or corporation, or any person about to enter the employ of such person, firm, or corporation, as a condition for continuing or obtaining such employment, shall promise or agree not to become or continue a member of a labor organization," was unconstitutional and void as violative of the provision of both the Federal and the Nevada Constitutions, that no person shall be deprived of life, liberty, or property without due process of law.

In *United States v. Scott*, 148 Fed. 431, a criminal prosecution of an agent and employee of an interstate carrier for threaten-

fare, and treated as a legitimate object of the police power.

Same — due process of law — liberty — forbidding discrimination against union labor.

5. The rights of personal liberty and property are infringed without due process of law, by a statute under which, as construed and applied by the highest state court, an employer or his agent may be criminally punished for having prescribed as a condition upon which one may secure employment under, or remain in the service of, such employer (the employment being terminable at will) that the employee shall enter into an agreement not to become or remain a member of any labor organization while so employed; the employee being subject to no incapacity or disability, but, on the contrary, free to exercise a voluntary choice.

(Mr. Justice Holmes, Mr. Justice Day, and Mr. Justice Hughes dissent.)

(January 25, 1915.)

ing other employees with loss of their employment if they joined a certain labor organization; and Order of Railroad Telegraphers v. Louisville & N. R. Co. 148 Fed. 437 (appeal dismissed in 214 U. S. 529, 53 L. ed. 1069, 29 Sup. Ct. Rep. 695), which was a suit by the labor organization against the employer to enjoin the latter from interfering with the representatives of the former in their efforts to secure members of the organization from among the employees of the defendant,—the United States circuit court for the western district of Kentucky held to be unconstitutional, as beyond the power granted to Congress by the Federal Constitution, to regulate commerce and to make all necessary and proper laws for executing this power, a Federal statute making it a criminal offense against the United States for an interstate carrier, or an agent or officer of such a carrier, to require any employee, or any person seeking employment, as a condition of such employment, to enter into an agreement not to become or remain a member of any labor organization; or for such carrier or agent or officer to threaten any employee with loss of employment, or unjustly discriminate against any employee because of his membership in such a labor organization, etc.

And in *Adair v. United States*, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764, which reversed a conviction of an agent of an interstate carrier for discharging an employee from service to such carrier because of his membership in a labor organization, and which was relied on by the majority of the court in *COPPAGE v. KANSAS*, the same Federal statute was held (Mr. Justice McKenna and Mr. Justice Holmes dissenting) to be unconstitutional in so far as it made it a criminal offense to discharge an employee from service to

ERROR to the Supreme Court of the State of Kansas to review a judgment which affirmed a judgment of the District Court for Bourbon County, convicting defendant of violating a statute forbidding employers to exact a promise not to join or retain membership in a labor organization as a condition of securing or retaining employment. Reversed.

The facts are stated in the opinion.

Messrs. R. R. Vermillion and W. F. Evans, for plaintiff in error:

The law deprives the defendant of liberty and property without due process of law.

Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; *Atchison, T. & S. F. R. Co. v. Brown*, 80 Kan. 312, 23 L.R.A.(N.S.) 247, 133 Am. St. Rep. 213, 102 Pac. 459, 18 Ann. Cas. 346; *Coffeyville Vitrified Brick & Tile Co. v. Perry*, 69 Kan. 297, 66 L.R.A. 185, 76 Pac. 848, 1 Ann. Cas. 936; *Gillespie v.*

an interstate carrier because of his membership in a labor organization, on the grounds that it invaded both personal liberty and the right of property without due process of law, and was not within the constitutional power of Congress to regulate commerce.

This case, by reversing the conviction, with directions to set aside the verdict and judgment, sustain a demurrer which had first been filed to the indictment, and dismiss the cause, also, in effect, reversed the judgment of the United States district court for the eastern district of Kentucky, reported in 152 Fed. 737, which had overruled the demurrer to the indictment in the case, holding the Federal statute in question valid as within the constitutional power of Congress to regulate interstate commerce, and not violative of the constitutional provision against depriving one of life, liberty, or property without due process of law.

And in *Re Berger*, 33 Ohio C. C. 289, it is held (Jones, J., dissenting) that the Ohio statute rendering liable to fine or imprisonment one who prevents employees from forming, joining, or belonging to a lawful labor union, or coerces or attempts to coerce employees by discharging or threatening to discharge them from employment because of their connection with such a labor organization, is unconstitutional as a violation of the personal rights secured by both the Federal and the Ohio Constitutions, including the right to employ labor and make contracts in relation thereto.

As to the validity of a contract to employ union labor only, see note to *Connors v. Connolly*, 45 L.R.A.(N.S.) 564.

As to the constitutionality of a statute requiring an employer to furnish a discharged employee the cause of his discharge, see *Atchison, T. & S. F. R. Co. v. Brown*, 23 L.R.A.(N.S.) 247, and note thereto.

People, 188 Ill. 176, 52 L.R.A. 283, 86 Am. St. Rep. 176, 58 N. E. 1007; Goldfield Consol. Mines Co. v. Goldfield Miners' Union, 159 Fed. 514; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; People v. Marcus, 185 N. Y. 257, 7 L.R.A.(N.S.) 282, 113 Am. St. Rep. 902, 77 N. E. 1073, 7 Ann. Cas. 118; State v. Coppage, 87 Kan. 752, 125 Pac. 8; State ex rel. Smith v. Daniels, 118 Minn. 155, 136 N. W. 584; State v. Julow, 129 Mo. 163, 29 L.R.A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; State ex rel. Zillmer v. Kreutzberg, 114 Wis. 530, 58 L.R.A. 748, 91 Am. St. Rep. 934, 90 N. W. 1098.

The law violates the 14th Amendment to the Constitution of the United States in that it denies persons within its jurisdiction the equal protection of the laws.

Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 112, 46 L. ed. 109, 22 Sup. Ct. Rep. 30; Connolly v. Union Sewer Pipe Co. 184 U. S. 558, 46 L. ed. 689, 22 Sup. Ct. Rep. 431; Gillespie v. People, 188 Ill. 176, 52 L.R.A. 283, 80 Am. St. Rep. 176, 58 N. E. 1007; Goldfield Consol. Mines Co. v. Goldfield Miners' Union, 159 Fed. 514; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 151, 41 L. ed. 667, 17 Sup. Ct. Rep. 255; State v. Coppage, 87 Kan. 752, 125 Pac. 8; State v. Haun, 61 Kan. 154, 47 L.R.A. 369, 59 Pac. 340; State v. Julow, 129 Mo. 163, 29 L.R.A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; State ex rel. Zillmer v. Kreutzberg, 114 Wis. 530, 58 L.R.A. 748, 91 Am. St. Rep. 934, 90 N. W. 1098.

The law cannot be sustained as a proper exercise of the police power of the state.

Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; Coffeyville Vitrified Brick & Tile Co. v. Perry, 69 Kan. 297, 66 L.R.A. 185, 76 Pac. 848, 1 Ann. Cas. 936; Goldfield Consol. Mines Co. v. Goldfield Miners' Union, 159 Fed. 514; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; State v. Julow, 129 Mo. 163, 29 L.R.A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; State ex rel. Zillmer v.

Kreutzberg, 114 Wis. 530, 58 L.R.A. 748, 91 Am. St. Rep. 934, 90 N. W. 1098.

Messrs. John S. Dawson, Attorney General of Kansas, and J. I. Sheppard, for defendant in error:

The law under which this prosecution was based is in furtherance of the 14th Amendment of the United States Constitution, and not in derogation thereof.

Arthur v. Oakes, 25 L.R.A. 414, 4 Inters. Com. Rep. 744, 11 C. C. A. 209, 24 U. S. App. 239, 63 Fed. 310, 9 Am. Crim. Rep. 169.

Mr. Justice Pitney delivered the opinion of the court:

In a local court in one of the counties of Kansas, plaintiff in error was found guilty and adjudged to pay a fine, with imprisonment as the alternative, upon an information charging him with a violation of an act of the legislature of that state, approved March 13, 1903, being chap. 222 of the Session Laws of that year, found also as §§ 4674 and 4675, Gen. Stat. (Kan.) 1909. The act reads as follows:

An Act to Provide a Penalty for Coercing or Influencing or Making Demands upon or Requirements of Employees, Servants, Laborers, and Persons Seeking Employment.

Be it enacted, etc.:

Section 1. That it shall be unlawful for any individual or member of any firm, or an agent, officer, or employee of any company or corporation, to coerce, require, demand, or influence any person or persons to enter into any agreement, either written or verbal, not to join or become or remain a member of any labor organization or association, as a condition of such person or persons securing employment, or continuing in the employment of such individual, firm, or corporation.

Section 2. Any individual or member of any firm, or any agent, officer, or employee of any company or corporation violating the provisions of this act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not less than \$50, or imprisoned in the county jail not less than thirty days.

The judgment was affirmed by the supreme court of the state, two justices dis-

As to the right of a labor union to forbid its members to handle one's product, see notes to Purvis v. Local No. 500, U. B. C. J. 12 L.R.A.(N.S.) 643; Meier v. Speer, 32 L.R.A.(N.S.) 792; and Burnham v. Dowd, 51 L.R.A.(N.S.) 778.

As to the right of a labor union to notify persons not to deal with a certain individual, see notes to Hey v. Wilson, 16 L.R.A.(N.S.) 85; Lindsay & Co. v. Montana Federation of Labor, 18 L.R.A.(N.S.) 707; and L.R.A.1915C.

American Federation of Labor v. Buck's Stove & Range Co. 32 L.R.A.(N.S.) 748.

For controversy over open or closed shop as justification for means employed to aid a strike, see notes to Reynolds v. Davis, 17 L.R.A.(N.S.) 102, and Folsom v. Lewis, 35 L.R.A.(N.S.) 787.

As to the law of union labels, see note to People v. Dantuma, 39 L.R.A.(N.S.) 1190.

A. C. W.

sending (87 Kan. 752, 125 Pac. 8), and the case is brought here upon the ground that the statute, as construed and applied in this case, is in conflict with that provision of the 14th Amendment of the Constitution of the United States which declares that no state shall deprive any person of liberty or property without due process of law.

The facts, as recited in the opinion of the supreme court, are as follows: About July 1, 1911, one Hedges was employed as a switchman by the St. Louis & San Francisco Railway Company, and was a member of a labor organization called the Switchmen's Union of North America. Plaintiff in error was employed by the railway company as superintendent, and as such he requested Hedges to sign an agreement, which he presented to him in writing, at the same time informing him that if he did not sign it he could not remain in the employ of the company. The following is a copy of the paper thus presented:

Fort Scott, Kansas, ———, 1911.

Mr. T. B. Coppage, Superintendent Frisco Lines, Fort Scott:

We, the undersigned, have agreed to abide by your request, that is, to withdraw from the Switchmen's Union, while in the service of the Frisco Company.

(Signed) _____

Hedges refused to sign this, and refused to withdraw from the labor organization. Thereupon plaintiff in error, as such superintendent, discharged him from the service of the company.

At the outset, a few words should be said respecting the construction of the act. It uses the term "coerce," and some stress is laid upon this in the opinion of the Kansas supreme court. But, on this record, we have nothing to do with any question of actual or implied coercion or duress, such as might overcome the will of the employee by means unlawful without the act. In the case before us, the state court treated the term "coerce" as applying to the mere insistence by the employer, or its agent, upon its right to prescribe terms upon which alone it would consent to a continuance of the relationship of employer and employee. In this sense we must understand the statute to have been construed by the court, for in this sense it was enforced in the present case; there being no finding, nor any evidence to support a finding, that plaintiff in error was guilty in any other sense. The entire evidence is included in the bill of exceptions returned with the writ of error, and we have examined it to the extent necessary in order to determine the Federal right that is as-

L.R.A.1915C.

serted (Southern P. Co. v. Schuyler, 227 U. S. 601, 611, 57 L. ed. 662, 669, 43 L.R.A. (N.S.) 901, 33 Sup. Ct. Rep. 277, and cases cited). There is neither finding nor evidence that the contract of employment was other than a general or indefinite hiring, such as is presumed to be terminable at the will of either party. The evidence shows that it would have been to the advantage of Hedges, from a pecuniary point of view and otherwise, to have been permitted to retain his membership in the union, and at the same time to remain in the employ of the railway company. In particular, it shows (although no reference is made to this in the opinion of the court) that, as a member of the union, he was entitled to benefits in the nature of insurance to the amount of \$1,500, which he would have been obliged to forego if he had ceased to be a member. But, aside from this matter of pecuniary interest, there is nothing to show that Hedges was subjected to the least pressure or influence, or that he was not a free agent, in all respects competent, and at liberty to choose what was best from the standpoint of his own interests. Of course, if plaintiff in error, acting as the representative of the railway company, was otherwise within his legal rights in insisting that Hedges should elect whether to remain in the employ of the company or to retain his membership in the union, that insistence is not rendered unlawful by the fact that the choice involved a pecuniary sacrifice to Hedges. Silliman v. United States, 101 U. S. 465, 470, 471, 25 L. ed. 987-989; Hackley v. Headley, 45 Mich. 569, 576, 8 N. W. 511; Emery v. Lowell, 127 Mass. 138, 141; Custin v. Viroqua, 67 Wis. 314, 320, 30 N. W. 515. And if the right that plaintiff in error exercised is founded upon a constitutional basis, it cannot be impaired by merely applying to its exercise the term "coercion." We have to deal, therefore, with a statute that, as construed and applied, makes it a criminal offense, punishable with fine or imprisonment, for an employer or his agent to merely prescribe, as a condition upon which one may secure certain employment or remain in such employment (the employment being terminable at will), that the employee shall enter into an agreement not to become or remain a member of any labor organization while so employed; the employee being subject to no incapacity or disability, but, on the contrary, free to exercise a voluntary choice.

In Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764, this court had to deal with a question not distinguishable in principle from the one now presented. Congress, in § 10 of an act of June 1, 1898, entitled,

"An Act Concerning Carriers Engaged in Interstate Commerce and Their Employees" (30 Stat. at L. 424, 428, chap. 370), had enacted "that any employer subject to the provisions of this act, and any officer, agent, or receiver of such employer, who shall require any employee, or any person seeking employment, as a condition of such employment, to enter into an agreement, either written or verbal, not to become or remain a member of any labor corporation, association, or organization; or shall threaten any employee with loss of employment, or shall unjustly discriminate against any employee because of his membership in such a labor corporation, association, or organization . . . is hereby declared to be guilty of a misdemeanor, and, upon conviction thereof . . . shall be punished for each offense by a fine of not less than one hundred dollars and not more than one thousand dollars." Adair was convicted upon an indictment charging that he, as agent of a common carrier subject to the provisions of the act, unjustly discriminated against a certain employee by discharging him from the employ of the carrier because of his membership in a labor organization. The court held that portion of the act upon which the conviction rested to be an invasion of the personal liberty as well as of the right of property guaranteed by the 5th Amendment, which declares that no person shall be deprived of liberty or property without due process of law. Speaking by Mr. Justice Harlan, the court said (p. 174): "While, as already suggested, the right of liberty and property guaranteed by the Constitution against deprivation without due process of law is subject to such reasonable restraints as the common good or the general welfare may require, it is not within the functions of government—at least, in the absence of contract between the parties—to compel any person in the course of his business and against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee. It was the legal right of the defendant Adair—however unwise such a course might have been—to discharge Coppage [the employee is that case] because of his being a mem-

ber of a labor organization, as it was the legal right of Coppage, if he saw fit to do so,—however unwise such a course on his part might have been,—to quit the service in which he was engaged, because the defendant employed some persons who were not members of a labor organization. In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract, which no government can legally justify in a free land."

Unless it is to be overruled, this decision is controlling upon the present controversy; for if Congress is prevented from arbitrary interference with the liberty of contract because of the "due process" provision of the 5th Amendment it is too clear for argument that the states are prevented from the like interference by virtue of the corresponding clause of the 14th Amendment; and hence, if it be unconstitutional for Congress to deprive an employer of liberty or property for threatening an employee with loss of employment, or discriminating against him because of his membership in a labor organization, it is unconstitutional for a state to similarly punish an employer for requiring his employee, as a condition of securing or retaining employment, to agree not to become or remain a member of such an organization while so employed.

It is true that, while the statute that was dealt with in the Adair Case contained a clause substantially identical with the Kansas act now under consideration,—a clause making it a misdemeanor for an employer to require an employee or applicant for employment, as a condition of such employment, to agree not to become or remain a member of a labor organization,—the conviction was based upon another clause, which related to discharging an employee because of his membership in such an organization; and the decision, naturally, was confined to the case actually presented for decision. In the present case, the Kansas supreme court sought to distinguish the Adair decision upon this ground. The distinction, if any there be, has not previously been recognized as substantial, so far as we have been able to find. The opinion in the Adair Case, while carefully restricting the decision to the precise matter involved, cited (208 U. S. on page 175), as the first in order of a number of decisions supporting the conclusion of the court, a case (*People v. Marcus*, 185 N. Y. 257, 7 L.R.A.(N.S.) 282, 113 Am. St. Rep. 902, 77 N. E. 1073, 7 Ann. Cas. 188) in which the statute denounced as unconstitutional was in substance the counterpart of the one with which we are now dealing.

But, irrespective of whether it has received judicial recognition, is there any real distinction? The constitutional right of the employer to discharge an employee because of his membership in a labor union being granted, can the employer be compelled to resort to this extreme measure? May he not offer to the employee an option, such as was offered in the instant case, to remain in the employment if he will retire from the union; to sever the former relationship only if he prefers the latter? Granted the equal freedom of both parties to the contract of employment, has not each party the right to stipulate upon what terms only he will consent to the inception, or to the continuance, of that relationship? And may he not insist upon an express agreement, instead of leaving the terms of the employment to be implied? Can the legislature in effect require either party at the beginning to act covertly; concealing essential terms of the employment—terms to which, perhaps, the other would not willingly consent—and revealing them only when it is proposed to insist upon them as a ground for terminating the relationship? Supposing an employer is unwilling to have in his employ one holding membership in a labor union, and has reason to suppose that the man may prefer membership in the union to the given employment without it—we ask, can the legislature oblige the employer in such case to refrain from dealing frankly at the outset? And is not the employer entitled to insist upon equal frankness in return? Approaching the matter from a somewhat different standpoint, is the employee's right to be free to join a labor union any more sacred, or more securely founded upon the Constitution, than his right to work for whom he will, or to be idle if he will? And does not the ordinary contract of employment include an insistence by the employer that the employee shall agree, as a condition of the employment, that he will not be idle and will not work for whom he pleases, but will serve his present employer, and him only, so long as the relation between them shall continue? Can the right of making contracts be enjoyed at all, except by parties coming together in an agreement that requires each party to forego, during the time and for the purpose covered by the agreement, any inconsistent exercise of his constitutional rights?

These queries answer themselves. The answers, as we think, lead to a single conclusion: Under constitutional freedom of contract, whatever either party has the right to treat as sufficient ground for terminating the employment, where there is no stipulation on the subject, he has the

right to provide against by insisting that a stipulation respecting it shall be a *sine qua non* of the inception of the employment, or of its continuance if it be terminable at will. It follows that this case cannot be distinguished from *Adair v. United States*.

The decision in that case was reached as the result of elaborate argument and full consideration. The opinion states (208 U. S. 171): "This question is admittedly one of importance, and has been examined with care and deliberation. And the court has reached a conclusion which, in its judgment, is consistent with both the words and spirit of the Constitution, and is sustained as well by sound reason." We are now asked, in effect, to overrule it; and in view of the importance of the issue we have re-examined the question from the standpoint of both reason and authority. As a result, we are constrained to reaffirm the doctrine there applied. Neither the doctrine nor this application of it is novel; we will endeavor to restate some of the grounds upon which it rests. The principle is fundamental and vital. Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money.

An interference with this liberty so serious as that now under consideration, and so disturbing of equality of right, must be deemed to be arbitrary, unless it be supportable as a reasonable exercise of the police power of the state. But, notwithstanding the strong general presumption in favor of the validity of state laws, we do not think the statute in question, as construed and applied in this case, can be sustained as a legitimate exercise of that power. To avoid possible misunderstanding, we should here emphasize, what has been said before, that so far as its title or enacting clause expresses a purpose to deal with coercion, compulsion, duress, or other undue influence, we have no present concern with it, because nothing of that sort is involved in this case. As has been many times stated, this court deals not with moot cases or abstract questions, but with the concrete case before it. *California v. San Pablo & T. R. Co.* 149

U. S. 308, 314, 37 L. ed. 747, 748, 13 Sup. Ct. Rep. 876; *Richardson v. McChesney*, 218 U. S. 487, 492, 54 L. ed. 1121, 1122, 31 Sup. Ct. Rep. 43; *Missouri, K. & T. R. Co. v. Cade*, 233 U. S. 642, 648, 58 L. ed. 1135, 1137, 34 Sup. Ct. Rep. 678. We do not mean to say, therefore, that a state may not properly exert its police power to prevent coercion on the part of employers towards employees, or *vice versa*. But, in this case, the Kansas court of last resort has held that *Coppage*, the plaintiff in error, is a criminal, punishable with fine or imprisonment under this statute, simply and merely because, while acting as the representative of the railroad company, and dealing with *Hedges*, an employee at will and a man of full age and understanding, subject to no restraint or disability, *Coppage* insisted that *Hedges* should freely choose whether he would leave the employ of the company or would agree to refrain from association with the union while so employed. This construction is, for all purposes of our jurisdiction, conclusive evidence that the state of Kansas intends by this legislation to punish conduct such as that of *Coppage*, although entirely devoid of any element of coercion, compulsion, duress, or undue influence, just as certainly as it intends to punish coercion and the like. But, when a party appeals to this court for the protection of rights secured to him by the Federal Constitution, the decision is not to depend upon the form of the state law, nor even upon its declared purpose, but rather upon its operation and effect as applied and enforced by the state; and upon these matters this court cannot, in the proper performance of its duty, yield its judgment to that of the state court. *St. Louis Southwestern R. Co. v. Arkansas*, 235 U. S. 350, 362, 59 L. ed. —, 35 Sup. Ct. Rep. 99, and cases cited. Now, it seems to us clear that a statutory provision which is not a legitimate police regulation cannot be made such by being placed in the same act with a police regulation, or by being enacted under a title that declares a purpose which would be a proper object for the exercise of that power. "Its true character cannot be changed by its collocation," as Mr. Justice Grier said in the *Passenger Cases*, 7 How. 458, 12 L. ed. 775. It is equally clear, we think, that to punish an employer or his agent for simply proposing certain terms of employment, under circumstances devoid of coercion, duress, or undue influence, has no reasonable relation to a declared purpose of repressing coercion, duress, and undue influence. Nor can a state, by designating as "coercion" conduct which is not such in truth, render criminal any normal and essentially innocent exercise of personal

liberty or of property rights; for to permit this would deprive the 14th Amendment of its effective force in this regard. We, of course, do not intend to attribute to the legislature or the courts of Kansas any improper purpose or any want of candor; but only to emphasize the distinction between the form of the statute and its effect as applied to the present case.

Laying aside, therefore, as immaterial for present purposes, so much of the statute as indicates a purpose to repress coercive practices, what possible relation has the residue of the act to the public health, safety, morals, or general welfare? None is suggested, and we are unable to conceive of any. The act, as the construction given to it by the state court shows, is intended to deprive employers of a part of their liberty of contract, to the corresponding advantage of the employed and the upbuilding of the labor organizations. But no attempt is made, or could reasonably be made, to sustain the purpose to strengthen these voluntary organizations, any more than other voluntary associations of persons, as a legitimate object for the exercise of the police power. They are not public institutions, charged by law with public or governmental duties, such as would render the maintenance of their membership a matter of direct concern to the general welfare. If they were, a different question would be presented.

As to the interest of the employed, it is said by the Kansas supreme court to be a matter of common knowledge that "employees, as a rule, are not financially able to be as independent in making contracts for the sale of their labor as are employers in making a contract of purchase thereof." No doubt, wherever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances. This applies to all contracts, and not merely to that between employer and employee. Indeed, a little reflection will show that wherever the right of private property and the right of free contract coexist, each party when contracting is inevitably more or less influenced by the question whether he has much property, or little, or none; for the contract is made to the very end that each may gain something that he needs or desires more urgently than that which he proposes to give in exchange. And, since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate

those inequalities of fortune that are the necessary result of the exercise of those rights. But the 14th Amendment in declaring that a state shall not "deprive any person of life, liberty, or property, without due process of law," gives to each of these an equal sanction; it recognizes "liberty" and "property" as coexistent human rights, and debars the states from any unwarranted interference with either.

And since a state may not strike them down directly, it is clear that it may not do so indirectly, as by declaring in effect that the public good requires the removal of those inequalities that are but the normal and inevitable result of their exercise, and then invoking the police power in order to remove the inequalities, without other object in view. The police power is broad, and not easily defined, but it cannot be given the wide scope that is here asserted for it, without in effect nullifying the constitutional guaranty.

We need not refer to the numerous and familiar cases in which this court has held that the power may properly be exercised for preserving the public health, safety, morals, or general welfare, and that such police regulations may reasonably limit the enjoyment of personal liberty, including the right of making contracts. They are reviewed in *Holden v. Hardy*, 169 U. S. 366, 391, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383; *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 566, 55 L. ed. 323, 338, 31 Sup. Ct. Rep. 259; *Erie R. Co. v. Williams*, 233 U. S. 685, 58 L. ed. 1155, 34 Sup. Ct. Rep. 761; and other recent decisions. An evident and controlling distinction is this: that in those cases it has been held permissible for the states to adopt regulations fairly deemed necessary to secure some object directly affecting the public welfare, even though the enjoyment of private rights of liberty and property be thereby incidentally hampered; while in that portion of the Kansas statute which is now under consideration—that is to say, aside from coercion, etc.,—there is no object or purpose, expressed or implied, that is claimed to have reference to health, safety, morals, or public welfare, beyond the supposed desirability of leveling inequalities of fortune by depriving one who has property of some part of what is characterized as his "financial independence." In short, an interference with the normal exercise of personal liberty and property rights is the primary object of the statute, and not an incident to the advancement of the general welfare. But, in our opinion, the 14th Amendment debars the states from striking down personal liberty or property rights, or materially restricting their normal exercise, excepting so far as may be

incidentally necessary for the accomplishment of some other and paramount object, and one that concerns the public welfare. The mere restriction of liberty or of property rights cannot of itself be denominated "public welfare," and treated as a legitimate object of the police power; for such restriction is the very thing that is inhibited by the Amendment.

It is said in the opinion of the state court that membership in a labor organization does not necessarily affect a man's duty to his employer; that the employer has no right, by virtue of the relation, "to dominate the life nor to interfere with the liberty of the employee in matters that do not lessen or deteriorate the service;" and that "the statute implies that labor unions are lawful and not inimical to the rights of employers." The same view is presented in the brief of counsel for the state, where it is said that membership in a labor organization is the "personal and private affair" of the employee. To this line of argument it is sufficient to say that it cannot be judicially declared that membership in such an organization has no relation to a member's duty to his employer; and therefore, if freedom of contract is to be preserved, the employer must be left at liberty to decide for himself whether such membership by his employee is consistent with the satisfactory performance of the duties of the employment.

Of course we do not intend to say, nor to intimate, anything inconsistent with the right of individuals to join labor unions, nor do we question the legitimacy of such organizations so long as they conform to the laws of the land as others are required to do. Conceding the full right of the individual to join the union, he has no inherent right to do this and still remain in the employ of one who is unwilling to employ a union man, any more than the same individual has a right to join the union without the consent of that organization. Can it be doubted that a labor organization—a voluntary association of working men—has the inherent and constitutional right to deny membership to any man who will not agree that during such membership he will not accept or retain employment in company with nonunion men? Or that a union man has the constitutional right to decline proffered employment unless the employer will agree not to employ any nonunion man? (In all cases we refer, of course, to agreements made voluntarily, and without coercion or duress as between the parties. And we have no reference to questions of monopoly, or interference with the rights of third parties or the general public. These involve other considerations, respect-

ing which we intend to intimate no opinion. See *Curran v. Galen*, 152 N. Y. 33, 37 L.R.A. 802, 57 Am. St. Rep. 496, 46 N. E. 297; *Jacobs v. Cohen*, 183 N. Y. 207, 213, 214, 2 L.R.A.(N.S.) 292, 111 Am. St. Rep. 730, 76 N. E. 5, 5 Ann. Cas. 280; *Plant v. Woods*, 176 Mass. 492, 51 L.R.A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011; *Berry v. Donovan*, 188 Mass. 353, 5 L.R.A.(N.S.) 899, 108 Am. St. Rep. 499, 74 N. E. 603, 3 Ann. Cas. 738; *Brennan v. United Hatters*, 73 N. J. L. 729, 738, 9 L.R.A.(N.S.) 254, 118 Am. St. Rep. 727, 65 Atl. 165, 169, 9 Ann. Cas. 698, 702.) And can there be one rule of liberty for the labor organization and its members, and a different and more restrictive rule for employers? We think not; and since the relation of employer and employee is a voluntary relation, as clearly as is that between the members of a labor organization, the employer has the same inherent right to prescribe the terms upon which he will consent to the relationship, and to have them fairly understood and expressed in advance.

When a man is called upon to agree not to become or remain a member of the union while working for a particular employer, he is in effect only asked to deal openly and frankly with his employer, so as not to retain the employment upon terms to which the latter is not willing to agree. And the liberty of making contracts does not include a liberty to procure employment from an unwilling employer, or without a fair understanding. Nor may the employer be foreclosed by legislation from exercising the same freedom of choice that is the right of the employee.

To ask a man to agree, in advance, to refrain from affiliation with the union while retaining a certain position of employment, is not to ask him to give up any part of his constitutional freedom. He is free to decline the employment on those terms, just as the employer may decline to offer employment on any other; for "it takes two to make a bargain." Having accepted employment on those terms, the man is still free to join the union when the period of employment expires; or, if employed at will, then at any time upon simply quitting the employment. And, if bound by his own agreement to refrain from joining during a stated period of employment, he is in no different situation from that which is necessarily incident to term contracts in general. For constitutional freedom of contract does not mean that a party is to be as free after making a contract as before; he is not free to break it without accountability. Freedom of contract, from the very nature of the thing, can be enjoyed only by being exercised; and each particular exercise of it involves making an engagement

which, if fulfilled, prevents for the time any inconsistent course of conduct.

So much for the reason of the matters let us turn again to the adjudicated cases.

The decision in the *Adair Case* is in accord with the almost unbroken current of authorities in the state courts. In many states enactments not distinguishable in principle from the one now in question have been passed, but, except in two instances (one, the decision of an inferior court in Ohio, since repudiated; the other, the decision now under review), we are unable to find that they have been judicially enforced. It is not too much to say that such laws have by common consent been treated as unconstitutional, for while many state courts of last resort have adjudged them void, we have found no decision by such a court sustaining legislation of this character, excepting that which is now under review. The single previous instance in which any court has upheld such a statute is *Davis v. State* (1893) 30 Ohio L. J. 342, 11 Ohio Dec. Reprint, 894, where the court of common pleas of Hamilton county sustained an act of April 14, 1892 (89 Ohio Laws, 269), which declared that any person who coerced or attempted to coerce employees by discharging or threatening to discharge them because of their connection with any lawful labor organization should be guilty of a misdemeanor, and upon conviction fined or imprisoned. We are unable to find that this decision was ever directly reviewed; but in *State v. Bateman* (1900) 10 Ohio S. & C. P. Dec. 68, 7 Ohio N. P. 487, its authority was repudiated upon the ground that it had been in effect overruled by subsequent decisions of the state supreme court, and the same statute was held unconstitutional.

The right that plaintiff in error is now seeking to maintain was held by the supreme court of Kansas, in an earlier case, to be within the protection of the 14th Amendment, and therefore beyond legislative interference. In *Coffeyville Vitriified Brick & Tile Co. v. Perry*, 69 Kan. 297, 66 L.R.A. 185, 76 Pac. 848, 1 Ann. Cas. 936, the court had under consideration chapter 120 of the Laws of 1897 (Gen. Stat. 1901, §§ 2425, 2426), which declared it unlawful for any person, company, or corporation, or agent, officer, etc., to prevent employees from joining and belonging to any labor organization, and enacted that any such person, company, or corporation, etc., that coerced or attempted to coerce employees by discharging or threatening to discharge them because of their connection with such labor organization should be deemed guilty of a misdemeanor, and upon conviction subjected to a fine, and should also be liable

to the person injured in punitive damages. It was attacked as violative of the 14th Amendment, and also of the Bill of Rights of the state Constitution.¹ The court held it unconstitutional, saying: "The right to follow any lawful vocation and to make contracts is as completely within the protection of the Constitution as the right to hold property free from unwarranted seizure, or the liberty to go when and where one will. One of the ways of obtaining property is by contract. The right, therefore, to contract cannot be infringed by the legislature without violating the letter and spirit of the Constitution. Every citizen is protected in his right to work where and for whom he will. He may select not only his employer, but also his associates. He is at liberty to refuse to continue to serve one who has in his employ a person, or an association of persons, objectionable to him. In this respect the rights of the employer and employee are equal. Any act of the legislature that would undertake to impose on an employer the obligation of keeping in his service one whom, for any reason, he should not desire, would be a denial of his constitutional right to make and terminate contracts and to acquire and hold property. Equally so would be an act the provisions of which should be intended to require one to remain in the service of one whom he should not desire to serve. . . . The business conducted by the defendant was its property, and in the exercise of his ownership it is protected by the Constitution. It could abandon or discontinue its operation at pleasure. It had the right, beyond the possibility of legislative interference, to make any contract with reference thereto not in violation of law. In the operation of its property it may employ such persons as are desirable, and discharge, without reason, those who are undesirable. It is at liberty to contract for the services of persons in any manner that is satisfactory to both. No legislative restrictions can be imposed upon the lawful exercise of these rights."

In *Atchison, T. & S. F. R. Co. v. Brown*, 80 Kan. 312, 23 L.R.A. (N.S.) 247, 133 Am. St. Rep. 213, 102 Pac. 459, 18 Ann. Cas. 346, the same court passed upon chapter 144 of the Laws of 1897 (Gen. Stat. 1901,

§§ 2421-2424), which required the employer, upon the request of a discharged employee, to furnish in writing the true cause or reason for such discharge. The railway company did not meet this requirement, its "service letter," as it was called, stating only that Brown was discharged "for cause," which the court naturally held was not a statement of the cause. The law was held unconstitutional, upon the ground (80 Kan. 315) that an employer may discharge his employee for any reason, or for no reason, just as an employee may quit the employment for any reason, or for no reason; that such action on the part of employer or employee, where no obligation is violated, is an essential element of liberty in action; and that one cannot be compelled to give a reason or cause for an action for which he may have no specific reason or cause, except, perhaps, a mere whim or prejudice.

In the present case the court did not repudiate or overrule these previous decisions, but, on the contrary, cited them as establishing the right of the employer to discharge his employee at any time, for any reason, or for no reason, being responsible in damages for violating a contract as to the time of employment, and as establishing, conversely, the right of the employee to quit the employment at any time, for any reason, or without any reason, being likewise responsible in damages for a violation of his contract with the employer. The court held the act of 1903 that is now in question to be distinguishable from the act of 1897, upon grounds sufficiently indicated and answered by what we have already said.

In five other states the courts of last resort have had similar acts under consideration, and in each instance have held them unconstitutional. In *State v. Julow* (1895) 129 Mo. 163, 29 L.R.A. 257, 50 Am. St. Rep. 443, 31 S. W. 781, the supreme court of Missouri dealt with an act (Missouri Laws 1893, p. 187) that forbade employers, on pain of fine or imprisonment, to enter into any agreement with an employee requiring him to withdraw from a labor union or other lawful organization, or to refrain from joining such an organization, or to "by any means attempt to compel or coerce any employee into withdrawal from any lawful organization or society." In *Gillespie v. People* (1900) 188 Ill. 176, 52 L.R.A. 283, 80 Am. St. Rep. 176, 58 N. E. 1007, the supreme court of Illinois held unconstitutional an act (Hurd's Stat. 1899, p. 844) declaring it criminal for any individual or member of any firm, etc., to prevent or attempt to prevent employees from forming, joining, and belonging to any lawful labor organization, and that any such person "that coerces or attempts to coerce

¹ Constitution of the state of Kansas. . . . Bill of Rights.

Section 1. All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.

Section 18. All persons, for injuries suffered in person, reputation, or property, shall have remedy by due course of law, and justice administered without delay. L.R.A.1916C.

employees by discharging or threatening to discharge them because of their connection with such lawful labor organization" should be guilty of a misdemeanor. In *State ex rel. Zillmer v. Kreutzberg* (1902) 114 Wis. 530, 58 L.R.A. 748, 91 Am. St. Rep. 934, 90 N. W. 1098, the court had under consideration a statute (Wisconsin Laws 1899, chap. 332) which, like the Kansas act now in question, prohibited the employer or his agent from coercing the employee to enter into an agreement not to become a member of a labor organization, as a condition of securing employment or continuing in the employment, and also rendered it unlawful to discharge an employee because of his being a member of any labor organization. The decision related to the latter prohibition, but this was denounced upon able and learned reasoning that has a much wider reach. In *People v. Marcus* (1906) 185 N. Y. 257, 7 L.R.A. (N.S.) 282, 113 Am. St. Rep. 902, 77 N. E. 1073, 7 Ann. Cas. 118, the statute dealt with (N. Y. Laws 1887, chap. 688), as we have already said, was in substance identical with the Kansas act. These decisions antedated *Adair v. United States*. They proceed upon broad and fundamental reasoning, the same in substance that was adopted by this court in the *Adair Case*, and they are cited with approval in the opinion (208 U. S. 175). A like result was reached in *State ex rel. Smith v. Daniels* (1912) 118 Minn. 155, 136 N. W. 584, with respect to an act that, like the Kansas statute, forbade an employer to require an employee or person seeking employment, as a condition of such employment, to make an agreement that the employee would not become or remain a member of a labor organization. This was held invalid upon the authority of the *Adair Case*. And see *Goldfield Consol. Mines Co. v. Goldfield Miners' Union*, 159 Fed. 500, 513.

Upon both principle and authority, therefore, we are constrained to hold that the Kansas act of March 13, 1903, as construed and applied so as to punish with fine or imprisonment an employer or his agent for merely prescribing, as a condition upon which one may secure employment under or remain in the service of such employer, that the employee shall enter into an agreement not to become or remain a member of any labor organization while so employed, is repugnant to the "due process" clause of the 14th Amendment, and therefore void.

Judgment reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Mr. Justice Holmes, dissenting:

I think the judgment should be affirmed. L.R.A.1915C.

In present conditions a workman not unnaturally may believe that only by belonging to a union can he secure a contract that shall be fair to him. *Holden v. Hardy*, 169 U. S. 366, 397, 42 L. ed. 780, 792, 18 Sup. Ct. Rep. 383; *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 570, 55 L. ed. 328, 339, 31 Sup. Ct. Rep. 259. If that belief, whether right or wrong, may be held by a reasonable man, it seems to me that it may be enforced by law in order to establish the equality of position between the parties in which liberty of contract begins. Whether in the long run it is wise for the workmen to enact legislation of this sort is not my concern, but I am strongly of opinion that there is nothing in the Constitution of the United States to prevent it, and that *Adair v. United States*, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764, and *Lochner v. New York*, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133, should be overruled. I have stated my grounds in those cases and think it unnecessary to add others that I think exist. See further, *Vegelahn v. Guntner*, 167 Mass. 92, 104, 108, 35 L.R.A. 722, 57 Am. St. Rep. 443, 44 N. E. 1077; *Plant v. Woods*, 176 Mass. 492, 505, 51 L.R.A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011. I still entertain the opinions expressed by me in *Massachusetts*.

Mr. Justice Day, dissenting:

The character of the question here involved sufficiently justifies, in my opinion, a statement of the grounds which impel me to dissent from the opinion and judgment in this case. The importance of the decision is further emphasized by the fact that it results not only in invalidating the legislation of Kansas, now before the court, but necessarily decrees the same fate to like legislation of other states of the Union.² This far-reaching result is attained because the statute is declared to be an infraction of the constitutional protection afforded under the 14th Amendment to the Federal Constitution, which declares that no person shall be deprived of life, liberty, or property without due process of law. The right of contract, it is said, is part of the liberty of the citizen, and to abridge it, as is done in this case, is declared to be beyond the legislative authority of the state.

That the right of contract is a part of

² Statutes like the Kansas statute have been passed in California, Colorado, Connecticut, Indiana, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Oklahoma, Oregon, Pennsylvania, Porto Rico, and Wisconsin. Bulletin of the Bureau of Labor Statistics No. 148, volumes 1 and 2; Labor Laws of the United States.

individual freedom within the protection of this Amendment, and may not be arbitrarily interfered with, is conceded. While this is true, nothing is better settled by the repeated decisions of this court than that the right of contract is not absolute and unyielding, but is subject to limitation and restraint in the interests of the public health, safety, and welfare, and such limitations may be declared in legislation of the state. It would unduly extend what I purpose to say in this case to refer to all the cases in which this doctrine has been declared. One of them is: *Frisbie v. United States*, 157 U. S. 160, 39 L. ed. 657, 15 Sup. Ct. Rep. 586. In that case, it was declared, and in varying form has been repeated many times since:

"While it may be conceded that, generally speaking, among the inalienable rights of the citizen is that of the liberty of contract, yet such liberty is not absolute and universal. It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts. It may deny to all the right to contract for the purchase or sale of lottery tickets; to the minor the right to assume any obligations, except for the necessities of existence; to the common carrier the power to make any contract releasing himself from negligence, and, indeed, may restrain all engaged in any employment from any contract in the course of that employment which is against public policy. The possession of this power by government in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the price of his labor, services, or property."

See also *Holden v. Hardy*, 169 U. S. 366, 391, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383; *Atkin v. Kansas*, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124; *Muller v. Oregon*, 208 U. S. 412, 421, 52 L. ed. 551, 555, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957; *McLean v. Arkansas*, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206; *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259; *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 202, 55 L. ed. 167, 180, 31 L.R.A. (N.S.) 7, 31 Sup. Ct. Rep. 164; *Erie R. Co. v. Williams*, 233 U. S. 685, 699, 58 L. ed. 1155, 1160, 34 Sup. Ct. Rep. 761. The *Erie Railroad Case* is a very recent deliverance of this court upon the subject, wherein it was declared:

"But liberty of making contracts is subject to conditions in the interest of the public welfare, and which shall prevail—principle or condition—cannot be defined by any precise and universal formula. Each instance of asserted conflict must be deter-

mined by itself, and it has been said many times that each act of legislation has the support of the presumption that it is an exercise in the interest of the public. The burden is on him who attacks the legislation, and it is not sustained by declaring a liberty of contract. It can only be sustained by demonstrating that it conflicts with some constitutional restraint, or that the public welfare is not subserved by the legislation. The legislature is, in the first instance, the judge of what is necessary for the public welfare, and a judicial review of its judgment is limited. The earnest conflict of serious opinion does not suffice to bring it within the range of judicial cognizance. *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 555, 55 L. ed. 328, 337, 31 Sup. Ct. Rep. 259; *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 58 L. ed. 1011, 34 Sup. Ct. Rep. 612."

It is therefore the thoroughly established doctrine of this court that liberty of contract may be circumscribed in the interest of the state and the welfare of its people. Whether a given exercise of such authority transcends the limits of legislative authority must be determined in each case as it arises. The preservation of the police power of the states, under the authority of which that great mass of legislation has been enacted which has for its purpose the promotion of the health, safety, and welfare of the public, is of the utmost importance. This power was not surrendered by the states when the Federal Constitution was adopted, nor taken from them when the 14th Amendment was ratified and became a part of the fundamental law of the Union. *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357.

Of the necessity of such legislation, the local legislature is itself the judge, and its enactments are only to be set aside when they involve such palpable abuse of power and lack of reasonableness to accomplish a lawful end that they may be said to be merely arbitrary and capricious, and hence out of place in a government of laws, and not of men, and irreconcilable with the conception of due process of law. *McGehee on Due Process of Law*, page 306, and cases from this court therein cited.

By this it is not meant that the legislative power is beyond judicial review. Such enactments as are arbitrary or unreasonable, and thus exceed the exercise of legislative authority in good faith, may be declared invalid when brought in review by proper judicial proceedings. This is necessary to the assertion and maintenance of the supremacy of the Constitution.

Conceding, then, that the right of contract is a subject of judicial protection,

within the authority given by the Constitution of the United States, the question here is, Was the power of the state so arbitrarily exercised as to render its action unconstitutional and therefore void? It is said that this question is authoritatively determined in this court, in the case of *Adair v. United States*, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764. In that case, a statute passed by the Congress of the United States, under supposed sanction of the power to regulate interstate commerce, was before this court, and it was there decided that the right of contract protected by the 5th Amendment to the Constitution, providing that no person shall be deprived of life, liberty, or property without due process of law, avoided a statute which undertook to make it a crime to discharge an employee simply because of his membership in a labor organization. The feature of the statute which is here involved, making it an offense to require any employee, or any person seeking employment, as a condition of such employment, to enter into an agreement, either written or verbal, not to become a member of any labor corporation, association, or organization,—a provision exactly similar to that of the Kansas statute now under consideration,—was not before the court upon the charge made or the facts shown, and this provision was neither considered nor decided upon in reaching the conclusion that an employer could not be made a criminal because he discharged an employee simply because of his membership in a labor organization. In the course of the opinion this fact was more than once stated, and the question before the court declared to be:

"May Congress make it a criminal offense against the United States—as by the 10th section of the act of 1898 it does—for an agent or officer of an interstate carrier, having full authority in the premises from the carrier, to discharge an employee from service simply because of his membership in a labor organization?"

Such was the question before the court, and that there might be no mistake about it, at the close of the opinion, the part of the act upon which the defendant in that case was convicted was declared to be separable from the other parts of the act, and that feature of the statute the only subject of decision. Mr. Justice Harlan, concluding the opinion of the court, said:

"We add that since the part of the act of 1898 upon which the first count of the indictment is based, and upon which alone the defendant was convicted, *is severable from its other parts*, and as what has been said is sufficient to dispose of the present case, *we are not called upon to consider* L.R.A.1915C.

other and independent provisions of the act, such, for instance, as the provisions relating to arbitration. *This decision is therefore restricted to the question of the validity of the particular provision in the act of Congress making it a crime against the United States for an agent or officer of an interstate carrier to discharge an employee from its service because of his being a member of a labor organization.*" (Italics mine.)

In view of the feature of the statute involved, the charge made, and this express reservation in the opinion of the court as to other features of the statute, I am unable to agree that that case involved or decided the one now at bar.

There is nothing in the statute now under consideration which prevents an employer from discharging one in his service at his will. The question now presented is, May an employer, as a condition of present or future employment, require an employee to agree that he will not exercise the privilege of becoming a member of a labor union, should he see fit to do so? In my opinion, the cases are entirely different, and the decision of the questions controlled by different principles. The right to join labor unions is undisputed, and has been the subject of frequent affirmation in judicial opinions. Acting within their legal rights, such associations are as legitimate as any organization of citizens formed to promote their common interest. They are organized under the laws of many states, by virtue of express statutes passed for that purpose, and, being legal, and acting within their constitutional rights, the right to join them, as against coercive action to the contrary, may be the legitimate subject of protection in the exercise of the police authority of the states. This statute, passed in the exercise of that particular authority called the police power, the limitations of which no court has yet undertaken precisely to define, has for its avowed purpose the protection of the exercise of a legal right, by preventing an employer from depriving the employee of it as a condition of obtaining employment. I see no reason why a state may not, if it chooses, protect this right, as well as other legal rights.

But it is said that the contrary must necessarily result, if not from the precise matter decided in the *Adair Case*, then from the principles therein laid down, and that it is the logical result of that decision that the employer may, as a condition of employment, require an obligation to forego the exercise of any privileges because of the exercise of which an employee might be discharged from service. I do not concede that this result follows from anything decided in the *Adair Case*. That case dealt

solely with the right of an employer to terminate relations of employment with an employee, and involved the constitutional protection of his right so to do, but did not deal with the conditions which he might exact or impose upon another as a condition of employment.

The act under consideration is said to have the effect to deprive employers of a part of their liberty of contract, for the benefit of labor organizations. It is urged that the statute has no object or purpose, express or implied, that has reference to health, safety, morals, or public welfare, beyond the supposed desirability of leveling inequalities of fortune by depriving him who has property of some part of his "financial independence."

But this argument admits that financial independence is not independence of law or of the authority of the legislature to declare the policy of the state as to matter which have a reasonable relation to the welfare, peace, and security of the community.

This court has many times decided that the motives of legislators in the enactment of laws are not the subject of judicial inquiry. Legislators, state and Federal, are entitled to the presumption that their action has been in good faith and because of conditions which they deem proper and sufficient to warrant the action taken. Speaking for this court in *Ex parte McCardle*, 7 Wall. 506, 514, 19 L. ed. 264, 265, Chief Justice Chase summed up the doctrine in a sentence when he said: "We are not at liberty to inquire into the motives of the legislature; we can only examine into its power under the Constitution." In *Cooley's Constitutional Limitations*, 7th ed. 257, that eminent author says: "They [the courts] must assume that legislative discretion has been properly exercised. If evidence was required, it must be supposed that it was before the legislature when the act was passed; and if any special finding was required to warrant the passage of the particular act, it would seem that the passage of the act itself might be held equivalent to such finding." "The rule is general with reference to the enactments of all legislative bodies that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferable from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments. Their motives, considered as the moral inducements for their votes, will vary with the

different members of the legislative body. The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile." *Soon Hing v. Crowley*, 113 U. S. 703, 710, 28 L. ed. 1145, 1147, 5 Sup. Ct. Rep. 730. "We must assume that the legislature acts according to its judgment for the best interests of the state. A wrong intent cannot be imputed to it." *Florida C. & P. R. Co. v. Reynolds*, 183 U. S. 471, 480, 46 L. ed. 283, 287, 22 Sup. Ct. Rep. 176.

The act must be taken as an attempt of the legislature to enact a statute which it deemed necessary to the good order and security of society. It imposes a penalty for "coercing or influencing or making demands upon or requirements of employees, servants, laborers, and persons seeking employment." It was in the light of this avowed purpose that the act was interpreted by the supreme court of Kansas, the ultimate authority upon the meaning of the terms of the law. Of course, if the act is necessarily arbitrary and therefore unconstitutional, mere declarations of good intent cannot save it, but it must be presumed to have been passed by the legislative branch of the state government in good faith, and for the purpose of reaching the desired end. The legislature may have believed, acting upon conditions known to it, that the public welfare would be promoted by the enactment of a statute which should prevent the compulsory exaction of written agreements to forego the acknowledged legal right here involved, as a condition of employment in one's trade or occupation.

It would be impossible to maintain that because one is free to accept or refuse a given employment, or because one may at will employ or refuse to employ another, it follows that the parties have a constitutional right to insert in an agreement of employment any stipulation they choose. They cannot put in terms that are against public policy either as it is deemed by the courts to exist at common law, or as it may be declared by the legislature as the arbiter within the limits of reason of the public policy of the state. It is no answer to say that the greater includes the less, and that because the employer is free to employ, or the employee to refuse employment, they may agree as they please. This matter is easily tested by assuming a contract of employment for a year and the insertion of a condition upon which the right of employment should continue. The choice of such conditions is not to be regarded as wholly unrestricted because the parties may agree or not, as they choose. And if the state may prohibit a particular stipulation,

in an agreement because it is deemed to be opposed in its operation to the security and well being of the community, it may prohibit it in any agreement, whether the employment is for a term or at will. It may prohibit the attempt in any way to bind one to the objectionable undertaking.

Would anyone contend that the state might not prohibit the imposition of conditions which should require an agreement to forego the right on the part of the employee to resort to the courts of the country for redress in the case of disagreement with his employer? While the employee might be discharged in case he brought suit against an employer if the latter so willed, it by no means follows that he could be required, as a condition of employment, to forego a right so obviously fundamental as the one supposed. It is therefore misleading to say that the right of discharge necessarily embraces the right to impose conditions of employment which shall include the surrender of rights which it is the policy of the state to maintain.

Take another illustration: The right to exclude a foreign corporation from carrying on a purely domestic business in the state has been distinctly recognized by decisions of this court; yet it has been held, and is now settled law, that it is beyond the authority of the state to require a corporation doing business of this character to file in the office of the secretary of state a written agreement that it will not remove a suit, otherwise removable, to a Federal court of the United States. *Home Ins. Co. v. Morse*, 20 Wall. 445, 22 L. ed. 365. In that case, the right to exclude was held not to include the right to impose any condition under which the corporation might do business in the state. In that connection this court said:

"A man may not barter away his life or his freedom, or his substantial rights. In a criminal case, he cannot, as was held in *Cancemi's Case*, 18 N. Y. 128, be tried, in any other manner than by a jury of twelve men, although he consent in open court to be tried by a jury of eleven men. In a civil case he may submit his particular suit by his own consent to an arbitration or to the decision of a single judge. So he may omit to exercise his right to remove his suit to a Federal tribunal, as often as he thinks fit, in each recurring case. In these aspects any citizen may, no doubt, waive the rights to which he may be entitled. He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented." *Home Ins. Co. v. Morse*, 20 Wall. 445, 451, 22 L. ed. 365, 368.
L.R.A.1915C.

It may be that an employer may be of the opinion that membership of his employees in the National Guard, by enlistment in the militia of the state, may be detrimental to his business. Can it be successfully contended that the state may not, in the public interest, prohibit an agreement to forego such enlistment as against public policy? Would it be beyond a legitimate exercise of the police power to provide that an employee should not be required to agree, as a condition of employment, to forego affiliation with a particular political party, or the support of a particular candidate for office? It seems to me that these questions answer themselves. There is a real, and not a fanciful, distinction between the exercise of the right to discharge at will and the imposition of a requirement that the employee, as a condition of employment, shall make a particular agreement to forego a legal right. The agreement may be, or may be declared to be, against public policy, although the right of discharge remains. When a man is discharged, the employer exercises his right to declare such action necessary because of the exigencies of his business, or as the result of his judgment for other reasons sufficient to himself. When he makes a stipulation of the character here involved essential to future employment, he is not exercising a right to discharge, and may not wish to discharge the employee when, at a subsequent time, the prohibited act is done. What is in fact accomplished, is that the one engaging to work, who may wish to preserve an independent right of action, as a condition of employment, is coerced to the signing of such an agreement against his will, perhaps impelled by the necessities of his situation. The state, within constitutional limitations, is the judge of its own policy and may execute it in the exercise of the legislative authority. This statute reaches not only the employed, but, as well, one seeking employment. The latter may never wish to join a labor union. By signing such agreements as are here involved he is deprived of the right of free choice as to his future conduct, and must choose between employment and the right to act in the future as the exigencies of his situation may demand. It is such contracts, having such effect, that this statute and similar ones seek to prohibit and punish as against the policy of the state.

It is constantly emphasized that the case presented is not one of coercion. But in view of the relative positions of employer and employed, who is to deny that the stipulation here insisted upon and forbidden by the law is essentially coercive? No form of words can strip it of its true character.

Whatever our individual opinions may be as to the wisdom of such legislation, we cannot put our judgment in place of that of the legislature and refuse to acknowledge the existence of the conditions with which it was dealing. Opinions may differ as to the remedy, but we cannot understand upon what ground it can be said that a subject so intimately related to the welfare of society is removed from the legislative power. Wherein is the right of the employer to insert this stipulation in the agreement any more sacred than his right to agree with another employer in the same trade to keep up prices? He may think it quite as essential to his "financial independence," and so in truth it may be if he alone is to be considered. But it is too late to deny that the legislative power reaches such a case. It would be difficult to select any subject more intimately related to good order and the security of the community than that under consideration—whether one takes the view that labor organizations are advantageous or the reverse. It is certainly as much a matter for legislative consideration and action as contracts in restraint of trade.

It is urged that a labor organization—a voluntary association of working men—has the constitutional right to deny membership to any man who will not agree that during such membership he will not accept or retain employment in company with non-union men. And it is asserted that there cannot be one rule of liberty for the labor organization and its members and a different and more restrictive rule for employers.

It, of course, is true, for example, that a church may deny membership to those who unite with other denominations, but it by no means follows that the state may not constitutionally prohibit a railroad company from compelling a working-man to agree that he will, or will not, join a particular church. An analogous case, viewed from the employer's standpoint, would be: Can the state, in the exercise of its legislative power, reach concerted effort of employees, intended to coerce the employer as a condition of hiring labor, that he shall engage in writing to give up his privilege of association with other employers in legal organizations, corporate or otherwise, having for their object a united effort to promote by legal means that which employers believe to be for the best interest of their business?

I entirely agree that there should be the same rule for employers and employed, and the same liberty of action for each. In my judgment, the law may prohibit coercive attempts, such as are here involved, to deprive either of the free right of exercising

privileges which are theirs within the law. So far as I know, no law has undertaken to abridge the right of employers of labor in the exercise of free choice as to what organizations they will form for the promotion of their common interests, or denying to them free right of action in such matters.

But it is said that in this case all that was done in effect was to discharge an employee for a cause deemed sufficient to the employer,—a right inherent in the personal liberty of the employer protected by the Constitution. This argument loses sight of the real purpose and effect of this and kindred statutes. The penalty imposed is not for the discharge, but for the attempt to coerce an unwilling employee to agree to forego the exercise of the legal right involved as a condition of employment. It is the requirement of such agreements which the state declares to be against public policy.

I think that the act now under consideration, and kindred ones, are intended to promote the same liberty of action for the employee, as the employer confessedly enjoys. The law should be as zealous to protect the constitutional liberty of the employee as it is to guard that of the employer. A principal object of this statute is to protect the liberty of the citizen to make such lawful affiliations as he may desire with organizations of his choice. It should not be necessary to the protection of the liberty of one citizen that the same right in another citizen be abridged or destroyed.

If one prohibitive condition of the sort here involved may be attached, so may others, until employment can only be had as the result of written stipulations, which shall deprive the employee of the exercise of legal rights which are within the authority of the state to protect. While this court should, within the limitations of the constitutional guaranty, protect the free right of contract, it is not less important that the state be given the right to exert its legislative authority, if it deems best to do so, for the protection of rights which inhere in the privileges of the citizen of every free country.

The supreme court of Kansas, in sustaining this statute, said that "employees, as a rule, are not financially able to be as independent in making contracts for the sale of their labor as are employers in making a contract of purchase thereof," and in reply to this it is suggested that the law cannot remedy inequalities of fortune, and that so long as the right of property exists, it may happen that parties negotiating may not be equally unhampered by circumstances.

This view of the Kansas court, as to the

legitimacy of such considerations, is in entire harmony, as I understand it, with the former decisions of this court in considering the right of state legislature to enact laws which shall prevent the undue or oppressive exercise of authority in making contracts with employees. In *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383, this court, considering legislation limiting the number of hours during which laborers might be employed in a particular employment, said:

"The legislature has also recognized the fact, which the experience of legislators in many states has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employees, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority. . . . But the fact that both parties are of full age and competent to contract does not necessarily deprive the state of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself. 'The state still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety, and welfare are sacrificed or neglected, the state must suffer.'" (Page 397.)

This language was quoted with approval in *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 570, 55 L. ed. 328, 339, 31 Sup. Ct. Rep. 259, in which a statute of Iowa was sustained, prohibiting contracts limiting liability for injuries, made in advance of the injuries received, and providing that the subsequent acceptance of benefits under such contracts should not constitute satisfaction for injuries received after the contract. Certainly it can be no substantial objection to the exercise of the police power that the legislature has taken into consideration the necessities, the comparative ability, and the relative situation of the contracting parties. While all stand equal before the law, and are alike entitled to its protection, it ought not to be a reasonable objection that one motive which impelled an enact-

ment was to protect those who might otherwise be unable to protect themselves.

I therefore think that the statute of Kansas, sustained by the supreme court of the state, did not go beyond a legitimate exercise of the police power, when it sought, not to require one man to employ another against his will, but to put limitations upon the sacrifice of rights which one man may exact from another as a condition of employment. Entertaining these views, I am constrained to dissent from the judgment in this case.

I am permitted to say that Mr. Justice Hughes concurs in this dissent.

WEST VIRGINIA SUPREME COURT OF APPEALS.

LIZZIE M. DAVIDSON, Admr., etc., of A. C. Davidson, Deceased, Plff. in Err.,

v.
JAMES S. BROWNING.

(— W. Va. —, 80 S. E. 363.)

Conflict of laws — limitation of actions — debt of nonresident to resident.

1. In an action on a writing evidencing indebtedness of a resident of another state or country to a resident of this state, made in such other state or country while the creditor resided here, and specifying no place of payment, the statute of limitations of this state, not that of the state or country in which the contract was made, applies. Same — place of payment.

2. This clause of § 18 of chapter 104 of the Code of this state, "and upon a contract which was made and was to be performed in another state or country, by a person who then resided therein, no action shall be maintained after the right of action thereon is barred by the laws of such state or country," is founded on the decision in *Huber v. Steiner*, 4 Moore & S. 328, and contemplates those cases in which the contract or obligation was expressly made payable in the state or country in which the debtor resided at the time, and those in which the facts and circumstances disclose intent to make it payable at such place.

Headnotes by POFFENBARGER, P.

Note. — *Applicability of statute referring question of limitation to the law of the state where contract was to be performed.*

The general rule that, in the matter of limitation of actions, the law of the forum will be applied, is subject to many statutory exceptions (see note to *Brunswick Terminal Co. v. National Bank*, 48 L.R.A. 639, where the whole question, as to statutes of the forum referring question of limi-

Evidence — payment — checks.

3. In an action by an administratrix for the recovery of money due on a contract, checks of the debtor subsequent in date to the contract, and bearing the indorsement of the creditor, and also memoranda indicative of intent to apply them on the debt sued for, are admissible as evidence of payment.

Witness — custom — signing checks.

4. If the debtor has signed such checks by a name other than his own, as "The Browning Mines, by J. S. B.," the defendant is a competent witness to prove his custom or habit of paying his personal debts by checks so drawn and signed.

(November 25, 1913.)

tation to foreign statutes, is considered). One statute, at least, provides broadly that if the cause of action is barred by the statute of any other state or territory, it shall be deemed barred at the forum. *Hower v. Aultman*, 27 Neb. 251, 42 N. W. 1039; *Taylor v. Union P. R. Co.* 123 Fed. 155, where the Nebraska statute was construed. But most statutes limit the applicability of foreign statutes of limitation by some such provision as is contained in the statute before the court in *DAVIDSON v. BROWNING*. As to construction and effect of statute admitting bar of statute of state or country in which the cause of action arises or accrues, see notes to *Doughty v. Funk*, 4 L.R.A.(N.S.) 1029, and *Bruner v. Martin*, 14 L.R.A.(N.S.) 776. Just as these two notes were confined to a single one of the various forms of statutory modifications of the general rule that the *lex fori* governs, so the discussion in the present note is limited to another particular form, i. e., that form in which the question of limitation is referred to the law of the state in which the contract was to be performed. For note covering all the forms, see note in 48 L.R.A. 639.

The court in *DAVIDSON v. BROWNING* refers to *Huber v. Steiner*, 4 Moore & S. 328, as indicative of the purpose of the statute. A rule to show cause why defendant should not be allowed to add a plea of a foreign statute of limitation was there made absolute, and the final disposition of the case is reported in 2 Scott, 304, 2 Bing. N. C. 202, 1 Hodges, 206. On the whole case there was an application of the general rule that *lex fori* governs as to limitation without reference to the *lex loci*, and a recognition of an exception stated in *Story's Commentaries on Conflict of Laws*, p. 487, i. e., that where the foreign law not only barred the action, but extinguished the cause of action as well, and the residence of the parties had been such that the foreign law had actually operated to extinguish the cause of action before the parties left the foreign jurisdiction, then no suit can be maintained, even though the action is not barred by the *lex fori*. The court held that the defendant did not come within the exception, because the foreign law was such that it would L.R.A.1915C.

ERROR to the Circuit Court for Mercer County to review a judgment in defendant's favor in an action brought to enforce collection of a duebill. Reversed.

The facts are stated in the opinion.

Messrs. B. W. Pendleton, Ross & Kahle, and R. Kemp Morton, for plaintiff in error:

Evidence in regard to the execution and delivery of a written instrument must definitely identify the instrument.

Wigmore, Ev. §§ 2129-2132; Greenl. Ev. § 557.

Absolute accuracy and precision in testifying as to events which happened in the distant past are properly considered as ad-

merely bar the action in five years, and would not extinguish the cause of action even if the parties had remained within its jurisdiction, which supposition as to residence had also been found against the defendant. Since the *lex fori* did not bar the action, the plaintiff was permitted to recover on the note, which had been due over sixteen years. If, therefore, the statute before the court in *DAVIDSON v. BROWNING* is merely declaratory of the law as it was expounded by the court in *Huber v. Steiner*, the foreign statute would not be a bar in any case, unless it was so worded that it not only barred the action, but extinguished the cause as well. The note to *Brunswick Terminal Co. v. National Bank*, 48 L.R.A. 625, covers the general rule applied in *Huber v. Steiner*, and as to the exception there recognized, see subsection III. a, 3, of the same note, page 630. But the court in *DAVIDSON v. BROWNING* bases its construction of the statute upon the one report of *Huber v. Steiner*, where this principle of the common law was not made apparent. Perhaps the legislature did the same thing. At any rate it enacted a statute which, as interpreted in *DAVIDSON v. BROWNING*, makes the case turn upon the question as to whether or not the action has been barred by the statute of the state where the contract was to be performed. It will be seen that if a citizen of the state has taken securities expressly made payable in another state, his right of action will be barred if it is barred by the statute of the state where the security is made payable, whether the cause of action is extinguished or not by the foreign statute. If the contract does not expressly designate a place of performance, then the fact that it was made at the place where both parties reside is sufficient to raise a presumption that it was to be performed at the same place. Clearly, the statute of the state where the contract was to be performed is the statute that must have barred the action, if it was barred by a foreign statute. Other elements mentioned in the statute, such as place of making the contract and residence of the parties, are to be considered as circumstances indicative of the intent to perform at a particular place, but have no value after

versely affecting the credibility of the witness.

40 Cyc. 2583 (VI.); Wigmore, Ev. § 995.

Chapter 130, § 23, of the Code, prohibits any interested party from giving any testimony that will tend to prove any personal transaction involved in the suit, and had with a person at the time of such examination deceased.

Seabright v. Seabright, 28 W. Va. 462; *Anderson v. Cranmer*, 11 W. Va. 575; *Callwell v. Prindle*, 11 W. Va. 324; *Trowbridge v. Stone*, 42 W. Va. 458, 26 S. E. 363; *Bank of Union v. Nickell*, 57 W. Va. 57, 49 S. E. 1003; *George v. Crim*, 66 W. Va. 434, 66 S. E. 526; 40 Cyc. 2314 (B).

The provision of chapter 104, § 18, of the Code, that "and upon a contract which was made and was to be performed in another state or country, by a person who then resided therein, no action shall be maintained after the right of action thereon is barred by the laws of such state or country," relates to contracts which, by stipulation between the parties, are made and to be performed in some other state or country, which is named in the contract.

Story, Conf. L. 8th ed. p. 476; *Whart. Conf. L.* 3d ed. p. 1257, note; *Finnell v. Southern Kansas R. Co.* 33 Fed. 427; *Urton v. Hunter*, 2 W. Va. 83; *Labatt v. Smith*, 83 Ky. 599.

The situs of the debtor's obligation follows the actual situs of the debtor.

Minor, Conf. L. § 121.

The situs of debts, for the purposes of administration, is at the home of the creditor. This is the general rule as to debts for any purpose.

Minor, Conf. L. § 124; *Story*, Conf. L. 2d ed. pp. 299, 331; *Chitty*, Contr. 11th Am. ed. 1069; *Consolidated Tank Line Co. v. Collier*, 39 Am. St. Rep. 181, and note, 148 Ill. 259, 35 N. E. 756; *Douglass v. Phoenix Ins. Co.* 138 N. Y. 209, 20 L.R.A. 118, 34 Am. St. Rep. 448, 33 N. E. 938; *Missouri P. R. Co. v. Sharitt*, 19 Am. St. Rep. 145, note; *Harvey v. Parkersburg Ins. Co.* 37 W. Va. 281, 16 S. E. 580; *Galloway v.*

Standard F. Ins. Co. 45 W. Va. 241, 31 S. E. 969; *Dandridge v. Harris*, 1 Wash. (Va.) 326, 1 Am. Dec. 465.

Messrs. W. J. Henson and Harold A. Ritz, for defendant in error:

The writing sued on in this case was executed in the state of Virginia, by a party who was at the time a resident of said state, and it was therefore a contract to be performed in said state of Virginia.

Abell v. Penn Mut. L. Ins. Co. 18 W. Va. 400; *Hefflebower v. Detrick*, 27 W. Va. 16; *Penfield v. Chesapeake, O. & S. W. R. Co.* 134 U. S. 351, 33 L. ed. 940, 10 Sup. Ct. Rep. 566; *Bishop*, Contr. § 1393; *Minor*, Conf. L. 378-389.

If this court should find that the lower court erred in admitting certain evidence, or in excluding certain evidence, still, if, upon the proper evidence which was offered, the judgment is still right, the same will be affirmed.

Krell Piano Co. v. Kent, 39 W. Va. 294, 19 S. E. 409; *Bartlett v. Patton*, 33 W. Va. 71, 5 L.R.A. 523, 10 S. E. 21; *Huffman v. Alderson*, 9 W. Va. 616.

Poffenbarger, P., delivered the opinion of the court:

The trial court having instructed the jury that the duebill sued on in this action was barred by the statute of limitations, and that they should therefore find for the defendant, there was a verdict and judgment in accordance with the instruction. This ruling raises the principal question in the case.

A. C. Davidson, the plaintiff's decedent, residing in this state, sold to **J. S. Browning**, residing just across the line in the state of Virginia, thirty-three head of cattle and one mule, March 1, 1903, for the sum of \$1,000, evidenced by a duebill reading as follows:

Due **A. C. Davidson** \$1,000 for 33 cattle and 1 mule. **J. S. Browning.**
1st March, 1903.

place of performance has been ascertained.

There is a line of cases cited in the notes to which reference has been made, supra, in which the courts construe the phrase "in which the cause of action arose" in such manner as to be practically equivalent to "in which the contract was performable" (many courts, perhaps a majority, are opposed to this interpretation), but such cases are not within the scope of the present note. No cases have been found in which the statute of the forum expressly refers the question of limitation to the law of the place where the contract was to be performed, without designating other elements such as residence of the parties, etc. By reference L.R.A.1915C.

to the notes cited, supra, it will appear that the courts have usually construed the statute of the forum literally. For example, where the question of limitation was referred to the law of the state in which the parties resided, and in which the contract was to be performed, the statute of the state in which the contract was to be performed could not bar the action unless the parties resided there also. *Walworth v. Routh*, 14 La. Ann. 201. But the court in *DAVIDSON v. BROWNING* has construed such a statute with reference to the object to be attained, rather than to the wording of the particular statute.

J. W. M.

The defendant introduced evidence tending to prove Davidson had driven the cattle and mule to Browning's farm in Tazewell county, Virginia, and sold them there. The plaintiff introduced evidence tending to show Browning had bought them at Davidson's farm in West Virginia. The defendant's theory of the case, adopted by the court and embodied in the instruction, is that the contract was made in Virginia and to be performed there, and the remedy thereon in this state is barred by the five-year statute of limitations of the state of Virginia, under the following provision of § 18 of chapter 104 of our Code: "And upon a contract which was made and was to be performed in another state or country, by a person who then resided therein, no action shall be maintained after the right of action thereon is barred by the laws of such state or country."

The rule of comity, unaffected by statute, applies the law of the forum or place in which the action is brought in all matters pertaining to the remedy, and the statute of limitations thereof, not that of the state or country in which the contract was made, governs; whether the period of limitation in the state in which the contract was made be longer or shorter than that of the state in which the action was instituted. *Urton v. Hunter*, 2 W. Va. 83; *Jones v. Hooks*, 2 Rand. (Va.) 303, 14 Am. Dec. 783; *Wood*, Limitations, 3d ed. § 8; *Buswell*, Limitations & Adverse Possession, § 347; *Minor*, Conf. L. § 210; *Story*, Conf. L. § 576, p. 793; *Whart*. Conf. L. § 535.

But this rule is modified and limited by the statute just quoted. Actions on contracts made and to be performed in another state or country are governed in the courts of this state by the statute of limitations of the state or country in which the contracts were made and to be performed. To fall within this limitation upon the general rule, a contract must have been made in another state or country and required to be performed there. The rules of construction to not authorize any interpretation or application of the limitation variant from its terms or inconsistent therewith, and literally it applies only to contracts which were made and were to be performed in another state or country. Therefore, if the trial court was right in assuming the contract sued on here to have been made in the state of Virginia, the instruction was nevertheless wrong, unless it was also to be performed there.

The condition prescribed by the limiting statute pertains to the place in which the contract was made and in which it is to be performed. "Place of performance," as mentioned in the authorities, sometimes relates to the manner of performance, the

coin or money in which the obligation is to be discharged, the rate of interest and similar matters, parts of its obligation, the substantive law of the contract, and has nothing to do with the matter of remedy. The "manner of performance" is ordinarily determined by the law of the place in which the contract was made, and, in that sense, it is the place of performance, the place whose laws govern the manner of performance. To illustrate, the law of the place where the contract is made determines the rate of interest when the contract specifically gives interest without fixing the rate. *Kent. Com.* p. 461. It thus carries the rate of interest of the place in which it was made, operates under the law of that place, and is performed by it. In that sense, the place in which it was made is the place of performance, but not the place of performance in the sense of execution, payment of the money in the cases of contracts for such payment.

The limiting statute does not deal with the manner of performance of the contract nor with the substantive law thereof in any sense. It has to do only with the remedy and the place in which the contract is to be carried out or finally executed. It applies the law of limitation of the foreign state, if the debtor made his obligation there and bound himself to perform it there, and thus impliedly absolved himself by his contract from any duty to perform elsewhere. If he obligates himself to pay generally, he does not so limit it, and he may be called upon to pay anywhere. In that event, the contract is not one to be performed, in the sense of payment, in the state or country of his residence. "When a debt is contracted in a foreign country, it is not to be deemed exclusively payable there, unless there is in the contract itself some stipulation to that effect. On the contrary, a debt contracted in a particular country, and not limited to a particular place of payment, is by operation of law payable everywhere, and may be enforced wherever the debtor or his property can be found." *Story*, Conf. L. § 329; *Blake v. Williams*, 6 Pick. 286, 315, 17 Am. Dec. 372; *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797; 2 *Parsons*, Contr. 8th ed. 702. "And as no place of payment is mentioned, the legal construction of the contract is that the money is to be paid where the obligee resides or wherever he may be found. His residence being in England at the execution of the bond, that must therefore be considered the place of payment, for the purpose of determining the question where that part of the contract is to be performed." *Chancellor Walworth in Chapman v. Robertson*, 6 Paige, 627, 31 Am. Dec. 264.

The text quoted from *Minor on Conflict of Laws*, § 159, p. 378, of which the *lex loci solutionis* is the subject, uses the place of performance in the sense of the obligation of the contract or manner of performance, and not of the place of payment or the place in which the stipulated act is actually to be done, as the authorities cited in support of it will show. All of them determine questions of obligation and rights under the contracts. In *Pritchard v. Norton*, 106 U. S. 124, 27 L. ed. 104, 1 Sup. Ct. Rep. 102, the validity of the contract and its binding force were the questions determined. *Clark v. Searight*, 135 Pa. 173, 20 Am. St. Rep. 868, 19 Atl. 941, involved the rate of interest. *Tenant v. Tenant*, 110 Pa. 478, 1 Atl. 532, involved the right of a surety to discharge his liability by notice to the creditor to sue the principal debtor. In *Barrett v. Dodge*, 16 R. I. 740, 27 Am. St. Rep. 777, 19 Atl. 530, the questions determined were the liability of the maker of a note and the construction of the instrument. *Bell v. Packard*, 69 Me. 105, 31 Am. Rep. 251, involved the question of the power of a married woman to become the surety of her husband. *Lex loci solutionis* covers a much broader field than that to which the statute under consideration applies. It is a phrase by which courts and text writers indicate the law with reference to which parties have contracted, and which they are therefore deemed to have embodied in their contract. Literally, it means the law of the place of solution, the law in the light of which the contract is to be read to determine the rights of the parties, and that does not govern the remedy in a different state or country.

The statute here under consideration does not deal with any of these matters. It pertains to the remedy only, and its purpose is to be sought in its terms and such additional light as may be found elsewhere. It appears in the Code of 1849, chap. 149, § 17, and was recommended by the revisors in their report at page 746. A note appended by them says: "This conforms to the decision in *Herbert v. Sterner*, 4 Moore & S. 328." The style of the case is *Huber v. Steiner*. It may be examined for indication of the purpose of the statute. It involved an action upon certain promissory notes made by the defendant at a place called Mullhausen, in Upper Saxony, in 1813, in favor of the plaintiff, and both parties then resided in that country. The action was brought on them in England in 1833. The defendant pleaded the general issue and the statute of limitations. Then the defendant asked for a rule on the plaintiff to show cause why he should not be permitted to plead further that, in the country in which

both were domiciled at the time of the making of the notes, and for more than five years after they became due, there existed a law similar in its provisions to the English statute of limitations, limiting the right of action to five years, and the court awarded the rule and made it absolute, thereby permitting a plea of the foreign statute of limitations. In awarding the rule, Chief Justice Tindal said: "It is so manifestly reasonable that parties should not be encouraged to come here and avail themselves of a law different from that which prevails in their own country, and thereby seek to obtain a different measure of justice after having for so many years slept upon their rights, that I think we ought to give the defendant the means of setting up the proposed defense." It was apparent to the court that the contract was not only made in a foreign country, but was also intended to be performed there in the sense of payment therein; for both parties to it resided there at the time it was made, and continued to do so until after the notes became due, and until after a right of action thereon had been barred. The substance and effect of the decision is that the foreign statute of limitations is applicable to actions on contracts made in a foreign country and to be fully and actually performed there, and the residence of both parties in the foreign country at the time of the making of the contract, and until after payment should have been made, is sufficient to show intent so to perform in the foreign country, or, in other words, is sufficient to repel any presumption in favor of intent to perform elsewhere. Having been drawn in view of this decision and for the express purpose of embodying the law thereof, the statute should be interpreted as having adopted the proposition there announced and applied. Hence, it does not contemplate application of the foreign statute of limitations in an action upon such a contract as is shown here. In this case, the plaintiff resided in the state of West Virginia, and the contract may be considered, for the purposes of this discussion, as having been made in the state of Virginia. It was not expressly made payable there, and no circumstances are disclosed from which intent to make it so can be inferred. On the contrary, the circumstances negative and repel such an inference. The manifest purpose of the statute is to apply the bar of the foreign law against citizens of the state, as to contracts for the payment of money, only when they have elected to take securities therefor expressly made payable in another state or country, or when both parties reside there at the date of the making of the contract.

conclusion makes obvious the error in giving the peremptory instruction to find for the defendant; and refusing one requested by the plaintiff, and submitting to the jury herein indicated as contended for, and requiring a verdict in her favor, the jury should find the facts in accordance with her claim, unless there was evidence of payment sufficient to take the case to the jury on that question.

As evidence of payment, the defendant introduced, over objection, two checks, one for \$500, dated June 10, 1903, and the other for \$250, dated May 5, 1905, both signed, "The Browning Mines, by J. S. Browning," and payable to A. C. Davidson. The first bore this memorandum, "For Cattle," and the other, "On a/c." Then the court permitted him to testify, over objection, that he was the Browning Mines and paid his personal indebtedness with checks so drawn. These checks bear the indorsements of Davidson and so prove his receipt of money, and were admissible if they can be regarded as Browning's checks. He was permitted to show they were by his own testimony as to his method of doing business. Under principles applied in *Fouse v. Gilfillan*, 45 W. Va. 213, 32 S. E. 178, he was a competent witness to prove his method of doing business. That was not a personal transaction between him and plaintiff's decedent. In *Owens v. Owens*, 14 W. Va. 88, Judge Haymond said: "There are, no doubt, many facts and circumstances to which a party to a suit against an administrator, etc., may testify as a witness in his own behalf, which transpired or occurred during the lifetime of the decedent, and which may in some respects be material, and cannot be said to be transactions or communications had personally with the decedent." To allow the defendant to testify to his manner of paying his personal obligations enables him only to say these checks represent his money or money he had the right to use. Such testimony does not prove payment nor directly tend to do so. That must be made out by other evidence. This testimony does not fall within the reasoning of the court in *Owens v. Owens*, *supra*; *Calwell v. Prindle*, 11 W. Va. 307; and *Anderson v. Cranmer*, 11 W. Va. 562.

As the duebill represented the purchase money of cattle, and one of the checks purported on its face to be a payment for cattle and the other to be a payment on account, they were admissible as evidence of payment, to have such weight as the jury saw fit to give them.

In view of this evidence, the court did not err in refusing to give the instruction requested by the plaintiff. Ignoring the evidence, L.R.A.1915C.

dence of partial payment, it would have been misleading. As framed it purported to give right to a verdict for the entire debt.

The oral testimony relating for the most part to the place of the making of the contract gave rise to several objections and exceptions to statements admitted, which need not be considered, since our conclusion as to the construction of the statute of limitations, in view of which they were admitted, renders them immaterial, and there will be no occasion for an attempt to introduce them on a new trial.

In rebuttal of the evidence of payment, the record of an action in Virginia between the parties to this case on a note was introduced by the plaintiff, to show the \$500 check was credited on that note, and the attorney who conducted that case was introduced as a witness. To a statement made by him to the effect that he had written letters to the defendant and his attorney about the duebill, the court sustained an objection, and this ruling is complained of. What he wrote them was not evidence, and he did not avow possession of any admission of theirs or purpose to prove any. The objection was properly sustained, and the record discloses no refusal of the court to permit the witness to give further testimony.

For the error noted, the judgment will be reversed, the verdict set aside, and the case remanded for a new trial.

WEST VIRGINIA SUPREME COURT OF APPEALS.

VAL FRUTH et al.

v.

BOARD OF AFFAIRS OF THE CITY OF CHARLESTON et al.

(— W. Va. —, 84 S. E. 105.)

Eminent domain — property requiring compensation.

1. "Property" within the meaning of our Constitution against the taking or damaging of private property without just compensation paid or secured to be paid comprehends not only the thing possessed, but the right also to use and enjoy it, and

Headnotes by MILLER, P.

Note. — Power to establish a building line.

The question as to the power to establish a building line is discussed in the notes to *Eubank v. Richmond*, 42 L.R.A. (N.S.) 1123, and *Willison v. Cooke*, 44 L.R.A. (N.S.) 1030. Two additional cases may be referred to.

A statute authorizing the councils of cities to pass and enforce by-laws to regu-

every part of it, and in the case of real estate to the full limits of the boundary thereof.

Same — Interference with dominion.

2. Wherefore anything done by a state or its delegated agent, as a municipality, which substantially interferes with the beneficial use of land, depriving the owner of lawful dominion over it or any part of it, and not within the general police power of the state, is the taking or damaging of private property without compensation, inhibited by the Constitution.

Constitutional law — police power — building line.

3. An ordinance of a municipal corporation ordained pursuant to a provision of its charter authorizing it, establishing a building line on a certain street, and inhibiting abutting owners from encroaching thereon, based on merely esthetic considerations, is not within the police power, and is unenforceable as a police regulation.

Eminent domain — establishing building line.

4. Whether by proper proceeding such statute and ordinance might be upheld and enforced under the power of eminent domain is a subject discussed, but not decided, because not presented by the pleadings and proofs in this case.

(January 5, 1915.)

PETITION by relators for a writ of mandamus to compel respondents to grant to them a permit to construct a church edifice upon their lot. Writ awarded.

The facts are stated in the opinion.

Messrs. Linn & Byrne for petitioners.

Messrs. A. S. Alexander, E. B. Dyer, and Morgan Owen for respondents.

Miller, P., delivered the opinion of the court:

Mandamus to require the board of affairs

late and limit the distance from the line of the street in front thereof at which buildings on residential streets may be built does not authorize a by-law prohibiting buildings within a certain distance of a street fronting or "abutting" on such street, so as to affect a lot on the corner of such street and another street having its only entrance on such other street. *Re Dinnick*, 28 Ont. L. Rep. 52, 11 D. L. R. 509.

In *Wood v. Winnipeg*, 21 Manitoba L. Rep. 426, it was held under a charter providing that the city may pass by-laws not inconsistent with the provisions of any dominion or provincial statute, for "regulating the distance within specified areas from the street line of any lot or property in front of which a building or structure shall not be placed," that a city having restricted a certain street may thereafter except from the restriction particular lots if it is reasonable and in public interests so to do, and that a conveyance to the city L.R.A.1915C.

of the city of Charleston to grant to relators, trustees of St. Paul's Evangelical Lutheran Church, a permit to construct a church edifice upon their lot at the intersection of Lee street with Beauregard street in said city, and having a frontage of 110 feet on each of said streets.

The alternative writ avers that on December 4, 1914, relators, in conformity with the requirements of the ordinances of said city, made formal application to the building inspector of said city for such permit, and were informed by him, that he would recommend to said board of affairs that said permit be rejected; and that on December 7, 1914, they appeared at a regular meeting of said board of affairs, and requested such permit, but that upon the report of said building inspector that the said church edifice as proposed to be erected upon said lot would extend over the building line on Lee street, as established by ordinance adopted on March 19, 1909, and that it would be impossible to construct said edifice on said lot as proposed without encroaching on said building line, said permit, by order entered of record, was rejected, and relators denied the right to so erect their said church building, upon the sole and only ground that the same would encroach upon the building line purporting to have been so established by said city.

The alternative writ further avers that the lot of relators is wholly outside of any prescribed fire limits, and that the proposed structure does not and will not in any way conflict with any ordinance or regulation of said city concerning the safety, the health, the morals, or the good order of or among the citizens or inhabitants of said city, and that the refusal of defendants to award said building permit rests solely on the question whether the council of said city has the

by the owner of part of such lots and of other land, enabling the widening of thronged roadways, justified the concessions.

For validity of public restrictions as to location of mercantile business, see note to *People ex rel. Friend v. Chicago*, 49 L.R.A.(N.S.) 438.

It may be noted that it was held in *Garrison v. Greenleaf Johnson Lumber Co.* 215 Fed. 576 (affirmed in 237 U. S. 251, 59 L. ed. —, 35 Sup. Ct. Rep. 551), that one who has made riparian improvements not encroaching on the harbor line fixed by the state authorities, which line after such improvement is adopted by the Secretary of War, will not be entitled to compensation for the loss of such improvements caused by the establishment of a new navigation or harbor line by the Secretary of War, which extends the navigable area so as to include a part of the locus of such improvements.

B. B. B.

right to prescribe, and the board of affairs the right to enforce, the aforesaid ordinance establishing a building line 25 feet from the property line of said Lee street, and to deny relators the right to occupy their lot with said structure within the said limits.

To so deny relators' right to erect said structure, as proposed, the writ further avers, would be to deprive them of their property without due process of law, and without compensation therefor, paid or secured to be paid, and contrary to §§ 9 and 10 of article 3 of the Constitution.

Defendants appeared and demurred to and moved to quash the alternative writ, and made no other or further return thereto. So the case stands upon the sufficiency of the averments of the alternative writ.

Legislative authority to pass the ordinance in question is referred to § 8 of chapter 3, Acts 1907, the charter act of said city defining its rights and powers, and purporting to give it authority, among other things, "to provide for the regular building of houses or other structures, and to determine the distance that they shall be built from any street or alley."

So there can be no doubt that the legislature, at least, made attempt to confer on said city power to establish building lines along its streets and alleys. Neither the charter provision, nor the ordinance in question passed in pursuance thereof, attempting to establish said building line, make any provision for condemning the property abutting on the street, nor for making compensation to the owner for the burden imposed upon his property for the public benefit.

Whether the charter or ordinance should so provide we think we need not determine, nor need we hold, according to our views of this case, that without such provision for condemnation and compensation, the charter or ordinance is void on constitutional grounds. Possibly the charter and ordinance might be construed as implying the power to condemn and to compensate for property taken or damaged by the lawful establishment of such building lines. In some states, in Missouri for example, it is held that a law of this kind, making no provision for compensation to the owner, is void as being in contravention of the Constitution against the taking or damaging of private property for public purposes without just compensation. *St. Louis v. Hill*, 116 Mo. 527, 21 L.R.A. 226, 22 S. W. 861.

Two propositions of law are mainly relied on by defendants as justifying denial of the peremptory writ: First, that the establishment of a building line, for mere esthetic purposes, is not a taking or damaging of private property for public purpose. L.R.A.1915C.

poses, within the meaning of the Constitution. Second, that whatever be the nature of the act, it is clearly within the police power of the state, delegated to the municipality, and for which no compensation, as for property taken or damaged, can be demanded, and that when so taken or damaged, the injury is *damnum absque injuria*.

On the first proposition, what is included within the word "property" as employed in the Constitution? Does it mean the mere abstract thing, the thing possessed, in this case the land embraced in the boundary of the lot? We think not. Literally taken the word is sometimes said to be *nomen generalissimum*, but it is not always so used. Generally, and particularly in an organic law, it comprehends not only the thing possessed, but the right also to use and enjoy it, and every part of it, and in the case of real estate to the full limits of the boundary thereof. 3 Bouvier's Law Dict. Rawle's 3d Rev. 2750; *Wells Fargo & Co. v. Jersey City* (D. C.) 207 Fed. 871 (syl. 4). "Things real are such as are permanent, fixed, and immovable, as lands, and rights issuing out of, or connected with lands." 2 Minor, Inst. 4, citing 2 Bl. Com. 15. In short, land, property, includes everything above and below it, *ab solo usque ad cælum*. 2 Minor, Inst. 4, and 2 Bl. Com. 17. As defined in *St. Louis v. Hill*, supra, property "is the exclusive right of any person to freely use, enjoy, and dispose of any determinate object whether real or personal." Citing 1 Bl. Com. 138; 2 Austin, Jur. 817, 818; 19 Am. & Eng. Enc. Law, 248; Lewis, Em. Dom. §§ 57, 58, and 59. And in the same case it is said: "Property, then, in a determinate object, is composed of certain constituent elements, to wit, the unrestricted right of use, enjoyment, and disposal of that object."

And by our statute, § 17, chapter 13, serial § 346, 15th paragraph, Code 1913: "The word 'land' or 'lands' and the words 'real estate' or 'real property' include lands, tenements, and hereditaments, and all rights thereto and interests therein except chattel interests."

And by the 17th paragraph thereof: "The word 'property' or 'estate' embraces both real and personal estate."

See also the general discussion of Judge Brannon, on the definitions of "property" and the right given by the Constitution to "tax all property, real and personal," in *Havey Coal & Coke Co. v. Dillon*, 59 W. Va. 605, 608, et seq. 6 L.R.A. (N.S.) 628, 53 S. E. 928.

Upon principle, therefore, as well as upon authority, we hold that anything done by a state or its delegated agent, as a municipality, which substantially interferes with

the beneficial use and ownership of land, depriving the owner of his lawful dominion over it or any part of it, not within the general police power of the state, as commonly understood, is a taking or damaging of the property without compensation, within the meaning of our Constitution, and inhibited thereby.

Now on the second proposition: Can the charter authority to establish a property line, as attempted by the ordinance in question, be sustained under the police power of the state? The demurrer to the alternative writ concedes the fact alleged that relators' lot is not within any of the fire limits established by the municipality; and it is alleged, and not denied, but in so far as well pleaded, admitted by the demurrer, that the proposed structure does not, and will not, conflict with any ordinance or regulation of the city covering the safety, the health, the morals, or the good order among the citizens and inhabitants thereof.

It is conceded by relators that an ordinance clearly regulative, and within the police powers of the state, and within delegated powers of the municipality, would be valid, but it is insisted that the ordinance in question does not fall within that category. Stated in its most comprehensive terms by the highest court of our country, this power extends not only to regulations which promote the public health, morals, and safety, but to those which promote the public convenience or the general prosperity. *Eubank v. Richmond*, 226 U. S. 137, 142, 57 L. ed. 156, 158, 42 L.R.A.(N.S.) 1123, 33 Sup. Ct. Rep. 76, Ann. Cas. 1914B, 192, citing *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175. And in the same connection it is said, on the authority of another case, that it is "the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government." *District of Columbia v. Brooke*, 214 U. S. 138, 149, 53 L. ed. 941, 945, 29 Sup. Ct. Rep. 560, 563.

But the court held in the principal case, reversing the supreme court of Virginia, that an ordinance of the city of Richmond, based on a provision of its charter act very similar to that of the city of Charleston, and tested by the extreme limits of the power, namely, the public convenience and general prosperity, that an ordinance which required the street committee on request in writing of the owners of two thirds of the property abutting on any street to establish a building line on the side of the square on which their property fronts to be not less than 5 feet nor more than 30 feet from the street line, was an unreasonable exercise of the police power, inasmuch as it au-

thorized one set of property owners to control the property rights of others, and therefore void. The court did not think it necessary to consider, and did not decide, the power of the city to establish a building line or regulate the structure or height of buildings, and with reference to the cases cited for this proposition said: "The ordinances or statutes which were passed on had more general foundation and a more general purpose, whether exercises of the police power or that of eminent domain."

And concluding said the court: "Nor need we consider the cases which distinguish between the esthetic and the material effect of regulations the consideration of which occupies some space in the argument and in the reasoning of the cases."

The Virginia court had held that the power delegated and sought to be exercised by the ordinance was in good faith and a valid exercise of the police power, and "in the interest of the health, safety, comfort, or convenience of the public, and for the benefit of the property owners generally who are affected by its provisions; and that the enactment tends to accomplish all, or at least some, of these objects."

The Supreme Court of the United States, in reply, said, that by this ordinance "one set of owners determine not only the extent of use, but the kind of use which another set of owners make of their property. In what way is the public safety, convenience, or welfare served by conferring such power?"

In *Welch v. Swasey*, 193 Mass. 364, 372, 23 L.R.A.(N.S.) 1160, 118 Am. St. Rep. 523, 79 N. E. 745, a case involving the power of Boston, under its charter, to regulate the height of buildings, and to divide the city into districts for that purpose, and to prescribe different rules therefor in the several districts, all in the interest of the safety of the people, the court said of the police power invoked: "In the exercise of the police power the legislature may regulate and limit personal rights and rights of property in the interest of the public health, public morals, and public safety. *Com. v. Pear*, 183 Mass. 242, 67 L.R.A. 935, 66 N. E. 719; *Com. v. Strauss*, 191 Mass. 545, 11 L.R.A.(N.S.) 968, 78 N. E. 136, 6 Ann. Cas. 842; *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306, 318, 50 L. ed. 204, 209, 26 Sup. Ct. Rep. 100. With considerable strictness of definition, the general welfare may be made a ground, with others, for interference with rights of property, in the exercise of the police power. *Com. v. Strauss*, *ubi supra*."

We have examined all the judicial decisions cited by the Virginia court for its conclusion in the *Eubank's Case*. With but

one exception, that of *State ex rel. Berger v. Hurley*, 73 Conn. 536, 48 Atl. 215, none of them are building-line cases. The other decisions involve the exercise of the police power in other classes of cases. One of them, *People ex rel. Kemp v. D'Oench*, 111 N. Y. 359, 361, 18 N. E. 862, involved a statute of the legislature regulating the height of dwelling houses and houses used as dwellings for more than one family, thereafter to be erected in the city of New York. The exact question in that case was whether hotel buildings fell within the provision of the statute. The statute was held to be a proper police regulation, as applied to the city of New York, where such regulation was necessary, in the judgment of the legislature, to protect the lives and conduce to the health of the occupants of such houses in a thickly populated city, but that such statute did not and was not intended to apply to a hotel building. In the Connecticut case the relator sought mandamus requiring the building commissioners to issue to her a permit to build in front of or beyond a building line, which had existed for ten years or more with the acquiescence of all parties. It will appear from that case that the statute provided for some proceeding to be had beforehand establishing such building line, and the contention of relator was that that proceeding was defective and void. The conclusion of the court was, under the circumstances, that relator's right to a permit was open to grave doubt, and that for this reason a peremptory writ of mandamus ought not to issue.

Sections 118 and 128, of Freund on Police Power, cited by the Virginia court, are in point only in so far as they relate to cases falling within the general police power of the state. The sections of Mr. Freund particularly applicable to the case at bar, where the purposes of the statute and ordinance are esthetic, and not to provide for the safety, health, and morals of the public in general, are §§ 180 and 181. These latter sections say, in accordance with the holdings of the courts everywhere, that for mere beauty and symmetry of the streets, or for mere esthetic purposes, having no reference to the safety, health, morals, or general welfare of the community at large, the state may not, under its police power, regulate or control the use by the owner of private property; that such right of regulation, if exercised at all, must be done under the power of eminent domain, and within constitutional limitations requiring just compensation to be paid for the taking or damaging of private property. This is the rule in Massachusetts as we understand the decisions. In *Welch v. Swasey*, supra, the supreme court of Massachusetts says that although

the legislature have no power to restrict the use of private property for purely esthetic purposes, yet when they have determined that the public health or the public safety requires the limitation of the height of buildings in a city, in exercising the police power for such lawful purposes they may also consider questions of taste and beauty. Counsel in the case at bar rely on McQuillin on Municipal Ordinances, §§ 32, 429, 430. In § 32, without citing any authority, Mr. McQuillin does say that a municipality under a proper grant of power may, by ordinance, establish on certain streets building lines, and provide that a certain class or character of buildings shall be erected in certain districts. It will be found, however, we think, that no adjudged case, except the Virginia case, reversed, has ever gone so far as to hold that for mere esthetic purposes, or beauty and symmetry of streets, the state may in the exercise of its police power alone limit the owner in the use of his private property; that if such restraint is imposed it must be done under the power of eminent domain, and not in the exercise of the police power.

Mr. Dillon, in his recent fifth edition of his work on Municipal Corporations, vol. 2, § 695, says: "Of recent years, in response to a growing demand for the preservation of natural beauty and the conservation of the amenities of the neighborhood resulting from the manner in which it has been laid out and built upon, legislatures and municipalities have sought, by statute and by ordinance, to prevent the encroachment of undesirable features, unsightly erections, and obnoxious trades. This legislation, induced mainly by esthetic considerations, has given rise to a series of novel questions affecting the legislative power of both the state and its governmental agent, the city. It has been held that, for esthetic considerations and to promote the popular enjoyment and advantages derived from the maintenance of a public park, the legislature may, by virtue of the power of eminent domain and upon making just compensation, impose restrictions upon the manner in which property abutting on the park may be improved and used. But it is apparent that restrictions founded, not upon the power of eminent domain, but upon the exercise of the police power, stand upon another basis, and several cases have laid down the rule that by virtue of the police power merely, neither the legislature, nor the city council exercising delegated power to legislate by ordinance, can impose restrictions upon the use of private property which are induced solely by esthetic considerations, and have no other relation to the health, safety, convenience, comfort, or

welfare of the city and its inhabitants. The law on this point is undergoing development, and perhaps cannot be said to be conclusively settled as to the extent of the police power."

We think this section from Mr. Dillon contains a fair statement of the present status of the law on the subject. The question of the extent of this police power has several times been presented in what are known as the bill or sign board cases, and generally it has been held that laws and ordinances operating to control the height of bill or sign boards, and the distance from the street or street lines, based merely on esthetic grounds, and having no reference to their safety, could not be sustained under the police power of the state. In *People ex rel. Wineburgh Adv. Co. v. Murphy*, 195 N. Y. 126, 21 L.R.A. (N.S.) 735, 88 N. E. 17, it is held that an ordinance which purports to legislate for public safety must tend in some appreciable way to that end. Unless there is a substantial connection between the assumed purpose and the end to be accomplished, such ordinance is unenforceable. In *Rochester v. West*, 164 N. Y. 510, 53 L.R.A. 548, 79 Am. St. Rep. 659, 58 N. E. 673, the charter of the municipality authorized an ordinance prohibiting the erection of billboards exceeding 6 feet in height, except with the permission of the common council. Construing an ordinance passed in pursuance of the charter, the New York court said: "We think this statute conferred upon the common council of the city authority to regulate boards . . . so far, at least, as such regulation was necessary to the safety or welfare of the inhabitants of the city, or persons passing along its streets."

This object was clearly within the police power. Neither the charter nor the ordinance prohibited the erection of signboards or billboards over 6 feet in height absolutely, but only without permission of council, and the regulation of council was limited to public safety. To the same effect is *Varney & Green v. Williams*, 155 Cal. 318, 21 L.R.A. (N.S.) 741, 132 Am. St. Rep. 88, 100 Pac. 867. And in the leading case of *City of Passaic v. Paterson Bill Posting, Adv. & Sign Painting Co.* 72 N. J. L. 285, 111 Am. St. Rep. 676, 62 Atl. 267, 5 Ann. Cas. 995, it was distinctly decided that "a city ordinance requiring that sign or bill boards shall be constructed not less than 10 feet from the street line is a regulation not reasonably necessary for the public safety, and cannot be justified as an exercise of the police power."

The opinion in that case cites the leading decisions on the subject, including some of those already cited in this opinion. L.R.A.1915C.

Our conclusion is, that under the present status of the law, and considering the present conditions as to population existing in the cities of our state, we should not go counter to the great weight of authority and take advanced ground on the question of the police power to regulate and control the use of private property, based on mere esthetic ground, and having no reasonable reference to the safety, health, morals, and general welfare of the people at large.

Whether without having made provision for condemnation or compensation for damages to the property taken or injured, and without providing for such condemnation and compensation, the charter and ordinance of the city of Charleston is void as an exercise of the power of eminent domain, as already stated, we need not decide, and we leave this question open for further consideration when a case shall be presented calling for such decision.

For the foregoing reasons we are of opinion that the peremptory writ awarded on a former day of the term was properly directed.

WISCONSIN SUPREME COURT.

ANNA KEELEY, Appt.,

v.

GREAT NORTHERN RAILWAY COMPANY, Resp't.

(156 Wis. 181, 145 N. W. 664.)

Libel — false statement in affidavit supporting motion for new trial.

A statement in an affidavit supporting a motion for new trial in an action by a widow to recover damages for the death of her husband, charging illicit relations between herself and a material witness in support of her claim, is absolutely privileged, and will not support an action for libel, although absolutely false.

(February 24, 1914.)

Note. — Libel and slander: privilege as to defamatory statements in testimony or affidavits to be used in progress of case.

This note does not include statements, complaints, or affidavits made in instituting proceedings.

Generally, as to libel by defamatory words in pleading, see notes to *Randall v. Hamilton*, 22 L.R.A. 640, and *Kemper v. Fort*, 13 L.R.A. (N.S.) 820.

As to whether publication of pleadings or other papers before any hearing has been had thereon is privileged, see notes to *Nixon v. Dispatch Printing Co.* 12 L.R.A. (N.S.) 188; *Byers v. Meridan Printing Co.* 38

A PPEAL by plaintiff from an order of the Circuit Court for Douglas County sustaining a demurrer to the complaint in an action to recover damages for an alleged libel. Affirmed.

Statement by Timlin, J.:

The appeal is from an order sustaining a demurrer to the complaint. The complaint, in substance, set forth that on May 13, 1907, the husband of plaintiff, while in the employment of defendant, was killed in consequence of defendant's negligence; that she brought an action against the defendant for damages under the death statute, and recovered after a trial in which she was a witness in

her own behalf with reference to formal and uncontested points, and in which an employee of the defendant named Harty was called as a witness by and for the plaintiff, and gave relevant and material testimony tending to establish the liability of defendant. After verdict for the plaintiff defendant moved for a new trial on six specified grounds, three relating to errors of law by the court and the other three somewhat general and ambiguous, namely, because the verdict was contrary to law, because the verdict was contrary to the evidence, and because the verdict was for excessive damages. Attached to and made part of the motion papers was an affidavit of one Sandager, a detective in the employment of defendant, made on July 23, 1908, contain-

L.R.A.(N.S.) 913, and *Lundin v. Post Pub. Co.* 52 L.R.A.(N.S.) 207.

As to privilege of informal communication with respect to criminal charge, see notes in 32 L.R.A.(N.S.) 740, and 4 L.R.A.(N.S.) 149.

For privilege as to grand jury proceedings, see note to *Boston v. Washington, A. & Mt. V. R. Co.* 32 L.R.A.(N.S.) 785.

As to what court proceedings privilege attaches, see *Meriwether v. Publishers: George Knapp & Co.* 16 L.R.A.(N.S.) 953, and note.

General rules; relevant statements; absolute privilege.

The general, if not in fact the universal, rule in regard to the privilege of a witness to immunity from liability for defamatory matter contained in affidavits, depositions, or testimony in judicial proceedings is the one adopted in *KEELEY v. GREAT NORTHERN R. Co.*, that the privilege is absolute if the statements complained of are pertinent and material to the matter under inquiry, even though they are in fact false and made maliciously. *Hendrix v. Daughtry*, 3 Ga. App. 481, 60 S. E. 206; *Burdette v. Argile*, 94 Ill. App. 171 (*obiter*); *McDavitt v. Boyer*, 169 Ill. 475, 48 N. E. 317; *Cooley v. Galyon*, 109 Tenn. 1, 60 L.R.A. 139, 97 Am. St. Rep. 823, 70 S. W. 607; *Laing v. Mitten*, 185 Mass. 233, 70 N. E. 128; *Crecelius v. Bierman*, 59 Mo. App. 513; *Lamberson v. Long*, 66 Mo. App. 253; *Carrington v. Russell*, Rap. Jud. Quebec, 42 C. S. 71, 4 D. L. R. 675; *Honan v. Parsons*, 13 Quebec Pr. Rep. 363.

This is true although the libelous statements were made concerning persons who were not parties to the proceeding. *Cooley v. Galyon*, 109 Tenn. 1, 60 L.R.A. 139, 97 Am. St. Rep. 823, 70 S. W. 607.

For earlier cases sustaining the rule that the testimony of a witness which is pertinent is absolutely privileged, see note to *Cooper v. Phipps*, 22 L.R.A. 836.

While numerous expressions may be found in the cases to the effect that there is a L.R.A.1915C.

rule that the testimony of witnesses or affidavits and depositions to be used in judicial proceedings are absolutely privileged, whether relevant or irrelevant, they generally state that the rule exists in some other jurisdiction, or they occur in cases where the adoption of such a rule is not necessary to the decision. It is doubtful if any of the courts have clearly and definitely adopted such a rule.

Thus, in *Perry v. Perry*, 153 N. C. 266, 31 L.R.A.(N.S.) 880, 69 S. E. 130, statements made in an affidavit filed in opposition to a motion to charge an executor with the costs of a previous suit, that the testimony of plaintiff in the former action was "false in the start, and fraudulent in the manner in which it was attempted to be established," and that plaintiff's claim was "essentially unjust, dishonest, and unlawful," were held to be absolutely privileged, even though false and made maliciously. Whether the court intended to decide that the words used were absolutely privileged because relevant to the matter under consideration, or because the testimony of a witness is absolutely privileged, whether relevant or not, is not clear, for it refers, for a statement of the law on that question, to two earlier decisions of the court, neither of which is within the scope of the present note, one of which apparently is based upon the rule that statements made in judicial proceedings are privileged if relevant, while the other, in an *obiter* statement, classes everything said by a witness in the box as being absolutely privileged, the same as words used in debate in Congress or the legislature.

In *Chambliss v. Blau*, 127 Ala. 86, 28 So. 602, in which a statement made by defendant while testifying in a prosecution of plaintiff for larceny of his fodder, that plaintiff stole the fodder, followed by testimony which showed conversion rather than larceny, was held to be privileged, the court approves a text writer's statement that testimony of a witness should be absolutely privileged regardless of its relevancy; but obviously the adoption of that rule was not necessary to the decision, inasmuch as the

ing false, defamatory, and libelous matter with reference to plaintiff therein set forth, reflecting upon the chastity of the plaintiff. It is averred that this affidavit and the statement above referred to were wholly and entirely immaterial, irrelevant, and not pertinent to any issues involved in said action or on said motion for said new trial, and that said affidavit and statements were not material, pertinent, or relevant to any matter or subject in said action, or considered, or proper to be considered, on said motion, and that neither said affidavit, nor any of the statements therein contained, nor any of the statements quoted therefrom, were proper to be used or filed in said action or upon said motion, which facts were well known to the defendant and its attorneys

and counsel at and prior to the time of making and filing said affidavit and statements. The defendant, acting by and through its attorneys at the hearing of the motion for a new trial, in the presence of the circuit judge and others, read said affidavit and statements in open court. The presiding judge filed an order in said court denying defendant's motion for a new trial, which order contained the following statement: "The affidavits of Zearfoss, Barr, and Sandager presented by defendant's counsel, in the opinion of this court, are improper and ought not to be considered, and they are not considered on the decisions of the several motions." This order and the decision of the circuit judge were affirmed by the supreme court of this state on the

statement complained of was clearly relevant.

A statement by a defendant in a suit, while testifying as a witness, that allegations of the complaint and statements of plaintiff while testifying as a witness were knowingly false, was held to be absolutely privileged in *Sebree v. Thompson*, 126 Ky. 223, 11 L.R.A.(N.S.) 723, 103 S. W. 374, 15 Ann. Cas. 770. In the course of its opinion the court approves what it considers to be the English rule, *i. e.*, that a witness is privileged in his statements regardless of whether they are relevant or irrelevant to the matter under consideration, but points out that the answers of defendant upon which the suit was based were in fact relevant, so that they were privileged under what it terms the modified rule, that proceedings in a court of justice are privileged only when they are relevant.

For English cases upon this question see the note to *Cooper v. Phipps*, *supra*. The case of *Kennedy v. Hilliard*, cited therein, in holding that the testimony of a witness is absolutely privileged whether relevant or irrelevant, went somewhat further than was necessary to a decision of the case, and evidently was using the word "relevancy" in the narrow sense in which it is used in considering whether testimony is admissible as evidence. And in *Dawkins v. Rokeby*, also cited, the lord chancellor expressly states that it was not denied that the statements in question related to the matter under inquiry.

Irrelevant statements; qualified privilege.

Statements of witnesses which are not pertinent and material are only qualifiedly privileged, and immunity from the legal consequences of their being libelous depends upon their being made in good faith. *Lamberson v. Long*, 66 Mo. App. 253; *Crecelius v. Bierman*, 59 Mo. App. 513; *Buschbaum v. Heriot*, 5 Ga. App. 521, 63 S. E. 645; *Honan v. Parsons*, 13 Quebec Pr. Rep. 363.

For other cases to the effect that irrelevant testimony of a witness is only qualifiedly privileged, see note to *Cooper v. Phipps*, 22 L.R.A. 836. L.R.A.1915C.

Showing of relevancy required.

The pertinency and materiality which will suffice to create immunity are not necessarily of as high a degree as that which is required to render matter admissible as evidence, and, in general, it may be said that such immunity will arise if the witness has reasonable ground for thinking his statements are material. And if they are made in answer to, and are fairly responsive to, questions put to the witness, the courts will not require him to determine whether or not they are relevant and material.

Thus, in *Acre v. Starkweather*, 118 Mich. 214, 76 N. W. 379, statements made by a witness upon cross-examination as to the reason for the opinion he had just given as a witness, that plaintiff's reputation for truth and veracity was bad, that "he is a thief; he has stole my paint clothes, paint brushes, and part of a harness,"—were held to be privileged. The court said: "The witness, who is not a lawyer, is not cognizant of the rules of law, and cannot, for himself, readily determine the materiality or responsiveness or pertinency of his answers. He is unfamiliar with the rules of evidence. Public policy requires that he should not be trammelled with fear of a prosecution for slander. The question was a general one. It cannot be said that it is unnatural that the witness should believe that this affected his reputation in the community. The rule is not so hard as to say that the witness, in reply to a general question, where he is not cautioned by court or counsel, must, at his peril, determine the materiality and responsiveness of the question."

In *Baggett v. Grady*, 154 N. C. 342, 70 S. E. 618, where the libelous matter was contained in affidavits which defendant submitted to the supreme court in obedience to its mandate in a proceeding before it to determine plaintiff's fitness to be admitted to the bar, it was held that the affidavits were absolutely privileged, because made and used in a proceeding before a court, relevantly to the inquiry, and while in the determination thereof, the same having been called for by the court. The court

appeal of the defendant therefrom. The statements contained in said affidavit and quoted were wholly and entirely false, and this fact was well known to the defendant at and prior to the time of filing and reading of said affidavit. On the day the affidavit was presented and filed in the circuit court, plaintiff caused to be served on the defendant a notice in writing, advising the defendant of the filing of said libelous affidavit and statements by its said attorneys, but the defendant failed and neglected to take any action of any kind disapproving of the conduct of its said attorneys and counsel, or in any manner disaffirming or repudiating such conduct or such libelous statements, but on the other hand, after receipt of this notice by and

through its attorneys, caused and procured said affidavit containing the alleged libelous statements to be filed in the office of the clerk of the circuit court for Eau Claire county, and thereafter to be filed with the clerk of the supreme court of the state of Wisconsin, and failed and neglected to make any effort or request to withdraw from the files said affidavit and such statements therein contained. It is further averred that the acts and conduct of said Sandager and of said attorneys were fully ratified, approved, and confirmed by the defendant, and that the said acts and conduct were malicious, vindictive, and with the intention and for the purpose of injuring, damaging, and destroying the good name and reputation of the plaintiff, and to cause her

said: "They were strictly relevant to the matter under consideration, but in this respect the privilege of a witness extends beyond that of counsel; for it is not the business of a witness to consider whether the subject under inquiry is relevant or not. This is strictly the province of counsel and of the court, and if no objection is made to a question, or, if being made, is overruled, it is the duty of a witness to assume that it is relevant and to answer it; and for his answer, when responsive to the question, he cannot be held liable in a civil suit."

When the alleged libelous matter is made in direct response to questions propounded, and no objection is made that the questions are immaterial, nor any motion made to strike out the testimony, its materiality is admitted, and no recovery for slander can be based upon it. *Hendrix v. Daughtry*, 3 Ga. App. 481, 60 S. E. 206; *Cooley v. Galyon*, 109 Tenn. 1, 60 L.R.A. 139, 97 Am. St. Rep. 823, 70 S. W. 607.

In *Buschbaum v. Heriot*, 5 Ga. App. 521, 63 S. E. 645, the court said: "We hold that the fact that a witness, without inquiry, and influenced by malice, volunteers false testimony defamatory of another, the immateriality of which is apparent to any ordinary mind, is such a circumstance as places the testimony of the witness in the class of conditional privilege, where he is no longer shielded by the law, unless it be made to appear that he bona fide believes that the facts stated by him are true, and unless, with at least some show of reason, he is of the opinion that his testimony is material. What we have said relates wholly to such testimony as is immaterial, and not only immaterial, but volunteered by the witness, because, in a case where the testimony is given in direct response to a question propounded by an officer of the court, the witness is not to be the judge of the materiality of his answer, but is required to answer the question if it is not objected to or is not self-incriminatory."

In *Baldwin v. Hutchison*, 8 Ind. App. 454, 35 N. E. 711, which was an action to recover money extorted from plaintiff by L.R.A.1915C.

defendant on threat to prosecute plaintiff for perjury in a case in which he had testified that defendant's reputation for veracity was bad, and, when cross-examined by defendant's counsel, further stated that he had heard defendant had stolen a sheep, it was held that there was no consideration for the payment of the money, as plaintiff's statements as a witness under the circumstances were absolutely privileged, they being responsive to questions put to him by defendant's counsel, and made in good faith under a belief that they were true.

—necessity for alleging irrelevancy.

The court will presume, in the absence of averment to the contrary, that the answers made by a witness are within the scope of the inquiry, pertinent to the issue, and honestly believed by the witness to be substantially true, although they were in fact false, and a petition which does not show the contrary is bad on demurrer. *Emerman v. Bruder*, 7 Ohio S. & C. P. Dec. 311, 5 Ohio N. P. 31.

So, in *Hibbard v. Cullen*, Rap. Jud. Quebec, 3 C. S. 463, it is held that the statements of a witness are privileged if he speaks relevantly to the cause or to the circumstances which belong to it, and a declaration for slander consisting of testimony of a witness, which fails to allege irrelevancy as to the case in which defendant swore or to the circumstances connected with it, is bad on demurrer.

And in *Miller v. Gust*, 71 Wash. 139, 127 Pac. 845, the alleged libel was published in a suit for divorce, in the complaint for which the wife alleged that the husband had committed adultery with a woman whose name was unknown, an affidavit being subsequently filed alleging that plaintiff was the woman referred to in the complaint. It does not appear from the report of the case whether the affidavit was supplementary to the pleading or was filed as evidence, but it was held that, inasmuch as the complaint for libel did not allege that the libelous matter was not relevant and

shame, humiliation, disgrace, and degradation. It is also averred that the plaintiff has always been, and is now, a woman of chaste character and of good reputation.

Mr. E. E. Collins with Messrs. Dietrich & Dietrich for appellant.

Mr. J. A. Murphy, for respondent:

A motion for a new trial on the ground that the verdict is contrary to the evidence is a motion addressed to the sound discretion of the court.

McLimans v. Lancaster, 57 Wis. 297, 15 N. W. 194; Collins v. Janesville, 117 Wis. 415, 94 N. W. 309; Schlag v. Chicago, M. & St. P. R. Co. 152 Wis. 165, 139 N. W. 756.

pertinent to the matter under discussion in the divorce suit, it was bad on demurrer.

But in Bibb v. Crawford, 6 Ga. App. 145, 64 S. E. 488, it is held that the defense of privilege is affirmative in its nature, and can be raised by demurrer only when all the facts essential to its existence appear in the petition, so, where the petition merely alleges publication of an affidavit generally, without stating that it was published in a judicial proceeding, a demurrer does not raise the question of privilege.

Facts illustrating privilege.

Where the libelous matter consisted of an affidavit of a third person, filed by an attorney (defendant in the present suit) in support of his answer to a petition sworn to by plaintiff as agent for another, to obtain an attachment for contempt, which affidavit stated that plaintiff's character was bad and from that character affiant would not believe him under oath, it was held that, for the purposes of the inquiry, plaintiff was a witness in the proceeding, and that fact rendered legitimate the production of impeaching affidavits by defendant in behalf of his client, and it could not be held that he abused his privilege in doing so. Conley v. Key, 98 Ga. 115, 25 S. E. 914.

An affidavit impeaching the veracity of a petitioner for injunction, whose oath verified the petition, is pertinent and material, especially when the allegations of fact in the petition are denied. Buschbaum v. Heriot, 5 Ga. App. 521, 63 S. E. 645.

Privilege applies to matter in an affidavit to be used as evidence in a trial, the same as to testimony in court. Bibb v. Crawford, supra.

The unsworn statement to the jury, made as provided for by statute by a defendant in a criminal trial, that plaintiff testified against him falsely because of ill will arising from defendant's refusal of credit to plaintiff because plaintiff was guilty of a criminal offense in living in adultery with a negro woman, was relevant and privileged. Nelson v. Davis, 9 Ga. App. 131, 70 S. E. 599.

L.R.A.1915C.

The affidavit complained of was filed and used before the court in the ordinary course of judicial proceedings, concerning a matter which the court had jurisdiction to hear, was absolutely privileged because of the occasion, and was addressed to the discretion of the court.

Schlag v. Chicago, M. & St. P. R. Co. supra; Ogdens, Libel & Slander, p. 191; Revis v. Smith, 18 C. B. 126, 25 L. J. C. P. N. S. 195, 2 Jur. N. S. 614, 4 Week. Rep. 506; Townshend, Slander & Libel, §§ 221-223, 354; Garr v. Selden, 4 N. Y. 91; Gilbert v. People, 1 Denio, 41, 43 Am. Dec. 646; Warner v. Paine, 2 Sandf. 195; Johnson v. Brown, 13 W. Va. 71; McLaughlin v. Cowley, 127 Mass. 316; Newell, Defama-

In McDavitt v. Boyer, 169 Ill. 475, 48 N. E. 317, reversing 67 Ill. App. 452, it was held that proof of remarks by defendant charging plaintiff with perjury, made either while defendant was suing out a warrant for the arrest of plaintiff for perjury, or while he was conducting the prosecution before a magistrate on that charge, both as a party and as his own counsel, or while he was testifying as a witness, did not prima facie show malice, but that the remarks were privileged, and actual malice must be affirmatively shown.

In Rall v. Donnelly, 56 Ill. App. 425, an affidavit by a third party stating that plaintiff was nothing more than a common prostitute, made and presented to the court in resistance to plaintiff's application for alimony and attorneys' fees in a suit by her husband for divorce, was held to be at least prima facie privileged, and not actionable unless express malice and want of probable cause were shown.

In McNabb v. Neal, 88 Ill. App. 571, it was held that alleged slanderous statements tending to prove hereditary insanity in plaintiff, made during an inquest into plaintiff's insanity, were clearly pertinent to the matter being investigated, and therefore the case presented was far inside the line of complete protection for the witness.

In Stewart v. Hall, 83 Ky. 375, the alleged libel consisted of the introduction by cross-examination into plaintiffs' deposition, taken to be used in a suit between two factions of a church, of an article which had been published in a religious paper, and the subsequent incorporation of the deposition in counsel's brief, which it was the practice to file in the trial court before the hearing. This suit for libel was brought against the plaintiffs in that suit and their counsel, and it was held that the matter was privileged because it was used in good faith, though on final judgment it was stricken out of the record as incompetent evidence.

If a person maliciously and without probable cause makes an affidavit containing libelous matter consisting of a charge of perjury in a former suit, and, without any legitimate reason for making the charge,

tion, Slander & Libel, p. 423; Terry v. Fellows, 21 La. Ann. 375; Calkins v. Sumner, 13 Wis. 193, 80 Am. Dec. 738; Larkin v. Noonan, 19 Wis. 82; Schultz v. Strauss, 127 Wis. 325, 106 N. W. 1066, 7 Ann. Cas. 528; Hoar v. Wood, 3 Met. 193; Stewart v. Hall, 88 Ky. 375; Hartsock v. Reddick, 6 Blackf. 255, 38 Am. Dec. 141; Rainbow v. Benson, 71 Iowa, 301, 32 N. W. 352; Bartlett v. Christliff, 69 Md. 219, 14 Atl. 518; Suydam v. Moffat, 1 Sandf. 459; Doyle v. O'Doherty, Car. & M. 418; Bibb v. Crawford, 6 Ga. App. 145, 64 S. E. 488; Buschbaum v. Heriot, 5 Ga. App. 521, 63 S. E. 645; Smith v. Kerr, 1 Edm. Sel. Cas. 190; Lawson v. Hicks, 38 Ala. 279, 81 Am. Dec. 49; Hollis v. Meux, 69 Cal. 625, 58 Am.

Dec. 574, 11 Pac. 248; Aylesworth v. St. John, 25 Hun, 156; Lea v. White, 4 Sneed, 111; Jennings v. Paine, 4 Wis. 358; Ball v. Rawles, 93 Cal. 228, 27 Am. St. Rep. 174, 28 Pac. 937; Wright v. Lothrop, 149 Mass. 385, 21 N. E. 963; Laing v. Mitten, 185 Mass. 233, 70 N. E. 128; Morrow v. Wheeler & W. Mfg. Co. 165 Mass. 349, 43 N. E. 105; Burke v. Ryan, 36 La. Ann. 951.

Timlin, J., delivered the opinion of the court:

The demurrer must be taken to admit the good character, chastity, and good reputation of the plaintiff, and the falseness of the accusations against her contained in the affidavit of Sandager, also the agency of

files it in a suit to which he is not a party, to support a motion for a new trial, he will be liable for damage resulting from the libel. Kelly v. Lafitte, 28 La. Ann. 435.

Where it distinctly appeared that nothing was claimed by reason of a memorandum or indorsement on a note, and that it therefore was immaterial who made it or how it came to be made, defendant's characterization of the writing as a forgery, not being material nor made in response to questions, was only qualifiedly privileged, and whether he believed on reasonable grounds that his statement was pertinent was a question of fact for the jury. Crece-lius v. Bierman, 59 Mo. App. 513.

A letter produced and read in a trial before a referee, being material and relevant to the matter under consideration, is privileged. Woodman v. Kidd, 25 App. Div. 254, 49 N. Y. Supp. 301.

In Beggs v. McCrea, 62 App. Div. 39, 70 N. Y. Supp. 864, which was an action for libel based upon an affidavit made by defendant in a proceeding in surrogate's court for the removal of plaintiff as testamentary trustee, it appeared that the attorney retained to make application for the removal of plaintiff secured from defendant, who was a director of a bank from which plaintiff had borrowed money and failed to repay it, an affidavit to the effect that plaintiff was insolvent and was not a fit person to act as trustee of an estate. It was held that the affidavit was not irrelevant, and that defendant was not deprived of the privilege extended to a person making an affidavit used in a judicial proceeding, by the fact that he made it without first requiring that proceedings be instituted to have his deposition taken.

Testimony honestly given in a suit for slander, of the circumstances connected with the utterance of the slanderous words, for the purpose of mitigating the damages, cannot be urged as a malicious repetition of the slander. Thompson v. McCready, 194 Pa. 32, 45 Atl. 78.

On an issue as to the damages sustained by delay of building operations because of injunction proceedings, where it was shown

that the contractor demanded additional pay for increased cost of the building because of the delay, and it was shown that plaintiff, another contractor, had offered to construct the building for the original contract price, testimony that plaintiff was not a reliable contractor, and was not responsible financially, was pertinent and therefore privileged. Cooley v. Galyon, 109 Tenn. 1, 60 L.R.A. 139, 97 Am. St. Rep. 823, 70 S. W. 607.

In Renaud v. Guenette, Rap. Jud. Quebec 25 C. S. 310, though the action was for malicious prosecution, the court considered the right of plaintiff to recover damages for defamatory words used by defendant as a witness, and said: "The defendant was unexpectedly called upon to give testimony as to the character of the plaintiff's hotel, and he said under oath what he honestly believed to be the case. The law clearly protects him from any responsibility for what he stated under such circumstances."

In Cote v. Deneau, Rap. Jud. Quebec 19 B. R. 272, where the defamatory statement was made to plaintiff, an attorney, while the latter was examining defendant, in answer to a question tending to discredit defendant as a witness, although the court refused to formally hold that the answer was a pertinent statement, it held that the witness did not act with such malice or go so far out of his way to find an insult to cast upon plaintiff as to have forfeited the immunity accorded to a witness.

In Watson v. Jones [1905] A. C. 480, 4 B. R. C. 934, 74 L. J. P. C. N. S. 151, 93 L. T. N. S. 489, 3 Ann. Cas. 124, testimony in a suit for separation on the ground of cruelty, brought by plaintiff against her husband, which was given by defendant, a physician, to the effect that, when called in consultation professionally by plaintiff, he ascertained that she was pregnant, and that she and her family were apparently bent upon inducing premature labor so as to free plaintiff of any permanent reminder of the marriage, and, if possible, upon obtaining a separation, was held to be privileged.

R. L. S.

the defendant's attorneys for defendant in procuring and filing this affidavit, and the ratification by defendant of their acts in so doing, by neglect, after notice, to take any action to withdraw or repudiate said affidavit or the libelous statements therein contained. On the other hand, it cannot be taken to admit the pleader's conclusions that the affidavit and its contents were irrelevant, because the facts upon which such conclusions are based are set forth in the complaint. The case is, from one view point, well calculated to arouse sympathy for the plaintiff and indignation against the defendant. The latter, upon motion for a new trial in the personal injury action reported in 139 Wis. 448, 121 N. W. 167, presented the affidavits of Zeaross and Barr, and that of its detective Sandager, the first two suggesting that one Harty, a witness for the plaintiff in that action, upon whose testimony the verdict largely rested, was a liar and perjurer, and the third charging that he was a self-confessed thief, but also containing, among other things, actionable aspersions upon the chastity of plaintiff, resting upon the hearsay statements of this man Harty, whose sworn testimony they at the same time contended was unworthy of belief. These hearsay statements were supplemented by a somewhat vague statement of the detective Sandager. But sympathy and indignation are emotions which must be laid aside in the decision of legal controversies by those who would hold with an even hand the scales of justice. There is also another aspect of the case which may have presented itself persuasively to the attorneys by and through whom the defendant acted. Harty's testimony largely turned the case against defendant, and there was considerable showing of recklessness of statement on his part. Professional zeal may have made the counsel unduly suspicious of those opposed, and unduly credulous of everything which made in their favor, but this is the ordinary mental condition of litigants and frequently of their counsel. If the illicit relations charged existed, a motive for falsifying by Harty would be shown, and he could no longer be considered a disinterested witness, as he appeared to the court and jury on the trial. The case was close enough on the evidence so that this consideration might induce the learned circuit court to exercise his discretion in granting a new trial if he believed the verdict unjust. The fact that the judge apparently disapproved of this attack upon the reputation of the plaintiff, and also denied the motion for a new trial, as he lawfully might do, is immaterial. The affidavit was just as relevant on the motion for a new trial denied in this way L.R.A.1915C.

as it would have been had the trial court been induced thereby to grant a new trial. *Schlag v. Chicago, M. & St. P. R. Co.* 152 Wis. 165, 139 N. W. 756, and cases cited.

To the ordinary observer it might, and no doubt often does, appear that court proceedings would be greatly improved by more courteous and considerate treatment of parties and witnesses, and to a great extent this is true. But this courtesy cannot be enforced to the extent of excluding relevant matters from the consideration of the court, for we are not to suspend the search for relevant truth for the sake of courtesy. The paramount public interest here intervenes and overrides considerations of mere private right as between the parties. It is not out of tenderness to the calumniator or the bearer of false witness that the law regards certain communications as absolutely privileged. But public interest demands that complainants and suitors and their lawful representatives be at liberty to urge, before any legal tribunal having authority to decide, all matters relevant to the questions to be decided. A communication may be absolutely or conditionally privileged. "An absolutely privileged communication is one in respect of which, by reason of the occasion upon which it is made, no remedy can be had in a civil action of slander or libel." "A conditionally privileged publication is a publication made on an occasion which furnishes a prima facie legal excuse for the making of it, and which is privileged unless some additional fact is shown, which so alters the occasion as to prevent its furnishing a legal excuse. The additional fact which in the majority of cases is required to destroy this conditional privilege is malice, meaning bad intent." *Noonan v. Orton*, 32 Wis. 106.

In *Schultz v. Strauss*, 127 Wis. 325, 106 N. W. 1066, 7 Ann. Cas. 528, the statements of a witness before a grand jury were held to be absolutely privileged; and in *Jennings v. Paine*, 4 Wis. 368, a relevant statement by an attorney in argument was held to be entitled to the same privilege. In *Larkin v. Noonan*, 19 Wis. 82, charges otherwise libelous and maliciously made, embraced in a petition to the governor for the removal of a sheriff from office, but relevant to the removal, were held not sufficient to support an action for libel. In *Calkins v. Sumner*, 13 Wis. 193, 80 Am. Dec. 738, a witness in an action was sued for slander in giving his testimony, and it was ruled that the defendant was not liable even if the charge was made by him maliciously, if what he testified to was relevant to the subject of inquiry.

It is contended here that the demurrer admits these averments of the complaint

which charged lack of good faith, want of reasonable belief in the truth of the affidavit made against the plaintiff, and knowledge on the part of the defendant that the affidavit in question was false and malicious; hence that the defendant cannot shelter itself behind a plea of privilege. This would be true as to conditional privilege. But this complaint shows on its face that the court had jurisdiction to entertain the motion, and that the matter complained of was relevant to the inquiry upon this motion, and in this respect shows a case of absolute privilege within the rule of *Jennings v. Paine*, 4 Wis. 358; *Calkins v. Sumner*, and *Larkin v. Noonan*, supra; *Schultz v. Strauss*, 127 Wis. 325, 108 N. W. 1066, 7 Ann. Cas. 528. The cases of *Cottrill v. Cramer*, 43 Wis. 242, *Eviston v. Cramer*, 47 Wis. 659, 3 N. W. 392, and *Cochran v. Melendy*, 59 Wis. 207, 18 N. W. 24, were cases of communications conditionally privileged, and are not in point here.

In order to bring a witness, counsel, or party in a litigation within the rule of absolute privilege, it is only necessary to show that the alleged slanderous or libelous words, at the time when made or published, were clearly relevant to the pending legal inquiry in which they were uttered or used. Nothing less than this would be an adequate protection. *Ogders, Libel & Slander*, p. 191; *Hoar v. Wood*, 3 Met. 193; *Laing v. Mitten*, 185 Mass. 233, 70 N. E. 128. Where slanderous or libelous words employed in such a proceeding are irrelevant, they fall within the rule of conditional privilege, and if they are shown to be false, and not put forward with any bona fide belief in their truth or their relevancy, or any other ground of actual malice be shown, the conditional privilege is lost and the utterer liable. Without approving everything said therein, we may here cite *Myers v. Hodges*, 53 Fla. 197, 44 So. 357; *Lauder v. Jones*, 13 N. D. 525, 101 N. W. 907. In some of the cases and text-books cited the distinction between absolute and conditional privilege is not accurately stated, as in *Newell on Defamation, Slander & Libel*, p. 423, but see page 425 of the same work. Cases from other courts may also be found which ignore the distinction between absolute and conditional privilege, here made to rest upon the nature of the judicial proceeding and the relevancy of the matter complained of. But such cases are not the law of this state. In legal proceedings, if the matter be relevant, but false in fact, the law undertakes to punish for perjury, but civil damages are not recoverable. If irrelevant, false, and uttered or published with express malice, damages may be recovered in a civil action. If irrelevant and

false, but uttered or published without actual, as contradistinguished from imputed, malice, it usually falls within the rule of conditional privilege, depending somewhat upon the degree of its irrelevancy; for if the matter is very obviously irrelevant, that circumstance may impugn the good faith of the utterer or publisher, and either take the case out of the rule of conditional privilege, or be considered evidence to support a finding of express malice. *Sherwood v. Powell*, 61 Minn. 479, 29 L.R.A. 153, 52 Am. St. Rep. 614, 63 N. W. 1103; *McLaughlin v. Cowley*, 127 Mass. 316; s. c., 131 Mass. 70. Order affirmed.

Siebecker, J., took no part.

NEBRASKA SUPREME COURT.

WILLIAM L. SHACKLEY et al., Admsrs., etc., of *Harrison W. Cremer, Deceased*, Appts.,

v.

ANNIE B. HOMER et al.

(87 Neb. 146, 127 N. W. 145.)

Will — devise for one reaching specified age.

1. Where real estate is devised to executors, to be held by them in trust until C. shall attain the age of twenty-five years, when the same shall be conveyed to him in fee, with a devise over, in the event of C.'s death prior to attaining such age, to C.'s widow and children, if any, and, if none, then to C.'s mother, and brother and sister of the full blood, this will confer on C. a vested estate in fee simple, subject to the prior chattel interest given to the executors, and also subject to defeasance in the event of his death before attaining such age.

Mortgage — foreclosure — trust — parties.

2. And in such a case, in a suit brought to foreclose a mortgage upon the real estate so devised, executed by the testator in his lifetime, where the probate of the will is being litigated, so that the executors named have not qualified, and no administrators c. t. a. have been or could be appointed in their stead, the service of summons upon C. and upon all persons then living who take the devise over in the event of C.'s death prior to his attaining the age of twenty-five years, and upon the widow and heirs at law of the testator, and upon the special administrator of the estate of the testator, confers upon the court jurisdiction over the said real estate and the

Headnotes by *FAWCETT, J.*

Note. — For provision in bequest or devise contemplating the attainment of a specified age as rendering the gift contingent, see note, post, 1012.

title thereto, and of all parties in interest in said real estate and title.

Same — confirmation of sale — barring redemption.

3. And the confirmation of a sale under a decree in such suit, and the execution and delivery of a sheriff's deed for the real estate involved therein, will bar all equity of redemption of the defendants so served, and will pass to the grantee in said deed all interest and title in and to said real estate owned by the testator at the time of his decease.

(June 10, 1910.)

A PPEAL by plaintiffs from a judgment of the District Court for Douglas County in defendants' favor in an action brought to redeem certain real estate from a mortgage which had been foreclosed without making persons alleged to have been necessary to the proceeding, parties thereto. Affirmed.

The facts are stated in the opinion.

Mr. Henry E. Maxwell, for appellants:

The duties imposed on the executors "and their successors" by the will are all active duties, and would require the fee to be vested in them, even if it had not been given to them in express terms.

Weller v. Noffsinger, 57 Neb. 455, 77 N. W. 1075; 1 Perry, Tr. 3d ed. §§ 259, 313-315; 3 Pom. Eq. Jur. 3d ed. § 1011, note; Moll v. Gardner, 214 Ill. 252, 73 N. E. 442; Spengler v. Kuhn, 212 Ill. 192, 72 N. E. 214; Green v. Grant, 143 Ill. 61, 18 L.R.A. 381, 32 N. E. 369; Wicker v. Moore, 79 Neb. 755, 113 N. W. 148; Haynes v. Bourn, 42 Vt. 690; Boutelle v. City Sav. Bank, 17 R. I. 781, 24 Atl. 838; Mott v. Ackerman, 92 N. Y. 539; Schroeder v. Wilcox, 39 Neb. 157, 57 N. W. 1031; Earle v. Earle, 93 N. Y. 108; Rowe v. Rowe, 103 App. Div. 100, 92 N. Y. Supp. 491; Feaster v. Fagan, 135 Iowa, 633, 113 N. W. 479; Vernor v. Coville, 54 Mich. 281, 20 N. W. 77; Aldrich v. Willia, 55 Cal. 81; Fay v. Reager, 2 Sneed, 200; Mullanny v. Nangle, 212 Ill. 247, 72 N. E. 385; Trask v. Donoghue, 1 Aik. (Vt.) 370; Re Robinson, 37 N. Y. 263; 18 Cyc. 213; Tarrance v. Reuther, 185 Pa. 279, 39 Atl. 956; Cohea v. Johnson, 69 Miss. 46, 13 So. 40; Mathews v. Meek, 23 Ohio St. 272; Jones v. Jones, 17 N. C. (2 Dev. Eq.) 387.

Title to property passing under a will relates back to the death of the testator.

Coggeshall v. Home for Friendless Children, 18 R. I. 698, 31 Atl. 694; Steadman v. Steadman, 143 N. C. 345, 55 S. E. 784; Doe ex dem. Cofer v. Roe, 1 Ga. 538; Richards v. Pierce, 44 Mich. 444, 7 N. W. 54; Scott v. West, 63 Wis. 529, 24 N. W. 164, 25 N. W. 18; Graves v. Mitchell, 90 L.R.A.1915C.

Wis. 306, 63 N. W. 273; Babcock v. Collins, 60 Minn. 73, 51 Am. St. Rep. 503, 61 N. W. 1022; Tudor v. Tudor, 80 Vt. 220, 130 Am. St. Rep. 977, 67 Atl. 541; Re Silkman, 121 App. Div. 202, 105 N. Y. Supp. 877; Camoy's Peerage, 6 Clark & F. 850, West, 34; Bohon v. Bohon, 78 Ky. 410; Ex parte Fuller, 2 Story, 329, Fed. Cas. No. 5,147; McDearmon v. Maxfield, 38 Ark. 631; Haynes v. Harris, 33 Iowa, 518; Rockwell v. Saunders, 19 Barb. 480; Gilkey v. Hamilton, 22 Mich. 287; Litz v. Exchange Bank, 15 Okla. 571, 83 Pac. 790; Gardner v. Gantt, 19 Ala. 669.

The rule applied in this case was adopted by the courts of England with the express purpose of modifying the "intolerable hardship" of the common law, by which a future estate was defeated by the determination of the particular estate supporting it before the future estate was to take effect.

Browne v. Browne, 3 Smale & G. 588, 26 L. J. Ch. N. S. 635, 3 Jur. N. S. 728, 5 Week. Rep. 777.

The reason for the rule having ceased, the rule itself "is no more."

Kerner v. McDonald, 60 Neb. 663, 83 Am. St. Rep. 550, 84 N. W. 92; Albin v. Parmele, 70 Neb. 740, 98 N. W. 30, 99 N. W. 646; Benedict v. Minton, 83 Neb. 782, 120 N. W. 430; Weller v. Noffsinger, 57 Neb. 459, 77 N. W. 1075; Brookhouse v. Pray, 92 Minn. 448, 100 N. W. 236.

The testator intended that his son should take no estate before the time for making the deed arrived.

Weller v. Noffsinger, 57 Neb. 459, 77 N. W. 1075; Green v. Grant, 143 Ill. 61, 18 L.R.A. 385, 32 N. E. 369.

Where trustees may be under the necessity of exercising a power over the fee, as by mortgage, a gift to them of the fee will not be cut down.

1 Perry, Tr. 3d ed. § 316; Watson v. Pearson, 2 Exch. 593; Blagrove v. Blagrove, 4 Exch. 570; Blount v. Walker, 31 S. C. 23, 9 S. E. 804; Fenwick v. Potts, 8 De G. M. & G. 506; Bagshaw v. Spencer, 1 Ves. Sr. 144, 2 Atk. 577; Goodtitle ex dem. Hayward v. Whitby, 1 Burr, 234, 1 Ld. Kenyon, 506.

Messrs. William Baird & Sons, for appellees:

The equitable title and real ownership were vested in Cedric E. Cremer the moment the breath of life passed from Mr. Cremer.

Goodson v. Ellisson, 3 Russ. Ch. 584, 27 Revised Rep. 127; Toner v. Collins, 67 Iowa, 369, 56 Am. Rep. 346, 25 N. W. 287; Weatherhead v. Stoddard, 58 Vt. 627, 56 Am. Rep. 573, 5 Atl. 517; Withers v. Sims, 80 Va. 663; Tiedeman, Real Prop. § 531; Jones v. Webb, 5 Del. Ch. 132; 2 Jarman, Wills, 659; Hinckley v. Simmons,

4 Ves. Jr. 160; *Ommaney v. Bevan*, 18 Ves. Jr. 291; *Burdge v. Walling*, 45 N. J. Eq. 10, 16 Atl. 51; *Waterman Hall v. Waterman*, 220 Ill. 569, 4 L.R.A.(N.S.) 776, 77 N. E. 142; *Illinois Land & Loan Co. v. Bonner*, 75 Ill. 315; *Cadman v. Richards*, 13 Neb. 383, 14 N. W. 159; *Henry v. Henry*, 73 Neb. 746, 103 N. W. 441, 107 N. W. 789.

Mr. E. H. Scott also for appellees.

Fawcett, J., delivered the opinion of the court:

Harrison W. Cremer died June 3, 1896, in Douglas county, leaving a last will and testament; the parts material to this inquiry being as follows:

"Item 2. I give and bequeath to my executors, hereinafter named, and their successors, the following described real estate, situate in the county of Douglas, Nebraska, to wit, lot seven (7) and the west twelve (12) inches in width of the south half of lot eight (8) in block one hundred and thirty-six (136), lot one (1), in block fifty-seven (57), and lot five (5) in block forty (40), all in the city of Omaha aforesaid, together with all and singular the buildings and appurtenances thereunto belonging; in trust, however, for the objects, uses, and purposes following, that is to say: That until such times as they shall convey said several lots or parcels of real estate as hereinafter directed, they shall manage and control the same to the best advantage of my estate and of said realty, leasing the same to the best advantage, collect rents, pay all lawful taxes, make all necessary repairs, effect reasonable insurance on the buildings, and do all things else requisite for the due preservation and care of the property. If the buildings upon either of the three parcels of ground shall, during the time they are in charge of my executors, be destroyed, or damaged by fire, or otherwise, they must rebuild or repair the same as soon as possible, and to that end, if the funds realized from the insurance upon the destroyed or injured building, or other available means, shall be inadequate for that purpose, they may borrow such additional sum as may be required, and secure the payment thereof upon the particular property whereon it is to be expended, by a mortgage to be by them duly executed, but not for a credit extending beyond the time when it is to be finally conveyed by them in fee as hereinafter directed. Out of the income of said three parcels of real estate (which is to be considered as a joint fund), in addition to the expenditures contemplated above for its preservation and care, I direct the payment of all interest as it shall mature, upon any mortgage encum-

brance resting thereon, the several bequests herein made of money to my wife, and my sons and daughters, and the balance thereof they shall deposit in the Omaha National Bank, upon the best terms that can be made as to interest thereon, as and for a sinking fund, which, in the order, and at the several times fixed herein for the conveyance of said several parcels of real estate to certain of my heirs, and to the full extent that it has then accrued, shall be applied toward the payment of any encumbrance then resting on the particular piece of property then to be conveyed. If any mortgage indebtedness resting on either of said parcels of real estate at the time of my decease shall mature while my executors are in charge thereof, I direct them to replace or extend the same by a new loan, securing the payment by a mortgage upon that particular piece of property, but such extension or new loan must not reach beyond the time fixed herein for their final conveyance of the premises which it is secured."

"Item 4. Subject to the foregoing provisions respecting the same, I give and bequeath to my beloved son, Leonidas R. Cremer, the above mentioned lot five (5) in block forty (40) and to my beloved son, Cedric E. Cremer, said lot seven (7) and the west twelve (12) inches in width of the south one-half of lot eight (8) in block one hundred and thirty-six (136) in the city of Omaha, Nebraska, the same to be conveyed to them, respectively, on reaching the age of twenty-five years, by my executors, by deeds duly executed and delivered, so as to convey to each of them, a good title in fee simple, but subject to whatever encumbrance may be then resting thereon after the preceding provisions respecting the same have been complied with. But in the event of the death of either of my said sons, Leonidas or Cedric, before reaching the age of twenty-five years, leaving surviving him a widow, or child or children, then in like manner my executors shall convey a one-third part of the premises hereby devised to such son to his widow and the remaining two thirds thereof to such child or children, share and share alike. If he leave no widow, but leaves a child or children the premises shall be conveyed to them. If he leave a widow, but no children, they shall convey to the widow an undivided one-third of the premises, and the residue to his mother, brother, and sister, of the full blood, or such of them as shall then be living, share and share alike. Provided, however, that if such brother or sister shall have died leaving children, they shall receive the share that their parent, if living, would have been entitled to under this will. If either of my said sons, Leonidas or Cedric, shall so die,

leaving no widow or children, then the whole of the estate herein devised to him shall be conveyed to his mother, and his brother and sister of the full blood, or such of them as shall then be living, share and share alike. Provided, further, that if such brother or sister shall have died, leaving issue, such issue shall have and take the portion that such brother or sister, if living, would have been entitled to hereunder."

Similar provisions are made by the fifth item of the will for the daughter Mina, with respect to the other lot.

"Item 7. I do hereby nominate my friends Charles C. Housel, formerly of said city of Omaha, but now of Chicago, Illinois, and W. B. Millard, of said city of Omaha, to be the executors of this my last will and testament, having full confidence that they will faithfully carry out its provisions."

A number of questions are presented in the pleadings, and have been ably argued by counsel, both in their briefs and at the bar; but the conclusion we have reached renders it unnecessary to consider any but the one question: What interest, if any, did Cedric E. Cremer take under the will of Harrison W. Cremer, deceased? Did he take a present vested interest in and title to the property devised, on the death of his father, or was such devise contingent merely, so that no interest or title would ever vest in him unless and until he attained the age of twenty-five years? Having reached such conclusion, it is unnecessary to set out *in extenso* the allegations of the pleadings. It will be sufficient to an understanding of the case to state that the two gentlemen named in the will as executors never qualified as such; that shortly after the death of the testator, and while a contest of the will was still pending, the Omaha Loan & Trust Company brought suit in the district court of Douglas county to foreclose defaulted interest coupons upon a \$40,000 mortgage which had been executed and delivered to it by Harrison W. Cremer in his lifetime. The principal mortgage at the time of such foreclosure was held by the defendants Anna B. Homer and Margaret H. Davis, under an assignment from the said loan and trust company. In the foreclosure suit referred to, the trust company made defendants: The devisees named in the fourth and fifth items of the will; the widow and all of the heirs at law of Harrison W. Cremer, deceased; Housel and Millard, named as executors in the will; and William Wallace, who had been appointed special administrator. All of said parties were duly served with summons. This included all of the persons then living who would take the devise over in the event of the death of Cedric E. Cremer, without having

married, prior to his reaching the age of twenty-five years. A decree of foreclosure was entered, and the property sold thereunder to the Omaha Loan & Trust Company. The sale was duly confirmed, and a sheriff's deed issued to said company. The company subsequently conveyed the property in controversy to the Omaha National Bank. Sometime thereafter, and before any administrator c. t. a. had been appointed, Mrs. Homer and Mrs. Davis foreclosed the principal mortgage. They made defendants all of the persons who had been made defendants in the first foreclosure, with others. Service of summons was duly had upon all of such defendants, and a decree of foreclosure entered. The premises were sold under such decree to said Homer and Davis. The sale was duly confirmed, and a deed issued to them therefor. Subsequently thereto the plaintiffs William L. Shackley and Edward S. Flor were appointed administrators with the will annexed. After having duly qualified, they instituted this suit.

The prayer of the petition is that an account be taken of the rents and profits collected by defendants since August 29, 1896; that plaintiffs be permitted to redeem from said mortgage; of the amount necessary to be paid in order to make such redemption; that defendants be required to acknowledge satisfaction of said mortgage upon the records of Douglas county and deliver to plaintiffs possession of said real estate; that the cloud cast on plaintiffs' title to said real estate by said sheriff's deeds be removed; and for such other and further relief as justice and equity may require. The district court found that the facts alleged in the petition and disclosed by the evidence fail to show that the plaintiffs have any equitable rights in and to the premises in controversy, and dismissed their suit for want of equity, with costs.

Plaintiffs contend that the law gives the property in fee simple to the executors "and their successors" in trust; that Cedric E. Cremer never had any title, legal or equitable, to the property; that the trusts imposed by the law are annexed to the office of the executors, and not to the persons nominated as executors in their individual character; that Charles C. Housel and Willard B. Millard, having failed to qualify, never became executors and did not take title to the property; that, upon the appointment and qualification of appellants as administrators with the will annexed, they were vested with the fee title to the property in trust for the uses, objects, and purposes specified in the will; that appellants' title relates back to the death of the testator; that the owner of the fee title to the property was not before the court in either of the suits to fore-

close the mortgage; that the fee was not cut off by the decree, or the pretended sale thereunder, in either suit; and that appellants are, therefore, entitled to redeem the property from the mortgage.

The sympathy of the writer for the young man who has lost what his father doubtless thought was a valuable devise is such that he spent several days in an industrious but vain attempt to sustain plaintiffs' contention and permit a redemption. An exhaustive examination of the authorities forces the conclusion that to do so would be to disregard the plain intention of the testator as expressed in his will, and to give no heed to the holdings of many eminent courts in numerous cases decided both in this country and in England, where similar questions so often arise that in 1829 (*Duffield v. Duffield*, 3 Bligh, N. R. 260, 311) Lord Eldon said: "In *Boraston's Case*, 3 Coke, 16a, 19, it appears from the margin of the report that there were then [the twenty-eighth year of the reign of Queen Elizabeth] 170 authorities upon the same subject." He added: "Yet the circumstances of this case are not precisely similar to those of any preceding case." In the decisions of the high and able courts of a country so prolific of cases of a similar character, in all their varying forms, involving vast estates, we may well expect to find careful consideration and elucidation of the question.

With the provisions of the will in mind, let us see what the courts of England have held. A review of the most noted cases, in chronological order, will be both interesting and instructive.

In *Boraston's Case*, referred to by Lord Eldon, *supra*, the will gave to Thomas Amery and Amphillis, his wife, certain real estate "for eight years next after my decease," upon certain conditions, "and after the term of the said eight years, the said upper part to remain to my executors until such time as Hugh Boraston shall accomplish his full age of twenty-one years, and the mean profits to be employed by my executors towards the performance of this my last will and testament; and when the said Hugh shall come to his age of twenty-one years, then I will he shall enjoy the said upper part to him and to his heirs forever." Hugh died when about the age of nine years. After his death, and after the death of Thomas and Amphillis, Philip Boraston, as brother and heir of the said Hugh, entered into the lands, and demised them to William Ambrye. Subsequently Constance Brand and Margaret Davies, granddaughters of the testator, Thomas Boraston (their husbands joining), claiming that no remainder was vested in Hugh Boraston until he attained his age of twenty-one years, and that,

forasmuch as Hugh never attained his said age, the land never vested in him, but remained in the heirs general, executed to plaintiff Richard Hynde a seven years' lease of the lands in controversy. Ambrye, who held under his demise from Philip, by command of Philip, entered upon the land, and Hynde brought ejectment. The court sustained the contention of defendant that the executors had a good term for twelve years, which was not determined by the death of Hugh, and held: "The case at bar is no other in effect, but that a man devises his lands to his executors (for the payment of his debts) until his son shall or should have come to his full age (of twenty-one years), the remainder to his son in fee; for although these are adverbs of time, 'when, etc.,' 'and then,' etc., yet they do not amount to make anything to precede the settling of the remainder, no more than in the common case. A man leases land for life or years, and after the decease of the lessee, or the term ended, the remainder to another, yet it shall remain presently; for when these adverbs refer to a thing which must of necessity happen, there they make no contingency, and it is certain that every man must die, for *statutum est hominibus semel mori*, and every term will end, for *tempus edax rerum*; and in the case at bar, certain it is that Hugh would or might have accomplished his age of twenty-one years, which are in this case of a will, all one in construction of law. So that these adverbs (then and when) in our case are demonstrations of the time when the remainder to Hugh shall take effect in possession, as in the said cases of a lease for life and lease for years, and not when the remainder shall vest; *quod fuit concessum per totam curiam*." And judgment was given that the plaintiff should take nothing by his will. That case has been followed with scarcely any deviation to the present day.

In *Goodtitle ex dem. Hayward v. Whitby*, 1 Burr. 229, R. P. devised his lands to Thomas Hayward and John Bates and the survivor of them and the heirs of such survivor "in trust, that they and the survivor of them, his heirs and assigns, should lay out, employ, and bestow the rents and profits of the devised premises, for the maintenance, education, bringing up, and putting forth into the world, of Thomas and John Hayward, sons of the testator's sister Elizabeth Hayward, during their minorities; and when and as they should respectively attain their ages of twenty-one, then to the use and behoof of the said sons of his sister Hayward, the said Thomas Hayward and John Hayward, and their heirs, equally." The testator then made the said two trus-

tees, Thomas Hayward and John Bates, his executors. Thomas Whitby claimed as testator's heir at law. Thomas Hayward, the elder of the testator's said two nephews, died under the age of twenty-one years, and without issue. Upon his death (his brother John being then under age), Whitby was by the trustees let into his moiety. John, having come of age, brought ejectment, claiming the moiety of his deceased brother, as well as his own moiety. The question construed by the court was "whether this moiety of Thomas, the deceased brother, belongs to John Hayward, either as heir to his brother, or as surviving joint tenant; or whether it belongs to Thomas Whitby, as heir at law of the testator as an undevisee estate." In the opinion by Lord Mansfield it is said: "Testator died, T. H. and J. B., the two trustees, entered into possession. Then Thomas Hayward, one of the two nephews and devisees, died, under age and without issue. Then the trustees let the now defendant, the testator's heir at law, into possession of his moiety. But it is not material what they did among themselves; that will not affect the right of the plaintiff. The question is 'whether the estate vested immediately in the two nephews, upon the death of the testator; or remained in contingency, till their respective coming of age;' and, consequently, 'whether this moiety belongs to John Hayward, upon the death of his brother Thomas, either as his heir at law, or as survivor; or whether it descends to the heir at law of the testator, as being undevisee.' In the construction of wills, adjudged cases may very properly be argued from; if they establish general rules of construction to find out the intention of the testator, which intention ought to prevail, if agreeable to the rules of law. Here it is agreed that a fee is devised to the nephews; but it is made a question 'whether it be a fee depending upon a precedent contingency, or an immediate fee.'" He then laid down two rules, the second of which is: "Whether an absolute property is given, and a particular interest given, in the meantime, as 'until the devisee shall come of age, etc., and when he shall come of age, etc., then to him, etc.,' the rule is that that shall not operate as a condition precedent, but as a description of the time when the remainderman is to take in possession. And to this purpose is *Boraston's Case*, . . . where this doctrine is fully laid down and explained. . . . Here, upon the reason of the thing, the infant is the object of the testator's bounty; and the testator does not mean to deprive him of it, in any event. Now, suppose that this object of the testator's bounty marries, and dies before his age of twenty-one, leaving children; could

L.R.A.1915C.

the testator intend in such an event to disinherit him? Certainly, he could not. And as to the testator's heir at law, his heir at law is only to take what the testator has not devised away from him. But in the present case the testator takes no notice of this Thomas Whitby, who is indeed stated to be (but it doth not appear how) his heir at law. And he does not except anything out of the interest he has given to his nephews; he only makes a trust, to be executed for their benefit, and devises nothing for the benefit of the trustees, who were also his executors. And this is only a chattel interest, which cannot last twenty-one years. On the rule in *Manning's Case*, 8 Coke, 95b, here is (at the utmost) only an exception, by this devise to the trustees, out of the absolute property given to his nephews. It is so plain upon the true intent and meaning of this will that it is a shame to cite cases upon it. . . . So here, the property is absolutely given; and the limitation is only of the trust. Therefore, upon the whole, he held the present case to be: An immediate gift to the two nephews, with a trust to be executed for their benefit, during their minority."

The case of *Bromfield v. Crowder*, 1 Bos. & P. N. R. 313, will be found to be a leading case very generally cited in subsequent decisions. In that case John Davenport, the testator, by his will, after charging his real and personal estate to the payment of his debts, legacies, and funeral expenses, directed his executors to pay to his nephew, the defendant Samuel Crowder, an annuity of £50 during his life, payable quarterly, upon the express condition that "if the said Samuel Crowder should at any time mortgage, sell, assign, dispose of, or in any manner encumber the same or any part thereof, then and from thenceforth the future payments of such annuity should cease and determine and be at an end to all intents and purposes whatsoever, and the same should be considered as if no such bequest had been made." He then gave to his godson, John Davenport Bromfield, the plaintiff in the cause, the sum of £100, provided he lived to attain the age of twenty-one years; otherwise such legacy was not to be paid or payable. He then devised unto his wife, Elizabeth Davenport, and her assigns, all his real estate for life. After her decease, to his cousin Joshua Rose, his heirs and assigns forever. He subsequently made a codicil revoking that part of his will which gave his estate to Joshua Rose and his heirs forever, in case he survived testator's wife, and gave the estate to Joshua during the term of his natural life in case he survived the wife, "and at the decease of Mrs. E. Davenport and Mr. Joshua Rose, or the

longest liver of them, I give all my real estate, of what nature and kind soever, to my godson John Davenport Bromfield, son of Charles Bromfield of St. Ann's, Liverpool, if the said John Davenport Bromfield shall live to attain the age of twenty-one years; but in case he die before he attains that age, and his brother Charles Bromfield shall survive him, in that case I give my real estate to Charles Bromfield his brother, if he lives to attain the age of twenty-one years, but not otherwise, but in case both the above-mentioned boys die before either of them attain the age of twenty-one years, then I give my real estate to John Vale my godson, . . . and his heirs forever." The testator died, leaving defendant Samuel Crowder his nephew and heir at law. Subsequently to his death, a bill was filed on behalf of the creditors to have a portion of the estate sold to pay debts, which was done. Pending these proceedings, Elizabeth Davenport died, and on her death Joshua Rose entered into possession. Subsequently Joshua died. The plaintiff John Davenport Bromfield, being then an infant under the age of twenty-one years, in June following, by his next friend, filed his bill in chancery against the defendant, claiming the unsold part of the real estate, praying "that his right to the said real estate upon the death of the said Joshua Rose might be declared." Defendant answered, and the case came on to be heard before the master of rolls. Defendant contended that plaintiff had no right or title to the estates, because the devise to plaintiff and to his brother Charles and to John Vale were contingent remainders limited upon the estates for life devised to Elizabeth Davenport and Joshua Rose, and that inasmuch as the preceding particular estates determined and were at an end before the events happened on which the said premises were to become vested, such remainders could not then take effect, and subsequently the said estates remaining unsold did, upon the death of Joshua Rose, result and then belonged to defendant Crowder as the heir at law of the testator. The master of the rolls ordered a case to be made for the opinion of the judges upon the following question: "Whether the plaintiff John Davenport Bromfield, in the events which have happened, takes any and what estate or interest in the freehold estates of the said John Davenport the testator."

In his argument, counsel for plaintiff makes this terse and well-supported statement: "The law favors vested estates, because it dislikes estates in abeyance and contingency; and there are many cases where, from the import of the will, it should appear that the estate was in contingency, and yet it has been holden to be vested."

L.R.A.1915C.

The opinion by Sir James Mansfield, Ch. J., after stating the will, said: "All the testator's real estate is given to the plaintiff immediately on the death of the preceding devisees, if he live to attain twenty-one; if he die before twenty-one and his brother Charles Bromfield survive, then the testator gives his real estate to the said Charles Bromfield, if he live to attain twenty-one, but not otherwise. If both die under twenty-one, then he gives it to his godson, John Vale, in fee. The plaintiff was under twenty-one at the time of the death of the surviving devisee, and the question is whether he took any and what estate in the freehold or copyhold premises? There does not appear to us to be any distinction between the freehold and the copyhold. In fact, this is an immediate devise to the plaintiff, to take place on the death of the two preceding devisees. If so, we must either break in upon the terms of the will, or give them effect. In the latter case, there is an end of all argument about the word 'if.' There is nothing in the will to prove that the testator meant the plaintiff not to take a vested estate unless he survived twenty-one. Indeed, the true sense of the thing is that the deviser meant him to take it as an immediate devise in himself, but that it was to go over in the event of his dying under twenty-one. It must be admitted that, according to repeated decisions, no precise words are necessary to constitute a condition precedent in wills. They must be construed according to the intention of the parties; and it would be absurd, considering the various circumstances under which wills are made, to require particular terms to express particular meanings. The apparent intention, as collected from the whole will, must always control particular expressions. Now the fairest construction that can be put upon this will, independent of authority, is that the plaintiff took an immediate vested estate on the death of the preceding devisees, with a condition subsequent. With respect to the cases, that of *Edwards v. Hammond*, 3 Lev. 132, is on all fours with the present. The circumstance of the devise over being to a stranger makes no difference; for it is clear that the testator meant no one to take his estate unless in the event of the plaintiff dying under twenty-one. *Edwards v. Hammond* is neither opposed nor weakened by any case. No doubt the general meaning of the word 'if' implies a condition precedent, unless it be controlled by other words. But in this case there is a variance between the expression and the meaning, and the case of *Edwards v. Hammond* sanctions us in giving effect to the latter. On these grounds, we are of opinion that the estate vested in the plaintiff on the death of the

preceding devisees; and the expression, 'all my estate,' is so general as to pass an estate in fee. Besides, it would be an absurdity on the face of the will to construe it only an estate for life. . . . This case has been argued before us by counsel, and we are of opinion that, in the events that have happened, the plaintiff John Davenport Bromfield takes a vested estate in fee simple in the freehold and copyhold estates of the said John Davenport the testator, determinable upon the contingency of his dying under the age of twenty-one years."

In *Doe ex dem. Hunt v. Moore*, 14 East, 601, James Moore, the testator, gave "John Moore, son of my said cousin John Moore aforesaid, when he attains the age of twenty-one years, . . . [certain real estate], to hold to him, his heirs and assigns forever; but in case he should die before he attains the age of twenty-one years, then I give and devise the last mentioned estate to his brother James Moore, when he attains the age of twenty-one years, to hold the same to him, his heirs and assigns forever. Also, I give and devise to the said James Moore, when he attains the age of twenty-one years, . . . [certain real estate], to hold to him, his heirs and assigns forever; but in case he should die before he attains the age of twenty-one years, then I give and devise the four last-mentioned estates to his brother Robert Moore, son of my said cousin John Moore, when he attains the age of twenty-one years; to hold to him, his heirs and assigns forever. Also I give and devise to the said Robert Moore, when he shall attain the age of twenty-one years, . . . [certain real estate], to hold the same to him his heirs and assigns forever; but in case he shall die before he shall attain the age of twenty-one years, then I give and devise the six last mentioned estates, . . . to his brother Charles Edward Moore, . . . when he attains the age of twenty-one years, to hold to him, his heirs and assigns forever; but in case he shall die before he attains the age of twenty-one years, then I give and devise the said seven last mentioned estates to all the daughters of my said cousin John Moore aforesaid, equally, share and share alike." Testator died, leaving Sarah Hunt and Samuel James Dawes, two of the lessors of the plaintiff, as his heirs at law. Upon the death of the testator, John Moore, the defendant, and Edward Moore, in the name and on behalf of the said John Moore, the son, James Moore, Robert Moore, and Charles Edward Moore, the devisees named in the will, entered into the possession of the seven last-mentioned estates, and are now in possession thereof. The devisees John, James, Robert, and Charles Edward L.R.A.1915C.

Moore, the sons of the testator's cousin, John, were all under the age of twenty-one years. Elizabeth, the only daughter of testator's cousin, has attained the age of twenty-one years. The question reserved was whether the lessors of the plaintiff, or any or either of them, as heirs at law of the testator, or otherwise, take any, and what estate or interest in the said seven devised estates, or in any of them. The opinion was by Lord Ellenborough, Ch. J. After stating the case, the opinion states: "On behalf of the plaintiff it was contended that the devisees attaining the age of twenty-one years was a condition precedent to any estate vesting in them, and that in the meantime the same descended to the lessors of the plaintiff, who were the heirs at law of the testator. And the cases of a bequest of personal estate were relied on, where it has been held that a legacy given to one, if or when he shall attain twenty-one, lapses in the event of the legatee dying under twenty-one. [Citing cases.] And it was argued that there was no distinction between devises of real and bequests of personal estate in this respect. But that is not so; for the rules by which legacies are governed are borrowed, all or the greater part, from the civil law; whereas, the decisions on the devises of real estate have established a different rule; and, according to them, a devise to A when he attains twenty-one, to hold to him and his heirs, and if he die under twenty-one then over, does not make the devisee's attaining twenty-one a condition precedent to the vesting of the interest in him: but the dying under twenty-one is a condition subsequent, on which the estate is to be divested. [Citing cases, the last of which is *Bromfield v. Crowder*, supra, which latter case was affirmed in the House of Lords.] These we consider as authorities precisely in point, especially the last case [*Bromfield v. Crowder*], the pendency of which in the House of Lords was the occasion of our judgment in this case being deferred. To which may be added *Goodtitle ex dem. Hayward v. Whitby*, 1 Burr. 228 [supra]. These authorities were attempted to be distinguished, on the ground that they were cases of a remainder, and not of an immediate devise, as in the case here; but that forms no substantial ground of distinction; the estate vests immediately, whether any particular interest is carved out of it to take effect in possession in the meantime, or not. . . . We are therefore of opinion that in this case the plaintiffs, who are the heirs at law of the testator, did not take any estate or interest in the premises so devised."

In *Doe ex dem. Roake v. Nowell*, 1 Maule & S. 327, Sarah Trymmer devised her freehold estate "to my said nephew John

Roake for his life, on consideration that out of the rents thereof he do from time to time keep such estates in proper and tenantable repair, and on the decease of my said nephew John Roake, I devise all my said estates (subject to and chargeable with the payment of £30 a year to Ann, the wife of the said John Roake for her life . . .) to and among his children lawfully begotten, equally, at the age of twenty-one and their heirs, as tenants in common. But if only one child shall live to attain such age, to him or her, and his or her heirs, at his or her age of twenty-one; and in case my said nephew John Roake shall die without lawful issue, or such lawful issue shall die before twenty-one then I devise all the said estates (chargeable with such annuity . . .) to and among my said nephews and nieces, Miles, Thomas, John, James, and Sarah Pinfold, and Susannah Longman, or such of them as shall be then living and their heirs and assigns forever." The testatrix died leaving John Roake, the devisee, surviving. Roake was then a widower, and had no issue. On testatrix's death, he entered upon the premises. He subsequently married, and afterwards had the four lessors of the plaintiff, his only children. He subsequently "levied a fine *sur connuissance de droit*, etc., of the premises, with proclamations to the use of himself in fee, in pursuance of a covenant contained in an indenture made on the 5th of November in that year. Two of the lessors of the plaintiff were born before the execution of the indenture and levying the fine above mentioned. In Trinity Term, 1797, J. Roake also suffered a recovery of the premises to the use of such persons as he should appoint, and on 21st May, 1802, by deeds of lease and release appointed the same to the defendant in fee. J. Roake was in possession of the premises as devisee under the will at the date of the said indenture and fine, and died on the 13th of February, 1803, leaving the four lessors of the plaintiff him surviving, being then all infants under the age of twenty-one years. The two first lessors of the plaintiff have since attained their respective ages of twenty-one years, subsequently to which and before the date of the demises in this ejectment an actual and formal entry was made by the plaintiff's lessors respectively upon the premises in question for the purpose of avoiding the operation of the fine and recovery. The question for the opinion of the court is: 'What interest (if any) the lessors of the plaintiff, the children of John Roake, or any of them, take under Sarah Trymmer's will? And whether the fine or recovery has barred their title.'" In the opinion, Lord Ellenborough, Ch. J., says: "I think this L.R.A.1915C.

case concluded by *Bromfield v. Crowder*, which was very fully considered. That was a devise in remainder of all the testator's estate to J. D. Bromfield, if the said J. D. B. should live to attain the age of twenty-one, but in case J. D. B. died under twenty-one, and C. Bromfield should survive him, then over; and it was resolved that J. D. Bromfield took a vested estate determinable upon the contingency of his dying under twenty-one. After that decision came the case of *Doe ex dem. Hunt v. Moore*, which was an immediate devise of the testator's real estate in fee to J. Moore, when he attained the age of twenty-one, but in case he died before twenty-one, then to his brother, etc.; and there it was held that J. Moore took a vested estate. So that it appears whether the devise be in remainder or an immediate devise, there is no substantial distinction. Here the words of the devise, after the decease of J. Roake, are to and among his children equally at the age of twenty-one, but if only one child shall live to attain such age, to such child at the age of twenty-one; and in case J. Roake shall die without issue, or such issue shall die before twenty-one, then over. I see nothing in this devise to distinguish it from the above cases. The consequence is that the children must be considered as taking vested remainders." This case was appealed to the House of Lords and is reported in 5 Dow. P. C. 202, under the title of *Randoll v. Doe*. This report of the case contains elaborate arguments by counsel on either side, in which *Bromfield v. Crowder*, 1 Bos. & P. N. R. 313; *Doe ex dem. Roake v. Nowell*, *supra*; *Goodtitle ex dem. Hayward v. Whitby*, 1 Burr. 229; *Doe ex dem. Hunt v. Moore*, 14 East, 601; and *Edwards v. Hammond*, commented upon in *Bromfield v. Crowder*, *supra*, are all cited and discussed. The opinion by Lord Eldon states: "In either view of this case it is a case of hardship. If the fine should be destroyed, some of the parties' purchasers may be damnified; and, if not, then the devisees will be deprived of the estates. But in the view of hardship, we have nothing to do with it; and after a careful consideration of the special verdict, and all that appears within the four corners of the instrument, the nature of the case, the authorities, and effect of the whole of the will, it is my humble opinion that this judgment ought to be affirmed."

Phipps v. Ackers, 9 Clark & F. 583, is another House of Lords case, and is a leading case, very generally cited in subsequent decisions. In that case the syllabus reads: "A testator gave all his real and personal estates to trustees; and as to his lands at W., which he held in fee simple, he directed that the trustees should stand seized thereof, in

trust to convey the same to G. H. A., 'when and as soon as he should attain his age of twenty-one years;' but in case he should die before he attained that age, without leaving issue of his body, then that the said lands at W., given and devised to him, should sink into the residue of the testator's real and personal estates; and he gave the residue to J. C. At the testator's death G. H. A. was only twelve years of age. Held, that an equitable estate in fee in the lands at W. vested in G. H. A. immediately on the testator's death, liable to be divested in the event of his dying under twenty-one without leaving issue of his body." At the time of the testator's death, his beneficiary, G. H. Ackers, was about twelve years of age. He attained his age of twenty-one years in 1833. The two years prior thereto, Mrs. Phipps, the plaintiff, testator's heiress at law, filed a bill in chancery against the acting trustee and G. H. Ackers, and others, stating the will, and also that the rents received by the trustee amounted to a considerable sum. The bill prayed, among other things, that it might be declared that plaintiff was entitled to the rents and profits from the death of the testator until such time as G. H. Ackers should attain twenty-one years of age. A demurrer to the bill for want of equity was allowed. The report contains elaborate argument by counsel on either side. (Citing substantially all of the cases above noted, with others.) Counsel for G. H. Ackers, in their argument, say: "If G. H. Ackers should die under twenty-one and without issue, the Wheelock estate was to pass to the residuary devisee, James Coops; but if G. H. Ackers attained twenty-one the trustees were to convey the estate to him; or if he died under twenty-one leaving issue, the issue were to take it; and yet it is contended that this was not a vested estate. It is sufficient to look at the will, without the aid of cases, to see that this was a vested estate, because it is manifest that the ancestor must take in order that the issue might take, unless the solecism is to be supported that an heir can take as heir without an ancestor." A very terse statement, indeed, of the question.

The opinion was delivered by Lord Ch. J. Tindal, in the course of which he says: "In order to answer your Lordships' question, it is not necessary for us to say what would be the legal effect of a simple devise to A and his heirs when or if he shall attain twenty-one, without any concomitant provisions calculated to show whether the testator did or did not mean to treat the attaining twenty-one as a condition precedent. In such a case Mr. Fearne may be right in the opinion found among his posthumous works L.R.A.1915C.

that, until the devisee attains the prescribed age he takes no interest whatever in the devised lands. But whatever might be the true meaning of such a devise, if it should occur by itself, there is ample authority for saying that such words may, from the context, be taken not to indicate the time when the estate is to vest, but to point out an event on the happening of which an estate already vested is to be divested in favor of some other person. And the cases on this subject appear to be resolvable into two classes: First, those in which the courts have relied on the circumstance that the estate, prior to the attainment of the age of twenty-one has been given to some third person, either for the benefit of the devisee himself, as in *Goodtitle ex dem. Hayward v. Whitby*, supra, or for the benefit of some other persons to endure during the minority, as in *Boraston's Case*, 3 Coke, 16a, and *Mansfield v. Dugard*, 1 Eq. Cas. Abr. 195, *Gilb. Eq. Rep.* 36; and, secondly, those cases in which the estates are given over in the event of the devisee dying under twenty-one, as in *Edwards v. Hammond*, 3 Lev. 132, *Bromfield v. Crowder and Doe ex dem. Hunt v. Moore*, supra. The first class of cases proceeds on the ground that the estate given to the devisee on his attaining twenty-one is in fact only a remainder, taking effect, in its natural order, on the determination of the preceding estates; and that the attaining the prescribed age in such a case no more imports a condition precedent than any other words indicating that a remainderman is not to take until after the determination of the particular estates. The second class of cases goes on the principle that the subsequent gift over in the event of the devisee dying under twenty-one sufficiently shows the meaning of the testator to have been that the first devisee should take whatever interest the party claiming under the devise over is not entitled to, which of course gives him the immediate interest, subject only to the chance of its being divested on a future contingency. Whether the doctrine on which this second class of cases has rested was originally altogether satisfactory is a point which we need not discuss. It is sufficient to say that it clearly has been established and recognized as a settled rule of construction, not only in the courts below, but also in your Lordships' House, and that rule appears to us clearly to govern the case put to us by your Lordships. In conformity with which rule, therefore, we beg leave to state that, on the question put to us, we are of opinion that G. H. A., on the decease of the testator, took an estate in fee simple in the lands and hereditaments at W., subject to be divested in

the event of his dying under twenty-one and without issue."

On further consideration of the case, the lord chancellor, on behalf of the House, stated: "The testator, by his will, devised his estates to trustees; and with respect to the Wheelock estate, the estate in question, he directed that the trustees should stand seised and possessed of it in trust to convey and assure it to George Holland Ackers, his godson, when and so soon as he should attain the age of twenty-one years, but that if he should die under the age of twenty-one years without leaving issue of his body lawfully begotten, in that case the estate should form part of his residuary estates, which he devised to another person. The question is, under this devise, what estate George Holland Ackers took in the Wheelock estate. . . . The object which your Lordships had in view was that the learned judges should review the cases of *Doe ex dem. Hunt v. Moore* and *Bromfield v. Crowder*, supra, and other cases of that class. The judges, after consideration, unanimously pronounce this as their opinion, that George Holland Ackers took a vested estate in fee in the Wheelock estate, liable to be divested in the event of his dying under twenty-one without leaving lawful issue. I am, for one, perfectly satisfied with that decision of the learned judges, and I have no doubt my noble and learned friends concur with me in that opinion; and the only question, therefore, that remains to be considered is this, whether a different construction should be put on this will, which conveys an equitable estate, from that which the learned judges have put upon the will as applied to the legal estate; or, in other words, whether the direction to convey makes any difference with respect to the disposition of the property. I am clearly of opinion that it does not; and I agree entirely in what fell from Sir William Grant, in the case of *Stanley v. Stanley*, 16 Ves. Jr. 491, that the right is not affected by the direction to convey, but that the conveyance must conform to the right, and that the will itself is an equitable conveyance, until that is displaced by the legal conveyance which is directed to be made. I am of opinion, therefore, that in this case George Holland Ackers took an equitable vested estate in fee in the Wheelock estate, and that it was divested on his dying under the age of twenty-one years without leaving lawful issue. The consequence of this is that the judgment of the vice chancellor must be affirmed."

Lord Brougham also wrote an opinion in the case, in the course of which he says: "We may then assume that if this devise had been to George Holland Ackers directly, L.R.A.1915C.

the legal estate, the estate given, would have been vested, and not contingent. The only question that remains is whether the interposition of trustees, the trust being declared to assign, convey, and assure the premises (not to receive the rents and profits—that was *Stanley v. Stanley*—but only to convey) to George Holland Ackers, when and so soon as he shall attain twenty-one years, makes any difference, and converts the vested into a contingent interest. It was contended that because the immediate interest is vested in the trustees, and that they are only directed to convey and to assign to George Holland Ackers when he is of age, the act done to entitle George Holland Ackers is postponed till that time, and his interest therefore only vests at that time. But there can be no doubt that the act which entitles him is the devise; from this he derives his interest, though an equitable interest; and the only difference between his case and that of a devisee without trustees interposed or directed to convey is that the legal estate remains in the trustees during his minority, and that the equitable estate vesting in him during that minority would be divested upon his decease under age. The inclination certainly should always be to make the rules of courts of equity conform as much as possible to the principles recognized at law; and I can see no reason whatever for dealing upon different principles with the vesting of an equitable and of a legal interest, in respect to the present question. . . . Upon the whole, I can see no reason to doubt that the estate, in the present case, vested immediately in George Holland Ackers, determinable upon his dying under the age specified; the trustees taking an interest for his behoof, limited to his minority."

When this case was originally commenced, G. H. Ackers, James Ackers (formerly James Coops, the devise to whom was to pass to him when he attained the age of twenty-four years, provided he gave security to do certain things and should take the surname of Ackers), and Benjamin Williams, trustee (his cotrustee, Hobson, refusing to join), were made defendants. *Phipps v. Williams*, 5 Sim. 46. They separately demurred generally. In concluding his opinion the vice chancellor said: "The consequence, therefore, is that the demurrer of George Holland Ackers must be allowed, and the demurrer of James Ackers must be overruled. And as to the demurrer of the trustees, it should never have been put upon the files of the court at all." Why not? Because the estate having vested upon the death of the testator in G. H. Ackers, and the controversy between Phipps and G. H. Ackers and James (Coops) Ackers involving

simply the question of when and in whom the estate vested, it was a matter of no concern to the trustees. They were merely the depositories or holders of the naked legal title of the estate, the equitable and actual title to which was vested in their *cestui que trust*, the devisee named in the will.

In a much later case (*Browne v. Browne*, 3 Smale & G. 568), the high court of chancery reviews a number of the authorities cited, and also considers *Festing v. Allen*, 12 Mees. & W. 279, 13 L. J. Exch. N. S. 94, 25 Eng. Rul. Cas. 604, cited in some of the cases as supporting the doctrine of a contingent remainder. The vice chancellor in the opinion says: "The question in this case is whether the devise in trust for all and every child and children of Richard Staples Browne, who should live to attain the age of twenty-one is, upon the true construction of the whole will, a contingent remainder. A devise in these terms, uncontrolled by anything in the context, certainly creates a contingent remainder. But in this case the words of gift are preceded and followed by various limitations. It has long been established that words of gift in a will, which taken by themselves would make the gift contingent, may be controlled and qualified by the terms of the next limitation or by other expressions in the will, so as to justify the construction that the devisee takes an immediate, although defeasible, estate." In considering *Festing v. Allen*, which was a decision by the court of exchequer, the learned chancellor says: "The view expressed by the court of exchequer of the cases of *Doe ex dem. Hunt v. Moore* and *Phipps v. Ackers* is not supported by any just appeal to previous decisions, or illustrated by any force of argument on established principles of law. On the contrary, it affects to discredit repeated decisions of the House of Lords, which have for generations governed the right to property on principles heretofore, and, it is to be hoped, still, sufficiently established, and, being established, not to be shaken without public mischief. . . . It is a rule of law that an estate in remainder must take effect *eo instante* that the particular estate determines; and if the remainder be limited on a contingency which has not happened when the particular estate determines, it must fail. To modify the intolerable hardship of defeating the clear intentions of testators, it is an established rule of construction that in doubtful cases a remainder shall, if possible, be construed to be vested rather than contingent. For this purpose words of contingency are, as much as possible, to be treated as referring rather to the period when the remainder is to become

vested absolutely and indefeasibly, than as preventing the remainderman from taking any present interest, and thereby altogether losing the estate. This rule is the foundation of that long series of decisions in which it has been variously applied, from *Boraston's Case* downwards. It is a rational and intelligible rule, repeatedly affirmed and applied by the House of Lords."

The chancellor then considers *Bromfield v. Crowder* and *Doe ex dem. Roake v. Nowell*, supra, and says: "In each of these cases (and in others of the same kind) the full event upon which alone, in the words of gift, the estate was to arise, had not taken place; yet in favor of the intention manifested in the more general language of the gift over, the remainder was treated by the House of Lords as vested before the full event on which the gift was made to depend. . . . In the present case the language of the gift over in default of issue is upon principle and authority sufficiently large to show the testator's intention that the gift over should not take effect if there were any children (for in cases like this the word 'issue' is held to mean children) who might live to attain the age of twenty-one. These words of qualification are sufficiently strong, unless the decision in *Festing v. Allen* be considered an authoritative decision. The court of exchequer, indeed, declared that they did not feel much doubt (if they felt any doubt at all) as to that case. They did not affect to reconcile their decision with the decision of the House of Lords in *Randall v. Doe*, nor with the principle of that case and the case of *Bromfield v. Crowder*; nor does it seem to have occurred to them that there was anything startling in treating the gift over as one to take effect only on the occurrence of that very event which would have defeated it, or on the event of there being no children at all. The old maxim, *Ex antecedentibus et consequentibus fit optima interpretatio*, is a sound rule in the construction of instruments. To magnify words of contingency by a narrow and microscopic view, which excludes the fair operation of the context, is not consistent with established principles of construction, or likely to produce any other than an erroneous result. Where the court of exchequer resolved to review decisions of the House of Lords, and to restrain and discredit or evade the application of a principle established by the highest authorities, a profound consideration of the question might have been expected, and the fruits of that consideration to justify so extraordinary a course might have appeared in some overwhelming force of reasoning and illustration, to show that words of contingency incorporated in a gift have

a more uncontrollable force when applied to the description of a person than of an event. The reports of the two other cases, in which the decision in *Festing v. Allen* has been followed, afford nothing to increase the inadequate weight of that case. It is satisfactory to find that there are at least two subsequent cases in which it has not been followed, and that the Vice Chancellor Knight Bruce, in the case of *Riley v. Garnett*, 3 DeG. & S. 629, 19 L. J. Ch. N. S. 146, 14 Jur. 236, preferred adhering to older authorities so often affirmed by the House of Lords. . . . Upon the whole, therefore, guided by an intelligible principle, sanctioned by the highest authorities, and not shaken by any adequate weight of subsequent decision or argument, the true construction of this will seems to be that the plaintiff, as the only child of Richard Staples Browne, is devisee in fee of an estate in fee simple, determinable in case of his dying under the age of twenty-one. The decree must be to that effect."

We will now consider a few of the cases from our sister states.

In *Hughes v. Hughes*, 12 B. Mon. 115, the will gave "to Charles S. Hughes, Mary E. Hughes, and Sarah F. Hughes, children of Richard F. Hughes, deceased, when they become of age, or marry, one tract of land, beginning," etc. The testator had four children and three grandchildren living; the three latter being the children of Richard F. Hughes, named in the foregoing devise. On the part of the grandchildren, it was contended that, under the first clause, they acquired a vested interest in the land, with a right to take immediate enjoyment. The court cites and follows *Doe ex dem. Hunt v. Moore*, 14 East, 601; *Doe ex dem. Roake v. Nowell*, 1 Maule & S. 327; and *Bromfield v. Crowder*, 1 Bos. & P. N. R. 313.

In *Toner v. Collins*, 67 Iowa, 369, 56 Am. Rep. 346, 25 N. W. 287, the syllabus reads: "The testator bequeathed to his executors, in trust for his children, certain real estate, with the following provision, among others: 'My said executors shall have the management and control of said property by me devised to them in trust for my said children, and they are to have the control and management thereof until they shall get married; and when any of my said children shall marry, with the consent of said executors, any worthy person, then the part or portion of property herein devised, or the proceeds thereof, . . . shall be and become the property of said child so marrying, and my said executors shall make the necessary conveyance thereof, so as to vest the absolute title in said legatee.' Held, that the marrying of a child with the consent of the executors was not a condition

precedent to the vesting in him or her of an interest in the estate, but only a condition for the termination of the trust as to one so marrying; and that the will, considered as a whole, vested in the children, upon the death of the testator, a present equitable interest in the estate. Consequently, where one of the daughters died at the age of twenty-two unmarried, and bequeathed to B. [her fiancé] all her property, personal and real, and all her interest in her father's estate, either as heir or devisee under his will, held, that her death terminated the trust as to the property bequeathed to the executors for her use, and they were properly decreed by the court below to convey the legal title thereof to B."

In *Raney v. Heath*, 2 Patton & H. (Va.) 206, the third paragraph of the syllabus reads: "A will contained the following clause: 'I give and bequeath my estate, except what I shall hereinafter name, both real and personal, to my brother Benjamin B. Heath's children; providing either of them shall live to the age of twenty-one. If neither of them live to be twenty-one, it is my desire that my sister Lilly Raney and my sister Barbara B. Lee's children to have it equally between them.' Held, that the legacy to the children of Benjamin B. Heath vested at the death of the testator, subject to be divested on the death of all of them under the age of twenty-one and that the same rule applied to both the real and personal estate." In the opinion the court say: "That the terms of the bequest to the children of B. B. Heath, standing alone and unaccompanied with the limitation over, would have imported a contingent legacy as to the personalty, and a contingent devise as to the realty, is a proposition about which there is no room for doubt or difference of opinion. And it is equally clear and well settled upon authority that the limitation over made it, as to the land, a vested devise; the limitation over in the event of the death of all under age being considered explanatory of the sense in which the testator intended the devisee's interest in the property to depend on his attaining the specified age, namely, that at the specified age it should become absolute and indefeasible. The effect of the construction is to convert the first words, which seem to import a condition precedent, and thereby to render the devise contingent, into a condition subsequent, whereby the vested estate of the devisee would be divested or defeated upon failure to attain the age prescribed. This rule of construction as to devises is now settled and established beyond the reach of cavil, by an unbroken series of concurrent

decisions, beginning with *Edwards v. Hammond*, 3 Lev. 132, followed by *Bromfield v. Crowder and Doe ex dem. Hunt v. Moore*, supra. . . . See the case of *Phipps v. Ackers*, 9 Clark & F. 583." The opinion upon this point concludes: "Upon the rule, then, which obtains in devises, and which I think ought to prevail in a case like this, in which both land and personalty are blended, because the rule is not only clearly settled and undisputed, but is in itself reasonable and ought to be held equally applicable to personalty as to land, I am of opinion that the bequest under consideration was vested, and not contingent, and that there is no error in the decree of the court below in so declaring."

In *Roome v. Phillips*, 24 N. Y. 463, the syllabus reads: "Devise of an estate for life to the testator's father, remainder to the heir at law and only child of the testator, 'after the decease of my father, and when he, the said child, shall become twenty-one years of age, and become married, and has children, and in case of his, the said child's decease before that period and after my father's decease, then the said real estate' was given over to other persons. Held, that the child took a vested remainder, subject to be divested only on his dying under the age of twenty-one." In the opinion the court say: "It seems to me it was the clear intention of the testator that his son Elisha, on the demise of John Burrows, the testator's father, should take the estate in fee, upon his arriving at the age of twenty-one years. He was also to take it, upon such demise, upon his marriage and having children. It vested in him in fee, on the death of the life tenant; and he was entitled to the possession on the happening of either of those events, subject to his being wholly divested on his dying before attaining the age of twenty-one years; and on the happening of which latter event, the devise over took effect; and it only took effect on his dying before the age of twenty-one." The court then cite with approval *Goodtitle ex dem. Hayward v. Whitby*, 1 Burr. 229; *Bromfield v. Crowder*, 1 Bos. & P. N. R. 313, and *Doe ex dem. Hunt v. Moore*, 14 East, 601.

In *Kerlin v. Bull*, 1 Dall. 175, 1 L. ed. 88, the syllabus reads: "A testator devised as follows: 'I give and bequeath unto my son A, when he arrives at the age of twenty-one years (a certain tract of land), to hold to him, his heirs and assigns forever.' Afterwards he bequeathed to his wife the use and profits of all his lands, for the maintenance [and education] of his children, until his sons should attain the age of twenty-one, etc. A died after the testator, under age, intestate, and with-

out issue, leaving a mother, brothers, and sisters. Held, that this was a vested devise in A, and that the estate was to be divided equally among his brothers and sisters." In the opinion the court say: "The absolute property is given to John when he should arrive at age, and the use and profits in the meantime to his mother, for the maintenance and education of all the children. This last devise is a particular interest, and no more than a chattel interest. The son John was the principal object of the testator's bounty, and if he had married, and died before twenty-one years of age, leaving children, he certainly meant not that this estate should go from them. This, therefore, was an immediate gift to John, though he was not to have the possession until he came of age. All the cases support this judgment." In like manner, we think that, in the case at bar, Cedric was the principal object of the testator's bounty. That the testator did not intend, in the event of Cedric's marriage before reaching the age of twenty-five, that the property should go from his children, is evidenced by the fact that he expressly provides that it shall go to them in such an event. It follows, therefore, that the devise in question was an immediate gift to Cedric, though he was not to have the possession until he arrived at the age of twenty-five years, and that the interest of the executors was no more than a chattel interest.

The *Illinois Land & Loan Co. v. Bonner*, 75 Ill. 315, is a well-reasoned case on this question. The opinion is by Sheldon, J., one of the ablest judges who ever graced that eminent court. The eighth paragraph of the syllabus reads: "Where lands are devised to a trustee to be held by him in trust until A shall attain his majority, when the same shall be conveyed to him in fee, this will confer on A a vested estate in fee simple, subject to the prior chattel interest given to the trustee, and consequently, on the death of A under age, the property will descend to his heir at law. But a devise to A, when he shall attain the age of twenty-one years, standing isolated and detached from the context, will confer a contingent interest only." The ninth paragraph reads: "Where a devise over is made dependent upon the first devisee dying before he becomes of age, or without issue, or any similar event, the devise is equivalent to a provision that the first donee shall take an immediate vested interest liable to be defeated by the happening of the contingency named; and, if it does not happen, the estate then becomes absolute and indefeasible." I will not quote further from this well-reasoned opinion. The opinion

speaks for itself. It is cited with approval in *Waterman Hall v. Waterman*, 220 Ill. 569, 4 L.R.A.(N.S.) 776, 781, 77 N. E. 142.

To the same effect is *Withers v. Sims*, 80 Va. 651.

Yoesel v. Rieger, 75 Neb. 180, 106 N. W. 428, is also in point. The syllabus reads: "Where a testator devised lands to his daughter in fee, but with a limitation over by way of executory devise in favor of her brothers and sisters, contingent upon her dying within a definite term of years without surviving issue, and the daughter died within the specified term leaving such issue, the latter succeeded to the estate of its mother in fee simple." The opinion is short and sustains the principle announced in the foregoing cases.

In concluding our citation of cases, we call attention to *Archer v. Jacobs*, 125 Iowa, 467, 101 N. W. 195. We will not extend this opinion by quotations from that case other than a few of the paragraphs of the syllabus: (1) "A remainder limited to a certain person on the termination of a life estate vests at the same instant and by the same grant as the life estate, and, although the remainderman cannot enter upon the possession, use, or enjoyment of the property until the termination of the life estate, yet the fee, less the life estate, is in him, and will descend to his heirs if he dies before coming into possession, or, as an estate of inheritance, may be aliened by him, or subjected to the claims of his creditors." (3) "Courts will hold a remainder to be vested if it can be done without manifest violation of the intention of the donor." (4) "The uncertainty whether a remainderman will outlive the life tenancy and come into actual possession does not make the remainder contingent." (7) "A clause in a will devising property to testator's grandchildren upon the death of their mother does not indicate an intention to postpone the vesting of the remainder to the date of the mother's death, instead of from the date of testator's death, but merely refers to the time when the remainderman shall come into the enjoyment of the estate."

In the light of the foregoing authorities, it may be said that this rule of law and of construction that we are invoking is well settled. Does the rule apply to the case at bar? In applying the rule that "we are to sit in the seat of the testator and construe his will," we must give effect to every expression contained therein, if by any reasonable construction we can give it meaning and legal effect. Sitting in that seat, we find the testator considering the uncertainties of life and the certainty of his ultimate demise. He is also considering his

worldly estate and the natural objects of his bounty. His youngest child, Cedric, is only a lad of about seven years. Two other children are minors. How will he provide for them so as to secure to them a support while they are growing to manhood and womanhood? They should not only be provided with the necessities of life, but they should receive an education as well. While gaining an education, they should be free from the cares of business and the management of property. And so he directs that the properties set out in the second item of his will be placed in the hands of executors, to be held by them in trust until such time as his children may reasonably be expected to have completed their education, at the age of twenty-five years, respectively, when his executors shall convey to each his or her respective devise; and, pending the arrival of those respective periods of time, he, by the third item of his will, directs that "out of the net income of the real estate mentioned in the next preceding item (item 2), my executors pay the following money bequests, viz., to my beloved wife, Ida Cremer, the sum of fifty dollars per month, monthly, from the time of my death until our youngest child Cedric E. Cremer shall reach the age of twenty-five years; to each of my three younger children, Leonidas R. Cremer, Mina Cremer, and Cedric E. Cremer, for their education and support, the sum of thirty-three and one-third dollars per month, monthly, from the time of my death until they severally arrived at the age of twenty-five years. If either of my said sons shall die before reaching the age of twenty-five years, leaving a widow and children, or either, the payments in this item provided for such son shall, after his death, be made to them, or such of them as shall survive; but if he leave no wife or child such payment shall cease." And a like proviso as to his daughter Mina, followed by a provision for two other children by a former wife. Still sitting in the seat of the testator, with an impartial desire to ascertain his will from the words he is using, the conclusion is irresistible that the children are the special objects of his bounty, and that he does not mean to deprive them of it, in any event. He not only is trying to secure it to them, at a time when they will be able to care for it, but gives it to their wives, or husband, and children, in the event of their marriage and demise prior to such time.

The further conclusion is equally irresistible, that he had no thought or intention of vesting in his executors anything more than such an interest—"chattel interest," the supreme court of Illinois and other

eminent courts have termed it—as would enable them to protect and manage the estate until the children named should respectively attain the age when, in his judgment, they would be out of school and be sufficiently mature to manage it themselves. As said in *Phipps v. Ackers*, 9 Clark & F. 583, their right “is not affected by the direction to convey, but that the conveyance must conform to the [their] right, and that the will itself is an equitable conveyance, until that is displaced by the legal conveyance which is directed to be made.” That he intended the property involved in this suit to vest, immediately upon his death, in Cedric, subject to the temporary provision for his mother until Cedric reached the age of twenty-five years, and thereafter in Cedric alone, is beyond the possibility of a doubt. The language employed to express his intention is not susceptible of any other reasonable construction. We therefore hold that upon the death of Harrison W. Cremer, the full equitable title to the property in controversy vested, *eo instante*, in Cedric E. Cremer, charged with its proportion of the allowance of \$50 per month to his mother, Ida Cremer, until he reached the age of twenty-five years, subject to a defeasance, as provided in the will, in the event of his death before attaining that age; and that, pending the qualification of the executors named in the will, or the appointment and qualification of administrators c. t. a. in the event of the refusal or failure of such executors to qualify, the legal title likewise vested in him, subject to be nominally and temporarily devested by a subsequent qualification of such executors, or the appointment and qualification of such administrators; and that in case of a failure of the executors to qualify and a failure of the appointment and qualification of administrators c. t. a. prior to his reaching the age of twenty-five years, his title and right of possession of said property would, upon his attaining such age, become absolute in fee simple.

As we have seen, the summons in the foreclosure suit was served upon Cedric and his mother, Ida; upon Housel and Millard, named in the will as executors; upon Leonidas R. Cremer and Mina Cremer, the brother and sister of the full blood, who under the will would take the devise over in the event of Cedric's death before reaching the age of twenty-five years; upon all of the other heirs at law of the testator; and upon the special administrator. This included every person *in esse* who was in any manner interested in either the property or the title. As has been shown, the executors had not then qualified. They

could not qualify until the will was admitted to probate. This could not be done until the contest proceedings then being prosecuted were terminated. If the will should be set aside, the title would be in the heirs at law; if sustained, it would be in the devisees until the executors qualified. If not, then it certainly was in the special administrator, subject to the payment of the debts of the deceased. But it is urged that the title was not in either; that it was in abeyance; that the mortgagee was bound to delay its foreclosure suit until the termination of the contest of the will and the qualification of the executors; that this would not deprive the mortgagee of its remedy, but would simply postpone the enforcement of it. But why should the mortgagee be put to such delay? It may be said that lawful interest is always a sufficient compensation for delay in the payment of money. While this is true as a general rule, like all general rules, it has its exceptions, and this seems to be such a case. The will contest might be prolonged for years, as such contests usually are. During that time the property, which it appears was then not of sufficient value to attract purchasers to the foreclosure sale, might depreciate in value, and the mortgagee be deprived of a large portion of its security. There are at least two reasons why we do not think the mortgagee was required to wait: First, it is contrary to the views of this court that titles to land may rest in abeyance. *Yoesel v. Rieger*, 75 Neb. 180, 181, 106 N. W. 428; *Clark v. Fleischmann*, 81 Neb. 445, 451, 116 N. W. 290. While this rule was not fully considered in those two cases, it is a rule that has been frequently announced, and one which we believe to be sound. Second, under our Constitution every person is entitled to have justice administered without delay; and a mortgagor should not be permitted, in person or by his will, to raise a controversy over the mortgaged property which will delay enforcement of the mortgage in the event of default in payment thereof. The volume of business transacted in this country upon borrowed capital is enormous, and to hold this point as contended for by plaintiffs might prove to be a very serious matter.

After carefully considering the case in all its aspects, we hold that the district court, in the foreclosure suits, acquired jurisdiction over the property and the title, and of all persons interested therein.

The judgment of the District Court is therefore affirmed.

Petition for rehearing denied.

PENNSYLVANIA SUPREME COURT.

RE ESTATE OF JOHN W. PAXSON, Deceased.

SALLIE W. HOWES, Appt.

(241 Pa. 452, 88 Atl. 673.)

Will — devise to persons upon reaching a certain age — vested estate.

A devise to children on their arriving respectively at the age of twenty-one years is vested, and not contingent, when the will also provides that in case of the death of either before arrival at that age without surviving issue his share shall be divided among the survivors, and that part of the income shall be used for their education and support until their arrival at the age specified; especially where in a codicil testator states that he has given the property to the children on their arrival at the specified age, and gives directions for the care and disposition of the property on that basis.

(June 27, 1913.)

APPEAL by Sallie W. Howes from a decree of the Orphans' Court for Philadelphia County sustaining exceptions to an adjudication settling the estate of John W. Paxson, deceased. Affirmed.

The facts are stated in the opinion.

Messrs. Duane, Morris, & Heckscher, for appellant:

The legacies bequeathed by the testator to his three grandchildren by the original will were contingent.

King v. Crawford, 17 Serg. & R. 118; *Moore v. Smith*, 9 Watts, 403; *Seibert's Appeal*, 13 Pa. 501; *Cascaden's Estate*, 153 Pa. 170, 25 Atl. 1075; *Engle's Estate*, 167 Pa. 463, 31 Atl. 681; *Lewis's Estate*, 203 Pa. 219, 52 Atl. 208.

Testator's latest testamentary expression operates to remove any remaining doubt as to the contingent character of the bequest previously made, and is independently efficacious to create a contingent bequest to each of his grandchildren on attaining the age of twenty-five.

Bibin v. Walker, 2 Ambl. 667; *Atwood v. Geiger*, 69 Ga. 498; *Farrer v. St. Catharine's College*, L. R. 16 Eq. 19, 42 L. J. Ch. N. S. 809, 28 L. T. N. S. 800; *Weeds v. Bristow*, L. R. 2 Eq. 333, 35 L. J. Ch. N. S. 839, 12 Jur. N. S. 446, 14 L. T. N. S. 587, 14 Week. Rep. 726; *Adams v. Adams*, 1 Hare, 538, 11 L. J. Ch. N. S. 305, 6 Jur. 681; *Hunt ex rel. Streater v. Evans*, 134 Ill. 496, 11 L.R.A. 185, 25 N. E. 579.

Note. — For provision in bequest or devise contemplating the attainment of a specified age as rendering the gift contingent, see note, post, 1012.
L.R.A.1915C.

The testator's will and codicils as a whole create a contingent legacy to each grandchild on reaching twenty-five; and hence no grandchild can acquire any right to the principal of the estate until and unless he attains that age.

Bentley v. Kaufman, 12 Phila. 435; *Beilstein v. Beilstein*, 194 Pa. 152, 75 Am. St. Rep. 692, 45 Atl. 73.

Messrs. Maurice Bower Saul and John G. Johnson, for appellees:

The legacies to the grandchildren were vested, and the accumulations belong to them.

Wengerd's Estate, 143 Pa. 615, 13 L.R.A. 360, 22 Atl. 869; *Smith's Estate*, 226 Pa. 304, 75 Atl. 425; *Peterson's Appeal*, 88 Pa. 397; *Reed's Appeal*, 118 Pa. 215, 4 Am. St. Rep. 588, 11 Atl. 787; *Middleton's Estate*, 212 Pa. 119, 61 Atl. 808; *Bowman's Appeal*, 34 Pa. 19; *Reed v. Buckley*, 5 Watts & S. 517, 40 Am. Dec. 531.

The fact that the will and codicils contain a provision of defeasance in the event of the death of any grandchild without issue under the specified age is presumptive of an intention to vest the legacies immediately upon the death of the testator.

Hawkins, Wills, p. 225; *Page, Wills*, p. 772; *Theobald, Wills*, p. 589; *Bland v. Williams*, 3 Myl. & K. 411, 3 L. J. Ch. N. S. 218; *Bull v. Pritchard*, 5 Hare, 571, 1 Russ. 213, 16 L. J. Ch. N. S. 185, 11 Jur. 34; *Phipps v. Ackers*, 9 Clark & F. 583, 6 Jur. 745; *Chew's Appeal*, 37 Pa. 23; *McCall's Appeal*, 86 Pa. 254; *Kerr v. Bosler*, 62 Pa. 183; *Page's Appeal*, 71 Pa. 402; *Batstone's Estate*, 136 Pa. 307, 20 Atl. 572; *Yost's Estate*, 134 Pa. 426, 19 Atl. 692.

The fact that the legacies are part of the residue of the testator's estate is evidence of an intention that the legacies should vest immediately upon the death of the testator.

Booth v. Booth, 4 Ves. Jr. 399, 4 Revised Rep. 235; *Theobald, Wills*, p. 585; *Pearman v. Pearman*, 33 Beav. 394; *Branstrom v. Wilkinson*, 7 Ves. Jr. 421; *Stuart v. Wrey*, L. R. 30 Ch. Div. 507, 54 L. J. Ch. N. S. 1098, 53 L. T. N. S. 334; *Smith's Estate*, 226 Pa. 304, 75 Atl. 425; *Roberts's Appeal*, 59 Pa. 70, 98 Am. Dec. 312.

The fact that an intestacy might result if the legacies be held contingent is evidence of an intention that the legacies should vest immediately upon the death of the testator.

1 *Jarman, Wills*, p. 555; *Doe ex dem. Barnfield v. Wetton*, 2 Bos. & P. 324; *Ryon's Appeal*, 124 Pa. 528, 17 Atl. 23; *Carstensen's Estate*, 196 Pa. 325, 46 Atl. 495.

The fact that there is a direction to apply a portion of the income for the sup-

port, education, and maintenance of the grandchildren until they arrive at the age of twenty-five years is evidence of an intention that the legacies should vest immediately upon the death of the testator.

Provenchere's Appeal, 67 Pa. 463; Reed's Appeal, 118 Pa. 215, 4 Am. St. Rep. 588, 11 Atl. 787; Weinmann's Estate, 223 Pa. 508, 72 Atl. 806; Fest's Estate, 13 Pa. Dist. R. 193; Potter's Estate, 13 Phila. 293.

Stewart, J., delivered the opinion of the court:

While it is a settled rule of construction that a legacy payable at a future period, unaccompanied by an antecedent substantive bequest independent of the period fixed for payment, is presumptively contingent rather than vested, this, like every other rule of construction, is but an aid in determining the actual intent of the testator. It is not a rule of law determining arbitrarily a certain conclusion from words employed, but merely a rule of construction which will supply a presumptive, conventional intent where the actual intent is not ascertainable. "With the desire to reduce to a minimum the perplexity and uncertainty inseparable from the subject," says Mitchell, J., in *Woelpper's Appeal*, 126 Pa. 562, 17 Atl. 870, "courts have established certain more or less artificial and arbitrary canons of construction, by which certain forms of expression are presumed to have certain meanings, and in doubtful cases these presumptions are held to be decisive. But all of these canons are subservient to the great rule as to intent, and are made to aid, not to override it. As in all such cases, care is required that tools shall not become fetters, and that the real end shall not be sacrificed to what was intended only as the means of reaching it." The whole force of the argument in support of this appeal rests on a rigid application and enforcement of the rule of construction, which would make the legacy in this case contingent because payable at a further fixed period, without antecedent substantive gift. That the language employed by the testator in the present case would not ordinarily import an antecedent gift may be conceded; and we may further concede that it fairly imports the opposite; nevertheless, if it appear from the rest of the will that the testator intended by the language used an antecedent gift, the law will give effect to his intention in this regard. To apply an artificial rule which would defeat such intention would be a gross perversion of the rule, making it a fetter, instead of an aid.

The language of the will for consideration L.R.A.1915C.

here is as follows: "All the rest, residue, and remainder of my estate, real personal and mixed whatsoever and wheresoever the same may be at the time of my death I give, devise and bequeath as follows: One equal third part thereof I give, devise and bequeath unto my daughter Sallie W. Howes absolutely. The remaining two-third part I give, devise and bequeath unto my three grandchildren John W. Paxson, Jr., David Paxson and Edna Paxson share and share alike, on their arrival respectively at the age of twenty-one years and in case of the death of either of my said grandchildren before his or her arrival at the age of twenty-one years without leaving issue him or her surviving, then his or her share so dying shall go to and be divided between the survivors or survivor thereof. And until the arrival of my said grandchildren of the age of twenty-one years respectively, I will and direct that one-half part of the income, interest and dividends of their respective shares shall go to and be paid to their mother Ella Paxson for their education and support during their minority respectively."

We find here certain marked features in the will, which to our mind disclose a clear intention on the part of the testator to vest his gift in his grandchildren, the legatees. First, the gift over upon the death of either grandchild before attaining the age when payment was to be made is dependent on death "without leaving issue him or her surviving." This is a circumstance so significant to the professional mind as showing an intent that the legacy should be a vested one that it has become the subject of a general rule of construction thus expressed by Mr. Hawkins in his treatise on Wills, on page 225: "In the case of a gift to children when and as they should attain a given age, with a gift over of the shares of those dying under that age without leaving issue, it has been held that the children took vested interests, inasmuch as they were to take if leaving issue, although dying under the given age."

The significance of this feature of the will in question is not derived from the rule, but the rule derives its significance from the persuasiveness of the feature that grandchildren were to take if leaving issue, although dying under the given age. In *Theobald on Wills*, p. 589, the rule is thus stated: "A gift over upon death of members of the class under twenty-one and without issue vests the gift. The gift over shows that the members were to take, except in the event of death under twenty-one and without issue."

In *Chew's Appeal*, 37 Pa. 23, we have a clear recognition of this rule.

The earlier case of *Kerlin v. Bull*, 1 Dall. 175, 1 L. ed. 88, is still more directly in point. The facts of that case sufficiently appear in the following extract of Chief Justice McKean: "The absolute property is given to John when he should arrive at age, and the use and profits in the meantime to his mother, for the maintenance and education of all the children. This last devise is a particular interest, and no more than a chattel interest. The son John was the principal object of the testator's bounty, and if he had married, and died before twenty-one years of age, leaving children, he certainly meant not that this estate should go from them. This, therefore, was an immediate gift to John, though he was not to have the possession until he came of age. All the cases support this judgment. Legacies are governed by the rules of the civil and ecclesiastical courts; devises by the intention of the testator."

Again, the provision that a moiety "of the income, interest, and dividends of their respective shares shall go to and be paid to their mother, Ella W. Paxson, for their education and support during their minority respectively," evinces an unmistakable purpose to bestow at once a beneficial interest. As indicating an intention that the legacy should be a present vested gift, such provision is allowed to be most persuasive. In *Reed's Appeal*, 118 Pa. 215, 4 Am. St. Rep. 588, 11 Atl. 787, it is said: "And while it is true as a general rule, as before observed, that where the time or other condition is annexed to the substance of the gift, and not merely to the payment, the legacy is contingent, yet it is equally true that a well-recognized exception to the rule is that when interest, whether by way of maintenance or otherwise, is given to the legatee in the meantime, the legacy shall, notwithstanding the gift appears to be postponed, vest immediately on the death of the testator. This circumstance indicates an intention that the beneficial enjoyment shall begin at once, and payment only of the principal or capital postponed. When a legacy is given by a direction to pay when the legatee attains a certain age, the direction to pay may import either a gift at a specified age, or a present gift with a postponed payment; and if the interest is given in the meantime, it shows that a present gift was intended. *Provenchere's Appeal*, 67 Pa. 463."

Further, it is to be observed that the reference in the clause providing against the death of either of the grandchildren in his or her minority is to "the shares of the one so dying." The significance of this expression is obvious. In referring to it as it occurred in a will under consideration L.R.A.1915C.

in *Smith's Estate*, 226 Pa. 304, 75 Atl. 425, our Brother Potter there remarks: "He [the testator] refers to the shares of those who were minors at the time of his death, and directs that such shares were to continue to accumulate until the minors respectively became twenty-one years old, when they were to receive the same. Unless the minors had a vested interest, they could own no shares."

Passing now to the third and last codicil to this will, we find there a general expression from the testator as to his own understanding of the original will, which by this codicil he ratified and republished: "Whereas I have given two-thirds of my residuary estate to my three grandchildren share and share alike on their arrival respectively at the age of twenty-five years. . . . Now I hereby ratify and confirm my said will and I do furthermore direct my executors to hold and invest the shares given to my grandchildren until their arrival respectively at the age of twenty-five years and to pay one-half of the income interest and dividends of each share to my daughter-in-law Ella W. Paxson as in my will mentioned, she to educate and support my grandchildren until they respectively arrive at the age of twenty-five years, the remaining half part of the income to accumulate and be paid to my grandchildren together with his and her share of the principal as they respectively arrive at said age." How could the testator have more clearly expressed an understanding on his part that by the original bequest it was not the vesting that was postponed, but merely the enjoyment? The executors were to hold and invest the fund committed to them in trust, not as the property of the testator's estate, but as shares he had given his grandchildren out of his residuary estate, one half the income therefrom to be applied towards their maintenance and education during the period of their minority, and the remaining one half to accumulate and be paid them on arrival at age, along with the corpus, showing clearly an understanding that by the terms of the original will the entire beneficial interest in the legacy passed to these legatees. We find nothing in this case calling for the application of artificial rules of construction, in view of these plain expressions from the testator as to his intention. That he intended a vested legacy to the grandchildren we have no doubt.

The practical question in the case is one of proper distribution of the accumulation of income directed by the will to be paid to the grandchildren, "together with his and her share of the principal as they respectively arrive at said age." The appeal

is from a decree awarding John W. Paxson, Jr., one of said grandchildren who has attained the prescribed age, one third of the accumulations, as well as interest on invested accumulations. The correctness of

the decree follows necessarily from the conclusion reached, that the legacy to the grandchildren was not contingent, but vested.

The assignments of error are overruled, and the decree is affirmed.

Note. — Provision in bequest or devise contemplating the attainment of a specified age as rendering the gift contingent.

I. Scope, 1013.

II. Introduction, 1014.

III. Circumstances supporting or varying implication of contingency.

a. In general, 1022.

b. Dissociation of provision contemplating the attainment of a specified age from the gift.

1. In general, 1025.

2. Where the provision is found only in the gift over, 1032.

c. Absence of gift apart from direction to pay, divide, or convey, 1032.

d. Gift of intermediate income or maintenance, 1036.

e. Provision for advancement of legatee, 1047.

f. Effect, in devises of realty, of a devise of an antecedent estate, 1047.

g. Postponement of gift to let in intermediate interest or for benefit of estate, 1049.

h. Gifts over, 1052.

i. Absence of gift over, 1056.

j. Severance of legacy from estate, 1057.

k. Intervention of trustees, 1059.

l. Appointment of trustee or guardian for minor legatee, 1061.

m. Direction to accumulate, 1061.

n. Provision for survivorship among legatees, 1062.

o. Effect of provision substituting the issue of any legatee who may die before division, 1062.

p. Assisting construction by reference to other gifts, 1063.

q. Assisting construction by reference to other limitations—reflecting contingency backwards and forwards, 1063.

r. Effect of express direction as to vesting, 1064.

s. Inferences from peculiarities of phraseology employed, 1070.

t. Miscellaneous, 1071.

IV. The decisions considered with reference to the sufficiency of the context to vest the gift immediately, 1072.

V. Legacies charged on real estate, 1072.

VI. Contingency as a constituent part of the description of the legatee or devisee, 1076.

VII. Appendix A. Cases which turn upon existence of an antecedent gift, apart from direction to pay, convey, or divide, 1085.

VIII. Appendix B. Cases in which the sufficiency of the context to overcome the implication of contingency is considered.

a. Gifts "if" a certain age shall be attained, 1102.

b. Gifts "in case" a certain age shall be attained, 1103.

c. Gifts "in event of" attaining a certain age, 1104.

d. Gifts "provided" or "providing" a certain age is attained, 1105.

e. Gifts "should" a certain age be attained, 1106.

f. Gifts "at" a specified age, 1106.

g. Gifts "on" or "upon" a specified age, 1109.

h. Gifts "after," "from and after," or "from and upon" a specified age, 1119.

i. Gifts "when" a certain age shall be attained, 1122.

j. Gifts "as" a specified age shall be attained, 1131.

k. Gifts "as soon as" or "so soon as" a certain age shall be attained, 1137.

l. Gifts "when and as," "as and when," or "when and so soon as" a certain age shall be attained, 1138.

m. Gifts "whenever" a certain age shall be attained, 1142.

n. Gift to trustee or third person "until" legatee attains a certain age, and "then" to him, 1143.

o. Where property is given in trust until a certain age is attained, without a further gift or direction to pay upon attaining that age, 1146.

p. Where there is a direction to divide when the eldest of a class attains a certain age, 1146.

q. Where there is a direction to divide when the youngest, or all, of a class shall attain a certain age, 1147.

VIII.—continued.

- r. Where there is a direction to divide when a third person shall attain a certain age, 1159.
- s. Miscellaneous, 1160.

I. Scope.

When a testamentary gift is made to an individual or a class "at," "on," "upon," or "from and after" attaining a certain age, or "when" "as," "as soon as," "if," "in case," or "provided" a certain age is attained, the question is likely to be raised whether the gift was intended to be contingent upon the attainment of the age specified. Among the ultimate questions occasioning this inquiry are: The devolution of the gift in case the devisee or legatee has not lived to attain the specified age; the right to the intermediate income; the right to have the legacy paid over at twenty-one where the testator has specified some later age for payment;¹ or the remoteness of the gift itself or of the limitation over. It is the function of this note to collate the decisions upon the question when gifts of this sort are to be considered contingent and when vested, and to seek to ascertain the principles of testamentary construction which they illustrate.

While the considerations involved in de-

termining whether a gift coupled with the attainment of a specified age is vested or contingent are to a certain extent the same as where its payment is postponed for a certain period of time after the testator's death, or until certain property shall be sold, or until marriage, or the happening of some other collateral event, the situation possesses certain distinctive features which warrant its separate treatment. Aside from the circumstance that the event of the legatee's attaining a particular age is unlike those events, such as marriage, with regard to which there is an uncertainty not only as to their ever happening, but also as to the time when they will happen if at all,² there is in the class of cases under consideration room for two contradictory implications not to be found in other cases relating to vesting, one of which is that the testator meant to make a provision for the legatee only in case of his attaining maturity, so that the gift will not vest in interest until then, and the other of which is that the postponement was made with reference to the legatee's fitness to be intrusted with the property, and therefore relates only to the time of enjoyment.

Cases the result in which may have been reached either by holding that the gift was contingent upon attaining the specified age, or by holding that it was vested subject to

¹ Where a legacy is vested immediately, it may be directed to be paid to the legatee at twenty-one, although by the will enjoyment of it is postponed until a later period, unless, during the interval, the property is given for the benefit of another. See *Saunders v. Vautier*, *Craig & Ph.* 240, 10 L. J. Ch. N. S. 354; *Rocke v. Rocke*, 9 Beav. 66; *Re Jacob*, 29 Beav. 402; *Josselyn v. Josselyn*, 9 Sim. 63; *Gosling v. Gosling*, *Johns. V. C.* (Eng.) 272, 5 Jur. N. S. 910; *Re Couturier* [1907] 1 Ch. 470, 76 L. J. Ch. N. S. 296, 96 L. T. N. S. 560; *Butler v. Butler*, 29 N. S. 145; *Re Wartmen*, 22 Ont. Rep. 601; *Goff v. Strohm*, 28 Ont. Rep. 553; *Lewis v. Moore*, 24 Ont. App. Rep. 393.

In *Gosling v. Gosling*, *Johns. V. C.* (Eng.) 272, it is said: "The principle of this court has always been to recognize the right of all persons who attain the age of twenty-one to enter upon the absolute use and enjoyment of the property given to them by a will, notwithstanding any directions by the testator to the effect that they are not to enjoy it until a later age, —unless, during the interval, the property is given for the benefit of another. If the property is once theirs, it is useless for the testator to attempt to impose any fetter upon their enjoyment of it in full so soon as they attain twenty-one. And upon that principle, unless there is in the will, or in some codicil to it, a clear indication of an intention on the part of the testator L.R.A.1915C.

not only that his devisees are not to have the enjoyment of the property he has devised to them until they attain twenty-five, but that some other person is to have that enjoyment; or unless the property is so clearly taken away from the devisees up to the time of their attaining twenty-five as to induce the court to hold that, as to the previous rents and profits, there has been an intestacy,—the court does not hesitate to strike out of the will any direction that the devisees shall not enjoy it in full until they attain the age of twenty-five years."

Payment will, however, be withheld where there is a gift over in case of the legatee's failure to attain the specified age. See *Grant v. Grant*, 3 Younge & C. Exch. 171, 7 L. J. Exch. in Eq. N. S. 20.

² *Danforth v. Talbot*, 7 B. Mon. 623.

Where a legacy is payable on marriage, instead of at majority, the time of payment, as well as the event on which it is to be made, is uncertain, and the legacy will not vest antecedently to the occurrence of the marriage; but where the legacy is given to one, payable to him at twenty-one or when he arrives at twenty-one, there is no uncertainty as to the time when the money is to be paid, and the consequence is, if such a case be considered on the assumption that the legatee's survival to the prescribed age is not a condition precedent to his right to claim the money, that all uncertainty is removed from the affair. *Post v. Herbert*, 27 N. J. Eq. 540.

be devested by death under the specified age, but which do not make it plain which view was entertained by the court, cannot be considered as in point upon this question, and have accordingly been omitted.

To prevent any possible misapprehension, it is desired to state that the question whether an expectant interest becomes indefeasibly vested upon the attainment of the specified age during the continuance of a precedent estate does not fall within the scope of this note, the question in cases of that sort being not whether the gift is contingent on attaining the specified age, but whether it is contingent on surviving the termination of the precedent estate.

Nor does this note cover the question as to when, in the case of a gift to a class at a specified age, or when the eldest or youngest member of a class attains a specified age, the membership of the class is to be ascertained. It may be remarked in passing, however, that it is a general rule that if there is a gift to a class upon a contingency, the contingency is not to be imported into the constitution of the class, even though the contingency is the existence of a member of the class at a particular time. The result is that all members of the class at the time when its membership is ascertained take vested interests, though they may not live to attain the specified age,³ unless there is something to distribute the contingency so as to make it apply to each member respectively. But perhaps where such is the case the class itself may be considered contingent.

II. Introduction.

Every question of testamentary construction necessitates three inquiries:

First, what is the presumptive or *prima facie* meaning of the form of expression under consideration;

Second, what other expressions or cir-

cumstances tend to support or vary that meaning, and,

Third, what is the probative force of such circumstances,—in other words, are the inferences to be drawn from the other expressions used in the will, the testator's general scheme of disposition, and his relation to the objects of his bounty, sufficient to outweigh the *prima facie* meaning of the expression in question.

In the present discussion these inquiries will be separately considered in order. The first and second are susceptible of categorical treatment; the third involves the delicate balancing of inferences and counterinferences, which makes the construction of a will so difficult a matter, and renders generalizations dangerous. In the part of this note which deals with the third inquiry, therefore, all that the annotator can do to aid the investigator is to display the various cases, arranged with reference to the form of expression involved, so that he may see for himself the elements entering into their determination, and choose for his instruction those cases the elements in which most nearly correspond to his own.

The question whether a testamentary gift to take effect at a future period is vested or not is always a difficult one.⁴ This is because, although nominally it depends upon the testator's intention, the fact is that in most cases the vesting of the gift in interest, as distinct from its vesting in enjoyment, was never present to the testator's conscious mind. This is true especially of the type of cases with which this note is chiefly concerned, where the enjoyment of the gift is postponed till majority, in which there is a possibility that the testator was thinking only of the legatee's fitness to control the property, without thinking of the possibility of the legatee's not living to attain that age, or the direction to be taken by the gift in case the legatee should not survive the time appointed. The inquiry,

³ See *Walker v. Thornton*, — Tex. Civ. App. —, 124 S. W. 166, where, however, the rule was erroneously applied; *Hilliard v. Fulford*, 28 L. T. N. S. 892, 42 L. J. Ch. N. S. 624.

⁴ In *Shattuck v. Stedman*, 2 Pick. 468, Parker, Ch. J., said: "Perhaps no question can arise in the course of legal inquiries more doubtful in its nature, or less referable to fixed and certain rules and principles, than whether the words of a devise or bequest constitute a vested or contingent remainder. Much stress has often been laid on particular words, to which it is possible the testator ascribed no particular force or meaning; and though in all the decisions the courts profess to seek for the intent of the testator, yet, as they are bound to confine themselves to the in-

strument itself to ascertain that intent, and as the same expressions are apt to convey a different sense or meaning to differently constructed minds, perhaps there is no branch of the law which falls so far short of certainty as this. It may not be extravagant to say that in most cases of the kind which have been thought worthy of contest, it would not be difficult to find authorities equally respectable in support of either side of the question. One thing, however, may be affirmed with confidence, namely, that there is a leaning towards a vested, rather than a contingent, interest, and this probably because testators generally have in view the immediate benefit of a legatee, though they may wish to postpone the actual enjoyment of it to a future period."

then, amounts to a conjecture as to what the testator's intention would have been had he had in mind, not the particular situation which has arisen, but the question of vesting in interest. This, however, does not involve that entry into the realm of pure conjecture which would amount to making a will for the testator, for the reason that the court looks to the ends which the testator was seeking to accomplish, and construes the gift as contingent or vested according as one or the other of these constructions will best effectuate those ends, thus giving effect to the testator's general intention, though the result may be to disappoint his particular intention in the situation which has arisen.

A provision in a will contemplating the attainment of a certain age by a legatee or devisee may have reference —

(a) To the vesting of the gift, in which case it is a condition precedent;

(b) To divesting in case of the nonattainment of such age, in which case it is a condition subsequent;

(c) To enjoyment only, in which case the provision does not operate as a condition at all, but only suspensively.

In inquiring into the question whether such a provision relates to the vesting in interest, or merely to the enjoyment, it is well to note the presumptive import of the particular expression of contingency by which the reference to the attainment of the specified age is introduced, since if the expression is one having a conditional and at the same time a nonsuspensive meaning, it will follow that the clause can operate only as a condition either precedent or subsequent, and therefore cannot relate to the enjoyment. Of the expressions of contingency so used, the words "when," "as soon as," "at," "upon," and "from and after" are suspensive, and not directly conditional, receiving such conditional effect as they may have from the context, and, not being capable of a nonsuspensive and at the same time conditional operation, they can never operate as a condition subsequent, but only (where they have a conditional operation) as a condition precedent; while, on the other hand, the words "if," "in case," and "provided" are directly conditional, but not necessarily suspensive, so that they may operate either as a condition precedent or a condition subsequent.⁵

⁵ In *Smith, Executory Interests*, p. 146, it is said: "True it is, that the word 'if,' and the words 'in case,' are directly conditional, and consequently might at first sight appear even more directly and necessarily to import a condition precedent than the words 'when,' 'at,' 'as soon as,' 'upon,' 'from and after,' which only imply a condition, and yet often denote a condition precedent. But conditions, we must remember, may be either precedent or subsequent, either suspensive or destructive. And although the words 'if' and 'in case' are indeed more directly and necessarily conditional, because they properly import contingency, whereas the words 'when,' 'at,' 'upon,' 'as soon as,' 'from and after,' abstractly regarded, do not import contingency to any greater degree than they import certainty, yet, the words 'if' and 'in case' are not so directly and necessarily suspensive, in their import and operation, as the words 'when,' 'at,' 'upon,' 'as soon as,' 'from and after,' which are necessarily suspensive, either of the ownership, or of the possession or enjoyment. It may be shown, independently of the leaning towards vesting, and of any such decisions as those to which allusion has just been made, that the word 'if,' and the words 'in case,' are, in their own nature, capable of a nonsuspensive, and yet a conditional, operation. For a devise to a person if or in case he shall live to attain a given age, is capable of being interpreted (as it was in fact in *Edwards v. Hammond*, 3 Lev. 132, 1 Bos. & P. N. R. 324, note, and *Bromfield v. Crowder*, 1 Bos. & P. N. R. 313), without doing any violence to language, to mean an immediate devise to him, provided, L.R.A.1916C.

or upon the supposition or condition, that he shall thereafter live to attain the required age. And the same construction may be fairly adopted where the subject-matter of the condition is the sustaining of a certain character, or the performance of a particular act; though, in these cases, such a construction is not quite so easy of application as in the former case. The words in the former case amount to the same thing as if the words had been, if he shall continue to live till he shall attain such an age; and these words are as obviously nonsuspensive as the words 'to A, and the heirs of his body, Lords of the Manor of Dale,' which (A being lord of the manor at the time) of course are not a condition precedent, but words constituting a limitation, amounting, in effect, as they do, to the same as a devise 'to A and the heirs of his body, so long as they shall continue to be Lords of the Manor of Dale.' On the other hand, the words 'when,' 'at,' 'upon' 'as soon as,' 'from and after,' are not capable of this nonsuspensive, and yet, at the same time, conditional, operation. For there is no condition except that denoted by the period to which they refer; and that period is a future period; and there is no gift except at that future period. Of course these words may be construed to mean the same as the word 'if,' or the words 'in case.' But such a construction would not be a fair interpretation. It would not be a construction of words according to one sense which they will naturally bear, in preference to another sense which is merely their *prima facie* import, as in the case of the above-mentioned construction of the words 'if,' 'in case,' but

The courts have found occasion to state that the word "if" invariably denotes a condition annexed,⁶ and that unless controlled by the context, it imports a condition precedent.⁷ The same is true of the words "in

case"⁸ and "provided."⁹ With respect to the word "when," while it is generally conceded that in the case of legacies of personality it presumptively operates as a condition precedent,¹⁰ there is a conflict of

it would amount to a conjectural translation of the words 'when,' 'at,' 'upon,' 'as soon as,' 'from and after,' into others of a different meaning, unless there were some expressions, independent of these words, indicating an intention to confer a vested interest on the devisee, and depriving such words of their proper suspensive sense."

⁶ May v. Wood, 3 Bro. Ch. 471.

⁷ The form of expression of a gift to one "if he should live to be twenty-one years of age," unless controlled by the context, postpones vesting. Nixon v. Robbins, 24 Ala. 663.

A devise to A, "if" or "when" he shall attain the age of twenty-one years, standing isolated and detached from the context, or unexplained by the context, will confer a contingent interest only. Sager v. Galloway, 113 Pa. 500, 6 Atl. 209.

A bequest to A "if" or "provided" or "when" he arrives at age or marries, standing alone, does not vest unless the condition is performed, and will not devolve upon his personal representatives should he die before arriving at age or marriage. Fuller v. Fuller, 58 N. C. (5 Jones, L.) 223.

Where a legacy is given "if," "at," or "when" the legatee shall attain the age of twenty-one, or in language of like import, time is of the substance of the gift, and the legacy does not vest until the contingency happens. Watkins v. Quarles, 23 Ark. 179.

If the words "to be paid" or "payable" are omitted, and legacies are given "at" twenty-one, or "if," "when," "in case," or "provided" the legatees attain twenty-one or any other future definite period, these expressions annex the time to the substance of the legacy, and make the legatee's right to it depend on his being alive at the time fixed for its payment. Major v. Major, 32 Gratt. 819.

The words "as," "if" or "when" the legatee arrives at a certain age, where not controlled by the context of the will, constitute the time of payment as of the essence of the bequest, and consequently the legatee can only take in the event of arriving at the designated age. Newport v. Cook, 2 Ashm. (Pa.) 332.

Where a legacy is given "if," "provided," or "in case of," or "when" the legatee shall attain twenty-one, these expressions will constitute the time of payment as the essence of the bequest, and consequently the legatee can take no vested interest until he attains twenty-one. Corbin v. Wilson, 2 Ashm. (Pa.) 178.

As a general rule, if the words "payable" or "to be paid" are omitted, and the legacy is given "at" twenty-one, or "if," "when," "in case," or "provided" the legatee attains twenty-one, or at any other

future definite period, this confers on him a contingent interest which depends for its vesting and transmissibility to his executors or administrators, upon his being alive at the period specified. Provenchere's Estate, 1 Campb. (Pa.) 68.

Where a legacy is given "at twenty-one," or "if," "in case," "provided," or "when" the legatee attains that age, time may be of the substance of the gift, and if so, the bequest does not vest till the event happens. Weyman v. Ringold, 1 Bradf. 40.

⁸ The words "in case" imply a condition as explicitly as "if," "upon," and the like, and express a contingency. Roberts's Appeal, 59 Pa. 70, 98 Am. Dec. 312.

See also Major v. Major; Corbin v. Wilson; Provenchere's Estate; and Weyman v. Ringold, in note 7, supra.

⁹ The word "provided" is an apt and appropriate word to indicate an intention to give contingently. Hersey v. Purington, 96 Me. 166, 51 Atl. 865.

The word "provided" is a conditional term; so that if a bequest is made to one provided he attain twenty-one, the legacy will not vest in him before he arrives at that age. High v. Pollock, 114 Md. 580, 80 Atl. 43.

See also Fuller v. Fuller; Major v. Major; Corbin v. Wilson; Provenchere's Estate; and Weyman v. Ringold, in note 7, supra.

¹⁰ The word "when," standing by itself, imports condition, and requires other words to show that it was meant only to defer payment. Hanson v. Graham, 6 Ves. Jr. 239, 5 Revised Rep. 277.

In Lane v. Goudge, 9 Ves. Jr. 225, 7 Revised Rep. 163, it was said that if a legacy is given when a person attains twenty-one, and he never attains that age, he never is entitled; but if it is coupled with other circumstances showing that it was not meant conditionally, but only to mark the time when the interest vests in possession, the sense will be put upon the words which the will requires.

A gift to legatees when they arrive at the age of twenty-one is contingent on the legatees attaining the specified age. Clayton v. Somers, 27 N. J. Eq. 230.

The word "when," standing by itself and applied to legacies, is a word of condition. Johnson v. Baker, 7 N. C. (3 Murph.) 318, 9 Am. Dec. 605; Hooker v. Bryan, 140 N. C. 402, 53 S. E. 130.

If a legacy is given to a person "when" that person arrives at the age of twenty-one, it is a contingent legacy. Kent v. Watson, 17 N. C. (2 Dev. Eq.) 366; Giles v. Franks, 17 N. C. (2 Dev. Eq.) 521.

When the subject of the gift is personal property, the word "when," like "it" or "if" is a word of condition, and imports

opinion as to whether, in case of a devise of realty, it may, unassisted by the context, be taken not as importing a condition precedent, but as referring to the time of enjoyment,¹¹ or, at most, as operating as a condition subsequent.¹² This difference seems to have been caused by a misunderstanding

of the effect of decisions in which there was either a precedent interest enabling the court to construe the word as relating to the enjoyment, or a gift over on the devisee's dying under the specified age, thereby enabling the court to hold that the devisee took whatever was not given over to the party

that the time when the legatee is to receive the bounty is of the essence of the donation, unless there is some other expression to explain it, or some provision in the context to control it. *Guyther v. Taylor*, 38 N. C. (3 Ired. Eq.) 323.

The word "when," like the words "at" or "if," applied to a legacy of personalty, ordinarily makes the gift contingent. *Sims v. Smith*, 59 N. C. (6 Jones, Eq.) 347.

The word "when," like "at," "if," "provided," etc., in a testamentary gift of personalty, is a word of condition denoting, unless qualified by the context, the time when the gift is to take effect in substance, so that if the legatee die before the period specified the legacy is lapsed. *Sellers v. Keed*, 88 Va. 377, 13 S. E. 754.

In *May v. Wood*, 3 Bro. Ch. 471, Sir K. P. Arden, M. R., is reported to have said that all the cases upon pecuniary legacies have determined the word "when," not as denoting a condition precedent, but only marking a period when the party shall have the full benefit of the gift, unless something appears upon the face of the will to show that testator's bounty should not take place unless the time actually arrives; and not where he has merely used the word "when" for the sole purpose of postponing the time of payment. The correctness of this part of the report is doubted by Sir Wm. Grant, M. R., in *Hanson v. Graham*, 6 Ves. Jr. 249, who there said: "This proposition is stated so broadly and generally that I rather doubt the correctness of the report. Considering the well-known diligence of the late master of the rolls in examining cases, and his uncommon accuracy in stating the result of them, he would hardly have drawn this conclusion from an examination of the cases; for no case has determined that the word 'when,' as referred to a period of life, standing by itself, and unqualified by any words or circumstances, has been ever held to denote merely the time at which it is to take effect in possession; but, standing so unqualified and uncontrolled, it is a word of condition, denoting the time when the gift is to take effect in substance. That this is so, is evident upon mere general principles; for it is just the same, speaking of an uncertain event, whether you say 'when' or 'if' it shall happen. Until it happens, that which is grounded upon it cannot take place." He further pointed out that the only cases alluded to in *May v. Wood* did not establish the principle that the word "when," standing by itself, does not import condition, but are explainable upon the ground that the word "when" was shown by the context to have been used, not as a

condition, but merely to postpone the enjoyment, the possession in the meantime being disposed of in another way; and that upon the whole view of the case, and taking the reasoning of the doctrine and the origin of it into consideration, there was no ground whatsoever for the generality of the proposition which his predecessor is represented to have laid down in *May v. Wood*.

"Bequests of personalty are construed generally according to the rules of the civil law; and according to the doctrines of that code, adopted by courts of equity, which take cognizance of legacies, a legacy given when the legatees marry or attain a prescribed age, without anything else in the will controlling or aiding the interpretation of it, will be understood to be contingent, and 'when' will, in such a case, be deemed synonymous with 'if,' or some other word or phrase implying a condition precedent to the vestiture of any certain interest. And accordingly a bequest of money to an infant at twenty-one years of age, or when he shall become twenty-one years old, will be construed to mean that he shall have no interest unless he shall attain the prescribed age. But a legacy to an infant *in presenti*, to be paid *in futuro*, is deemed to be vested, and as not depending on his living until the time fixed for payment." *Roberts v. Brinker*, 4 Dana, 570.

See also *Sager v. Galloway*, 113 Pa. 500, 6 Atl. 209; *Fuller v. Fuller*, 58 N. C. (5 Jones, L.) 223; *Watkins v. Quarles*, 23 Ark. 179; *Major v. Major*, 32 Gratt. 819; *Newport v. Cook*, 2 Ashm. (Pa.) 332; *Corbin v. Wilson*, 2 Ashm. (Pa.) 178; *Provenchere's Estate*, 1 Campb. (Pa.) 68; and *Weyman v. Ringold*, 1 Bradf. 40, in note 7, *supra*; *Post v. Herbert*, 27 N. J. Eq. 540, in note 19, *infra*.

¹¹ The word "when" is ordinarily to be construed not as creating a contingency, but as referring to the time of enjoyment. *Danforth v. Talbot*, 7 B. Mon. 623.

It appears to be a recognized construction that where the words "when" or "upon," etc., are used in wills in reference to the attainment of a specified age in the devise of real estate, they relate to the time of enjoyment, and not to the time of vesting of the estate. *Illinois Land & Loan Co. v. Bonner*, 75 Ill. 315.

¹² It is well settled that where an estate in land is devised to an infant "when he attains the age of twenty-one years," his attaining that age is not a condition precedent to the vesting of his estate, but a simple postponement of the period at which he shall take possession. *Radley v. Kuhn*, 97 N. Y. 26; *Clark v. Peters*, 68 Misc. 252, 124 N. Y. Supp. 961.

claiming under the devise over, and to construe the condition as a condition subsequent divesting a previously vested estate; and the better opinion and weight of authority is to the effect that it is *prima facie* a word of contingency.¹³ The word "when," however, has been said not to be so stubborn

as the words "if" or "provided," and may be more readily subdued by the context.¹⁴ The expressions "when and as," and "as and when," likewise import contingency,¹⁵ but also readily yield to inferences of a contrary intention derived from the context.¹⁶ It has been said that while the word "as" is not

Where nothing is interposed between the infant and his enjoyment of real estate except his own minority, he has a vested estate subject to be defeated by the condition subsequent of his dying under age. *Manice v. Manice*, 43 N. Y. 308; *Bailey v. Buffalo Loan, Trust & S. D. Co.* 75 Misc. 23, 132 N. Y. Supp. 513.

In *Hooker v. Bryan*, 140 N. C. 402, 53 S. E. 130, the court, though finding it unnecessary to determine whether the distinction exists, stated that while several modern text writers of approved excellence, and many decisions, seem to give the words "when" and "upon" the same significance in reference to devises of real and bequests of personal property, the older authorities hold that in respect to realty such words import usually a condition subsequent determinative of the estate according to the terms of the condition, and that in the meantime the estate will vest.

The rule that a gift to one at or when he attains a certain age is contingent does not altogether apply to devises of realty. *Sellers v. Reed*, 88 Va. 377, 13 S. E. 754.

¹³ The word "when," unexplained by the context, is a word of contingency. *Re Francis* [1905] 2 Ch. 295, 74 L. J. Ch. N. S. 487, 53 Week. Rep. 571, 93 L. T. N. S. 132.

A devise to one "when" he shall attain a certain age, standing alone, and not preceded by any intermediate interest which might have enabled the court to say that attaining the prescribed age does not import a condition precedent, but marks the determination of the particular estate, or followed by any gift over on the devisee's dying under the specified age, which might have enabled the court to hold that the devisee took whatever was not given over to the party claiming under the devise over, and to construe the condition as a condition subsequent divesting a previously vested estate,—is contingent, and the attainment of the specified age is a condition precedent to the estate vesting. *Ibid.*

In *Bigelow v. Bigelow*, 19 Grant, Ch. (U. C.) 549, it was said that it had never been expressly decided that a devise to A when he should attain twenty-one, standing isolated, without any gift over or any disposition of an intermediate estate or interest, will confer a mere contingent interest, but that, on principle and from what is found stated by text writers of authority, it must be assumed that that would be the proper conclusion.

Mr. Fearn, whose work on *Contingent Remainders & Executory Devises* entitles him to speak with authority, gave as his opinion in a case in which he was consulted, that a devise of lands to one "when he L.R.A.1915C.

arrives to twenty-one years of age" will not vest in the devisee under that age unless the devise is accompanied with some intermediate disposition of the estate or of the rents and profits thereof, saying: "And if it should be urged that here being a devise to him and his heirs, followed by the words 'when he arrives to twenty-one years of age,' the latter words shall be construed only to denote the time when he is to become entitled to the possession, the question is, Who shall have the possession in the meantime? For it must be either the devisee himself or the heir of the testator. The devisee cannot be entitled thereto if we pay any regard or allow any sort of effect to the words 'when he arrives to twenty-one years of age.' And if we admit the heir of the testator to be entitled thereto, then we destroy the supposition of the estate's being vested in the devisee, for the heir of the testator could not possibly be entitled (as such) under any interest vested in the devisee." *Fearne*, *Posthumous Works*, 191.

¹⁴ The words "if" and "provided" import an absolute condition, but "when" is not so stubborn and will yield to an intention, if it can be reasonably inferred from other parts of the will not to annex the condition to the gift, but only to the possession and enjoyment; as, when the suspension of the enjoyment may be accounted for by special circumstances and reasons not applicable to a suspension of the gift, showing that the only purpose was to suspend the enjoyment, and that the word "when," if not thus restricted, would carry the suspension beyond what testator meant. *Fuller v. Fuller*, 58 N. C. (5 Jones, Eq.) 223.

See also, in this connection, notes 20 and 22, *infra*.

¹⁵ In *Kidman v. Kidman*, 40 L. J. Ch. N. S. 359, *Malins v. C.*, said that in all the cases the result is that where there is no intermediate gift of income by way of maintenance or otherwise, all gifts, whether they are to be "as or when" or "if" a party attains a particular age, are contingent.

In *Ingram v. Suckling*, 7 Week. Rep. 386, *Wood v. C.*, said that the words "as and when," more particularly in reference to personal estate, if there was no other gift have been held to imply that the gift was contingent until the particular age had been attained, but that the courts had struggled to find an intermediate gift of property so as to refer these words to the period of distribution.

¹⁶ The words "as and when" are ambiguous, and do not of themselves make the attainment of the specified age a condition precedent to the acquisition of the right to

directly conditional, still it imports contingency, and is generally so construed.¹⁷

The words "on" or "upon," in a gift to one on or upon attaining a certain age, where uncontrolled by other parts of the will, import contingency,¹⁸ as does also the word "at."¹⁹

All these words and their kindred may be

the legacy. *Pearman v. Pearman*, 33 Beav. 394.

A gift to children "as and when they shall attain twenty-one," though *prima facie* meaning a gift to children contingently upon their attaining twenty-one, may be said to be words of a character that may have light thrown upon them by the words of the gift over on the parent dying without leaving any children, though it seems that such words cannot be turned into noncontingent words, and gifts to the children become vested at birth, merely by reason of a gift over on the parent dying without children or without issue. Per *Romer, L. J.*, in *Re Edwards* [1906] 1 Ch. 570, 75 L. J. Ch. N. S. 321, 54 Week. Rep. 446, 94 L. T. N. S. 593.

"A direction to pay implies a gift, and a direction to pay only to such persons as shall attain a certain age (unless controlled by other words clearly and decidedly preventing that effect) will prevent the implied gift from vesting in any object of it who does not attain that age. But a direction to pay an indefinite class of persons, when and as they attain the age, is ambiguous. It does not necessarily, or at least so strongly as the description of the class before mentioned, tend to prevent the vesting in interest. The gift itself and the time of payment are not necessarily identical; though the gift itself is found in the direction to pay, the words may mean only to postpone the payment, without postponing the vesting of the gift." *Harrison v. Grimwood*, 12 Beav. 192.

¹⁷ *Re Blake*, 157 Cal. 448, 108 Pac. 287.

¹⁸ There is no difference between the words "on his attaining," and "when" or "if" the devisee shall attain, a certain age, or "at" that age. All equally import contingency when they are contained in the gift itself and are uncontrolled by the other portions of the will. *Love v. Love, Ir. L. R. 7 Eq. 306.*

The use of the word "upon," followed by a direction to convey, indicates that until the contingency named happens there is to be no vesting. *Lewisohn v. Henry*, 179 N. Y. 352, 72 N. E. 239.

In bequests of personal property, the words "on or upon," or "when," usually import a condition, and unless explained or controlled by some expressions or other provisions of the will, they are annexed as conditions precedent to the substance of the gift, and render the interest contingent. *Hooker v. Bryan*, 140 N. C. 402, 53 S. E. 130.

¹⁹ A bequest to A "at" a given age or marriage, or "when" or "from and after" L.R.A.1916C.

so explained and controlled by the context of the will as not to prevent the legacy or devise from vesting before the time when it is to take effect in enjoyment.²⁰ As to the context which will be sufficient to do this, see the cases set forth in subdivision VIII. *infra.*

The form in which the inquiry whether

his attaining a given age, is *prima facie* contingent. *Post v. Herbert*, 27 N. J. Eq. 540.

See also *Watkins v. Quarles*, 23 Ark. 179; *Major v. Major*, 32 Gratt. 819; *Provenchere's Estate*, 1 Campb. (Pa.) 68; and *Weyman v. Ringold*, 1 Bradf. 40; in note 7, *supra*; *Love v. Love, Ir. L. R. 7 Eq. 306*; in note 18, *supra*.

²⁰ It was said by Lord Chief Justice Tindal in delivering the opinion of the common-law judges in response to the question propounded by the House of Lords in *Phipps v. Ackers*, 9 Clark & F. 583, 6 Jur. 745, that whatever may be the meaning of a simple devise to A and his heirs "when" or "if" he shall attain twenty-one, without any concomitant provisions calculated to show whether the testator did or did not mean to treat the attaining twenty-one as a condition precedent, there is ample authority for saying that such words may, from the context, be taken not to indicate the time when the estate is to vest, but to point out an event on the happening of which an estate already vested is to be divested in favor of some other person.

Notwithstanding the use of the word "when," when it appears from the context or from the general scope of the will that the testator intended to designate only the time when the enjoyment of the legacy is to commence, the legacy will be held to be vested. *Sims v. Smith*, 59 N. C. (6 Jones, Eq.) 347.

While it is the general rule that a legacy to a person "when" or "as" he shall attain to a given age is *prima facie* contingent, circumstances, even though but slight, in the context, may be sufficient to show that the attainment of the specified age was not intended as a condition, but only to fix the time of payment, in which case it will be held to be a vested legacy. *Fisher v. Johnson*, 38 N. J. Eq. 46.

The words "when" and "upon" may be so explained and controlled by other expressions and provisions of the will that they do not import a condition at all, but simply refer to the time of enjoyment. *Hooker v. Bryan*, 140 N. C. 402, 53 S. E. 130.

In *Colt v. Hubbard*, 33 Conn. 281, it is said that the rule that a legacy given to a person "as" or "when" he arrives at a certain age is presumably contingent was adopted by English jurists from the civil law; and that although in England, where most wills are drawn with technical accuracy by men educated to the business of conveyancing, it may be safe to assume as a rule that the words are used in the technical sense they have acquired, it is ques-

the particular expression used relates to the vesting or to the enjoyment is usually put, is whether futurity is or is not annexed to the substance of the gift.²¹ The modes of expression which will disserve the provision relative to the attainment of the specified age from the substance of the gift will be considered in due course. As above stated, expressions importing a postponement of vesting may be so controlled by other expressions and circumstances as to postpone payment or possession only, and not the vesting.²²

In determining whether the expression

tionable whether such an assumption is safe in the United States; that although where the words "if" or "provided" the legatee arrive at a certain age are used, the intention to give contingently is clear, the words "as," "when," and "at" may naturally be used, and probably are often used by the draftsman, when the intention of the testator is to give an absolute legacy and let it remain in the hands of the executors until the legatee arrives at an age to be intrusted with the control of it. The court further expressed the opinion that where those words are used by a draftsman of ordinary intelligence and experience, and the legacy is specific, and the time fixed is that of legal age, and there is no bequest over, nor provision for intermediate support or appropriation of the income, and nothing else to indicate an intention to give contingently, a court should hesitate to confer such an intention from their use alone.

See also, in this connection, note 22, *infra*.

²¹ See footnote 42, *infra*.

²² *Davies v. Fisher*, 5 Beav. 201, 11 L. J. Ch. N. S. 338, 6 Jur. 248.

Although the terms in which a legacy is given are such as, standing alone and unexplained, would prevent it from immediately vesting, yet if from the context of the will it appears that a condition precedent to its vesting was not intended, but that the words importing a condition were merely employed to designate the period when the legacy should be received or enjoyed, that sense is put upon the words which the will requires. *Watkins v. Quarles*, 23 Ark. 179; *Nixon v. Robbins*, 24 Ala. 663.

Words literally contingent in their meaning and import must bend to a construction in favor of vesting the estate in interest, if the will in its other parts and features shows that such was the intention of the testator. Technical words are presumed to be used in their settled legal meaning, but where a different intention is fairly deducible from the whole will the technical meaning must yield to the apparent intention. *Hersey v. Purington*, 96 Me. 166, 51 Atl. 866.

If it appears from any expression or direction contained in the will, or if it can fairly be deduced from the entire instrument, that testator's intention was that

used operates as a condition precedent,²³ or a condition subsequent, it must be remembered that a gift may be contingent either because the event upon which, or the person to whom, it is given remains uncertain. It follows that if the conditional element is incorporated into the description of, or gift to, the legatee, the condition is precedent; while if it is independently expressed it is a condition subsequent.

The difficulty in the application of these general principles in the class of cases under consideration is that it is not ordinarily possible to say, with any degree of con-

the legacy should vest immediately, words which, standing alone, would operate as words of condition, will be construed to designate only the time when the interest shall take effect in possession. *Gifford v. Thorn*, 9 N. J. Eq. 702.

The rule that, where a legacy is given to a person when a future event happens, the legacy will be contingent until the occurrence of such event, is a mere judicial exposition of the natural meaning of a certain form of expression. It is not an artificial contrivance which when present is to have a supreme effect, but is a rule simply because the phrases in question, considered intrinsically and without qualification *ab extra*, import a definite testamentary purpose. The phraseology has received its accepted interpretation because it is supposed that such interpretation will carry out the view of the testator. The consequence is, the rule is always subject to be modified or abrogated by the conditions of the case to which it is applied. *Post v. Herbert*, 27 N. J. Eq. 540.

Words which import a contingency may be so explained and controlled by the context of the will as not to prevent the legacy from vesting, the intention of the testator predominating over technical words and expressions, when either declared or apparent from a sound construction of the will. *Corbin v. Wilson*, 2 Ashm. (Pa.) 178.

Words of condition may be so explained and controlled by the context of the will as not to prevent the legacies from vesting before the happening of the event upon which they are made payable. *Green v. Green*, 86 N. C. 546.

"The courts will not construe a remainder to be contingent merely on account of the inaccurate and inartificial use of expressions importing contingency, if the nature of the limitations affords ground for concluding that they were not used with a view to suspend the vesting." *Jarman, Wills*, 6th ed. *778.

See also footnotes 14, 20, *supra*, and 33, 64, 72 and 218, *infra*.

²³ In *Bromfield v. Crowder*, 1 Bos. & P. N. R. 313, it was said that no precise words are necessary to constitute a condition precedent in wills, but that they must be construed according to the intentions of the parties; and that it would be

fidence, whether the testator was thinking of the attainment of the specified age by the legatee as an uncertain event, or merely as marking a period of time.²⁴ It is, as before remarked, equally possible that the testator may have wished to provide for the legatee only in case he shall reach maturity, or that he may have intended simply to defer possession and control until years of discretion shall be attained.

Again, it is not always easy to say whether the conditional element is incorporated into the gift, or is part of the description of the legatee. For instance, while in the case of a gift to such of the children of A as shall attain twenty-one the contingency clearly enters into the description of the legatees, in the case of a gift to the children of A if they attain twenty-one it may be argued with equal plausibility, on the one hand, that the contingency attaches only to the gift, or, on the other hand, that a child of A must attain twenty-one in order to sustain the character of a legatee. It has even been suggested that attainment of the specified age may be part of the description of the legatee, where the gift is to a known individual.²⁵ This apparently inconsequential distinction has two practical consequences; one of which is that if the gift is a class gift, and the contingency is regarded as attaching to the event rather than to the description of the legatee, the members of the class living at the time the eldest of them attains the specified age will take vested interests whether they live to attain such age or not,²⁶ which they of course could not do if the attainment of such age were considered as part of the description of the persons entitled. The sec-

ond consequence is that where the provision contemplating the accomplishment of a certain age does not form part of the description of the legatees, it may be shown by the context to relate to the enjoyment, and not to the vesting.

Another element of confusion in the subject under discussion is that the rules of construction were originally different in cases of devises of realty than in cases where personalty only is involved. This difference, which seems to have been due to the circumstance that the technical rules of law operating in each case necessitated a different construction of the same forms of expression in order to prevent the general intention of the testator from being defeated thereby, has apparently been lost sight of in some of the American cases.

Where real and personal property are blended in the same gift,²⁷ or when a legacy is given out of a mixed fund of real and personal estate,²⁸ or when a legacy is charged upon real estate,²⁹ or when land and personalty are devised together, with a direction to invest the personalty in the purchase of land,³⁰ there is authority to the effect that the rules governing devises of realty will prevail. But where a legacy or annuity is payable out of both real and personal property, it must be dealt with, so far as it is payable out of realty, according to the rules regarding legacies payable out of real estate only, and, so far as it is payable out of personal estate, according to those regarding legacies payable out of personal estate only.³¹ A gift out of the proceeds of lands directed to be sold will be considered as a gift of personalty.³²

absurd, considering the various circumstances under which wills are made, to require particular terms to express particular meanings.

²⁴ In *Briscoe v. Wickliffe*, 6 Dana, 162, it is said in reference to a devise to one "if" or "when" he attains a certain age, that "the law, in ascertaining the intention of the testator, may regard him as looking only to the point of time when the event referred to would certainly happen, if at all, and not to the happening of the event itself; and as in this point of view the time may be ascertained with entire certainty, the devise, though apparently dependent on a contingent event, may be construed as referring to a certain time which must come, and as, therefore, being in itself uncontingent and sufficient to convey an immediate vested interest, the enjoyment of which may or may not be postponed as indicated by other circumstances in the will." And see, to the same purport, *Williams v. Williams*, 91 Ky. 547, 16 S. W. 361.

L.R.A.1915C.

²⁵ See *Dawson v. Killet*, 1 Bro. Ch. 123, as set forth in note 51, *infra*; *Leake v. Robinson*, 2 Meriv. 363, 16 Revised Rep. 168, and *Mackell v. Winter*, 3 Ves. Jr. 296, as set forth in note 215, *infra*.

²⁶ See cases cited in footnote 3, *supra*.

²⁷ *James v. Wynford*, 1 Smale & G. 40, 22 L. J. Ch. N. S. 450, 17 Jur. 17, 1 Week. Rep. 61; *McLeod v. McDonnell*, 6 Ala. 236; *Collier's Will*, 40 Mo. 287; *Sellers v. Reed*, 88 Va. 377, 13 S. E. 754.

²⁸ *Van v. Clark*, 1 Atk. 510.

²⁹ See subdivision V. *infra*.

³⁰ *Jackson v. Marjoribanks*, 12 Sim. 93, 5 Jur. 885.

³¹ *Creeth v. Wilson*, Ir. L. R. 9 Eq. 216.

³² See *Hart's Trusts*, 3 De G. & J. 202, 28 L. J. Ch. N. S. 7, 4 Jur. N. S. 1264, 7 Week. Rep. 28.

The mere fact that the testator provides the means for the payment of legacies by directing that real estate shall be sold for the purpose cannot affect the question as to whether they are vested or contingent. *Clayton v. Somers*, 27 N. J. Eq. 230.

III. Circumstances supporting or varying implication of contingency.

a. In general.

From what has been said in the preceding subdivision, it will be apparent that a provision in a bequest or devise contemplating the attainment of a certain age, without more, is generally regarded as implying that the gift is contingent upon the attainment of such age; but that it may be shown by the context to relate to enjoyment only, or to operate simply as a condition

subsequent to divest the gift if the donee fails to reach the specified age.

But before proceeding to examine the forms of expressing the gift itself, or the other circumstances in the context which will vary its presumptive meaning, note must be taken of certain general considerations, applicable alike to devises of realty and bequests of personalty. These are the leaning of the courts toward a construction which will give the legatee or devisee a vested rather than a contingent interest,³³ which sometimes finds form in the expression of a preference for a construction which

³³ When words are equivocal, leaving it in some doubt whether words of contingency or condition apply to the gift itself or to the time of payment, courts are inclined to construe them rather as applying to the time of payment, and to hold the gift rather as vested than contingent. *Eldridge v. Eldridge*, 9 Cush. 516.

The law leans in favor of the vesting of legacies, because the convenience of the legatees and the interests of society are opposed to the tying up of property and keeping it out of the commerce of life. It favors the vesting of legacies more especially when given to children or those standing in a like relation to testator, because it presumes that the testator's natural desire is that families of the legatees who die before the time for actual receipt of the legacy shall succeed to the provision made for their parents. And it also favors the vesting of legacies, because it will not intend that the testator meant to die partially intestate. *Vanhook v. Vanhook*, 21 N. C. (1 Dev. & B. Eq.) 589.

The inclination of the courts is always in favor of the vesting of legacies, because in ninety-nine cases out of a hundred it is the intention of the testator that his bounty should be transmitted to the children or family of the beneficiary; otherwise, indeed, full effect is not given to it. *Chess's Appeal*, 87 Pa. 362, 30 Am. Rep. 361.

A further consideration is applicable in the case of a remainder. Thus in *Browne v. Browne*, 3 Smale & G. 568, it is said: "It is a rule of law that an estate in remainder must take effect *eo instante* that the particular estate determines; and if the remainder be limited on a contingency which has not happened when the particular estate determines, it must fail. To modify the intolerable hardship of defeating the clear intentions of testators, it is an established rule of construction that in doubtful cases a remainder shall, if possible, be construed to be vested rather than contingent. For this purpose words of contingency are, as much as possible, to be treated as referring rather to the period when the remainder is to become vested absolutely and indefeasibly, than as preventing the remainderman from taking any present interest, and thereby altogether losing the estate." L.R.A.1915C.

The courts lean even more strongly in favor of the vesting of devises than of legacies. The former are always held to be vested, except estates in the devise of which the condition precedent is so clearly expressed that to treat them as vested would be to decide in direct opposition to the intention of the testator. Hence words of seeming condition, as "when," "upon," etc., are, if possible, held to have only the effect of postponing the right of possession. And even though the devise be clearly conditional yet the condition will be construed, if possible, as a condition subsequent, so as to confer an immediately vested estate, subject to be divested on the happening of the contingency. *Sellers v. Reed*, 88 Va. 377, 13 S. E. 754.

A reason sometimes given for construing gifts of realty as vested, rather than as executory devises to take effect at the attainment of a particular age, is that otherwise the property would in the meantime descend to the heir at law, who, knowing that he can enjoy it only for a short period, may mismanage it to the end that he may receive the greatest possible profit. Thus, in *Duffield v. Duffield*, 3 Bligh, N. R. 260, Best, Ch. J. said: "Whilst estates remain contingent, those in whom they are at a future time to be vested have no interest in the estates, or the rents and profits of such estates. Such estates must descend to the heir, if they are not given to any person to hold until the events happen on which they are to become vested. This point is too clear to require any observation; indeed, it was not disputed at the bar. Testators who create contingent estates often forget to make any provision for the preservation of their estates, and for the disposition of the rents and profits in the intermediate period between their deaths and the vesting of their estates. In such cases, the estates descend to the heirs, who, knowing that they are to enjoy them only for a short period, and that they have obtained the possession of them from the inattention of and not from the bounty of the testator, or from the mistake of the professional man who drew the will, will make the most that they can of them during the time that they remain theirs, regardless of any injury that the estates may suffer from their conduct. The rights of

will preserve the gift to the children of legatees or devisees in case of their death before attaining the specified age;³⁴ their

inclination in favor of the construction which will avoid, as against one which will produce, an intestacy,³⁵ which is especially

the different members of families not being ascertained whilst estates remain contingent, such families continue in an unsettled state, which is often productive of inconvenience, and sometimes of injury to them. If the parents' attaining a certain age be a condition precedent to the vesting estates, by the death of their parents before they are of that age children lose estates which were intended for them, and which their relation to the testators may give them the strongest claim to. In consideration of these circumstances, the judges from the earliest times were always inclined to decide that estates devised were vested; and it has long been an established rule for the guidance of the courts of Westminster in construing devises, that all estates are to be holden to be vested, except estates in the devise of which a condition precedent to the vesting is so clearly expressed that the courts cannot treat them as vested without deciding in direct opposition to the terms of the will. If there be the least doubt, advantage is to be taken of the circumstance occasioning that doubt; and what seems to make a condition, is holden to have only the effect of postponing the right of possession."

³⁴ For instances in which this consideration was a factor, see *Dodson v. Hay*, 3 Bro. Ch. 404 (set out in VIII. a, infra); *Goodtitle ex dem. Hayward v. Whitby*, 1 Burr. 228, 1 Ld. Kenyon, 506 (set out in VIII. l, infra); *Doe ex dem. Wheedon v. Lea*, 3 T. R. 41, 25 Eng. Rul. Cas. 585 (set out in VIII. l, infra); *Duffield v. Duffield*, 3 Bligh, N. R. 260 (set out infra); *Kerlin v. Bull*, 1 Dall. 175, 1 L. ed. 88 (set out in VIII. l, infra); *Cropley v. Cooper*, 19 Wall. 167, 22 L. ed. 109 (set out in VIII. i, infra); *McArthur v. Scott*, 113 U. S. 340, 28 L. ed. 1015, 5 Sup. Ct. Rep. 652 (set out in VIII. q, infra); *Dale v. White*, 33 Conn. 294 (set out in III. b, 1, infra); *Danforth v. Talbot*, 7 B. Mon. 623 (set out in VIII. i, infra); *Collier's Will*, 40 Mo. 287 (set out in VIII. q, infra); *Teele v. Hathaway*, 129 Mass. 164 (set out in VIII. f, infra); *Goebel v. Wolf*, 113 N. Y. 405, 10 Am. St. Rep. 464, 21 N. E. 388 (set out in VIII. q, infra); *Perry v. Rhodes*, 6 N. C. (2 Murph.) 140 (set out in VIII. q, infra); *Johnson v. Baker*, 7 N. C. (3 Murph.) 318, 9 Am. Dec. 605 (set out in VIII. i, infra); *Vanhook v. Vanhook*, 21 N. C. (1 Dev. & B. Eq.) 589 (set out in VIII. j, infra); *Reed v. Buckley*, 5 Watts & S. 517, 40 Am. Dec. 531 (set out in VIII. f, infra); *Kinsey v. Lardner*, 15 Serg. & R. 192 (set out in VIII. k, infra); *Stark v. Molleson*, 8 Watts, 432 (set out in VIII. i, infra); *Sellers v. Reed*, 88 Va. 377, 13 S. E. 754 (set out in VIII. q, infra); *Raney v. Heath*, 2 Patton & H. (Va.) 206 (set out in VIII. d, infra).

The fact that the devisee's children would, L.R.A.1915C.

in the event of his death under a specified age leaving children, have taken a much smaller interest than they would have taken had the devise vested in their parent, is a factor to be considered. *Danforth v. Talbot*, 7 B. Mon. 623.

It is a consideration of weight in determining whether a remainder is vested or contingent, that if it is held contingent the children of the remainderman dying under twenty-one will take no benefit of the provision made for their father. *Cropley v. Cooper*, 19 Wall. 167, 22 L. ed. 109; *McArthur v. Scott*, 113 U. S. 340, 28 L. ed. 1015, 5 Sup. Ct. Rep. 652.

But in *Duffield v. Duffield*, 3 Bligh, N. R. 260, Best, Ch. J., said, with reference to the contention that estates should be considered vested to preserve them for the children of devisees dying before attaining the age at which the estates would vest: "But is it wise to encourage the marriage of infants, by making a provision for the children, however imprudently, and however much in opposition to the wishes of their guardians, such marriages may be contracted? The uncertainty of a provision for a family may occasion a pause, before the most important step in life be taken, which cannot be attended with lasting inconvenience, and may prevent lasting misery. Children will seldom suffer from estates remaining contingent until their parents attain the age of twenty-one; as few to whom such estates are given will have legitimate children before they are of age."

³⁵ Since, *prima facie*, it may be presumed that a testator did not intend that any interest bequeathed in his will should lie dormant or undisposed of after his death, or should ever lapse, a slight circumstance may be sufficient for showing that a legacy is vested, and not contingent. *Roberts v. Brinker*, 4 Dana, 570.

For instances in which this consideration was a factor, see *Peard v. Kekewich*, 15 Beav. 166, 21 L. J. Ch. N. S. 456 (set out in III. b, 1, infra); *Wadley v. North*, 3 Ves. Jr. 364 (set out in III. b, 1, infra); *Bevan's Trusts* L. R. 34 Ch. Div. 716, 56 L. J. Ch. N. S. 652, 56 L. T. N. S. 277, 35 Week. Rep. 400 (set out in VIII. j, infra); *Watkins v. Quarles*, 23 Ark. 179 (set out in VIII. a, infra); *Morton Trust Co. v. Chittenden*, 81 Conn. 105, 70 Atl. 648 (set out in VIII. a, infra); *Richardson v. Penicks*, 1 App. D. C. 261 (set out in VIII. g, infra); *Boling v. Miller*, 133 Ind. 602, 33 N. E. 354 (set out in VIII. d, infra); *Ross v. Ayrhart*, 138 Iowa, 117, 115 N. W. 906 (set out in III. b, 1, infra); *Danforth v. Talbot*, 7 B. Mon. 623 (set out in VIII. i, infra); *Grigsby v. Breckinridge*, 12 B. Mon. 629 (set out in VIII. g, infra); *Allan v. Vanmeter*, 1 Met. (Ky.) 264 (set out in VIII. j, infra); *Williams v. Williams*, 91 Ky. 547, 16 S. W. 361 (set out in VIII. i,

strong where the subject of the gift is residue.³⁶ So, also, the circumstance that a bequest is to a class is said to be favorable to a construction of the gift as vested rather than as contingent.³⁷

While none of these considerations is in itself sufficient to control the construction of a testamentary provision,³⁸ it may turn the scale in what would otherwise be a doubtful case.

If the construction of a testamentary pro-

vision is one about which a court would have no doubt, that construction cannot be altered or wrested to something different, for the purpose of escaping from the consequences of the rule against perpetuities,³⁹ though possibly if the gift might equally well be construed in two ways, one of which only would offend against the rule, the court might, because of the rule, be led to adopt the other construction.⁴⁰

infra; *Teale v. Hathaway*, 129 Mass. 164 (set out in VIII. f, *infra*); *Ordway v. Dow*, 55 N. H. 11 (set out in VIII. f, *infra*); *Vanhook v. Vanhook*, 21 N. C. (1 Dev. & B. Eq.) 589 (set out in VIII. j, *infra*); *Robinson's Estate*, 13 Phila. 299 (set out in VIII. r, *infra*); *Raney v. Heath*, 2 Patton & H. (Va.) 206 (set out in VIII. d, *infra*).

As to its probative force, see note 38, *infra*.

³⁶ See *Leake v. Robinson*, 2 Meriv. 363, 16 Revised Rep. 168; *Jones v. Mackilwain*, 1 Russ. Ch. 220, 25 Revised Rep. 32; *Bolger v. Mackell*, 5 Ves. Jr. 509; *Pearman v. Pearman*, 33 Beav. 394; *Sullivan v. Edgell*, 23 Week. Rep. 722; *Raney v. Heath*, 2 Patton & H. (Va.) 206.

Where a bequest is of a residue, and the words are such as, in the case of a legacy merely, would have made the legacy contingent, the bequest of the residue shall not be so held; and upon this distinction, that it is difficult to suppose that the testator meant to die intestate as to the residue. *Underwood v. Dismukes*, Meigs, 299. But compare cases in note 38, *infra*.

³⁷ *Raney v. Heath*, *supra*.

Upon any difficulty occurring where there are words that import the necessity of a child attaining twenty-one before a vested interest can accrue, if the gift is to a class, and not to an individual, there is a stronger reason for holding that the intention was that the gift should be vested before twenty-one than in the case of a gift to an individual. *King v. Isaacson*, 1 Smale & G. 371, 22 L. J. Ch. N. S. 455, 17 Jur. 434, 1 Week. Rep. 209, citing *Harrison v. Grimwood*, 12 Beav. 192, 18 L. J. Ch. N. S. 485, 13 Jur. 864.

As to the probative force of this circumstance, see note 38, *infra*.

³⁸ The possibility of the disinheritance of the issue of any child dying before attaining the age of twenty-one will not countervail the ordinary rules of construction, and render that a vested gift which would, according to the ordinary interpretation of language, be contingent only. *Re Wrangham*, 1 Drew. & C. 358, 30 L. J. Ch. N. S. 258, 7 Jur. N. S. 15, 3 L. T. N. S. 722, 9 Week. Rep. 156.

The circumstance that the testator, by directing that any child marrying before the period for division should be deprived of the benefit of a provision for intermediate maintenance, thereby showing that he

was cognizant of the possibility of marriage and consequently of issue prior to that time, is not of itself sufficient to overcome the presumption created by the fact that the gift is found only in a direction to divide. *Anderson v. Felton*, 36 N. C. (1 Ired. Eq.) 55.

"It is said that the court leans against an intestacy. I do not know whether that expression at the present day means anything more than this, that in cases of ambiguity you may, at any rate in certain wills, gather an intention that the testator did not intend to die intestate, but it cannot be that, merely with a view to avoiding intestacy, you are to do otherwise than construe plain words according to their plain meaning." *Per Romer, L. J.*, in *Re Edwards* [1906] 1 Ch. 570.

The circumstance that a residue is the subject of the bequest, so that a construction of the gift as contingent may be to create a partial intestacy, although a circumstance to which some weight may attach, and which in a doubtful case may control the construction, is not of itself sufficient to overcome the effect of the use of the words importing contingency. *Gifford v. Thorn*, 9 N. J. Eq. 702.

The circumstance that the gift is to a class will not render a legacy, *prima facie* contingent, a vested one. *Post v. Herbert*, 27 N. J. Eq. 540.

³⁹ *Leake v. Robinson*, 2 Meriv. 363, 16 Revised Rep. 168; *Re Merwin* [1891] 3 Ch. 197, 60 L. J. Ch. N. S. 671, 65 L. T. N. S. 186, 39 Week. Rep. 697; *Re Turney* [1899] 2 Ch. 739, 69 L. J. Ch. N. S. 1, 48 Week. Rep. 97, 81 L. T. N. S. 548; *Re Hume* [1912] 1 Ch. 693, 81 L. J. Ch. N. S. 382, 106 L. T. N. S. 335, 56 Sol. Jo. 414.

In considering whether a testamentary gift is vested, the court lays out of sight the circumstance that, if one construction is adopted, a limitation in the will will be void for remoteness, while according to the other construction the limitation may be supported; but in such cases it first ascertains what the provisions of the instrument are, by applying to it the ordinary rules of construction, and then determines to what extent the provisions thus ascertained are in accordance with the rules of law. *Taylor v. Frobieber*, 5 De G. & S. 191, 21 L. J. Ch. N. S. 605, 16 Jur. 283.

⁴⁰ *Re Hume*, *supra*; *Re Bevan*, L. R. 34 Ch. Div. 716, 56 L. J. Ch. N. S. 652, 56 L. T. N. S. 277, 35 Week. Rep. 400.

So far as anything is apparent upon the face of the cases, it seems to have made little difference whether the age fixed by the testator is the age of majority or some later age, though in one case⁴¹ it is said that when the time appointed for the payment of a legacy is the age at which the law would give the legatee possession, i. e., at the age of twenty-one, the natural inference is that such age is not meant as the time at which the legacy should vest, but only at which the legatee will take possession; but if a further time is specified it may be supposed that the time may constitute one of the grounds upon which the legacy should vest. There is also a group of New York cases⁴² which state as a general rule that where nothing is interposed between an infant and his enjoyment of real estate except his own minority, he has a vested estate subject to be divested by the condition subsequent of his dying under age. There is no such general rule, and the statement, probably made in the first place through inadvertence, has simply been mechanically re-echoed in the subsequent decisions. The effect of the authorities cited in its support has been misapprehended, the existence of the limitation over being treated as immaterial, when in fact it was the point on which those authorities turned.

b. Dissociation of provision contemplating the attainment of a specified age from the gift.

1. In general.

It is a general rule, applicable alike to devises of realty and gifts of personality, that where there is a gift independent of the provision relating to the attainment of some specified age, the latter will not operate as a condition precedent, but will be taken as relating either to the time of enjoyment, or as constituting a condition subsequent operating to divest the gift, which in such case must necessarily vest in interest immediately.⁴³

Thus, where a future time for the payment of a legacy is defined by a will, the legacy will be vested or contingent according as, upon construing the will, it appears whether the testator meant to annex the time to the payment of the legacy or to the gift of it, or, as it is sometimes put, whether futurity is annexed to the substance of the gift or to the time of payment only.⁴⁴ Where a bequest is first made in terms which plainly vest an immediate estate, the subsequent addition of equivocal expressions having a contrary tendency will not be accepted as indicative of a contrary intention;⁴⁵ and if the gift and the direction as to payment are distinct, the direction as to time of payment does not postpone the vest-

⁴¹ *Wadley v. North*, 3 Ves. Jr. 364, 4 Revised Rep. 16.

⁴² *Manice v. Manice*, 43 N. Y. 308; *Bailey v. Buffalo Loan, Trust & S. D. Co.* 75 Misc. 23, 132 N. Y. Supp. 513; *Radley v. Kuhn*, 97 N. Y. 26; *Clark v. Peters*, 68 Misc. 252, 124 N. Y. Supp. 961.

In *Shannon v. Pentz*, 1 App. Div. 331, 37 N. Y. Supp. 304, the court, relying on this supposed principle held that the rule that a gift or devise to a person at his majority, or a direction of payment or transfer to him at that time, will not prevent the vesting of the estate or interest, but merely defeats it on the nonfulfilment of the condition, is not confined to cases where there is a limitation over in case the taker should die during minority.

⁴³ If the gift and the time of payment are distinct, then, as each clause in the will is to have some operation, the gift is deemed to be vested at once and payable at a future time. *Warren v. Hembree*, 8 Or. 118.

A gift to a person or class on their attaining the age of twenty-one is a contingent, and not a vested, gift; but if it is capable of being dissevered from a direction as to the time of payment, which is to be made on attaining twenty-one, the reference to the attainment of twenty-one is considered to apply only to the payment, and not to the gift, and does not prevent L.R.A.1915C.

the gift vesting. *Re Wrangham*, 1 Drew. & S. 358, 30 L. J. Ch. N. S. 258, 7 Jur. N. S. 15, 3 L. T. N. S. 722, 9 Week. Rep. 156.

⁴⁴ *Lenox v. Lenox*, 1 Hayw. & H. 11, Fed. Cas. No. 8,246a; *McLemore v. McLemore*, 8 Ala. 687; *High v. Worley*, 32 Ala. 709; *Andrews v. Russell*, 127 Ala. 195, 28 So. 703; *Johnson v. Terry*, 139 Ala. 614, 36 So. 775; *Cogburn v. Ogleby*, 18 Ga. 56; *Bowman v. Long*, 23 Ga. 242; *Wallingford v. DeBell*, 15 B. Mon. 551; *Furness v. Fox*, 1 Cush. 134, 48 Am. Dec. 593; *Eldridge v. Eldridge*, 9 Cush. 516; *Brown v. Brown*, 44 N. H. 281; *Marsh v. Wheeler*, 2 Edw. Ch. 156; *Everitt v. Everitt*, 29 N. Y. 39; *Greenland v. Waddell*, 116 N. Y. 234, 15 Am. St. Rep. 400, 22 N. E. 367; *Reed v. Buckley*, 5 Watts & S. 517, 40 Am. Dec. 531; *Seibert's Appeal*, 13 Pa. 501; *Provenchere's Appeal*, 67 Pa. 463; *Walker v. Thornton*, — Tex. Civ. App. —, 124 S. W. 166; *Major v. Major*, 32 Gratt. 819; *Benner v. Mauer*, 133 Wis. 325, 113 N. W. 663.

Whether time is annexed to the substance of the gift or only to the time of enjoyment, depends much upon the form of words in which the gift is expressed, the other parts of the will, and surrounding circumstances. *Eldridge v. Eldridge*, 9 Cush. 516.

⁴⁵ *Kimble v. White*, 50 N. J. Eq. 28, 24 Atl. 400; and see also cases in VII. infra.

ing;⁴⁶ but where there is no independent gift separate from the direction to pay, the legacy is contingent,⁴⁷ unless there is something in the context to vary the construction.⁴⁸

There is, however, a difference between cases involving devises of realty or legacies charged upon realty, and cases involving gifts of pure personalty, as to the form of expression which will dissociate the pro-

vision relative to the attainment of the specified age from the gift itself. In the case of legacies of a purely personal character, it is a very generally accepted principle of construction that (unless the context shows a contrary intention) the introduction of the words "to be paid," or "payable," or some equivalent expression,⁴⁹ dissociates the words of gift from the expression relative to the attainment of the specified age.⁵⁰

⁴⁶ If there is a direct gift to legatees, a direction for payment when they shall attain a certain age will not prevent the vesting of the legacy. *Re Bartholomew*, 1 Macn. & G. 354, 1 Hall & Tw. 565, 19 L. J. Ch. N. S. 237, 14 Jur. 181; *Re Kalter*, 86 Misc. 621, 148 N. Y. Supp. 921; *Weyman v. Ringold*, 1 Bradf. 40; and see also cases cited in footnote 47, *infra*.

It is a principle of very general application, although one which is not altogether inflexible, that where a legacy is given absolutely, but the time of payment is deferred, the legacy vests upon the death of the testator, even though the legatee may die before the time of payment arrives, for in such case the time of payment is not regarded as of the substance of the gift. *Zartman v. Ditmars*, 37 App. Div. 173, 55 N. Y. Supp. 908.

⁴⁷ If a legacy is given in the first instance, and then there is a separate direction to pay at twenty-one or marriage, it is vested; but if there is not an independent gift separate from the direction to pay, but a mere direction to pay at twenty-one or marriage, it is not vested. *Shum v. Hobbs*, 3 Drew. 93, 24 L. J. Ch. N. S. 377, 3 Week. Rep. 221.

Wherever the time is annexed to the legacy itself, and not to the payment of it, if the legatee dies before the time of payment it is a lapsed legacy. *Smell v. Dec*, 2 Salk. 415.

Where there is an antecedent absolute gift independent of the direction and time for payment, the legacy is vested; but where there is no substantive gift, and it is only implied from the direction to pay, the legacy is contingent (*Cooper v. Scott*, 62 Pa. 139; *Bowman's Appeal*, 34 Pa. 19); and does not vest until the contingency happens (*Grothe's Estate*, 237 Pa. 262, 85 Atl. 141; *Gregg v. Bethea*, 6 Port. [Ala.] 9).

See also cases cited in note 66, *infra*.

⁴⁸ See footnote 72, *infra*; also III. d, *et seq.*

⁴⁹ Among these equivalent expressions are:

"To be at their own disposal." *Burrill v. Sheil*, 2 Barb. 457 (set out in VII. *infra*).

"To be delivered" in the case of a specific bequest. *Hall v. David*, 67 Ga. 72; *Re Budd*, 166 Cal. 286, 135 Pac. 1131 (set out in VII. *infra*).

"To be given." *Warren v. Hembree*, 8 Or. 118 (set out in VII. *infra*).

"To be set apart." *Higgins v. Waller*, 57 Ala. 396 (set out in VII. *infra*).
L.R.A.1915C.

"To be distributed." *Brennan v. Brennan* [1894] 1 I. R. 69 (set out in VII. *infra*).

"To be divided." *Westwood v. Southey*, 2 Sim. N. S. 192, 21 L. J. Ch. N. S. 473, 16 Jur. 400 (set out in VII. *infra*); *Festing v. Allen*, 5 Hare, 573 (set out in VII. *infra*); *Farmer v. Francis*, 2 Sim. & Stu. 505, 4 L. J. Ch. 154 (set out in VII. *infra*); *Re Baillie*, 3 B. C. 350 (set out in VII. *infra*); *Cox v. McKinney*, 32 Ala. 461 (set out in VII. *infra*); *Dale v. White*, 33 Conn. 294 (set out in VII. *infra*); *Packard v. Packard*, 16 Pick. 191 (set out in VII. *infra*); *Doubleday v. Newton*, 27 Barb. 231 (set out in VII. *infra*); *Wade v. Dick*, 36 N. C. (1 Ired. Eq.) 313 (set out in VII. *infra*); *Guyther v. Taylor*, 38 N. C. (3 Ired. Eq.) 323 (set out in VII. *infra*); *Sims v. Smith*, 59 N. C. (6 Jones, Eq.) 347 (set out in VII. *infra*).

"To be received." *Kevern v. Williams*, 5 Sim. 171 (set out in VII. *infra*).

"Each receiving." *Wadleigh v. North*, 3 Ves. Jr. 364, 4 Revised Rep. 16 (set out in VII. *infra*).

"But they shall not receive." *Re Becker*, 59 Misc. 135, 112 N. Y. Supp. 221 (set out in VII. *infra*).

Words directing division or distribution between two or more objects at a future time are equivalent to a direction to pay. *Everitt v. Everitt*, 29 N. Y. 39.

The words "to have," in the phrase "each to have the amount of his share when he arrives at the age of twenty-one," have been held not equivalent to "to be paid." *Major v. Major*, 32 Gratt. 819; but see *contra*, *Breedon v. Tugman*, 3 Mees. & K. 289, 3 L. J. Ch. N. S. 169 (set out in VII. *infra*).

⁵⁰ A legacy to a child, payable when twenty-one, does not lapse upon the legatee's death before twenty-one. *Anonymous*, 2 Vern. 199, 2 Vent. 344.

The words "payable" or "to be paid" are supposed to dis sever the time from the gift of the legacy, so as to leave the gift immediate, in the same manner in respect to its vesting as if the bequest stood singly and contained no mention of time. *Major v. Major*, *supra*.

When a legacy is given, to be paid or payable at a particular time, or when the legatee shall attain a particular age, the legacy is vested, the condition relating only to the time of payment. *Gregg v. Bethea*, 6 Port. (Ala.) 9.

When a legacy is given to a person, to be paid or payable "at" or "when" he shall

attain the age of twenty-one, or at a future definite period, the interest in the legacy shall be considered to be vested in the legatee immediately upon the testator's death, the time being annexed only to the payment, and not to the gift of the legacy. *Corbin v. Wilson*, 2 Ashm. (Pa.) 178.

If a legacy is given to a legatee, and is directed to be paid at twenty-one, and the legatee dies before that age, the legacy will vest in the meantime, subject to be divested in the event of his dying under the age of twenty-one. *Moody v. Walker*, 3 Ark. 187; *Blackburn v. Hawkins*, 6 Ark. 50.

Where the gift of a legacy is absolute, and the time of payment only is postponed, as, where a sum of money is given to A to be paid when he shall attain the age of twenty-one, the time, not being of the substance of the gift, postpones the payment, but not the vesting of the legacy. *Watkins v. Quarles*, 23 Ark. 179.

It is a well-settled rule of construction that a legacy given to a person or a class to be paid or divided at a future time takes effect, in point of right, on the death of the testator. In such case the contingency attaches not to the substance of the gift, but to the time of payment. And where words are equivocal, leaving it in doubt whether the words of contingency or condition apply to the gift itself or the time of payment, courts are inclined to construe them as applying to the time of payment, and to hold the gift as vested rather than contingent. *Dale v. White*, 33 Conn. 294.

If a legacy is given to a class of persons, to be paid to them or to be divided between them when one shall attain a certain age, or at any other definite future time, they take a vested interest immediately after the testator's death, the presumption being that he intended to annex the time to the payment and distribution, and not to the gift; and this presumption is strengthened if he directs the intermediate use or profits to be applied for their maintenance. *Hocker v. Gentry*, 3 Met. (Ky.) 463.

In *Kimball v. Crocker*, 53 Me. 263, it is said that when there is a gift of a legacy or a share of residue, to be paid at or when the legatee shall attain twenty-one years, or any specified age, the gift vests in the legatee at the death of the testator, the time applying only to the payment.

Where a legacy is given to a legatee by words of immediate or present gift, but payable at the age of twenty-one, it is deemed a vested legacy. *Spence v. Robins*, 6 Gill & J. 507, 26 Am. Dec. 587.

Where a legacy is given to a person, to be paid at a particular age or at the end of a fixed term, he takes a vested interest. *Burrill v. Sheil*, 2 Barb. 457.

Where a legacy is given to a person, to be paid or payable at or when he shall arrive at the age of twenty-one, or at a future definite period, the interest in the legacy shall be considered to be vested immediately on the testator's death, the time being only annexed to the payment, and not L.R.A.1915C.

to the gift of the legacy. *Bayard v. Atkins*, 10 Pa. 15.

There is a distinction where a legacy is given to one at his age of twenty-one in which case it is not vested, and a case where it is given to him, to be paid at twenty-one, in which case it is vested. *Fonereau v. Fonereau*, 3 Atk. 645, 1 Ves. Sr. 118.

The rule is that, where a legacy is given to a person to be paid at a future time, it vests immediately; but where it is not given until a certain future time, it does not vest until that time; and if the legatee dies before, it is lost. This is the rule, but in the application of it there is great nicety, and the adjudged cases can hardly be reconciled. *Patterson v. Hawthorn*, 12 Serg. & R. 114.

In the case of a legacy to a person, to be paid to him at twenty-one, the legacy is considered as vesting in him immediately, but where the gift is merely by a direction to pay to him at twenty-one, the legacy does not vest forthwith, but until he attains the specified age he has no vested interest. *Jones v. Mackilwain*, 1 Russ. Ch. 220, 25 Revised Rep. 32.

Where a legacy or devise is given to a person, to be paid at a future time, it vests immediately. When, however, it is not given till a future time, it is contingent, and does not vest until that time occurs. *Re Blake*, 157 Cal. 448, 108 Pac. 287.

A legacy to one upon attaining a given age is contingent upon attainment of that age by the legatee, but a legacy to one, payable at a given age, is a present gift, and vests at once, the principal only being postponed. *Re Couturier* [1907] 1 Ch. 470, 76 L. J. Ch. N. S. 296, 96 L. T. N. S. 560.

If a gift of personality is general, and there is merely a simple direction that it be paid or that the fund be distributed or divided at a specified time or upon the happening of a like contingency, it will vest at the testator's death, and the payment or distribution only will be postponed. If, however, the element of futurity is annexed to the gift itself, and is not merely indicative of the time of payment, or if the time of payment is made descriptive of the class that is to take, the gift will not vest in interest until the time so fixed for payment or distribution has arrived. *McCartney v. Osburn*, 118 Ill. 403, 9 N. E. 210.

If a legacy be devised to one generally, "to be paid" or "payable" at the age of twenty-one years or any other age, and the legatee die before that age, yet this is such an interest vested in the legatee that his executors or administrators may sue for and recover it; but if a legacy be devised to one "at" twenty-one, or "if" or "when" he shall attain the age of twenty-one years, and the legatee dies before that age, in this case the legacy is lapsed, and shall not go to his executors or administrators. *Stapleton v. Cheales*, Pree. in Ch. 317, 2 Vern. 673; *Carr v. Jeannerett*, 2 McCord, L. 66.

The rule and distinction is that if a legacy be devised to one generally, "to be

paid" or "payable" at the age of twenty-one or any other age, and the legatee die before that age, yet this is an interest vested in the legatee, for it is *debitum in presenti*, though *solvendum in futuro*, the time being annexed to the payment, and not to the legacy itself; but if a legacy be devised to a person "at" twenty-one, or "if" or "when" he shall attain the age of twenty-one, and the legatee dies before that age, the legacy is lapsed. *Steadman v. Palling*, 3 Atk. 423.

In *Goss v. Nelson*, 1 Burr. 226, Lord Mansfield said, *obiter*, that in legacies there is a known distinction between the time being annexed to the substance of the gift, or to the payment. "If complete words of gift direct the executor to pay, the other words only fix the time of such payment; and then the legacy vests; and is transmissible, though the legatee should die before the day of payment, as a legacy given 'to be paid at twenty-one.' But if the time is annexed to the substance of the gift, as a legacy 'if' or 'when' he shall attain twenty-one, it will not vest before that contingency happens."

Where a legacy is given to a person "as," "if," "when," or "provided" he arrives at a certain age, or "at" that time, and there is no other controlling evidence of intention, the legacy is contingent; but where it is given generally, and "payable" or "to be paid" at such time, it is vested. *Colt v. Hubbard*, 33 Conn. 281.

Where property is given by will to one when he shall attain the age of twenty-one years, or at the age of twenty-one, the vesting itself, and not merely the possession, is deferred, and a contingent interest is conveyed. If, however, the gift be in the first instance to the devisee or legatee, and is then directed to be paid at the age of twenty-one, the title vests immediately upon the death of the testator. *Cogburn v. Ogleby*, 18 Ga. 56.

A bequest to a person, payable or to be paid at or when he shall attain twenty-one years, confers on him a vested interest immediately at the testator's death; for the words "payable" or "to be paid" are supposed to dismiss the time from the gift of the legacy, so as to leave the gift immediate in the same manner in respect to its vesting as if the bequest stood singly and contained no mention of time; but if the words "payable" or "to be paid" are omitted, and the legacies are given at twenty-one, or "if," "when," "in case," or "provided" the legatees attain twenty-one or any other future definite period or term, these expressions annex the time to the substance of the legacy, and make the legatee's right to it depend upon his being alive at the time fixed for its payment. *Bowman v. Long*, 23 Ga. 242.

If a legacy be given to a person, "payable" or "to be paid" at or when he shall attain the age of twenty-one years, or at or upon any other definite period or event, the legacy becomes vested immediately on

the testator's death; but if the words "payable" or "to be paid" are omitted, and the legacy is given at twenty-one or at or upon any other future period or event, the interest is contingent, and depends for its vesting on the legatee having arrived at the period or event specified. *Conwell v. Heavilo*, 5 Harr. (Del.) 296.

In *Brown v. Brown*, 44 N. H. 281, it is said that "it appears to be an established rule of construction, that if the bequest be of a sum of money to the legatee, 'at the age of twenty-one years,' or 'if or provided he arrive, at that age,' then the interest is contingent, unless these terms are controlled by other parts of the will, such as a provision for the payment of the interest, in the meantime, to the legatee. On the contrary, where the gift is of a sum of money to the legatee, 'payable' or 'to be paid' at the age of twenty-one, the legacy vests immediately, and, upon the legatee's death before that age, goes to his representative; and this is upon the ground that the testator intended the gift to be absolute, but chose to postpone the payment to a period when the legatee might better make use of his bounty."

Where a legacy is given to one, payable or to be paid at a particular time, it is a vested legacy, because in such cases the time is annexed to the payment, and not to the gift; but where these words are omitted, and the legacy is given "at" twenty-one or "if," "when," "in case of," or "provided" the legatee attains the age of twenty-one, or any other definite period, these expressions annex the time to the substance of the legacy, and make the legatee's right to it depend upon his being alive at the time fixed for payment. *Green v. Green*, 86 N. C. 546.

Where the time specified in the bequest is annexed to the payment only, as where the legacy is given payable or to be paid when the legatee attains the age of twenty-one years, the legacy vests immediately upon the death of the testator, the time of payment only being postponed; but where the time is annexed not to the payment only, but to the gift itself, as when the legacy is given to the legatee at twenty-one, or "if" or "when" he attains the age of twenty-one, the legacy does not vest until the legatee attains that age. *Gifford v. Thorn*, 9 N. J. Eq. 702; *Neilson v. Bishop*, 45 N. J. Eq. 473, 17 Atl. 962.

A bequest to a person, "payable at," or "to be paid at," or "when" he shall attain twenty-one years of age, is a vested legacy; but if these words are omitted, and the legacy is given "at" twenty-one, or "if," "in case of," "when," or "provided" the legatee attains twenty-one, these expressions annex the time to the substance of the legacy, and make the legatee's right depend upon his being alive at the time fixed for the payment. *Seabrook v. Seabrook*, *McMull*, Eq. 201.

And see also cases in VII. *infra*.

The suggestion has been made that this is because the introduction of these words prevents the attainment of the specified age from forming a part of the description of the legatee;⁵¹ but the idea that the attainment of a particular age makes part of the description of a legatee who is designated by name seems rather fanciful. The rule is more probably of an arbitrary character.⁵²

⁵¹ In *Dawson v. Killet*, 1 Bro. Ch. 123, Lord Thurlow said that if the time when the legacy is to be paid is attached to the legacy itself, as for instance to A B at the age of twenty-one, it makes such a description of the person who is to take that if the person does not sustain the character at the time the legacy will fail; but if the legacy be to A B, and that it shall be payable at twenty-one, the description is satisfied, and the rest refers to the payment only.

A similar idea is expressed in *Engles's Estate*, 167 Pa. 463, 31 Atl. 681, set out in VIII. 1, *infra*.

⁵² In *Chandos v. Talbot*, 2 P. Wms. 601, the Lord Chancellor said that it seemed but a very slight and superficial diversity between a legacy given "at twenty-one," and "payable at twenty-one;" and though it had been established in the spiritual court as to legacies given out of personal estate, it did not deserve to be favored or countenanced, where the legacy is charged upon the land, and the infant legatee dies before twenty-one, or before the time when the legacy is made payable.

In *Yates v. Phetipplace*, 2 Vern. 416, Prec. in Ch. 140, the Lord Keeper (Sir Nathan Wright), expressed the opinion that a devise to one of a sum of money to be paid at twenty-one, and a devise to him at twenty-one, was all the same, and the testator's intention the same in both cases, and said the distinction taken by *Swinbourne v. Godolphin*, between the age being mentioned in the body of the devise, and in the time of payment, was a distinction without a difference, and that the authorities they cited did not come up to what they laid down.

In *Mackell v. Winter*, 3 Ves. Jr. 536, Lord Loughborough refers to the rule that where a testator says, "I give at twenty-one," the gift is contingent, and where he gives "payable at twenty-one," the gift is vested, as a rule met with in many cases, but which is never treated with great respect, and as being a positive rule not founded upon any principle of interpretation.

The distinction between the effect of giving a legacy at twenty-one, and a legacy payable at twenty-one, is borrowed from the civil law, and has been held by some equity judges as altogether without foundation, and by others has been treated as too refined. *Hanson v. Graham*, 6 Ves. Jr. 239, 5 Revised Rep. 277.

In *Parker v. Hodgson*, 1 Drew. & S. 508, *Kindersley, V. C.*, referring to the refusal L.R.A.1915C.

It is said to have been adopted by the ecclesiastical courts from the civil law, and to have been followed by the English equity courts in cases involving legacies of personalty (over which the ecclesiastical courts and chancery courts had concurrent jurisdiction), for the sake of uniformity in decision.⁵³ In cases where this consideration did not operate, namely, cases of devises of

of the courts, in the case of legacies charged on real estate, to recognize any difference between a legacy to an infant "at twenty-one," or "when he attains twenty-one," or "provided he attains twenty-one," and a legacy to the infant in the first instance, and then adding "payable at twenty-one," said: "Whichever of those forms is used, the law of England equally considers the attainment of twenty-one as a condition annexed to the gift. But then the ecclesiastical court, dealing with a legacy only as payable out of personal estate, adopted from the civil law a principle established by the old Roman law, that although a legacy given to an infant 'at twenty-one' is not to be raised unless the infant attains twenty-one; yet if it be given to the child and made 'payable at twenty-one,' then, on the artificial principle of regarding it as *debitum in presenti, solvendum in futuro*, it is vested, and although the child does not attain the age of twenty-one, still the legacy is raisable and payable to his legal personal representative. It is vain to discuss the question which is the most rational view, though I cannot help saying that the rule of the English law is in my opinion the most rational, and that has been the opinion of many learned judges. If a testator gives a legacy to an infant 'at twenty-one,' or gives it to him and makes it payable at twenty-one, he equally means it as a provision for the infant on attaining twenty-one; and if he does not attain the age he does not want it, and it is not the intention that it should be raised. The rule introduced from the civil law is a merely artificial rule, and is limited to the case of a legacy payable out of personal estate, and does not supersede the rule of the English law with respect to a legacy payable out of real estate."

In *Shattuck v. Stedman*, 2 Pick. 468, the court, after alluding to the rule that if a legacy be given to one generally, to be paid or payable at the age of twenty-one, and the legatee die before that age, the legacy vests and shall go to his executor, the time being annexed to the payment, but if devised to one at twenty-one, or if or when he shall attain that age, if he die before it is lapsed,—said that, considering the loose and untechnical manner in which wills are often drawn, and the little attention often paid to the collocation or use of words, it is not probable the application of this rule always conforms to the real intention of the testator.

⁵³ See cases in preceding footnote.

real estate,⁵⁴ or of legacies charged on real estate,⁵⁵ the English courts adhere to what they regard as the more rational view, that the introduction of such words is in no way indicative of an intention to vest the gift in interest. But even though the rule is an artificial one, it may have been adopted for some substantial reason, in order to give effect to the general intent of the testator, even though his particular intent may have been to make the gift contingent. None of the cases state what this reason was; but it may be conjectured that as originally the executor took in his own right all personality not required for the payment of debts and legacies, the courts strove to construe legacies given at a future time as vesting in interest immediately—as *debitum in presenti, solvendum in futuro*, the phrase went—wherever they could find an excuse for doing so, in order that, in case the legatee should die before the time of payment, the property would remain in the family of the testator, or of the legatee, rather than go to the executor, who might be a stranger in blood.

But though the conditions which prompted the invention of this rule of construction have passed away, the rule still remains, one

of the calf-paths of the law, from which no court has as yet ventured to stray. The rule, however, is not an absolute one, and if, upon the sound construction of a will, it appears that testator meant that time of payment and vesting should be the same, the case will form an exception, though the legacy be given in terms of immediate bequest, with a direction for payment at twenty-one, or other definite period.⁵⁶ Some instances in which the legacy has been held, by virtue of the context, to be contingent notwithstanding the use of the words "to be paid" or "payable," may be found in the footnote.⁵⁷

Inasmuch as the presence of an antecedent gift apart from the direction to pay, in the case of legacies, or the direction to convey or divide, in the case of realty, is conclusive of the question of vesting, many of the decisions turn on the existence of such a gift. Those in which the decision turned on the fact of the existence of an antecedent gift are set forth in Appendix "A", *infra*; those in which the existence of a separate gift has been expressly or impliedly negatived are set forth in detail in connection with other points on which they bear.⁵⁸ As instanced by the decisions set forth in Ap-

⁵⁴ The courts will not follow the distinction made between gifts at twenty-one and gifts payable at twenty-one, where the subject of the gift is real estate. *Mackell v. Winter*, *supra*.

The distinction between gifts at a specified future time, and a general gift followed by a simple direction for payment at a specified time, has no application to a devise of real estate, the rule having been borrowed from the civil law by the ecclesiastical courts, and followed by the other courts of England in respect to gifts of personal property only. *McCartney v. Osburn*, 118 Ill. 403, 9 N. E. 210.

⁵⁵ See *Chandos v. Talbot*, 2 P. Wms. 601; *Parker v. Hodgson*, 1 Drew. & S. 568, 30 L. J. Ch. N. S. 590, 7 Jur. N. S. 750, 4 L. T. N. S. 762, 9 Week. Rep. 607; and cases cited in subdivision V. *infra*.

⁵⁶ *Bayard v. Atkins*, 10 Pa. 15.

⁵⁷ Even though a legacy is given, "to be paid at twenty-one," it may be rendered contingent by the context, as where testator adds, "in case he shall attain that age, and not otherwise." See *Heath v. Perry*, 3 Atk. 101, set out in VIII. b, *infra*.

In *Onslow v. South*, 1 Eq. Cas. Abr. 295, testator, having property both in England and Jamaica, appointed separate executors for his estate in each place, and gave and bequeathed "to J. S., now under the custody of R. D., the sum of £2,000 at the age of twenty-one years, to be paid by my executors in England." It was held that the legacy lapsed upon the legatee's death before attaining the age of twenty-one; that, though the word "paid" was made use of, yet it was plainly designative of the persons L.R.A.1915C.

by whom the legacy was to be paid, namely, by his executors in England, which was proper, he having two sets of them.

In *Re Kalter*, 86 Misc. 621, 148 N. Y. Supp. 921, where testator gave to his eight nephews and nieces all his personal estate, "to be distributed among them share and share alike, payable unto them upon their attaining the respective age of twenty-one years," further directing his executor to deposit "all my moneys that I may die possessed of in the savings bank to bear interest," and giving to a friend the "interest that may accrue on my said possessions deposited in a bank for a period of ten years, payable to him every five years. After the period of ten years the interest to go to be payable to my heirs equally as hereinbefore provided,"—it was held that though the gift and the direction for payment were distinct, yet as the nephews and nieces were not to get the interest on their legacies for the stated term, the bequests were to be taken as contingent, and not vested.

In *Yates v. Phetiplace*, 2 Vern. 416, Prec. in Ch. 140, a legacy of £3,000 to be paid at twenty-one or marriage, if married with consent, if not, then but £1,000, was held contingent by reason of the provision requiring consent. But, in the phrase of the old reporters, "query as to the sense of this," since such a legacy is payable at twenty-one, though the legatee has married without consent. See *Dobbins v. Bland*, 2 Eq. Cas. Abr. 545; *Hanson v. Graham*, 6 Ves. Jr. 239, 5 Revised Rep. 277; *Knight v. Cameron*, 14 Ves. Jr. 389.

⁵⁸ For instances in which the existence of a separate and antecedent gift independent

pendix A, it is sufficient if the antecedent gift is to trustees to hold during minority,⁶⁰ and it makes no difference that there is an express direction that the gift be retained by the executor, or that division be postponed, until the attainment of the specified age; or that the gift is alternatively expressed to be to certain persons, or such of them as shall attain a certain age; or that the gift is to go to another in the event

of the first donee not accomplishing the age specified.⁶¹

The rule that if there is a direct gift to legatees, a direction for payment when they shall attain a certain age will not prevent vesting, is equally applicable where the direction as to the time of payment includes the alternative of marriage,⁶² or of marriage with consent.⁶³

Statements have been made in some cases

of the direction to pay, divide, or transfer has been denied, see subdivision VIII. of this note, and especially *Cruise v. Barley*, 3 P. Wms. 20, 2 Eq. Cas. Abr. 543, pl. 15 (set out in VIII. f, *infra*); *Murray v. Tancred*, 10 Sim. 465 (set out in VIII. g, *infra*); *Knight v. Knight*, 2 Sim. & Stu. 490, 25 Revised Rep. 253 (set out in VIII. k, *infra*); *Butler v. Freeman*, 3 Atk. 58 (set out in VIII. f, *infra*); *Barker v. Lea*, Turn. & R. 413, 24 Revised Rep. 85 (set out in VIII. g, *infra*); *Sullivan v. Edgell*, 23 Week. Rep. 722 (set out in VIII. l, *infra*); *Ruthven v. Ruthven*, 25 Grant, Ch. (U. C.) 534 (set out in VIII. g, *infra*); *Re Bank of Montreal*, 26 Grant, Ch. (U. C.) 420 (set out in VIII. f, *infra*); *Heberton v. McClain*, 135 Fed. 226 (set out in VIII. i, *infra*); *Travis v. Morrison*, 28 Ala. 494 (set out in VIII. c, *infra*); *Johnson v. Terry*, 139 Ala. 614, 36 So. 775 (set out in VIII. j, *infra*); *Re Blake*, 157 Cal. 448, 108 Pac. 287 (set out in VIII. j, *infra*); *Breneman v. Herdman*, 35 App. D. C. 27 (set out in VIII. n, *infra*); *Allen v. Whitaker*, 34 Ga. 6 (set out in VIII. i, *infra*); *Campbell v. Robertson*, 62 Ga. 709 (set out in VIII. j, *infra*); *Bennett v. Bennett*, 217 Ill. 434, 4 L.R.A.(N.S.) 470, 75 N. E. 339 (set out in VIII. s, *infra*); *Dohn v. Dohn*, 110 Ky. 884, 62 S. W. 1033, 64 S. W. 352 (set out in VIII. q, *infra*); *Snow v. Snow*, 49 Me. 159 (set out in VIII. i, *infra*); *Webber v. Jones*, 94 Me. 429, 47 Atl. 905 (set out in VIII. q, *infra*); *Thomas v. Thomas*, 97 Miss. 697, 53 So. 630 (set out in VIII. i, *infra*); *Butler v. Butler*, 3 Barb. Ch. 304 (set out in VIII. p, *infra*); *Drake v. Pell*, 3 Edw. Ch. 251 (set out in VIII. q, *infra*); *Grothe's Estate*, 237 Pa. 262, 85 Atl. 141 (set out in VIII. j, *infra*); *Lemacks v. Glover*, 1 Rich. Eq. 141 (set out in VIII. i, *infra*); *Major v. Major*, 32 Gratt. 819 (set out in VIII. i, *infra*).

⁶⁰ A gift is not contained in the direction to transfer the subject thereof to the legatee at a certain age, where it is to be separated from the estate immediately and vested in trustees in the meantime. *Saunders v. Vautier*, Craig & Ph. 240, 10 L. J. Ch. N. S. 354.

In *Zartman v. Ditmars*, 37 App. Div. 173, 55 N. Y. Supp. 908, where testator bequeathed to his executors the sum of \$4,000, in trust to pay the income thereof in equal shares to two nephews annually until they should respectively arrive at the age of thirty years, when one half of said sum was to be paid to each "to have and to hold the same absolutely," it was held that, L.R.A.1915C.

though the gift was made in the first instance to the executors, the fact that the interest upon the legacy was directed to be given to the legatees until the legacies themselves became payable, and the further fact that the gift was by the terms of the will directed to be severed instantan from the general estate, and invested by the executors for the benefit of the legatees until the time should arrive when they would be severally entitled to the principal,—indicated an intention on the part of the testator that the legacies should vest immediately.

For other instances, see VII. *infra*. See also III. j, *infra*.

⁶¹ A contingent bequest over in event of the legatee's dying under twenty-one will not prevent a legacy from vesting under prior words of gift, though undoubtedly such a bequest over may be called, in aid of other circumstances, to show that no present interest was intended to pass. *Bayard v. Atkins*, 10 Pa. 15.

See, in this connection, *Re Budd*, 166 Cal. 286, 135 Pac. 1131; *Braunsdorf v. Braunsdorf*, 23 N. Y. Supp. 722; *Farmer v. Francis*, 2 Sim. & Stu. 505, 4 L. J. Ch. 154; *Silvers v. Canary*, 114 Ind. 129, 16 N. E. 166; *Packard v. Packard*, 16 Pick. 191; *Nicholls v. Osborn*, 2 P. Wms. 419; *Blease v. Burgh*, 2 Beav. 221, 9 L. J. Ch. N. S. 226; *Thruston v. Anstey*, 27 Beav. 335; *Re Bartholomew*, 1 Macn. & G. 354, 1 Hall & Tw. 565, 19 L. J. Ch. N. S. 237, 14 Jur. 181; *Josselyn v. Josselyn*, 9 Sim. 63; *Dundas v. Wolfe Murray*, 1 Hem. & M. 425, 1 New Reports, 429, 32 L. J. Ch. N. S. 151, 11 Week. Rep. 359; *Festing v. Allen*, 5 Hare, 573; *State v. Main*, 87 Conn. 175, 87 Atl. 38; *Von der Horst v. Von der Horst*, 88 Md. 127, 41 Atl. 124; *Kearney v. Kearney*, 17 N. J. Eq. 59; *Nelson v. Bishop*, 45 N. J. Eq. 473, 17 Atl. 962; *Re Lehman*, 2 App. Div. 531, 37 N. Y. Supp. 1086; *Kerr v. Bosler*, 62 Pa. 183; *Dewart's Appeal*, 70 Pa. 403; *Yost's Estate*, 134 Pa. 426, 19 Atl. 692. Set out in VII. *infra*; also cases cited in note 65, *infra*.

For an instance in which the gift over was relied upon as showing that the gift was contingent, see *Johnson v. Terry*, 139 Ala. 614, 36 So. 775, set out in VIII. j, *infra*.

⁶² *Maher v. Maher*, Ir. L. R. 1 Eq. 22; and see also *Crickett v. Dolby*, 3 Ves. Jr. 10; *Smith v. Edwards*, 88 N. Y. 92; and *Thomas v. Benton*, 4 Desauss. Eq. 17.

⁶³ The construction of a legacy as being vested is not precluded by the circumstance

to the effect that although the language employed by a testator is not such as ordinarily imports an antecedent gift, such a gift may be implied from the context;⁶⁴ but this is simply another way of saying what is said in the class of cases next to be discussed, that the implication of contingency may be overcome by the context.

2. Where the provision is found only in the gift over.

The circumstance that a gift is limited

that it is payable at the age of twenty-one or upon marriage with consent, since at the age of twenty-one, whether married with consent or not, the legatee will be entitled. *Hanson v. Graham*, 6 Ves. Jr. 239, 5 Revised Rep. 277, *contra*; *Yates v. Phettipiece*, 2 Vern. 416, Prec. in Ch. 140; but see comment on this case in VII. *infra*.

⁶⁴ Although the language employed by a testator is not such as ordinarily imports an antecedent gift, nevertheless, if it appear from the rest of the will that the testator intended, by the language used, an antecedent gift, the law will give effect to his intention in this regard. RE PAXSON.

Wherever there are strong circumstances to be collected from the will, indicating the intention of the testator to be that the interest in the bequest shall immediately vest, although there be a future time fixed for payment, such intention shall prevail although words of immediate gift are wanting. *Lemonnier v. Godfroid*, 6 Harr. & J. 472.

⁶⁵ *Stanley v. Stanley*, 16 Ves. Jr. 491; and see also cases cited in note 61, *supra*.

In *Taylor v. Johnson*, 2 P. Wms. 504, Mosely, 98, where testator bequeathed a sum of money to his infant grandson, without mentioning any time of payment, with a proviso that if the grandson should die before twenty-one the legacy should go over to another, the legacy was held vested, subject to be devested by the legatee's death before twenty-one.

In *Davidson v. Dallas*, 14 Ves. Jr. 576, 9 Revised Rep. 350, where testator bequeathed to the children of his brother a sum of money to be equally divided among them, with a further provision that if either of them should die before the age of twenty-one their share should go to the survivors, it was held that the legacy, being immediate, was vested, subject to be devested by the death of any of the children under the age of twenty-one, leaving another child surviving.

In *Fraser v. Fraser*, 1 New Reports, 430, 8 L. T. N. S. 20, where testator gave residue in trust for his four children, with a gift over to the survivors or survivor in case of any or either of them dying under the age of twenty-five, empowering his trustees to apply any part of the income or accumulation of the income to arise from the presumptive share of either of his children "during his minority" for his maintenance, L.R.A.1915C.

over upon the death of the legatee or devisees under the age specified does not evince an intention that he shall not take any estate until he shall attain that age, since the event upon which an estate is given over cannot determine what is the event upon which it is to vest.⁶⁵

c. Absence of gift apart from direction to pay, divide, or convey.

Where there is no antecedent and separate gift, and no other legatory expression

education and advancement, and directed that the income and accumulation of income to arise "during the minority" of either of his children should be added to his share, it was held that each of the children took a vested interest, subject to be devested only in the event of his not attaining the age of twenty-five.

In *Sulley v. Barber*, 59 L. T. N. S. 824, it was held that under a devise to A for life, with remainder to the use of his surviving children, and in case A should die without leaving issue to attain the age of twenty-one, then over, the son of A took a vested remainder at birth, opening to let in afterborn brothers and sisters, and subject to be devested by death under twenty-one.

In *Thrasher v. Ingram*, 32 Ala. 645, where testator gave certain property to his wife "during her natural life or widowhood, or until my children by her shall come of age or marry," and, after making certain provisions for his children, directed "that if one of the above-named children die before he or she shall come of age, that the survivor shall be the sole heir or heirless; and should neither survive or come of age, that then the whole property revert unto my estate,"—the provisions for the children were held vested, subject to be devested by death under twenty-one.

In *Moody v. Walker*, 3 Ark. 187, testator bequeathed to his son a certain negro, to his daughter, another negro, and directed that after the death of his wife all his personal estate should be equally divided between such son and daughter, and if either of them should die before arriving at lawful age or without heir lawfully begotten of their body, the surviving one should have that part of the estate bequeathed to the deceased one, it was held that the legacy of the slave to the daughter vested immediately upon the death of the testator, as the will gave her the principal as well as the interest to the property by express words.

In *Re Goodrich*, 2 Redf. 45, where testator directed his executor to sell all his property not specifically bequeathed, and, after paying debts, to divide the residue between testator's two sons, further providing that should the two sons die before they should become twenty-one years of age the property should go elsewhere, it was held that, as the gift was absolute to the two

of intention than that implied from the direction to pay, convey, or divide, then the attainment of the age at which the payment, conveyance, or division is to take place is a condition precedent to vesting, rendering

the legacy or devise contingent.⁶⁶ But where there is a gift in the form of a direction to pay to the legatee or legatees generally, apart from another direction to pay at an age specified, the contingency will not

sons, their legacies were vested, subject to be divested upon the death of both of them under the age of twenty-one.

In *Moore v. Sleet*, 113 Ky. 600, 68 S. W. 642, where testator, after giving his wife a life estate in certain lands, "which at her death shall go to my nephew and namesake," said in a subsequent clause, "In regard to the reversionary interest in the 50 acres of my home place willed to [such nephew], if Willie [the nephew] should die before he comes into possession of same, or before he arrives at twenty-one years of age," then that the same should be sold and the proceeds distributed as directed, it was held that the fair and reasonable construction of the language employed by testator indicated that his intention was that such nephew should take a vested interest in remainder, subject to be divested by his death before arriving at twenty-one and before coming into possession of the land.

In *Woodman v. Madigan*, 58 N. H. 8, where testator devised his residuary estate to a certain person, but if he should die under age and unmarried, or under age and married and leaving no child living at his decease, gave the residue to other persons, it was held that, no time being expressly fixed by the will when the legatee was to receive the residue, it vested in him at the testator's death, subject to be divested by his death during minority without issue living at his decease.

In *Com. v. Wellford*, 114 Va. 372, 44 L.R.A.(N.S.) 419, 76 S. E. 917, where testator provided that "in the event of my children all dying before having attained the age of twenty-one years and without issue," the property should go to others, it was held that the testator's children took defeasible fees, subject to be divested by all the children dying under age and without issue.

In *Reybold v. Reybold*, 7 Del. Ch. 29, 44 Atl. 794, a gift in trust for certain children, the accruing dividends to be from time to time invested for them during the lifetime of their father, and if either of them should die under age and unmarried his share to belong to the survivors, with a further gift over in case all of them should die under age and without issue, and followed by a direction in a codicil that the income should be applied in the education of the said children if the trustee should think fit,—was held to vest immediately upon the death of the testator, subject to be divested upon the contingencies mentioned in the will.

See also in this connection *Kimble v. White*, 50 N. J. Eq. 28, 24 Atl. 400, set out in III. b, 1, *supra*.

⁶⁶ *Williams v. Clark*, 4 De G. & S. 472; *Merry v. Hill*, L. R. 8 Eq. 619, 17 Week. Rep. 985; *Roberts v. Brinker*, 4 Dana, 570; L.R.A.1915C.

Post v. Herbert, 27 N. J. Eq. 540; *Warner v. Durant*, 76 N. Y. 133; *Goebel v. Wolf*, 113 N. Y. 405, 10 Am. St. Rep. 404, 21 N. E. 388; *Lewisohn v. Henry*, 179 N. Y. 352, 72 N. E. 239; *Canfield v. Fallon*, 26 Misc. 345, 57 N. Y. Supp. 149 (aff'd on opinion of court below in 43 App. Div. 561, which is similarly aff'd in 161 N. Y. 623); *Provenchere's Estate*, 1 Campb. (Pa.) 68; *Weyman v. Ringold*, 1 Bradf. 40; *Seibert's Appeal*, 13 Pa. 501; *Lamb v. Lamb*, 8 Watts, 184; and see also cases in footnote 47, *supra*.

Where there is no gift except in the direction to pay, and the direction is to pay when the legatees attain the required age, the gift is in effect a gift to such of the legatees as shall attain that age, and therefore fails as to such who die under it. *Re Bartholomew*, 1 Macn. & G. 354, 1 Hall & Tw. 565, 19 L. J. Ch. N. S. 237, 14 Jur. 181.

Where there is no separate and antecedent gift which is independent of the direction and time for payment, the legacy is contingent, the gift being necessarily inseparable from the direction, and partaking of its quality, inasmuch that if the one is future and contingent, so must the other be. *Moore v. Smith*, 9 Watts, 403.

A bequest in the form of a direction to divide between and distribute to specified persons vests in those *in esse* answering to the description at the appointed time for division and distribution. *Benner v. Maurer*, 133 Wis. 325, 113 N. W. 663.

This rule has been held to govern in the following instances:

—cases involving gifts of personalty: *Leake v. Robinson*, 2 Merw. 363, 16 Revised Rep. 168 (set out in note 216, *infra*); *Shum v. Hobbs*, 3 Drew. 93, 24 L. J. Ch. N. S. 377, 3 Week. Rep. 221 (set out in VIII. 1, *infra*); *Ford v. Rawlins*, 1 Sim. & Stu. 328, 1 L. J. Ch. 170, 24 Revised Rep. 188 (set out in VIII. q, *infra*); *Boughton v. James*, 1 Colly. Ch. Cas. 26, 8 Jur. 329 (set out in VIII. g, *infra*); *Meredith v. Tooke*, 1 Ves. Jr. Supp. 324 (set out in VIII. j, *infra*); *Sansbury v. Read*, 12 Ves. Jr. 75 (set out in VIII. q, *infra*); *Chance v. Chance*, 16 Beav. 572 (set out in VIII. f, *infra*); *Laxton v. Eedle*, 19 Beav. 321 (set out in VIII. n, *infra*); *Gardiner v. Slater*, 25 Beav. 509 (set out in VIII. l, *infra*); *Bentinck v. Portland*, 4 L. J. Ch. 13, 27 Revised Rep. 251 (set out in VIII. f, *infra*); *Re Hunter*, L. R. 1 Eq. 295 (set out in VIII. q, *infra*); *Locke v. Lamb*, L. R. 4 Eq. 372, 16 L. T. N. S. 616, 15 Week. Rep. 1016 (set out in VIII. j, *infra*); *Re Mervin* [1891] 3 Ch. 197, 60 L. J. Ch. N. S. 671, 65 L. T. N. S. 186, 39 Week. Rep. 697 (set out in VIII. l, *infra*); *Re Douglas*, 22 Ont. Rep. 553 (set out in VIII. q, *infra*); *Lyman v. Parsons*, 26

attach to the gift,⁶⁷ such a case not falling within the terms of the rule. And a gift is not contained in the direction to transfer the subject thereof to the legatee at a certain age, where it is to be separated from

the estate immediately and vested in trustees in the meantime.⁶⁸

The foregoing rule has been the subject of both criticism⁶⁹ and approval.⁷⁰ It is not an absolute rule,⁷¹ however, but only

Conn. 493 (set out in VIII. g, *infra*); Ross v. Ware, 131 Ky. 828, 116 S. W. 241 (set out in VIII. q, *infra*); Hall v. Hall, 123 Mass. 120 (set out in VIII. i, *infra*); Smith v. Edwards, 88 N. Y. 92 (set out in III. b, 1, *supra*); Greenland v. Waddell, 116 N. Y. 234, 15 Am. St. Rep. 400, 22 N. E. 367 (set out in VIII. q, *infra*); Brooklyn Trust Co. v. Phillips, 134 App. Div. 697, 119 N. Y. Supp. 401, affirmed without opinion in 201 N. Y. 561, 95 N. E. 1124 (set out in VIII. i, *infra*); Bailey v. Buffalo Loan, Trust & S. D. Co. 75 Misc. 23, 132 N. Y. Supp. 513 (set out in VIII. g, *infra*); Anderson v. Felton, 36 N. C. (1 Ired. Eq.) 55 (set out in VIII. q, *infra*); Moore v. Smith, 9 Watts, 403 (set out in VIII. k, *infra*); Seibert's Appeal, 13 Pa. 501 (set out in VIII. j, *infra*).

—cases involving gifts in which realty and personality are blended: Bastin v. Watts, 3 Beav. 97, 7 Jur. 791 (set out in VIII. q, *infra*); Anderson v. Bell, 29 Grant, Ch. (U. C.) 452 (set out in VIII. g, *infra*); Cogburn v. Ogleby, 18 Ga. 56 (set out in VIII. q, *infra*); Dohn v. Dohn, 110 Ky. 884, 62 S. W. 1033, 64 S. W. 352 (set out in VIII. q, *infra*); Schlereth v. Schlereth, 173 N. Y. 444, 93 Am. St. Rep. 616, 66 N. E. 130 (set out in VIII. q, *infra*); Lewisohn v. Henry, 179 N. Y. 352, 72 N. E. 239 (set out in VIII. i, *infra*); Re Kottmeier, 24 Misc. 58, 53 N. Y. Supp. 392 (set out in VIII. g, *infra*); Whitefield v. Crissman, 123 App. Div. 233, 108 N. Y. Supp. 110 (set out in VIII. q, *infra*); Dickerson v. Sheehy, 156 App. Div. 101, 141 N. Y. Supp. 35 (set out in VIII. g, *infra*); Barker v. Southerland, 6 Dem. 220 (set out in VIII. h, *infra*); Re Ridgway, 4 Redf. 226 (set out in VIII. n, *infra*); Engle's Estate, 167 Pa. 463, 31 Atl. 681 (set out in VIII. i, *infra*); Kountz's Estate, 213 Pa. 390, 3 L.R.A.(N.S.) 639, 62 Atl. 1103, 5 Ann. Cas. 427 (set out in VIII. q, *infra*).

—cases involving devises of real estate: Walker v. Mower, 16 Beav. 365 (set out in III. q, *infra*); Blagrove v. Hancock, 16 Sim. 371, 18 L. J. Ch. N. S. 20, 12 Jur. 1081 (set out in VIII. j, *infra*); McLellan v. Meggatt, 7 U. C. Q. B. 558 (set out in VIII. q, *infra*); Kingman v. Harmon, 131 Ill. 171, 23 N. E. 430 (set out in VIII. q, *infra*); McClain v. Capper, 98 Iowa, 145, 67 N. W. 102 (set out in VIII. q, *infra*); Marson v. Purdy, 31 N. Y. S. R. 130, 9 N. Y. Supp. 579, affirmed without opinion in 126 N. Y. 667, 27 N. E. 854 (set out in VIII. g, *infra*).

⁶⁷ See Chaffers v. Abell, 3 Jur. 577, set out in III. b, 1, *supra*.

⁶⁸ See footnote 60, *supra*.

⁶⁹ In Cammann v. Bailey, 210 N. Y. 19, 103 N. E. 824, it is said by Chief Justice L.R.A.1915C.

Cullen: "The result of the rule as to the construction of a gift confined to a mere direction to divide and pay over has been productive of more litigation than any other rule as to the construction of wills. That nearly all laymen and very many lawyers are wholly ignorant of it, there can be no question. Despite of that fact, if it had become a rule of property, it should be respected, whether good or bad; but instead of being a rule of property, it is a rule which unsettles title to property, and the condition of the decisions is such that in almost every case counsel is justified in insisting, if not actually required to insist, that his client shall obtain the decision of the court of last resort on the question. It may very well be that the rule has obtained so long that entire relief from it cannot be obtained except by legislative action. Still, it seems to me the plain duty of the courts to limit it as far as practicable."

And in Dickerson v. Sheehy, 209 N. Y. 592, 103 N. E. 717, Cullen, Ch. J., in the course of his dissenting opinion said that, as a result of a review of the New York decisions bearing on the question, he thought the rule should be considered as established that a gift by means of a direction to divide or pay over at a future time will not be deemed contingent so as to fail on death before that time, unless provision is made for a substitute gift in favor of the issue of the first devisee or legatee.

⁷⁰ The rule that, where there is no gift other than that implied from the direction to pay at a future time, the legacy is contingent, is a guide to certainty of result, where it is necessary to choose between supposititious intents in cases where it is nearly certain that there was no intent at all; and it therefore frustrates the testator's purpose as seldom as any other which could be employed. Moore v. Smith, 9 Watts, 403.

⁷¹ The circumstances that a gift is future, and that there is no gift except in the direction for payment, are only circumstances going to show that the gift is contingent, but are not conclusive. Leeming v. Sheratt, 2 Hare, 14, 11 L. J. Ch. N. S. 423, 6 Jur. 683.

While it is a settled rule of construction that a legacy payable at a future period, unaccompanied by an antecedent substantive bequest, independent of the period fixed for payment, is presumptively contingent rather than vested, this, like every other rule of construction, is but an aid in determining the actual intent of the testator. It is not a rule of law determining arbitrarily a certain conclusion from words employed, but merely a rule of construction, which

furnishes a presumption of intention, which may be overcome by the context.⁷² It has

even been said that the fact that a gift is not direct, but is in the form of a direction

will supply a presumptive conventional intent where the actual intent is not ascertainable. *RE PAXSON*.

The mere fact that the gift is future, and made solely under the form of a direction to pay or transfer, does not furnish a simple rule of decision for all cases, but is only a circumstance to be considered in arriving at the intention. *Taylor v. Mosher*, 29 Md. 443.

The rule that, when a testamentary gift is found only in a direction to divide at a future time, the gift is future and contingent, is not controlling, but is subordinate to the primary canon that the construction shall follow the intent to be collected from the whole will. *Canfield v. Fallon*, 26 Misc. 345, 57 N. Y. Supp. 149 (aff'd on opinion of court below in 43 App. Div. 561, which is similarly aff'd in 161 N. Y. 623).

The rule that where the interest of legatees or devisees is derivable only under a direction to pay, convey, or divide, futurity attaches to the substance of the gift, is not an inflexible rule, and always yields to evidence of a contrary intention on the part of a testator, as that may be discoverable upon a consideration of the will as a whole. *Kessler v. Friede*, 29 Misc. 187, 60 N. Y. Supp. 891.

⁷³ The rule that where there is no gift except a direction to pay as the objects attain a certain age, the attainment of the age is of the essence of the gift, which must be read as a bequest to those only of a class who attain the specified age, will give way to particular indications of a contrary intention, as where the subject of the gift is a separated fund, and the gift over is on the death of the tenant for life without leaving issue. *Re Bevan*, L. R. 34 Ch. Div. 716, 56 L. J. Ch. N. S. 652, 56 L. T. N. S. 277, 35 Week. Rep. 400.

Even where there is no express gift of the legacy, and time is annexed to its payment, but from other parts of the will it can be gathered that the testator intended that the legacy should vest immediately, such intention will control. *Gregg v. Bethea*, 6 Port. (Ala.) 9.

The rule that where there is no gift except in the direction for payment, the interest of the legatee is contingent, applies only where, beyond the direction for future distribution, there are no words and no provisions which import a present or vested gift, or indicate such an intent. It does not control where the language of the will, while not expressly saying, "I give and bequeath," does yet plainly import a present gift intended to vest immediately, without reference to the clause of distribution. *Smith v. Edwards*, 88 N. Y. 92.

The rule that where the only gift is found in the direction to divide at the future time, the gift is contingent, is subordinate to the primary canon of construction, that the construction shall follow the intent, L.R.A.1915C.

to be collected from the whole will, and that the intention of the testator, so ascertained, must prevail, and that general rules, adopted by the courts in aid of the interpretation of wills, must give way when on a consideration of the scheme of the will, or of special clauses or provisions, their application in the particular case would defeat the intention. *Goebel v. Wolf*, 113 N. Y. 405, 10 Am. St. Rep. 464, 21 N. E. 388.

For instances in which the rule has been held overcome by the context, see the ensuing portion of this note, and particularly the following cases:

—involving gifts of personality: *Saunders v. Vautier*, Craig & Ph. 240, 10 L. J. Ch. N. S. 354 (set out in VIII. n, supra); *Steadman v. Palling*, 3 Atk. 423 (set out in VIII. j, infra); *Vivian v. Mills*, 1 Beav. 315, 8 L. J. Ch. N. S. 239 (set out in VII. g, infra); *Davies v. Fisher*, 5 Beav. 201, 11 L. J. Ch. N. S. 338, 6 Jur. 248 (set out in VIII. j, infra); *Re Smith*, 20 Beav. 197, 24 L. J. Ch. N. S. 466, 1 Jur. N. S. 220, 3 Week. Rep. 277 (set out in VIII. q, infra); *Perrott v. Davies*, 38 L. T. N. S. 52 (set out in VIII. l, infra); *Fox v. Fox*, L. R. 19 Eq. 286, 23 Week. Rep. 314 (set out in VIII. l, infra); *Butler v. Butler*, 29 N. S. 145 (set out in VIII. g, infra); *Wood v. Cone*, 7 Paige, 471 (set out in VIII. j, infra); *Paterson v. Ellis*, 11 Wend. 259 (set out in VIII. h, infra); *Goebel v. Wolf*, 113 N. Y. 405, 10 Am. St. Rep. 464, 21 N. E. 388 (set out in VIII. q, infra); *Cammann v. Bailey*, 210 N. Y. 19, 103 N. E. 824, reversing 156 App. Div. 87, 141 N. Y. Supp. 41 (set out in VIII. g, infra); *Titus v. Weeks*, 37 Barb. 136 (set out in VIII. r, infra); *Kessler v. Friede*, 29 Misc. 187, 60 N. Y. Supp. 891 (set out in VIII. p, infra); *Weyman v. Ringold*, 1 Bradf. 40 (set out in VIII. g, infra); *Smith v. Wiseman*, 41 N. C. (6 Ired. Eq.) 540 (set out in VIII. q, infra); *Haywood v. Rogers*, 43 N. C. (8 Ired. Eq.) 278 (set out in VIII. j, infra); *Reed v. Buckley*, 5 Watts & S. 517, 40 Am. Dec. 531 (set out in VIII. f, infra); *Middleton's Estate*, 212 Pa. 119, 61 Atl. 808 (set out in VIII. f, infra); *Rhode Island Hospital Trust Co. v. Noyes*, 26 R. I. 323, 58 Atl. 999 (set out in VIII. g, infra); *Hayes v. Robeson*, 29 R. I. 216, 69 Atl. 686 (set out in VIII. f, infra); *Benner v. Mauer*, 133 Wis. 325, 113 N. W. 663 (set out in VIII. f, infra).

—involving gifts in which realty and personality are blended: *Knox v. Wells*, 2 Hem. & M. 674 (set out in VIII. j, infra); *Young v. McKinnie*, 5 Fla. 542 (set out in VIII. g, infra); *Teale v. Hathaway*, 129 Mass. 164 (set out in VIII. f, infra); *Hoxie v. Hoxie*, 7 Paige, 187 (set out in VIII. i, infra); *Smith's Estate*, 226 Pa. 304, 75 Atl. 425 (set out in VIII. p, infra); *RE PAXSON* (set out in VIII. g, infra); *Kelly v. Dike*, 8 R. I. 436 (set out in VIII.

to pay over at majority, is without significance, where the will is inartificially drawn.⁷³ A gift of a legacy under the form of a direction to pay at a future time or upon a given event is not less favorable to vesting than a simple and direct bequest of a legacy at a like future time or upon a like event.⁷⁴

It has been said that this rule is not applicable to devises of real estate,⁷⁵ but this is true only in the sense that the exceptions to the rule are different where real

estate is the subject of the gift than where personality only is involved.

d. Gift of intermediate income or maintenance.

Perhaps the strongest circumstance going to show that a gift to the substance of which futurity is apparently annexed is not contingent upon the attainment of the specified age is a gift of the intermediate use to or for the benefit of the legatee.⁷⁶ Although

q, *infra*); *Underwood v. Dismukes*, Meigs, 299 (set out in VIII. g, *infra*); *Battle v. House*, 4 Lea, 202 (set out in VIII. q, *infra*); *Baker v. McLeod*, 79 Wis. 534, 48 N. W. 657 (set out in VIII. l, *infra*); *Middleton's Estate*, 212 Pa. 119, 61 Atl. 808 (set out in VIII. f, *infra*).

⁷³ *Teale v. Hathaway*, 129 Mass. 164.

⁷⁴ *Leeming v. Sherratt*, 2 Hare, 14, 11 L. J. Ch. N. S. 423, 6 Jur. 683.

⁷⁵ The distinction between merely appointing a time for payment of a legacy, and annexing the time to the very substance of the gift, is borrowed from the civil law, and the rule of construction which in this particular governs in cases of legacies is inapplicable to devises, which are governed by the common law. Per Gibson, J., in *Kinsey v. Lardner*, 15 Serg. & R. 192.

On the authority of the foregoing case it is said in *Linton v. Laycock*, 33 Ohio St. 128, that the rule sometimes applied to the vesting of legacies bequeathed only by a direction to pay or divide, which fixes the vesting at the time of payment or division, does not apply to devises of real estate, such distinction having been borrowed from the civil law, and being inapplicable to cases of devises, which are governed by the common law.

⁷⁶ Where a legacy is given by a direction to pay when the legatee attains a certain age, the direction to pay may import either a gift at the specified age, or a present gift with a postponed payment; and if the interest is given in the meantime, it shows that a present gift was intended. Re Hart, 3 De G. & J. 202, 28 L. J. Ch. N. S. 7, 4 Jur. N. S. 1264, 7 Week. Rep. 28; *Cropley v. Cooper*, 19 Wall. 167, 22 L. ed. 109; *Provencher's Appeal*, 67 Pa. 463; *Reed's Appeal*, 118 Pa. 215, 4 Am. St. Rep. 588, 11 Atl. 787.

A provision for payment of interest in the meantime, where the legacy is given generally "at" or "if" or "when" the legatee should attain such an age, will make it an interest vested presently. *Stapleton v. Cheales*, Prec. in Ch. 317, 2 Vern. 673.

A gift of dividends to legatees during minority is a circumstance which is considered as strongly marking the intention of the testator that the legacy should vest, though a distant day is fixed for the absolute enjoyment of it. *Jones v. Mackil*, L.R.A.1915C.

wain, 1 Russ. Ch. 220, 25 Revised Rep. 32.

Though there is no direct gift until a certain age is attained, if interest on the legacy is given in the meantime it will be considered as an immediate vested interest. *Murkin v. Phillipson*, 3 Myl. & K. 257, 3 L. J. Ch. N. S. 148.

A legacy which would, upon the terms of the gift, be contingent upon the legatee attaining a certain age, may become vested by a gift of the interest in the meantime, whether direct or in the form of maintenance, provided it be of the whole interest. *Watson v. Hayes*, 5 Myl. & C. 125, 9 L. J. Ch. N. S. 49, 4 Jur. 186.

In *James v. Wynford*, 1 Smale & G. 40, 22 L. J. Ch. N. S. 450, 17 Jur. 17, 1 Week. Rep. 61, it is said that, notwithstanding the difficulty of reconciling some of the decisions, it must be considered as well established that an immediate gift of the whole rents, profits, or income of an estate, real or personal, to one until he attains a certain age, and on his attaining that age to him absolutely, confers an immediate vested interest, and does not postpone the vesting till such age is attained, notwithstanding the legacy would, upon the terms of the gift alone, be contingent upon the legatee's attaining such age.

If the whole intermediate interest is appropriated for the benefit of the legatee, the whole property vests, though absolute enjoyment be deferred until a future time. *Hardcastle v. Hardcastle*, 1 Hem. & M. 405, 1 New Reports, 83, 7 L. T. N. S. 503.

In *Vize v. Stoney*, 1 Drury & War. 337, 4 Ir. Eq. Rep. 64, Lord St. Leonards said that if to a gift at twenty-one interest is annexed in the meantime, that interest so given dispenses with the contingency, and that though it still sounds in contingency, it cannot so operate.

A direction to apply the interest for the benefit of the legatee affords evidence of an intention to vest the capital. *Davies v. Fisher*, 5 Beav. 201, 11 L. J. Ch. N. S. 338, 6 Jur. 248.

In *Re Smith*, 20 Beav. 197, 24 L. J. Ch. N. S. 466, 1 Jur. N. S. 220, 3 Week. Rep. 277, it is said that no doubt could be raised but that if a testator gives a sum of money to trustees, and directs them to apply the interest for the benefit of legatees during their minority, and then directs the money to be divided between them on the youngest

attaining twenty-one, with a gift over of the share of anyone who dies before that period, this constitutes a legacy *debitum in presenti* but *solvendum in futuro*.

Where there is a positive and direct trust that the whole of the income of the property shall be divided among certain persons until they all attain twenty-one, and that then it shall be sold and the corpus divided amongst them, the bequest vests at the death of the testator. *Boulton v. Pilcher*, 29 Beav. 633, 7 Jur. N. S. 767, 4 L. T. N. S. 426, 9 Week. Rep. 626.

In *Re Martin*, 57 L. T. N. S. 471, it is said that the rule clearly established by authority is this: If you find a gift of a legacy or of residue to A, and the income of the legacy or share is directed to be given to him in the meantime until the time of payment of the legacy arrives, that vests the gift.

The rule is absolute that where a legacy is given at a future date, accompanied by a gift of the income in the meantime, the legacy vests in the legatee at once, notwithstanding the fact that he does not live until the date fixed for payment. *Re Williams* [1907] 1 Ch. 180, 76 L. J. Ch. N. S. 41, 95 L. T. N. S. 759.

It is well settled that if there is a gift to an individual or a class upon the attainment of a certain age, such gift is *prima facie* contingent on the specified age being attained, but that where there is also a gift to the same individual or class of the income to accrue before the specified age be attained, a gift of the corpus, though in form contingent, will be construed as conferring a vested interest. *Re Hume* [1912] 1 Ch. 693, 81 L. J. Ch. N. S. 382, 106 L. T. N. S. 335, 56 Sol. Jo. 414.

A direction to apply the interest of the fund bequeathed may be a sufficient indication of intention to vest the legacy immediately. *McLeod v. McDonnell*, 6 Ala. 236.

In the absence of any indication of a contrary intention, a gift of the entire income to the beneficiary of a gift is regarded as evincing an intention on the part of the testator to vest the gift immediately, although the gift is in a direction to pay and deliver at a future time. *Re Blake*, 157 Cal. 448, 108 Pac. 287.

A provision that the legatees are to have the interest or dividends on a legacy of stock before the legacy is to take effect in possession evinces an intention that the legacy shall vest in point of right immediately on testator's death. *Dale v. White*, 33 Conn. 294.

In bequests of personal estate, a gift of the whole interest to or for the benefit of the legatee *prima facie* vests the principal, though if such words had not been used the legacy would not have been treated as vested. *Equitable Guarantee & T. Co. v. Bowe*, 9 Del. Ch. 336, 82 Atl. 693.

Where the income of the estate is given to the donee in the meantime, it affords the most satisfactory evidence that the testator intended to give the corpus of the estate, but only deferred the time of coming L.R.A.1915C.

into possession. Where a portion of the interest only is given, or a sum sufficient for the support and education of the donee in the discretion of the trustees, it affords a less conclusive ground of inference in favor of the estate vesting, but still one of considerable weight. *Hersey v. Purington*, 96 Me. 166, 51 Atl. 865.

Where the interest of the legacy is directed to be paid to the legatee until he receive the principal, or where the legacy is placed in the hands of trustees for the exclusive benefit of the legatee until it is directed to be paid over, the legacy will be deemed vested. *Gifford v. Thorn*, 9 N. J. Eq. 702.

Even where there is in terms no absolute gift of the legacy, as where it is given when the legatee shall attain or provided he does attain the age of twenty-one, but the testator directs the interest of the legacy to be applied in the meantime for the benefit of the legatee, as there is an absolute gift of the interest the principal will be deemed to have vested. *Tucker v. Bishop*, 16 N. Y. 402.

The rule that where there is no immediate gift made in distinct terms separate and apart from the direction to divide and distribute, the interest of the legatee is contingent, is subject to the exception that where the gift is to be severed instantaneously from the general estate for the benefit of the legatee, and in the meantime the interest is to be paid to him, that is indicative of the intent of the testator that the legatee shall at all events have the principal, and is to wait only for the payment until the day fixed. *Smith v. Edwards*, 88 N. Y. 92.

A gift of income tends to vest in the beneficiary the capital of which the income is given. *Cammann v. Bailey*, 210 N. Y. 19, 103 N. E. 824.

A direction that in the interim the income shall be paid to the legatee is indicative of an intent of the testator that the legatee shall at all events have the principal, and is to wait only for payment until the day fixed. *Re Meikle*, 2 Connoly, 97; 20 N. Y. Supp. 88.

A direction that the interest upon the legacy is directed to be given to the legatee until the legacy itself becomes payable is indicative of an intention upon the part of the testator that the legacy shall vest immediately upon his death. *Zartman v. Ditmars*, 37 App. Div. 173, 56 N. Y. Supp. 908.

The intermediate application of the income is a circumstance invariably given great weight as denoting an intention to vest the remainder from the time the income begins to accrue. *Wright v. Mercein*, 34 Misc. 414, 69 N. Y. Supp. 936.

The rule that the words importing contingency will defer vesting until the legatee attains the specified age is subject to an exception where the income is given in the interim. *Provencher's Estate*, 1 Campb. (Pa.) 68.

When interest, whether by way of main-

in one case⁷⁷ the rule that a gift of the intermediate income has the effect to vest the legacy is spoken of as an absolute one, it is not so in fact, the effect of the gift of income being merely to create a counter-presumption in favor of vesting, which will

ordinarily, though not invariably, outweigh the implication of contingency arising from the form in which the gift is expressed. Although this rule of construction has come in for criticism,⁷⁸ it is universally recognized.⁷⁹ It is immaterial that the gift of

tenance or otherwise, is given to the legatee in the meantime, the legacy, notwithstanding the gift appears to be postponed, vests immediately on the death of the testator. This circumstance indicates an intention that the beneficial enjoyment shall begin at once, and payment only of the principal or capital be postponed. *Reed's Appeal*, 118 Pa. 215, 4 Am. St. Rep. 588, 11 Atl. 787.

Where interest is given to the legatee until the time of payment arrives, the gift, although in form contingent, will be held vested. *Middleton's Estate*, 212 Pa. 119, 61 Atl. 808.

The allowance of the entire income pending the period between testator's decease and the final delivery or distribution of the corpus of the property is deemed sufficient evidence of the intention of the testator that the estate shall vest immediately. *Kelly v. Dike*, 8 R. I. 436.

It is well settled with regard to pecuniary legacies, that however in point of terms and form the gift itself and the time of payment may be annexed, still, if interest upon the legacy is in the meantime given to the legatee, the legacy itself is vested. *Underwood v. Dismukes*, Meigs, 299.

If the intermediate estate is given to the legatee, or is directed to be applied for his benefit, the legacy is prima facie vested, this circumstance being considered as an indication of the testator's intention that the legatee shall have the principal at all events. *Sellers v. Reed*, 88 Va. 377, 13 S. E. 754.

See also, to similar effect, *Perry v. Rhodes*, 6 N. C. (2 Murph.) 140 (set out in VIII. q, infra); *Johnson v. Baker*, 7 N. C. (3 Murph.) 318, 9 Am. Dec. 605 (set out in VIII. i, infra).

⁷⁷ *Re Williams* [1907] 1 Ch. 180, 76 L. J. Ch. N. S. 41, 95 L. T. N. S. 759.

⁷⁸ In *Re Byrne*, Ir. L. R. 23 Eq. 260, the master of the rolls, referring to the rule that where a legacy is in terms contingent upon the legatee attaining a given age or the like, the gift of the entire intermediate income to the legatee accelerates the vesting and makes it immediate, said that he had no doubt that the intention of the testator was frequently defeated by this rule, but that it was too firmly established to be disputed.

⁷⁹ For instances of the application of this rule, see *Cloberry v. Lampden*, 2 Freem. Ch. 24 (set out in VIII. i, infra); *Fonereau v. Fonereau*, 3 Atk. 645, 1 Ves. Sr. 118 (set out in VIII. i, infra); *Dodson v. Hay*, 3 Bro. Ch. 404 (set out in VIII. s, infra); *Hammond v. Maule*, 1 Colly. Ch. Cas. 281, 13 L. J. Ch. N. S. 386, 8 Jur. 568 (set out in VIII. b, infra); *Eccles v. Birk-*

ett, 4 De G. & S. 105, 19 L. J. Ch. N. S. 280, 14 Jur. 800 (set out in VIII. l, infra); *Rofe v. Sowerby*, Tamlyn, 376 (set out in VIII. i, infra); *Jones v. Mackilwain*, 1 Russ. Ch. 220, 25 Revised Rep. 32 (set out in VIII. h, infra); *Davies v. Fisher*, 5 Beav. 201, 11 L. J. Ch. N. S. 338, 6 Jur. 248 (set out in VIII. j, infra); *Harrison v. Grimwood*, 12 Beav. 192, 18 L. J. Ch. N. S. 485, 13 Jur. 864 (set out in VIII. l, infra); *Armitage v. Williams*, 27 Beav. 346 (set out in VIII. g, infra); *Latham v. Vernon*, 29 Beav. 604, 7 Jur. N. S. 815, 4 L. T. N. S. 531, 9 Week. Rep. 822 (set out in VIII. f, infra); *Boulton v. Pilcher*, 29 Beav. 633, 7 Jur. N. S. 767, 4 L. T. N. S. 426, 9 Week. Rep. 626 (set out in VIII. h, infra); *Shrimpton v. Shrimpton*, 31 Beav. 425, 11 Week. Rep. 61 (set out in III. b, 1, supra); *Bird v. Maybury*, 33 Beav. 351 (set out in VIII. g, infra); *Parsons v. Justice*, 34 Beav. 598 (set out in note 224, infra); *Re Bartholomew*, 1 Macn. & G. 354, 1 Hall & Tw. 565, 19 L. J. Ch. N. S. 237, 14 Jur. 181 (set out in III. b, 1, supra); *Breedon v. Tugman*, 3 Myl. & K. 289, 3 L. J. Ch. N. S. 169 (set out in III. b, 1, supra); *Potts v. Atherton*, 28 L. J. Ch. N. S. 486, 7 Week. Rep. 331 (set out in VIII. n, infra); *Westwood v. Southey*, 2 Sim. N. S. 192, 21 L. J. Ch. N. S. 473, 16 Jur. 400 (set out in III. b, 1, supra); *Perrott v. Davies*, 38 L. T. N. S. 52 (set out in VIII. l, infra); *Pearson v. Dolman*, L. R. 3 Eq. 315, 30 L. J. Ch. N. S. 258, 15 Week. Rep. 120 (set out in VIII. g, infra); *Re Peek*, L. R. 16 Eq. 221, 42 L. J. Ch. N. S. 422, 21 Week. Rep. 820 (set out in VIII. l, infra); *Re Bunn*, L. R. 16 Ch. Div. 47, 29 Week. Rep. 348 (set out in VIII. g, infra); *Re Turney* [1899] 2 Ch. 739, 69 L. J. Ch. N. S. 1, 48 Week. Rep. 97, 81 L. T. N. S. 548 (set out in VIII. g, infra); *Re Williams* [1907] 1 Ch. 180, 76 L. J. Ch. N. S. 41, 95 L. T. N. S. 759 (set out in VIII. g, infra); *Fulton v. Fulton*, 24 Grant, Ch. (C. C.) 422 (set out in VIII. l, infra); *Re Sproule*, 17 Ont. Rep. 334 (set out in III. b, 1, supra); *Re Livingston*, 14 Ont. L. Rep. 161 (set out in III. b, 1, supra); *Cropley v. Cooper*, 19 Wall. 167, 22 L. ed. 109 (set out in VIII. i, infra); *Newberry v. Hinman*, 49 Conn. 130 (set out in VIII. n, infra); *Sterling v. Ives*, 78 Conn. 498, 62 Atl. 948 (set out in VIII. j, infra); *Young v. McKinnie*, 5 Fla. 542 (set out in VIII. g, infra); *Hocker v. Gentry*, 3 Met. (Ky.) 463 (set out in VIII. q, infra); *Cornelison v. Million*, — Ky. —, 124 S. W. 366 (set out in VIII. j, infra); *Hersey v. Purington*, 96 Me. 166, 51 Atl. 865 (set out in VIII. d, infra); *Lemonnier v. Godfroid*, 6 Harr. & J. 472 (set out in VIII. n, infra); *Plaenker v. Smith*, 95 Md. 389, 62

the intermediate interest or income is not directly to the legatee, but to another for the legatee's use and benefit;⁸⁰ or that there is no gift of the principal except in the direction to divide it;⁸¹ or that the legacy is given to another in event of the

legatee's dying before reaching the specified age.⁸²

It is likewise immaterial that the income may have been given by way of maintenance, and not as a direct gift to the object,⁸³

Atl. 606 (set out in VIII. q, infra); Hancock v. Titus, 39 Miss. 224 (set out in VIII. n, infra); Harris v. Cook, 98 Mo. App. 38, 71 S. W. 1126 (set out in VIII. i, infra); Dusenberry v. Johnson, 59 N. J. Eq. 336, 45 Atl. 103 (set out in VIII. n, infra); Weyman v. Ringold, 1 Bradf. 40 (set out in VIII. g, infra); Torrey v. Shaw, 3 Edw. Ch. 356 (set out in VIII. q, infra); Paterson v. Ellis, 11 Wend. 259 (set out in VIII. h, infra); Tucker v. Bishop, 16 N. Y. 402 (set out in VIII. m, infra); Everitt v. Everitt, 29 N. Y. 39 (set out in VIII. i, infra); Stevenson v. Lesley, 70 N. Y. 512 (set out in VIII. j, infra); Re Murphy, 144 N. Y. 557, 39 N. E. 691 (set out in VIII. s, infra); Sawyer v. Cubby, 146 N. Y. 192, 40 N. E. 869 (set out in VIII. g, infra); Burrill v. Sheil, 2 Barb. 457 (set out in III. b, 1, supra); Boies v. Wilcox, 40 Barb. 286 (set out in VIII. b, infra); Wright v. Mercein, 34 Misc. 414, 69 N. Y. Supp. 936 (set out in VIII. q, infra); Zartman v. Ditmars, 37 App. Div. 173, 55 N. Y. Supp. 908 (set out in III. b, 1, supra); Lake v. Ascher, 132 App. Div. 684, 117 N. Y. Supp. 463 (set out in VIII. g, infra); Re Crossman, 15 N. Y. S. R. 841, 1 N. Y. Supp. 103 (set out in VIII. g, infra); Devane v. Larkins, 56 N. C. (3 Jones, Eq.) 377 (set out in VIII. e, infra); Hooker v. Bryan, 140 N. C. 402, 53 S. E. 130 (set out in VIII. g, infra); Johnson's Appeal, 12 Serg. & R. 317 (set out in VIII. j, infra); Letchworth's Appeal, 30 Pa. 175 (set out in VIII. q, infra); Robert's Appeal, 59 Pa. 70, 98 Am. Dec. 312 (set out in VIII. b, infra); Cooper v. Scott, 62 Pa. 139 (set out in III. b, 1, supra); Safe Deposit & T. Co. v. Wood, 201 Pa. 420, 50 Atl. 920 (set out in VIII. h, infra); McCall's Estate, 11 Phila. 41 (set out in VIII. g, infra); Robinson's Estate, 13 Phila. 299 (set out in VIII. r, infra); Arthurs's Estate, 24 Pittsb. L. J. N. S. 28 (set out in VIII. q, infra); Smith's Estate, 7 Pa. Dist. R. 236 (set out in III. b, 1, supra); Glading's Estate, 13 Pa. Dist. R. 314 (set out in VIII. h, infra); Sammis v. Sammis, 14 R. I. 123 (set out in VIII. q, infra); Hayes v. Robeson, 29 R. I. 216, 69 Atl. 686 (set out in VIII. f, infra); Baker v. McLeod, 79 Wis. 534, 48 N. W. 657 (set out in VIII. l, infra).

⁸⁰ Lister v. Bradley, 1 Hare, 10, 11 L. J. Ch. N. S. 49, 5 Jur. 1034; Hardcastle v. Hardcastle, 1 Hem. & M. 405, 1 New Reports, 83, 7 L. T. N. S. 503; Davies v. Fisher, 5 Beav. 201, 11 L. J. Ch. N. S. 338, 6 Jur. 248; Equitable Guarantee & T. Co. v. Bowe, 9 Del. Ch. 336, 82 Atl. 693; Tucker v. Bishop, 16 N. Y. 402; Sellers v. Reed, 88 Va. 377, 13 S. E. 754.

⁸¹ Parker v. Golding, 13 Sim. 418; and L.R.A.1915C.

see also the instances in which the rule has been applied.

⁸² See Walcott v. Hall, 2 Bro. Ch. 305 (set out in VIII. f, infra); Shepherd's Estate, 8 Pa. Co. Ct. 520 (set out in VIII. n, infra).

In Vawdry v. Geddes, 1 Russ. & M. 203, Tamlyn, 361, 8 L. J. Ch. 63, it was said by Sir John Leach, M. R., that where interim interest on a gift of personality is given, it is presumed that the testator meant an immediate gift, because for the purpose of interest the particular legacy is to be immediately separated from the bulk of the property; but that such presumption fails entirely when the testator has expressly declared that the legacy is to go over in case of the death of the legatee before a particular period. And the same judge in Bland v. Williams, 3 Myl. & K. 411, 3 L. J. Ch. N. S. 218, said that if the gift over is simply upon the death of the legatee under the specified age, the gift cannot vest before that age. But Lord Langdale, M. R., in Davies v. Fisher, 5 Beav. 201, 11 L. J. Ch. N. S. 338, 6 Jur. 248, characterized these statements as *dicta*, and held that though a gift over may be called in aid of other circumstances to show that no present interest was intended to pass, it is not alone sufficient to prevent vesting. And in Re Baxter, 10 Jur. N. S. 845, 4 New Reports, 131, 10 L. T. N. S. 487, Wood, V. C., said that there are *dicta* of Sir John Leach in Vawdry v. Geddes, 1 Russ. & M. 207, Tamlyn, 361, 8 L. J. Ch. 63, and Bland v. Williams, supra, supposed to support the rule to the effect that if the devising clause exactly tallies with the prior limitation, then, notwithstanding that there are other directions which would favor the vesting, the gift over must determine the question against the vesting; but that this has been denied by Lord Langdale in Davies v. Fisher, supra.

⁸³ Wilson v. Knox, Ir. L. R. 13 Eq. 349; Re Bunn, L. R. 16 Ch. Div. 47, 29 Week. Rep. 348.

In Re Wintle [1896] 2 Ch. 711, 65 L. J. Ch. N. S. 863, 75 L. T. N. S. 207, 45 Week. Rep. 91, North, J., said, by way of summarizing the authorities, that if all the income is given it will make that vest immediately which, but for the direction as to income, would not have vested till a later date; that a direction that the income shall be applied for maintenance will not make any difference; nor will a direction that part of the income shall be applied for maintenance make any difference if that is part of income the whole of which is given.

A gift of the income to be applied for the maintenance of legatees, although the pay-

provided the gift be of the whole interest.⁸⁴ A mere gift of maintenance out of the interest does not bring the case within the reasons for the rule, presently to be stated. Although the point has been a controverted one, the trend of judicial opinion seems to

be toward the view that if the whole of the income is available for maintenance, if necessary, it makes no difference that the amount actually to be applied is left to the discretion of trustees.⁸⁵ The gift is of the whole interest where the surplus, after pro-

ment of the legacy is postponed till twenty-one or marriage, constitutes a vested interest. *Perrott v. Davies*, 38 L. T. N. S. 52.

Where there is a gift by will of a share of residue to be paid or transferred to the legatee on his attaining a particular age, with a direction that in the meantime the income of the share shall be applied for his maintenance, the share is vested, and not contingent. *Re Livingston*, 14 Ont. L. Rep. 161.

The gift of the intermediate interest to be applied to the clothing and education of the ultimate beneficiaries has the effect *prima facie* of vesting the legacy. *Everett v. Mount*, 22 Ga. 323.

A direction that the intermediate use or profits be applied for the maintenance of the legatee is a strong indication in favor of an immediate gift. *Hocker v. Gentry*, 3 Met. (Ky.) 463.

The fact that the testamentary guardian is authorized to appropriate all of the interest, and, if necessary, a portion of the principal, to the use of the legatee during his minority, is an indication of the testator's intention that the legatee shall at all events have the principal. *Boies v. Wilcox*, 40 Barb. 286.

Where maintenance generally is given, so that the whole interest may be exhausted, the directed appropriation of the interest for the maintenance of the legatee will not prevent the legacy from vesting. *Bayard v. Atkins*, 10 Pa. 15.

A provision that the intermediate income shall be employed for the education and support of the legatee during minority is persuasive evidence that the legacy was intended as a present vested gift. *RE PAXSON*.

In one case—*Pulsford v. Hunter*, 3 Bro. Ch. 416 (subsequently followed in *Re Ashmore*, L. R. 9 Eq. 99, 39 L. J. Ch. N. S. 202)—it is laid down that maintenance is not equivalent to a gift of interest for the purpose of vesting a legacy; but in *Fox v. Fox*, L. R. 19 Eq. 286, Sir G. Jessel, M. R., said: "I cannot help thinking there is some mistake in the report of *Pulsford v. Hunter*. The observations in the judgment, as reported, seem to me to point not to a gift of the interest for maintenance, but to a gift of maintenance out of the interest, which is not in accordance with the terms of the will as given in the report."

The report says that "the Lord Chancellor thought that, however it might be where interest was given, yet that the giving maintenance was a different case, and was not equivalent to giving interest." These observations, if correctly reported (which I doubt), seem to me to point to L.R.A.1915C.

the distinction taken by Lord Cottenham [in *Watson v. Hayes*, 5 Myl. & C. 125, 9 L. J. Ch. N. S. 49, 4 Jur. 186] between a gift of interest to be applied in maintenance, and a gift of maintenance apart from interest; but if this be not the true meaning of them, then I think they are overruled by what Lord Cottenham said and by the current of modern authorities."

For other instances in which a gift of the income for maintenance has been held to vest the gift, see *Re Hart*, 3 De G. & J. 202, 28 L. J. Ch. N. S. 7, 4 Jur. N. S. 1264, 7 Week. Rep. 28 (set out in VIII. i, *infra*); *Hoath v. Hoath*, 2 Bro. Ch. 3 (set out in VIII. f, *infra*); *Brennan v. Brennan* [1894] 1 I. R. 69 (set out in VIII. g, *infra*).

⁸⁴ *James v. Wynford*, 1 Smale & G. 40, 22 L. J. Ch. N. S. 450, 17 Jur. 17, 1 Week. Rep. 61.

If the whole of the income of a legacy given at a future date be given for maintenance until the time fixed for payment, that is treated as a gift of income, and the legacy is vested. *Re Williams* [1907] 1 Ch. 180, 76 L. J. Ch. N. S. 41, 95 L. T. N. S. 759.

⁸⁵ A discretionary power to apply the whole income, or so much as the trustees may think proper, is a gift of the whole interest within such rule. *Fox v. Fox*, L. R. 19 Eq. 286, 23 Week. Rep. 314.

This case has been criticized by North, J., in *Re Wintle* [1896] 2 Ch. 711, 65 L. J. Ch. N. S. 863, 75 L. T. N. S. 207, 45 Week. Rep. 91, as laying down too broad a rule; but in a later decision by the court of appeal (*Re Turney* [1899] 2 Ch. 739, 69 L. J. Ch. N. S. 1, 48 Week. Rep. 97, 81 L. T. N. S. 548), Lindley, M. R., said that he was by no means satisfied that *Fox v. Fox* was wrongfully decided, but that his impression was that the decision therein was very good sense and very good law; and Sir F. H. Jeune said that he agreed with the view taken by Jessel, M. R., that there was to be gathered from the earlier cases a general rule, and that so far, therefore, from thinking that *Fox v. Fox* ought to be treated as overruled, he should be glad to think that it was established law.

In *Re Williams*, *supra*, Neville, J., expressed a doubt as to whether *Re Wintle* and *Fox v. Fox*, *supra*, can stand together.

In *Re Hume* [1912] 1 Ch. 693, 81 L. J. Ch. N. S. 382, 106 L. T. N. S. 335, 56 Sol. Jo. 414, it is said that it is possible that a direction to apply the intermediate income, or such part thereof as the trustees may think proper, for the maintenance or benefit of the beneficiary, may have the effect to vest the gift.

If there is a clear gift of the entire in-

viding for maintenance, is to be accumulated for the benefit of the legatee;⁸⁶ but the case is otherwise where the surplus is to be accumulated for the benefit of the persons who shall ultimately obtain a vested interest in the property, as there it is not

evident that the testator means the legatee to have the whole of the income in one form or another.⁸⁷

The fact that in a case in which payment is postponed beyond minority, a direction to apply interest to the benefit of the legatee

come for maintenance, its effect in vesting the legacy may not be nullified by the mere circumstance that there is a discretion in the trustees so to employ less than the whole income, that discretion being presumably for the benefit of the object of the gift. *Wilson v. Knox*, Ir. L. R. 13 Eq. 349.

It is not material that the amount to be expended is discretionary with the executors. *Gairdner v. Gairdner*, 1 Ont. Rep. 184.

The gift of such sums as the trustee should think fit for the purpose of intermediate maintenance is a circumstance tending to show that a gift is vested. *Felton v. Sawyer*, 41 N. H. 202.

Where the testator directs so much of the income as shall be necessary to be applied for the maintenance of the beneficiaries, such provision indicates an intention that the legacy shall vest immediately. *Safe Deposit & T. Co. v. Wood*, 201 Pa. 420, 50 Atl. 920.

A discretionary power to apply the whole income, or as much as the trustees may think proper, is equivalent to a gift of the whole estate, within the rule that a gift of the intermediate use indicates an intention to vest a legacy immediately. *Rhode Island Hospital Trust Co. v. Noyes*, 26 R. I. 323, 58 Atl. 999.

For other instances, see *Scotney v. Lomer*, L. R. 31 Ch. Div. 380, 55 L. J. Ch. N. S. 443, 54 L. T. N. S. 194, 34 Week. Rep. 407 (set out in VIII. 1, *infra*); *Eccles v. Birkett*, 4 De G. & S. 105, 19 L. J. Ch. N. S. 280, 14 Jur. 800 (set out in VIII. 1, *infra*); *Re Williams* [1907] 1 Ch. 180, 76 L. J. Ch. N. S. 41, 95 L. T. N. S. 759 (set out in VIII. g, *infra*).

For a limitation of this doctrine see *Re Hume* [1912] 1 Ch. 693, 81 L. J. Ch. N. S. 382, 106 L. T. N. S. 335, 56 Sol. Jo. 414, in footnote 87, *infra*.

Contra.

The rule that a gift of the intermediate income has the effect to vest a legacy does not apply where a portion only of the income is directed to be applied for the maintenance of the legatee, or if a discretion is given to the trustees as to the amount to be applied. *Boulton v. Pilcher*, 29 Beav. 633, 7 Jur. N. S. 767, 4 L. T. N. S. 426, 9 Week. Rep. 626 (dictum).

In *Re Martin*, 57 L. T. N. S. 471, it was said, *obiter*, that if the direction to apply income for maintenance is to apply the whole or such part as the trustees may think fit, the capital is not vested.

Fox v. Fox, L. R. 19 Eq. 286, 23 Week. Rep. 314, was doubted by Kay, J., in *Re Martin*, *supra*, who said that he felt great difficulty in following that decision in so far as it held that a gift contained in a

direction to pay and divide amongst a class at a specified age, followed by a direction to apply the whole income for maintenance in the meantime, is vested, and not the less so because there is a discretion conferred upon the trustees to apply less than the whole income for that purpose.

In *Re Wintle* [1896] 2 Ch. 711, it was held by North, J., that a power given by will to trustees to apply "the whole or such part as they . . . shall think fit, of the annual income of the share or presumptive share of any of my children or grandchildren during minority for or towards his, her, or their education or maintenance," did not vest the shares of children under twenty-one, on the ground that it could not be said that the testator intended by such provision to give the whole of the income to the legatees in every event.

See also *Re Grimshaw*, L. R. 11 Ch. Div. 406, 48 L. J. Ch. N. S. 399, 27 Week. Rep. 544 (set out in VIII. g, *infra*).

⁸⁶ Where ultimately the accumulated residue, after providing for maintenance, whatever it may be, is to go to the same legatee, then the whole gift is vested. *Pearson v. Dolman*, L. R. 3 Eq. 315, 36 L. J. Ch. N. S. 258, 15 Week. Rep. 120 (set out in VIII. g, *infra*).

See also *Stretch v. Watkins*, 1 Madd. Ch. 253 (set out in VIII. s, *infra*); *Butler v. Butler*, 29 N. S. 145 (set out in VIII. g, *infra*); *Fraser v. Fraser*, 1 New Reports, 430, 8 L. T. N. S. 20 (set out in III. b, 2, *supra*); *Lowe v. Barnett*, 38 Miss. 329 (set out in VIII. s, *infra*); *Smith v. Parsons*, 146 N. Y. 116, 40 N. E. 736 (set out in VIII. g, *infra*); *Re Ranken*, 101 App. Div. 189, 91 N. Y. Supp. 933 (affirmed without opinion in 182 N. Y. 519, 74 N. E. 1124) (set out in VIII. g, *infra*).

In *Goebel v. Wolf*, 113 N. Y. 405, 10 Am. St. Rep. 464, 21 N. E. 388, the fact that the testator directed the income to be applied in part for the support and maintenance of his widow and minor children, and the discharge of mortgages on the property devised, and that the balance should be invested for the benefit of the ultimate beneficiaries, was regarded as a circumstance indicative of his intention to give them immediate vested interests.

⁸⁷ The creation in trustees of a mere discretionary power to apply the income of an expectant share for the maintenance or benefit of the beneficiary, with a direction to accumulate the income not so applied for the benefit of the persons who ultimately obtain a vested interest in the share in question, will not vest a gift originally given upon attaining a specified age, as the donor is evidently contemplating not that

extends only to the minority, will not preclude the inference therefrom of an intention to vest the capital, where there is nothing in the will to prevent the implication, from such direction, of a gift of the benefit or enjoyment of the interest during the whole interim.⁸⁸

Two reasons are given for the rule that the gift of the intermediate interest is indicative of an intention to postpone pos-

session only, and not the vesting. One is, that for the purpose of the interest there must be an immediate separation of the legacy from the bulk of the estate,⁸⁹ thereby bringing the case within an exception elsewhere discussed (III. j, *infra*); but a more logical reason is that the right to the whole of the income from the fund is equivalent to a gift of the fund from which such income is derived.⁹⁰

the beneficiary will in some form or other enjoy the intermediate income, but that he will not so enjoy it unless the discretionary power be exercised. *Re Hume* [1912] 1 Ch. 693, 81 L. J. Ch. N. S. 382, 106 L. T. N. S. 335, 56 Sol. Jo. 414.

In *Wilson v. Knox*, Ir. L. R. 13 Eq. 349, where testator bequeathed to each of his children, naming them, "who being sons shall attain the age of twenty-one years, and being daughters shall attain that age or marry under that age with the consent of her guardians or guardian, the sum of £1000," further declaring that the trustees should during the minority or respective minorities of any of the sons, or minority and discovery of any of the daughters, "apply the whole or such part as they or he shall think fit of the interest, dividends, and income of the share or legacy, and the rents and profits of any real estate or chattels real to which any of my said children shall for the time being be respectively entitled in expectancy or in possession under the trusts and limitations hereinbefore declared and contained, for or towards his or her maintenance or education, . . . and shall during such minority or respective minorities . . . and discoveries . . . accumulate all the residue (if any) of the same interest, dividends, income, and rents and profits . . . for the benefit of the person or persons who under the trusts herein contained shall be or become entitled to the principal fund or hereditaments from which same respectively shall have proceeded,"—it was held that, though there was power in the trustees to apply the entire intermediate income for maintenance or education, the whole intermediate income could not be said to have been given to the legatees so as to vest the principal.

⁸⁸ *Davies v. Fisher*, 5 Beav. 201, 11 L. J. Ch. N. S. 338, 6 Jur. 248.

The word "minority" may mean the period during which the testator has kept the legatee out of the full control of the property, and if the whole tenor of the will be such as clearly to indicate that the word is used in such a sense, the court can let the testator be the expounder of his own words. *Maddison v. Chapman*, 4 Kay & J. 709.

But in *Thomas v. Wilberforce*, 31 Beav. 299, it was held that the construction of the gift as contingent was not to be varied by a power to apply such part of the income as the executors should think fit to maintenance during minority, leaving a gap between twenty-one and the time when L.R.A.1915C.

the legatees should attain the age descriptive of the class entitled to the legacy.

⁸⁹ *Vawdry v. Geddes*, 1 Russ. & M. 203, Tamlyn, 361, 8 L. J. Ch. 63; *Saunders v. Vautier*, Craig & Ph. 240, 10 L. J. Ch. N. S. 354.

⁹⁰ A legacy of personal estate made payable at a future time or upon the happening of some event, in terms which, if they stood alone, would undoubtedly render the legacy contingent, may be construed as vested if there is, as part of the same gift, a bequest of the interest in the meantime. This depends on the same principle by virtue of which an absolute gift of the income of personal estate is held to pass the corpus. If the entire income is disposed of, there can be no further beneficial ownership of the fund in anyone else. *Wilson v. Knox*, Ir. L. R. 13 Eq. 349.

"This," says Parker, J., in discussing the rule in *Re Hume* [1912] 1 Ch. 693, "is not unreasonable, for the donor evidently contemplates that the beneficiary will take the income till the specified age be attained, and the corpus when such age is attained. In other words, that he will ultimately take the whole subject-matter of the gift, both principal and income."

Although there is no gift of the legacy previous to the period appointed for its payment, yet if the intermediate interest be given to the legatee, or to be used for his benefit, such circumstance will operate to vest the legacy; for the reason that, as the whole interest is given either in one way or the other for the benefit of the legatee, it could not have been the intention of the testator to have made the absolute interest in the legatee contingent. *Nixon v. Robbins*, 24 Ala. 663.

The doctrine that a gift of interest in the meantime will vest the principal appears to be founded upon the idea that the gift of interest *eo nomine* is difficult to be reconciled with a suspension of the vesting, because interest is a premium or compensation for the forbearance of principal to which it supposes a title. It is a very plain inference from this assigned reason of the exception, that it can only apply where the whole interest is given during the delay of payment. If any part of it is diverted to purposes other than the benefit of the legatees, that is treating the principal as not belonging to them, but remaining in the estate as a source of income for the benefit of the estate. *Smith v. Edwards*, 88 N. Y. 92.

The latter reason precludes the application of the rule where a portion only of the income is given.⁹¹ The statement to be found in some of the American cases to the effect that the fact that the whole of the income is not given only decreases the force of the inference,⁹² seems to have been due to a want of understanding of the basis of the rule.

Where the testator has dealt with the

income, not as an incident of the property or fund, but as a separate and independent subject of gift, there is no ground for the presumption that his intention was to postpone payment only, and not the vesting.⁹³ In order to have that effect, the gift of income must be a gift of the income of the very fund dealt with.⁹⁴ It has, therefore, been a question in several cases set out in the footnote below,⁹⁵ whether the gift of

⁹¹ See footnote 99, *infra*.

⁹² Where a portion of the income is given for the benefit of the legatee, especially in the discretion of the trustees, it affords a less conclusive ground of inference in favor of the legacy vesting, but still one of very considerable weight. *Kelly v. Dike*, 8 R. I. 436 (set out in VIII. q, *infra*); *Hersey v. Purington*, 96 Me. 166, 51 Atl. 865 (set out in VIII. d, *infra*).

For an instance in which a gift of two thirds of the income was held to indicate vesting, see *Sterling v. Ives*, 78 Conn. 498, 62 Atl. 948, set out in VIII. j, *infra*.

⁹³ Where there is one gift of corpus and income as parts of the whole, a gift otherwise contingent will be vested, but where there are separate gifts, one of capital and one of income, not necessarily going together, the gift will not be deemed vested. *Brennan v. Brennan* [1894] 1 I. R. 69.

When maintenance is given, questions arise whether it is a distinct gift, or merely a direction as to the application of the interest; and if it is a distinct gift, it has no effect upon the question of the vesting of the legacy. *Watson v. Hayes*, 5 Myl. & C. 125, 9 L. J. Ch. N. S. 49, 4 Jur. 186.

Where the gift of interest or maintenance is distinct, and the direction is to pay or transfer the principal sum at the specified age or upon the condition named, the legacy is contingent. *Provenchere's Appeal*, 67 Pa. 463.

Where the interest alone is the subject of the gift up to a particular time, and the principal is then for the first time given, the prior gift of interest or dividends will not vest the capital. *Spencer v. Wilson*, L. R. 16 Eq. 501, 42 L. J. Ch. N. S. 754, 29 L. T. N. S. 19.

In *Re Bunn*, L. R. 16 Ch. Div. 47, *Jessel, M. R.*, quoted with approval the following passage from *Theobald, Wills*: "It makes no difference whether the interest is first given up to a given time, and then the principal, or *vice versa*, at any rate, if the age fixed is either twenty-one or some later age, but such as to indicate that the testator has fixed upon it only from the probable incapacity of the legatees to manage their property satisfactorily earlier." But in *Re Wrey*, L. R. 30 Ch. Div. 507, 54 L. J. Ch. N. S. 1098, 53 L. T. N. S. 334, *Kay, J.*, adverted to this passage, and said that if the principal of the cases was that the age fixed must be such as to indicate that the testator fixed upon it only from the probable incapacity of the legatees to manage their property satisfactorily earlier, the L.R.A.1915C.

distinction was one with which he was not familiar, and which he did not know to have been drawn in any other case.

⁹⁴ A direction for maintenance, followed or preceded by gift of the fund at a future date or on a contingency, will not have the effect to accelerate vesting, unless it amounts to a gift of the interest or income of the very fund dealt with, and of the whole interest or income. *Wilson v. Knox, Jr.* L. R. 13 Eq. 349.

See also cases cited in note 102, *infra*.

⁹⁵ In *Watson v. Hayes*, 9 Sim. 500, testator directed that his executors should pay £25 per annum for the maintenance and education of his daughter Sophia till she should attain twenty-one or be married, "when my said executors are hereby required to pay to Sophia the clear sum of £500 to and for her own use and benefit." The Vice Chancellor held that as the £25 directed to be applied for the daughter's maintenance and education might fairly be regarded as intended to be the interest of the £500 which was directed to be paid to her on her attaining twenty-one or being married, the legacy was vested; but upon appeal the Lord Chancellor held (5 Myl. & C. 125, 9 L. J. Ch. N. S. 49, 4 Jur. 186) that though it was probable that the testator fixed upon the sum of £25 per annum as interest at 5 per cent upon the £500, it clearly was not given as interest upon that sum, and could not be considered such so as to effect the vesting of the legacy.

In *Spencer v. Wilson*, L. R. 16 Eq. 501, 42 L. J. Ch. N. S. 754, 29 L. T. N. S. 19, testator gave real and personal property upon trust to convert into money and to pay thereout various annuities, including annuities to his three sisters, and, upon the death of either of his said sisters, upon trust to pay and divide the said legacies or shares, or the securities on which the same might be invested, unto his four natural children, naming them, or such of them as might be then living, as they should attain their respective majorities, or, being a daughter, should attain that age or marry. He further directed that the residue should be held in trust to pay or apply the annual income for the benefit of his said four children, as the trustees should think proper, until they respectively should attain the age of twenty-one years, and when they should attain that age, or, being a daughter, should attain that age or marry, upon trust to pay or transfer the said residue or the securities whereon the same should be invested unto

intermediate income for maintenance was to be considered a separate and distinct gift. The fact that the gift of the legacy

is found only in a direction to pay and divide does not put the gift of income on the footing of a separate gift.⁹⁶ But the fact

the said four children, in equal shares and proportions, as tenants in common. It was held that the capital being the subject of one gift and the income of another, the direction to apply income to maintenance did not have the effect to vest the legacies in the children.

In *Re Ashmore*, L. R. 9 Eq. 99, 39 L. J. Ch. N. S. 202, testatrix bequeathed her residuary personal estate upon trust, after the decease of her daughter, to assign, transfer, and pay it unto and equally between such of her four grandchildren (naming them) as should be living at the decease of her daughter, and as should then have attained or should thereafter live to attain the age of twenty-one years, and in the meantime to apply the dividends and annual proceeds of the share or shares of such of them as should be under the age of twenty-one years, or so much thereof as might be necessary, in or towards his, her, or their maintenance and education. She further provided that in case any of said four grandchildren should die in their mother's lifetime leaving lawful issue, the share of the one so dying should be assigned and transferred to such issue on attaining the age of twenty-one years, the dividends and proceeds thereof in the meantime to be applied in or towards their maintenance and education. Sir W. M. James, V. C., although saying that his first impression was that the children took vested interests, considered himself bound by the case of *Pulsford v. Hunter*, 3 Bro. Ch. 416 (set forth in note 83), to hold that the interests of such of the issue of the grandchild as died under twenty-one did not vest at the death of their parent, but vested only upon attaining twenty-one, on the ground that the giving of maintenance was not equivalent to giving interest. He further suggested that the decision might be sustained by another consideration, namely, that the gift was not of a separate share to each of the issue on attaining twenty-one, with a gift of the dividends and proceeds thereof in the meantime to be applied in maintenance, but a gift of a fund to each of the issue on attaining twenty-one in equal shares and proportions, and a gift of the dividends and interest in the meantime. But in *Fox v. Fox*, L. R. 19 Eq. 286, 23 Week. Rep. 314, Sir G. Jessel, M. R., dissented from the foregoing decision, expressing the opinion that there must be some mistake in the report of *Pulsford v. Hunter*, and that the distinction suggested between a gift of a separate share to each of the children on attaining twenty-one, with a gift of the income in the meantime for maintenance, and a gift of a fund to each of the children on attaining twenty-one in equal shares, with a gift of interest in the meantime, was much too fine to be relied on.

L.R.A.1915C.

In *Seabrook v. Seabrook*, McMull. Eq. 201, where testator, who had directed that his lands and negroes be kept together until his youngest child should reach the full age of twenty-one years, when they were to be divided into five equal shares among his five children, and who had given, devised, and bequeathed one of the said shares to each of the said children as they should respectively attain the full age of twenty-one years, directed that the income of the shares of those under age should fall into and form a part of the residuary estate, and that each child during minority should receive "only a proper education and a reasonable maintenance and support out of the income of the said estate," it was held that the provision for education and maintenance had no connection with the income of the share of each child, but was a distinct gift out of a general fund, and therefore could not have the effect to vest the gift of personality.

A gift of dividends of stock is not sufficient to vest a gift of the stock contained only in the direction for payment upon the legatee's attaining a specified age, dividends being always a distinct subject of legacy. *Batsford v. Kebbell*, 3 Ves. Jr. 363, 4 Revised Rep. 15. But in *James v. Wynford*, 1 Smale & G. 40, 22 L. J. Ch. N. S. 450, 17 Jur. 17, 1 Week. Rep. 61, the case of *Batsford v. Kebbell*, supra, is spoken of as one difficult to reconcile with the established principle.

In *Re Peek*, L. R. 16 Eq. 221, 42 L. J. Ch. N. S. 422, 21 Week. Rep. 820, Sir R. Malins, V. C., said with reference to *Batsford v. Kebbell*, supra, and *Watson v. Hayes*, 5 Myl. & C. 125, 9 L. J. Ch. N. S. 49, 4 Jur. 186, that in them there was no gift of corpus till the time of payment.

On the other hand, in *Butler v. Butler*, 29 N. S. 145, where testator directed his executors to invest a sum of money, and to pay the income therefrom to and for the use and benefit of his son "until he shall have arrived at the full age of twenty-eight years, and upon his attaining said age to pay said sum and its accumulations and unapplied income, if any, or deliver the securities representing the same to him," it was held that the gift of the income and the gift of the corpus were not two separate gifts so as to preclude the operation of the rule that a gift of intermediate income has the effect to vest the legacy.

A direction that a legacy shall carry interest does not amount to a gift of interest distinct from the gift of principal. *Re Hart*, 3 De G. & J. 202, 28 L. J. Ch. N. S. 7, 4 Jur. N. S. 1264, 7 Week. Rep. 28.

⁹⁶ See *Parker v. Golding*, 13 Sim. 418, set out in VIII. n. infra.

that the gift of the intermediate income is subject to forfeiture in event of an attempt to alien or anticipate shows it to be an independent disposition; ⁹⁷ as does an interval or gap separating the gift of the income from the principal.^{97½} The gift of an annuity in the meantime,⁹⁸ or of maintenance out of, but not to the extent of,

the intermediate income,⁹⁹ or out of a general fund,¹⁰⁰ is clearly a gift wholly distinct from the disposition of the principal, and will not accelerate vesting. For instances in which there has been held to be a gift of interest for maintenance, and not merely a gift of maintenance out of interest, see footnote.¹⁰¹

⁹⁷ See *Pearson v. Dolman*, L. R. 3 Eq. 315, 36 L. J. Ch. N. S. 258, 15 Week. Rep. 120, set out in VIII. g, infra.

^{97½} In *Pearson v. Dolman*, supra, it is said that where the principal is given at a distant epoch, and the whole income is given in the meantime, the court, leaning in favor of vesting, will say that the whole thing is given; but if there occurs an interval or gap which separates the gift of the income from the principal, it is not vested; and it is suggested that some, though perhaps not all, of the cases may be reconciled on this theory.

⁹⁸ *Pleasanton's Appeal*, 99 Pa. 362.

⁹⁹ Where a legacy is given payable at a future date, and something is given out of income for maintenance, not necessarily exhausting the income, such gift is not sufficient to make the legacy vest. Re *Wintle* [1896] 2 Ch. 711, 65 L. J. Ch. N. S. 863, 75 L. T. N. S. 207, 45 Week. Rep. 91.

A gift of maintenance out of the interest of a legacy does not show the legacy to be vested, but a gift of the whole interest for that purpose does. *Gairdner v. Gairdner*, 1 Ont. Rep. 184.

A provision for maintenance out of the intermediate income of children, which describes them as entitled to the income "in expectancy," will not operate to vest the gift. *Dewar v. Brooke*, L. R. 14 Ch. Div. 529, 49 L. J. Ch. N. S. 374, 28 Week. Rep. 613.

A provision for maintenance will not bring the case within that exception to the general principle which is founded on a gift of the intermediate interest or profit to the same legatee to whom the future legacy of the capital is given. That exception does not apply if the maintenance is not to absorb the whole amount of the profit, or if it be not restricted to that as the only fund. *Anderson v. Felton*, 36 N. C. (1 Ired. Eq.) 55.

¹⁰⁰ Where the testator gives interest in the meantime, he gives a property in the principal, unless there be something on the face of the will to prevent its having such operation. But where maintenance is directed in the interim, it does not produce the effect of vesting the legacy, because it does not arise out of the principal, and has no necessary connection therewith. *Lemonnier v. Godfroid*, 6 Harr. & J. 472.

Where there is no severance of the legacy from the rest of the estate, and no appropriation of the interest to the separate benefit of the legatee, but the whole estate is vested in the hands of trustees, and the legatee is to receive not the interest of his L.R.A.1915C.

legacy, but a maintenance and education from the general fund of the estate in common with others, such a disposition of the estate can raise no presumption of an intention on the part of the testator that the legacy shall vest immediately. *Gifford v. Thorn*, 9 N. J. Eq. 702.

¹⁰¹ In *Brennan v. Brennan* [1894] 1 L. R. 69, where testator directed his executors to invest for the maintenance and education of his children during their minorities, or if girls, until their marriage, all the moneys to which they might respectively be entitled under his will, it was held that there was a gift of interest for maintenance, and not for maintenance out of interest.

In *Hanson v. Graham*, 6 Ves. Jr. 239, where testator gave to the three children of his daughter £500 apiece of 4 per cent consolidated bank annuities, when they should respectively attain their ages of twenty-one or day or days of marriage, which should first happen, provided it was with consent of his executors and trustees as therein mentioned, and further declared that the interest of said legacies should be laid out for the benefit of his grandchildren till they should attain their respective ages of twenty-one years or day or days of marriage, it was contended on the one hand that the legatees were entitled because interest was given, and that they came within the established rule that though such words are used as would not have vested the legacy, yet the circumstance of giving interest is an indication of intention denoting that the testator meant the whole legacy to belong to the legatee. On the other side it was contended that the interest was not so given as to bring it within the general rule, but what was given was more like maintenance. The Master of the Rolls said: "It is true, it has been held that has not the same effect as giving interest, upon this principle, that nothing more than a maintenance can be called for, what can be shown to be necessary for maintenance, however large the interest may be; and therefore what is not taken out of the fund for maintenance must follow the fate of the principal, whatever that may be. But by this will it is clear the whole interest is given. Can there be any doubt that in this case all the interest became, as it fell due, the absolute property of these infants, as separated altogether from the residue? All that is left to the trustees is to determine in what manner it may be best employed. It is not merely so much of the interest as shall be necessary for the maintenance, but the interest entirely,

The rule that a gift of intermediate income will operate to vest a legacy does not apply where the income is given as a common fund toward the maintenance and education of a class;¹⁰² but the contrary is the case where each member of the class is to

have the income of his or her expectant share.¹⁰³ For instances in which the gift has been held to be of the latter character, see footnote.¹⁰⁴

The rule in question has occasionally been applied in cases involving devises of real

separated from the principal. It is therefore the simple case of interest."

¹⁰² Re Hunter, L. R. 1 Eq. 295.

Where the gift is of an entire fund payable to a class of persons equally on their attaining a certain age, a direction to apply the income of the whole fund in the meantime for their maintenance will not create a vested interest in a member of the class who does not attain that age. Re Mervin [1891] 3 Ch. 197, 60 L. J. Ch. N. S. 671, 65 L. T. N. S. 186, 39 Week. Rep. 697; see also *dictum* of Jessel, M. R., in Re Parker, L. R. 16 Ch. Div. 44, to the same effect.

In Re Ashmore, L. R. 9 Eq. 99, 39 L. J. Ch. N. S. 202, James, V. C., suggested that there might be a distinction between a gift of a separate share to each of the children on attaining twenty-one, with a gift of the income in the meantime for maintenance, and a gift of the fund to each of the children on attaining twenty-one in equal shares, with a gift of interest in the meantime. But in Fox v. Fox, L. R. 19 Eq. 286, 23 Week. Rep. 314, Jessel, M. R., said that he could find no such distinction taken in any other case, and that it seemed to him to be much too fine to be relied on.

Where the gift of the intermediate income is to members of a class *per stirpes*, and the principal is to be divided between them *per capita*, they do not take the income and principal in the same right so as to vest the legacy. Kountz's Estate, 213 Pa. 390, 3 L.R.A.(N.S.) 639, 62 Atl. 1103, 5 Ann. Cas. 427.

In Re Martin, 57 L. T. N. S. 471, testatrix devised and bequeathed real and personal estate upon trust for sale and conversion, and, after payment of debts and legacies, upon trust to divide the residue of the income of her personal estate and the rents of her real estate until sold into nine equal shares, one of which she disposed of in the following manner: "As to one equal ninth part or share of the said dividends, rents, and interests upon trust to pay and apply the same for and towards the maintenance and education of" certain named persons, the children of a deceased nephew, "and as and when they should respectively attain the ages of twenty-one years, upon trust to pay to them in equal shares one equal ninth part or share of the principal moneys and the dividends and interest which might accrue due thereon." It was held that as it was not the income of each particular share, but one ninth of the income of the whole estate which was to be applied for the maintenance of the children, and there was no direction to pay them each a separate fund, L.R.A.1915C.

but merely to apportion one ninth of the whole capital among them, it was not so clearly a gift of the income of the particular share of the person who attains twenty-one to him as would suffice to vest the shares.

In Re Morris, 33 Week. Rep. 895, where testatrix gave her residuary real and personal estate to a trustee upon trust to sell and invest, "and to apply the income arising therefrom for or towards the maintenance and education of her two children [naming them] until they shall respectively attain the age of twenty-one years, and then to divide the trust funds equally between them as tenants in common," it was held that while there was a gift to the trustee of the income to be applied for the maintenance and education of the children, there was no division of the income equally between the two, and no gift of any specified part of the income to either child so as to vest the gift of the corpus, which was to take effect only when the children should respectively attain twenty-one.

¹⁰³ Re Hume [1912] 1 Ch. 693, 81 L. J. Ch. N. S. 382, 106 L. T. N. S. 335, 56 Sol. Jo. 414.

¹⁰⁴ In Re Gossling [1903] 1 Ch. 448, 72 L. J. Ch. N. S. 433, 88 L. T. N. S. 279 (reversing [1902] 1 Ch. 945, 71 L. J. Ch. N. S. 680, 87 L. T. N. S. 63) where testator gave his residuary estate in trust to pay and transfer the same unto and equally between his two children on their severally attaining twenty-one, the income "during their respective minorities" to be applied in or towards their maintenance, with a power for the trustees at any time during the "respective minorities" of his said two children to advance any portion "of his or her presumptive share" in or towards their advancement in the world, it was held that on the peculiar wording of the will the two children were intended to have the income, not indiscriminately of the whole, but only, in each case, of their aliquot shares during their minority, and accordingly that each took an immediate vested interest.

In Re Byrne, Ir. L. R. 23 Eq. 260, where a will contained the following clause: "I bequeathed the pecuniary legacies following, namely, . . . to each of the children of my son Redmond Peter who shall be living at my death, and who shall live to attain the age of twenty-one years, the sum of £100, the interest thereof in the meantime to be paid to their said father in aid of their maintenance and education,"—it was held that as the gift was not of a common fund to such of the class as should attain the age of twenty-one in shares, but of so many definite sums of £100 as there

estate,¹⁰⁵ but cases of real estate differ from cases of personal estate in this, that it is immaterial whether the intermediate rents and profits are given for the benefit of the devisee or of some third person,¹⁰⁶ as in the latter case the devise may be considered vested upon another ground, elsewhere discussed. (III. f, *infra*.)

e. Provision for advancement of legatee.

A provision for advancements to the legatees before the time for distribution—especially where such advancements are direct-

were members of the class, with a gift of the entire interest upon each separate £100 to each legatee in the meanwhile, the gift of the intermediate interest had the effect to vest the legacies immediately.

For instances in which the income has been held to have been given as a common fund, see note 102, *supra*.

¹⁰⁵ The gift of intermediate profits to a devisee is a circumstance going to show that his interest is vested immediately. *Danforth v. Talbot*, 7 B. Mon. 623.

The carving out of a prior interest for the benefit of the ulterior devisees, and extending over the whole period for which the possession and enjoyment are postponed, is in effect a devise of the whole estate instant to the devisees, with the exception of the partial interest carved out for their benefit. *Allan v. Vanmeter*, 1 Met. (Ky.) 264.

A future interest may be treated as vested where there is any present interest in the income of the property. *Toms v. Williams*, 41 Mich. 565, 2 N. W. 814; *Taylor v. Richards*, 153 Mich. 667, 117 N. W. 208.

The rule which treats future interests as vested where there is any present interest in the income of the property is not conclusive of the construction to be given to a will. *Chamberlain v. Young*, 9 Ky. L. Rep. 270, 5 S. W. 380.

See also *Foster v. Holland*, 56 Ala. 474 (set out in VIII. q, *infra*); *Eldridge v. Eldridge*, 9 Cush. 516 (set out in VIII. i, *infra*); *Seitz v. Faversham*, 141 App. Div. 903, 126 N. Y. Supp. 801 (set out in VIII. q, *infra*); *Rauchfuss v. Rauchfuss*, 2 Dem. 271 (set out in VIII. q, *infra*).

¹⁰⁶ While in the case of a gift of personal estate merely, where the intermediate income is not given at all to the legatees, or only a part of it to the legatees, words importing a condition precedent will prevent the vesting, it is well settled that as to real estate the purpose for which the intermediate rents and profits are given or carved out does not prevent the vesting. *James v. Wynford*, 1 Smale & G. 40, 22 L. J. Ch. N. S. 450, 17 Jur. 17, 1 Week. Rep. 61.

¹⁰⁷ See *Fonereau v. Fonereau*, 3 Atk. 645, 1 Ves. Sr. 118 (set out in VIII. i, *infra*); *Vivian v. Mills*, 1 Beav. 315, 8 L. J. Ch. N. S. 239 (set out in VIII. g, *infra*); *Harrison v. Grimwood*, 12 Beav. 192, 18 L. J. Ch. N. L.R.A.1915C.

ed to be charged against them respectively, and be deducted from their respective shares—is strongly indicative of an idea in the mind of the testator that at the time of such charges the legatee has some vested interest against which these charges may be made.¹⁰⁷

f. Effect, in devises of realty, of a devise of an antecedent estate.

It was a rule of the common law, based upon what were regarded as sufficient reasons,¹⁰⁸ that a limitation capable of taking

S. 485, 13 Jur. 864 (set out in VIII. l, *infra*); *Everitt v. Everitt*, 29 N. Y. 39 (set out in VIII. i, *infra*); *Goebel v. Wolf*, 113 N. Y. 405, 10 Am. St. Rep. 464, 21 N. E. 388 (set out in VIII. q, *infra*); *Re Meikle*, 2 Connoly, 97, 20 N. Y. Supp. 88 (set out in VIII. q, *infra*); *Kelly v. Dike*, 8 R. I. 436; (set out in VIII. q, *infra*); *Underwood v. Dismukes*, Meigs, 299 (set out in VIII. q, *infra*).

In *Torrey v. Shaw*, 3 Edw. Ch. 356, an intention that the legatees should take immediate vested interests was held to be shown by a clause in the will authorizing the executors in their discretion to advance to any of them any part of "their respective shares of the estate" before the time fixed for distribution.

¹⁰⁸ In *Smith on Executory Interests*, p. 71, it is said: "It is a well-known rule that a limitation shall, if possible, be construed to be a remainder, rather than an executory devise. Or, to express the rule more precisely and in its true extent, a limitation, whether by deed or devise, shall, if it possibly can consistently with other rules of law, be construed to be a remainder, rather than an executory limitation not by way of remainder. The reason which is usually and justly assigned for this rule is that an executory interest not by way of remainder, unless it is engrafted on an estate tail, cannot be barred; and consequently there is a tendency in such interests to a perpetuity which is contrary to the policy of the law. It may be added, however, that it may perhaps have been originally adopted, partly at least, for another and more general reason, which would seem to affect executory interests engrafted on an estate tail, as well as those engrafted on other estates, though the application of that reason has ceased since the statute of uses. Before that statute, executory interests which were not by way of remainder, or by way of augmentative or diminuent limitation, could only be limited by way of use or devise; and they were mere trusts, which could only be enforced in equity; and therefore it is not improbable that the courts for this reason, as well as for the preceding, may have inclined towards construing a limitation to be a remainder, rather than an executory interest not by way of remainder."

effect as a remainder would not be considered an executory devise. It was likewise a rule based on considerations of feudal polity, that a contingent remainder could not take effect if the preceding estate should be destroyed or determined before the happening of the event upon which the remainder was limited. Where, therefore, there was a devise to A until B should attain twenty-one, and when B should attain twenty-one then to him and his heirs forever, there was danger, should the remainder to B be construed as contingent upon his attaining twenty-one, that it might fail of effect, though B should attain twenty-one, by the previous destruction of the precedent estate. And where there was a devise to A for life, remainder to B if or when he should attain twenty-one, there was danger, should the remainder be construed as contingent, of B's losing his estate, though he should attain twenty-one, by the death of the tenant for life before that time. In

¹⁰⁰ It was said by Lord Chief Justice Tindal, in delivering the response of the common-law judges to the question propounded by the House of Lords in *Phipps v. Ackers*, 9 Clark & F. 583, 6 Jur. 745, that the cases in which the courts have relied on the circumstance that the estate prior to the attainment of the age twenty-one has been given to some third person, either for the benefit of the devisee himself or for the benefit of some other persons, to endure during the minority, proceed on the ground that the estate given to the devisee on his attaining twenty-one is in fact only a remainder taking effect in its natural order on the determination of the preceding estates, and that the attaining the prescribed age in such a case no more imports a condition precedent than any other words indicating that a remainderman is not to take until after the determination of the particular estates.

In *Goodtitle ex dem. Hayward v. Whitby*, 1 Burr. 228, Lord Mansfield laid down these rules of construction: "1st. Wherever the whole property is devised, with a particular interest given out of it, it operates by way of exception out of the absolute property. . . . 2d. Whether an absolute property is given, and a particular interest given, in the meantime, as 'until the devisee shall come of age, etc., and when he shall come of age, etc., then to him, etc.' the rule is that that shall not operate as a condition precedent, but as a description of the time when the remainderman is to take in possession."

Where a testator creates a particular estate, and then goes on to dispose of the ulterior interest expressly in an event which will determine the prior estate, the words descriptive of such event occurring in the latter devise will be construed as referring merely to the period of the determination of the possession or enjoyment under the L.R.A. 1915C.

order to prevent the testator's *general* intention to benefit B from being thus defeated, it was necessary to construe the remainder to B as vested, and to that end to treat the words referring to attaining the specified age either as pointing out the time when the remainder should take effect in possession, or as creating a condition subsequent; although the adoption of such construction involved the possibility of disappointing the testator's *particular* intention that the devisee should take nothing unless he should attain the age designated.

Such seems to be the actual justification of the cases which lay down the rule that a devise of the intermediate interest until the devisee shall attain the specified age operates only as an exception out of the absolute property, the reference to the attainment of the specified age only indicating the time when the remainder takes effect.¹⁰⁰ This rule, the principal exponent of which is *Boraston's Case*, 3 Coke, 19a,

prior gift, and not as designed to postpone the vesting. *Meyer v. Eisler*, 29 Md. 28.

The doctrine is well settled that when a devise is made in words that are apparently creative of a future estate, and that even import a contingency, such words, if a prior interest has been carved out of the estate, will be construed as referring merely to the futurity of possession occasioned by the carving out of the prior interest, and as pointing out the determination of that interest, and not as designed to protract the vesting. *Grigsby v. Breckinridge*, 12 B. Mon. 629.

A devise to A in fee when he attains the age of twenty-one years becomes a vested remainder, provided the will contains an intermediate disposition of the estate or of the rents and profits during the minority of A. *Roome v. Phillips*, 24 N. Y. 463; *Burrows v. Stumm*, 22 How. Pr. 169.

A devise to one "when" he shall arrive at a given age, with the intermediate estate devised to another, vests immediately on the death of the testator, and is not defeated by the death of the devisee before the specified age. The words of futurity importing contingency are not regarded as a condition precedent or as postponing the period of vesting, but as specifying the time when the remainderman is to take possession. *Linton v. Laycock*, 33 Ohio St. 128.

The gift of a beneficial interest to a trustee will not prevent vesting, the interest of the trustee being considered only as an exception out of the absolute property given to those who are the chief objects of the testator's bounty. *Kinsey v. Lardner*, 15 Serg. & R. 192.

Where a testator devises lands to trustees until A shall attain the age of twenty-one years, and if or when he shall attain that age, then to him in fee, this is construed as conferring on A a vested estate in fee simple, subject to the prior title or interest

25 Eng. Rul. Cas. 579 (set out in VIII. i, *infra*), has been held to apply as well where the devise takes an equitable as where he takes a legal remainder.¹¹⁰ For instances of its application, see cases cited below.¹¹¹

It will be perceived that the turning of the words referring to the attainment of the particular age into a demonstration of the time when the remainder is to take effect is merely incidental to the attainment of the desired end,—the construction of the remainder as vested,—yet it has been seized upon as if it were an absolute rule. Hence the statement made in one case¹¹² that the principle that if a prior interest has been carved out of an estate the words of contingency will be construed as referring merely to futurity of possession occasioned by the carving out of such interest applies though the particular estate carved out may be previously determined upon a contingency, as of marriage.

While in the case of a devise of real estate to a tenant for life with remainder to chil-

dren who should attain a particular age, the children are held to take a vested remainder in order that the gift to them may not be defeated by the termination of the particular estate before their attaining that age, in the case of personal property, as the same objection does not apply, a different rule prevails.¹¹³

g. Postponement of gift to let in intermediate interest or for benefit of estate.

It is a general rule of construction that if it appears that a future gift is postponed in order to let in some other interest, or, as it is sometimes expressed, "for the benefit of the estate," the gift is vested notwithstanding, although the enjoyment is postponed, the presumption being that the testator postponed the distribution or payment for the purposes of the prior bequest, and not to prevent the ulterior legacy from vesting. The rule sometimes finds expression in the statement that when successive interests are given the interests of the first

given to the trustees, though a devise to A if or when he shall attain the age of twenty-one years, isolated and detached from the context, would confer a contingent interest. *Illinois Land & Loan Co. v. Bonner*, 75 Ill. 315; *Lunt v. Lunt*, 108 Ill. 307.

¹¹⁰ See footnote 151, *infra*.

¹¹¹—legal remainders: *Boraston's Case*, 3 Coke, 19a, 25 Eng. Rul. Cas. 579 (set out in VIII. i, *infra*); *Mansfield v. Dugard*, 1 Eq. Cas. Abr. 195, *Gilb. Eq. Rep.* 36 (set out in VIII. i, *infra*); *Goodtitle ex dem. Hayward v. Whitby*, 1 Burr. 228, 1 Ld. Kenyon, 506 (set out in VIII. l, *infra*); *Doe ex dem. Wheedon v. Lea*, 3 T. R. 41 (set out in VIII. l, *infra*); *Goodright ex dem. Revell v. Parker*, 1 Maule & S. 692 (set out in VIII. f, *infra*); *Taylor ex dem. Smith v. Biddall*, 2 Mod. 289, 1 Freem. K. B. 243 (set out in VIII. h, *infra*); *Parkin v. Knight*, 15 Sim. 83, 15 L. J. Ch. N. S. 209, 10 Jur. 23 (set out in VIII. q, *infra*); *Doe ex dem. Morris v. Underdown*, Willes, Rep. 293 (set out in VIII. n, *infra*); *Marcon v. Alling*, 5 Grant, Ch. (U. C.) 562 (set out in VIII. g, *infra*); *Bigelow v. Bigelow*, 19 Grant, Ch. (U. C.) 549 (set out in VIII. j, *infra*); *Holtby v. Wilkinson*, 28 Grant, Ch. (U. C.) 550 (set out in VIII. i, *infra*); *McCoppin v. McGuire*, 34 U. C. Q. B. 157 (set out in VIII. i, *infra*); *Kerlin v. Bull*, 1 Dall. 175, 1 L. ed. 88 (set out in VIII. i, *infra*); *Arnold v. Buffum*, 2 Mason, 208, Fed. Cas. No. 554 (set out in VIII. h, *infra*); *Hempstead v. Dickson*, 20 Ill. 193, 71 Am. Dec. 260 (set out in VIII. q, *infra*); *Thomas v. Wootton*, 4 Harr. & McH. 428 (set out in VIII. n, *infra*); *Hogan v. Hogan*, 102 Mich. 641, 61 N. W. 73 (set out in VIII. i, *infra*); *Taylor v. Richards*, 153 Mich. 667, 117 N. W. 208 (set out in VIII. g, *infra*); *MAfee v. Gilmore*, 4 N. H. 391 (set out in VIII. i, *infra*); *Burton v. Conigland*, 82 N. C. 99 (set out in VIII. s, L.R.A.1916C.

infra); *Hooker v. Bryan*, 140 N. C. 402, 53 S. E. 130 (set out in VIII. g, *infra*); *Linton v. Laycock*, 33 Ohio St. 128 (set out in VIII. q, *infra*); *Smith v. Myers*, 212 Pa. 51, 61 Atl. 573 (set out in VIII. q, *infra*); *Roberts v. Herron*, 78 S. C. 115, 58 S. E. 968 (set out in VIII. n, *infra*).

—equitable remainders: *Phipps v. Ackers*, 9 Clark & F. 583, 6 Jur. 745 (set out in VIII. l, *infra*); *Stanley v. Stanley*, 16 Ves. Jr. 491 (set out in VIII. n, *infra*); *James v. Wynford*, 1 Smale & G. 40, 22 L. J. Ch. N. S. 450, 17 Jur. 17, 1 Week. Rep. 61 (set out in VIII. g, *infra*); *Jackson v. Marjoribanks*, 12 Sim. 93, 5 Jur. 885 (set out in VIII. h, *infra*); *Doe ex dem. Cadogan v. Ewart*, 7 Ad. & El. 636 (set out in VIII. h, *infra*); *Smith v. Spencer*, 6 De G. M. & G. 631, 3 Jur. N. S. 193, 5 Week. Rep. 136 (set out in VIII. n, *infra*); *Greene v. Potter*, 2 Younge & C. Ch. Cas. 517, 7 Jur. 736 (set out in VIII. b, *infra*); *Re Mottram*, 10 Jur. N. S. 915, 10 L. T. N. S. 866 (set out in VIII. k, *infra*); *Dobbie v. McPherson*, 19 Grant, Ch. (U. C.) 262 (set out in VIII. g, *infra*); *Daniels v. Eldredge*, 125 Mass. 356 (set out in VIII. n, *infra*); *Chapman v. Nichols*, 61 How. Pr. 275 (set out in VIII. r, *infra*).

Possibly *Re Mahan*, 98 N. Y. 376 (set out in III. b, 1, *supra*); *Aldrich v. Green*, 16 N. Y. S. R. 535, 1 N. Y. Supp. 549 (set out in III. b, 1, *supra*); *Braunsdorf v. Braunsdorf*, 23 N. Y. Supp. 722 (set out in III. b, 1, *supra*); *Gallatin v. Gallatin*, 15 N. Y. S. R. 323 (set out in III. b, 1, *supra*); *Ryan v. Cooley*, 15 Ont. App. Rep. 379 (set out in III. b, 1, *supra*),—are also referable to this principle.

¹¹² *Grigsby v. Breckinridge*, 12 B. Mon. 629.

¹¹³ *Per Malins, V. C.*, in *Patching v. Barnett*, 28 Week. Rep. 886, 49 L. J. Ch. N. S. 665, 43 L. T. N. S. 50.

and subsequent takers vest at the same time, or in the statement that the prior

interest given operates as an exception out of the generality of the bequest.¹¹⁴ In-

¹¹⁴ In *Packham v. Gregory*, 4 Hare, 396, 14 L. J. Ch. N. S. 191, 9 Jur. 175, it was said, *obiter*, that if there is a gift to a person at twenty-one, or a direction to pay and divide when a person attains twenty-one, there, the gift being to persons answering a particular description, if a party cannot bring himself within it he is not entitled to take the benefit of the gift; but if upon the whole will it appears that the future gift is only postponed to let in some other interest, or, as it is commonly expressed, for the benefit of the estate, the interest is vested notwithstanding, although the enjoyment is postponed.

When the intermediate interest is not bequeathed for the benefit of the legatee during minority or until the fund is directed to be paid him, but such interest is bequeathed to another person beneficially until the legatee of the capital arrive at a particular age, and when he attains it the fund is directed to be paid to him, the person to whom the absolute property is limited will take an immediate vested interest, such bequest being in the nature of a remainder, and the interest of the first and subsequent takers vesting at the same time. *Nixon v. Robbins*, 24 Ala. 663.

The fact that there is a prior interest extending over the whole period for which the devise or bequest is postponed is regarded as indicative of the intention of the testator that the reversionary interest should immediately vest, possession only being postponed. *Cogburn v. Ogleby*, 18 Ga. 56.

Where a legacy is given upon the legatee's attaining a certain age, and an intermediate interest is given to other persons, the legacy is to be considered as vested. *Roberts v. Brinker*, 4 Dana, 570.

If the will gives the property, its use or profits to persons other than the ulterior legatees, or for other purposes than their benefit, until one of them shall attain a certain age, and the property or its proceeds is directed to be divided between or paid to them at the end of that period, it is of the nature of a remainder, and they take an immediate vested interest, the presumption being that the testator postponed the distribution or payment for the purposes of the prior bequest, and not to prevent the ulterior legacy from vesting. *Hocker v. Gentry*, 3 Met. (Ky.) 463.

Wherever it is apparent that the gift was not made immediate, but that the time of payment was postponed for the convenience of the estate, and not from considerations of a personal nature applicable to the legatee, the legacy will not lapse though the legatee dies before the contingency happens upon the occurrence of which it is made payable. *Spence v. Robins*, 6 Gill & J. 507, 26 Am. Dec. 587.

Where the postponement of the payment, division, and partition of the property seems to be more for the convenience of the estate than for any considerations personal

to the heirs and devisees, such postponement does not prevent the devise or legacy from vesting. *Collier's Will*, 40 Mo. 287.

The construction which reads words that are seemingly creative of a future interest as referring merely to the futurity of possession occasioned by the carving out of a prior interest, and as pointing to the determination of that interest, and not as designed to postpone the vesting, has obtained in some instances where the terms in which the posterior gift is framed import contingency, and would, unconnected with and unexplained by the prior gift, clearly postpone the vesting. *Ibid*.

A bequest in the form of a direction to pay, or to pay and divide, vests immediately if the payment be postponed for the convenience of the estate, or to let in some other interest. *Herbert v. Post*, 26 N. J. Eq. 278.

Where the absolute property in a fund is bequeathed in fractional interests in succession at periods which must arrive, the interests of the first and subsequent takers vest together. *Ibid*.

If upon the whole will it appears that the future gift is postponed only to let in some other interest, or, as it is commonly expressed, for the benefit of the estate, the gift is vested notwithstanding, although the enjoyment is postponed. *Post v. Herbert*, 27 N. J. Eq. 540.

Where the postponement is for the benefit of the estate, the legacy vests at the death of the testator, notwithstanding the direction is to pay "when" or "as" the legatee attains a specified age. *Fisher v. Johnson*, 38 N. J. Eq. 46.

In determining whether a future gift to a class is postponed to let in an intermediate estate, or in order ultimately to bestow the corpus or remainder upon persons who shall then be living to enjoy it, and cannot be ascertained at the testator's death, the testator's intention is as decisive as it is in other questions of construction. If the postponement is simply for the benefit or convenience of the estate, that indicates that the gift itself is not intended to be postponed, but that it is not presently payable, and it will be more convenient to pay it after an intermediate or trust estate has expired. But if it is postponed for the benefit of the legatee, as if he is an infant, and payment is to be made at his majority, then the gift is future and conditional. *Dougherty v. Thompson*, 167 N. Y. 472, 60 N. E. 760.

The reason for the rule that if the postponement of the payment is for the purpose of letting in an intermediate estate, the interest shall be deemed vested at the death of the testator, is that where it is plain that the testator intended successive gifts to persons named by him or ascertainable at the time of his death, the last gift is just as direct as the first. *Ibid*.

Where the intermediate interest is given

stances of the application of this rule are cited in the footnote.¹¹⁵

The existence of a gift of the intermediate interest, while creating a presumption that the ulterior gift was postponed to let in

the intermediate interest, does not, however, conclusively show that the testator did not mean to make the ulterior disposition contingent on attaining the specified age.¹¹⁶ Thus, just as in the case of a gift of the

either to a stranger or to the legatee himself, such a case forms an exception to the rule that a gift of a legacy to one "at" or "if" or "when" he attains the age of twenty-one is contingent, because it explains the reason why the time of payment or division was postponed, and is perfectly consistent with an intention in the testator that the legacy should immediately vest. *Perry v. Rhodes*, 6 N. C. (2 Murph.) 140.

The rule that the word "when," standing by itself and as applied to legacies, is a word of condition, is subject to an exception where the testator has disposed of the immediate interest either to a stranger or the legatee. *Johnson v. Baker*, 7 N. C. (3 Murph.) 318, 9 Am. Dec. 605.

Where a final bequest is subject to or following after temporary interests in the property beneficially bequeathed to others, it is presumed that those to whom the absolute property is given are intended to take at all events, although the enjoyment is deferred because and to the extent of those intermediate interests. *Vanhook v. Vanhook*, 21 N. C. (1 Dev. & B. Eq.) 589.

Where the legacy is disposed of in the meantime, so that the interest given to the legatees is in the nature of a remainder, the term "when," though generally a word of condition, marks only the commencement of the remainder. *Guyther v. Taylor*, 38 N. C. (3 Ired. Eq.) 323.

Where an estate is bequeathed or devised to one upon his becoming twenty-one years of age, or when he becomes twenty-one, and in the meantime the property is given beneficially to a stranger, the interest will vest at the death of the testator, since such a bequest is in the nature of a remainder, the rule as to which is that the interests of the first and subsequent takers vest together. *Hooker v. Bryan*, 140 N. C. 402, 53 S. E. 130.

When the enjoyment is divided into successive periods, all the fragments of it vest at the same time. *Provenchere's Estate*, 1 Legal Gaz. Rep. 68, s. c. on appeal, 67 Pa. 463.

Where the enjoyment of an entire fund is given in fractional parts at successive periods which must eventually arrive, the distinction between time annexed to payment and time annexed to the gift becomes unimportant. In such a case it is well settled that all the interests vest together. *King v. King*, 1 Watts & S. 205, 37 Am. Dec. 459.

In some instances words seemingly creative of a future interest have been construed as referring to futurity of possession, occasioned by the carving out of a prior interest, and as pointing to a determination of that interest, when the terms im-

port contingency, and would, unconnected with and unexplained by the prior gift, clearly postpone the vesting. *Sager v. Galloway*, 113 Pa. 500, 6 Atl. 209.

Where the postponement is for the mere convenience of the estate, it will not affect the vesting of a legacy, even though there be no other gift than is taken in the direction to pay. *Little's Appeal*, 117 Pa. 14, 11 Atl. 520.

¹¹⁵ *Lane v. Goudge*, 9 Ves. Jr. 225, 7 Revised Rep. 163 (set out in VIII. h, infra); *Gairdner v. Gairdner*, 1 Ont. Rep. 184 (set out in VIII. e, infra); *Gregg v. Bethea*, 6 Port. (Ala.) 9 (set out in VIII. f, infra); *McLeod v. McDonnel*, 6 Ala. 236 (set out in VIII. q, infra); *McLemore v. McLemore*, 8 Ala. 687 (set out in VIII. j, infra); *High v. Worley*, 32 Ala. 709 (set out in VIII. q, infra); *Watkins v. Quarles*, 23 Ark. 179 (set out in VIII. s, infra); *Scott v. Logan*, 23 Ark. 351 (set out in VIII. i, infra); *Earnshaw v. Daly*, 1 App. D. C. 218 (set out in VIII. q, infra); *Roberts v. Brinker*, 4 Dana, 570 (set out in VIII. i, infra); *Meyer v. Eisler*, 29 Md. 28 (set out in VIII. q, infra); *Post v. Herbert*, 27 N. J. Eq. 540 (affirming 26 N. J. Eq. 278) (set out in VIII. q, infra); *Parker v. Glover*, 42 N. J. Eq. 559, 9 Atl. 217 (set out in VIII. q, infra); *Goebel v. Wolf*, 113 N. Y. 405, 10 Am. St. Rep. 464, 21 N. E. 388 (set out in VIII. q, infra); *Williams v. Conrad*, 30 Barb. 524 (set out in VIII. q, infra); *Canfield v. Fallon*, 26 Misc. 345, 57 N. Y. Supp. 149 (set out in VIII. j, infra); *Perry v. Rhodes*, 6 N. C. (2 Murph.) 140 (set out in VIII. q, infra); *Clancy v. Dickey*, 9 N. C. (2 Hawks) 498 (set out in VIII. n, infra); *Myers v. Williams*, 58 N. C. (5 Jones, Eq.) 362 (set out in VIII. a, infra); *Stark v. Molleson*, 8 Watts, 432 (set out in VIII. i, infra); *Kinsey v. Lardner*, 15 Serg. & R. 192 (set out in VIII. k, infra); *Sellers v. Reed*, 88 Va. 377, 13 S. E. 754 (set out in VIII. q, infra).

See also, in this connection, *Higgins v. Waller*, 57 Ala. 396 (set out in III. b, 1, supra); *Andrews v. Russell*, 127 Ala. 195, 28 So. 703 (set out in III. b, 1, supra); *Scott v. James*, 3 How. (Miss.) 307 (set out in III. b, 1, supra); *Smith v. Wiseman*, 41 N. C. (6 Ired. Eq.) 540 (set out in VIII. q, infra); *Hathaway v. Leary*, 55 N. C. (2 Jones, Eq.) 264 (set out in III. b, 1, supra).

For an instance in which it was held that the postponement was not for the purpose of letting in an intermediate interest, see *Streib v. Streib*, — N. J. Eq. —, 39 Atl. 723 (set out in VIII. q, infra).

¹¹⁶ The rule that where a gift is postponed to let in intermediate interests, it will be considered as vesting immediately, like every other rule with respect to the vesting or not vesting of legacies, is not

intermediate income to the legatee himself,¹¹⁷ the rule does not apply where the testator has dealt with the intermediate and ulterior interests as distinct and independent subjects of bequest.¹¹⁸

The rule of course does not apply where the intermediate interest may terminate before the ultimate disposition can take effect.¹¹⁹

arbitrary and inflexible, but a rule of construction adopted to ascertain the intention of the testator, and therefore yields to an opposite intent whenever it is manifested. This intent may be indicated by terms used either in the temporary disposition or in the final gift of the property. *Vanhook v. Vanhook*, 21 N. C. (1 Dev. & B. Eq.) 589.

The rule that a gift in remainder after a particular estate carved out vests immediately is subject to exception where from the plan and context of the will it is clearly shown that the testator did not intend any interest in the principal or capital to pass (where he has disposed of the interest or dividends only for a particular purpose) during the continuance of the particular estate. *Drake v. Pell*, 3 Edw. Ch. 251.

¹¹⁷ See note 93, *supra*.

¹¹⁸ When a testator appears to have drawn a precise distinction between the interest and the principal of a sum of money, or between dividends of stock and the capital stock itself, and to have bequeathed these as though they were distinct, independent subjects, although in truth the former are but the fruits or produce of the latter, the presumption in favor of vesting the ulterior legacy is weakened, and readily yields to any further indications that the gift was designed to be conditional, depending on the character of the legatees, and not postponed merely because of previous arrangements with respect to the subject of the gift. *Vanhook v. Vanhook*, *supra*.

¹¹⁹ The fact that if the person to whom the intermediate gift is given dies before the legatee arrives at twenty-one, there will be a gap between the two bequests, precludes the application of the rule. See *Nixon v. Robbins*, 24 Ala. 663.

¹²⁰ *Doe ex dem. Hunt v. Moore*, 14 East, 601 (set out in note 123); *Phipps v. Ackers*, 9 Clark & F. 583, 6 Jur. 745 (set out in VIII. 1, *infra*); *Illinois Land & Loan Co. v. Bonner*, 75 Ill. 315 (set out in VIII. g, *infra*); *Lunt v. Lunt*, 108 Ill. 307 (set out in VIII. i, *infra*); *Hughes v. Hughes*, 12 B. Mon. 115 (set out in VIII. i, *infra*); *Danforth v. Talbot*, 7 B. Mon. 623 (set out in VIII. i, *infra*); *Hersey v. Purington*, 96 Me. 166, 51 Atl. 865 (set out in VIII. d, *infra*); *Roome v. Phillips*, 24 N. Y. 463 (set out in VIII. i, *infra*); *Manice v. Manice*, 43 N. Y. 380 (set out in note 124); *Smith v. Edwards*, 88 N. Y. 92 (set out in III. b, 1, *supra*); *Burrows v. Stumm*, 22 How. Pr. 169 (set out in VIII. i, *infra*); L.R.A.1915C.

h. Gifts over.

It is a generally accepted rule that where a devise of real estate to a person if he shall attain a particular age, which, standing alone, would be contingent, is followed by a limitation over in case he dies under such age, the first devise vests immediately, subject to be divested on the occurrence of the contingency.¹²⁰ Of the cogency of the

Weyman v. Ringold, 1 Bradf. 40 (set out in VIII. g, *infra*); *Williamson's Estate*, 3 Pa. Co. Ct. 239 (set out in note 224); *Menoher's Estate*, 18 Pa. Super. Ct. 335; *Rivers v. Fripp*, 4 Rich. Eq. 276 (set out in note 224, *infra*).

In *Raney v. Heath*, 2 Patton & H. (Va.) 206, the court, in discussing the rule that a limitation over has the effect to vest a devise, said: "It has sometimes been said that the rule in devises is arbitrary and rests upon no rational foundation. I entertain a different opinion. To say nothing of its consonance with the policy of the common law, which favors the vesting of estates, and which is the foundation of the general rule that interests shall be construed to be vested rather than contingent if possible consistently with other rules of law and without defeating the intention of the instrument or the testator, the rule seems to me better calculated to effectuate the intention of testators in most, if not all, cases than the one insisted on as applicable to bequests of personals, which was borrowed from the civil law."

For instances in which this rule has been applied, see *Security Co. v. Cone*, 64 Conn. 579, 31 Atl. 7 (set out in VIII. i, *infra*); *Bowman v. Long*, 23 Ga. 242 (set out in VIII. e, *infra*); *Rivers v. Fripp*, 4 Rich. Eq. 276 (set out in note 224, *infra*); *Raney v. Heath*, 2 Patton & H. (Va.) 206 (set out in VIII. d, *infra*); *Hughes v. Hughes*, 12 B. Mon. 115 (set out in VIII. i, *infra*); *Phipps v. Ackers*, 3 Clark & F. 702, 9 Clark & F. 583, 6 Jur. 745 (affirming 5 Sim. 44, 1 L. J. Ch. N. S. 96, 57 Revised Rep. 27) (set out in VIII. 1, *infra*); *Edwards v. Hammond*, 3 Lev. 132 (set out in VIII. a, *infra*); *Bromfield v. Crowder*, 1 Bos. & P. N. R. 313 (set out in VIII. a, *infra*); *Doe ex dem. Roake v. Nowell*, 1 Maule & S. 327 (set out in VIII. f, *infra*); *Doe ex dem. Dolley v. Ward*, 9 Ad. & El. 582, 1 Perry & D. 568, 8 L. J. Q. B. N. S. 154 (set out in VIII. f, *infra*); *Re Dennis*, 5 Ont. L. Rep. 46 (set out in VIII. a, *infra*); *Roome v. Phillips*, 24 N. Y. 463 (set out in VIII. i, *infra*); *Burrows v. Stumm*, 22 How. Pr. 169 (set out in VIII. i, *infra*); *Williams v. Vancleave*, 7 T. B. Mon. 388 (set out in VIII. n, *infra*).

For instances in which a legacy has been held contingent notwithstanding a gift over should the legatee die before attaining the specified age, see *Atkinson v. Turner*, 2 Atk. 41, *Barnard. Ch.* 74 (set out in VIII. d, *infra*); *Butler v. Freeman*, 3 Atk. 58 (set out in VIII. f, *infra*).

reasons¹²¹ given in support of this rule, the reader must judge for himself. In the case of *Phipps v. Ackers*, 9 Clark & F. 583, 6 Jur. 745, which was decided in 1842, it was regarded as too firmly established to be departed from; and it is doubtless too late to challenge it, though it would seem that the natural inference to be drawn from

the limitation over in event of the devisee's failure to attain the specified age would be that the testator, believing the first disposition made by him to be contingent upon the devisee's attaining such age, desired to provide for the event of such disposition failing of effect.¹²²

It has been held to make no difference in

¹²¹ It was said by Lord Chief Justice Tindal in delivering the response of the common-law judges to the question propounded by the House of Lords in *Phipps v. Ackers*, 9 Clark & F. 583, 6 Jur. 745, that the cases in which the courts have relied on the circumstance of the estate having been given over in the event of the devisee dying under twenty-one go on the principle that the gift over sufficiently shows the meaning of the testator to have been that the first devisee should take whatever interest the party claiming under the devise over is not entitled to, which of course gives him the immediate interest, subject only to the chance of its being divested on a future contingency. He further remarked that whether the doctrine on which this class of cases has rested was originally satisfactory was a point which need not be discussed, it having been established and recognized as a settled rule of construction.

In other cases it is said that the limitation over is regarded as explanatory of the nature of the estate which it was intended the devisee should take upon arriving at the age named, *i. e.*, that it should then become absolute and indefeasible. *Illinois Land & Loan Co. v. Bonner*, 75 Ill. 315; *Lunt v. Lunt*, 108 Ill. 307; *Hughes v. Hughes*, 12 B. Mon. 115; *Hersey v. Purington*, 96 Me. 166, 51 Atl. 865; *Rivers v. Fripp*, 4 Rich. Eq. 276; *Menoh's Estate*, 18 Pa. Super. Ct. 335.

In *Danforth v. Talbot*, 7 B. Mon. 623, it is said that the principle to be deduced from the cases in which an inference that a devise is not contingent is drawn from there being a devise over on failure of the condition is that the apparent condition or contingency in the first devise is held not to be a condition, but only a designation of the time when the gift is to vest in possession, and that the failure of the event referred to in the first devise, being made the condition of the devise over, thus becomes with respect to the first devise a condition subsequent.

A devise of real estate to a person if he should attain a particular age, standing alone, is contingent; yet if it be followed by a limitation over in case he dies under such age, the devise over is considered explanatory, and the first devise is held to vest instantaneously, subject to be divested on the occurrence of the contingency, the limitation aiding to show an intention to give to the primary devisee whatever estate was not given over. *Weyman v. Ringold*, 1 Bradf. 40.

When it is doubtful whether the time appointed applies to the vesting or merely L.R.A.1915C.

to the payment, a gift over in the event of the death of the legatee before such time may imply a prior vesting, and so resolve the doubt. *Williamson's Estate*, 3 Pa. Co. Ct. 239.

¹²² In California, the rule is that a devise over is to be construed as indicating an intention on the part of the testator not to make a vested devise. *Re Blake*, 157 Cal. 448, 108 Pac. 287.

Compare *Re Rogers*, 94 Cal. 526, 29 Pac. 962 (set out in VIII. i, *infra*); *Collier v. Slaughter*, 20 Ala. 263 (set out in VIII. j, *infra*).

In *Smith on Executory Interests*, p. 179, the author, commenting on some of the cases in which this doctrine is laid down, says: "It is perfectly clear, upon principle, and firmly established by authority, that the expressions used in these cases of *Doe ex dem. Hunt v. Moore*, 14 East, 601 [set out in note 123] and *Randall v. Doe*, 5 Dow. 202 [set out in VIII. f, *infra*], would have amounted to conditions precedent, suspending the vesting, if there had been no devise over. Was, then, a devise simply in the event of the prior devisee dying before twenty-one, and not in the complex event of his dying without issue, before twenty-one sufficient entirely to alter the effect of the preceding words? Quite the reverse. For a devise or bequest over simply in case of the nonhappening of the event on which the prior devise is apparently made contingent (except in the case of a survivorship clause hereafter mentioned) affords some degree of presumption that the prior devise was only to vest on the happening of that event; so that though, on the one hand, it is not sufficient, of itself, to show that the prior devise is contingent, yet it may be called in aid of other circumstances in evidence thereof.

"In support of this proposition, we may observe, on the one hand, that where a testator devises to a person when he shall attain a given age, with a devise over in case of his death before that age, and the testator either gives the whole of the intermediate rents and profits to the prior devisee, or leaves him entirely unprovided for in the meantime, there the devise over will not indeed afford any necessary presumption that the testator intended to suspend the vesting of the prior interest till the given age. For the testator, considering it most probable that the prior devisee would attain the given age, may have intended that he should in the meantime be entitled to the rents and profits, and, with that view, may have intended that he should have a vested interest, subject to be divested in the event

the application of this rule whether the case is one of immediate devise without any particular interest carved out of it to take

effect in possession in the meantime, or is one of a remainder.¹²³

Although the rule was originally properly

of his dying under the given age. And if the testator has expressly given him the whole of the intermediate rents and profits, he may have done so, either from ignorance of the fact that the devisee would be entitled to them, as incidental to an immediate vested interest, or from an excess of caution. And if, on the contrary, he has entirely omitted to provide for the devisee in the meantime, he may have omitted to do so because, intending the devisee to have a vested interest, he knew that the devisee would be entitled to the intermediate income as incidental to his vested interest. But still, on the other hand, though such a devise over does not furnish a necessary presumption, it does so far furnish some degree of presumption that the testator intended to suspend the vesting till the given age, that there is a greater probability that such was his intention where there is such a devise over than there is where no such devise over exists. Where there is no such devise over, it may with great reason be urged that if the testator had intended the devise to be contingent until the happening of the event specified, he would naturally have made some provision for the case of that event not happening, and the consequent failure of the interest dependent on the happening of that event; and therefore that the absence of any such provision furnishes a presumption that he intended such interest to be immediately vested in right, though not to be vested in possession or enjoyment till the happening of the event specified, or, if vested in possession or enjoyment, to be subject to divestment on its not happening. Whereas, if there is a devise over simply on the nonhappening of the event on which the prior devise is apparently made contingent, that argument in favor of the devisee taking a vesting interest is excluded. In such case, the testator expressly gives the property to another on the nonhappening of the event; and therefore, so far from there being any reason to think that he considered the prior interest to be vested, as we have seen there would be if there were no devise over, it is *prima facie* rather to be inferred that he intended the prior interest to be contingent, and, considering it to be so, he added a provision for the case of the nonhappening of the event and the failure of the prior interest. But, even admitting that such a devise over affords no reason whatever to suppose that the prior interest is contingent, it certainly affords no reason whatever to support the prior interest to be vested; for if the testator were desirous of preventing an intestacy, or of excluding the residuary devisee from the property comprised in the prior devise, in case of the nonhappening of the event specified, he must, in order to accomplish that object, make a devise over, to take effect in case of the event not happening, whether the prior interest were un-

questionably vested, or unquestionably contingent; and consequently such devise over amounts to nothing more than a further disposition, designed as a provision for the case of the nonhappening of the event specified, and not in any way tending to explain the nature of the prior interest, as regards vesting, unless, as we have already observed, it be to afford some presumption that such prior interest was intended to be contingent.

¹²³ In *Doe ex dem. Hunt v. Moore*, 14 East, 601, Lord Ellenborough said that decisions on devises of real estate (citing *Manfield v. Dugard*, 1 Eq. Cas. Abr. 195, Gilb. Eq. Rep. 36 [set out in VIII. i, *infra*]; *Edwards v. Hammond*, 3 Lev. 132 [set out in VIII. a, *infra*]; *Bromfield v. Crowder*, 1 Bos. & P. N. R. 313 [set out in VIII. a, *infra*]; and *Goodtitle ex dem. Hayward v. Whitby*, 1 Burr. 228, 1 Ld. Kenyon, 506 [set out in VIII. l, *infra*]), have established the rule that a devise to A when he attains twenty-one, to hold to him and his heirs, and if he die under twenty-one, then over, does not make the devisee's attaining twenty-one a condition precedent to the vesting of the interest in him; but the dying under twenty-one is a condition subsequent on which the estate is to be divested, and that it makes no difference in the application of this rule whether the case is one of immediate devise without any particular interest carved out of it to take effect in possession in the meantime, or is one of a remainder.

In *Phipps v. Ackers*, 3 Clark & F. 715, Lord Brougham said with reference to the case of *Doe ex dem. Hunt v. Moore*, 14 East, 601, that he desired to speak with the greatest possible respect to that case, but that he was not the only member of the profession who had considered the language of Lord Ellenborough in giving the judgment of the court in that case as being very strong indeed, and going a very great way, and being very difficult to be reconciled with the other cases as to the use of the word "when" and similar words. Any doubts as to the acceptance of the doctrine of *Doe ex dem. Hunt v. Moore* were, however, set at rest by the opinion rendered by the common-law judges in *Phipps v. Ackers*, 9 Clark & F. 583, 6 Jur. 745, although they said that whether the doctrine on which the class of cases to which *Doe ex dem. Hunt v. Moore* belongs has rested was originally altogether satisfactory is a point which it was unnecessary to discuss, it having been established and recognized as a settled rule of construction. In this opinion Lord Lyndhurst and Lord Campbell concurred. Lord Brougham, however, said that though he was not prepared to recommend that the Lords should differ from the learned judges, and should declare the law to be erroneous, laid down in a decision which had for thirty years been unquestioned, and must in a great number of

applicable only to devises of realty,¹²⁴ some cases¹²⁵ have applied it to gifts of personality as well.

A limitation over will not have the effect to vest a gift where the attainment of the prescribed age forms part of the original description of the legatee or devisee;¹²⁶ and it has been doubted whether it will have this effect where it is itself contingent.¹²⁷

In the case of gifts of personal property it has been held that a gift over in case of

instances have been acted upon, he was of the opinion that had the question been new and entire, he should have held the decision in *Doe ex dem. Hunt v. Moore* to be erroneous.

It is worth noting that in each of the cases cited in *Doe ex dem. Hunt v. Moore*, as supporting the doctrine therein laid down, there was either a precedent estate during the minority of the devisee,—so that the words relating to the attainment of the specified age might be taken as referring to the termination of such precedent estate, and the limitation over be taken as upon a condition subsequent,—or a precedent estate for life, rendering it necessary to construe the words relating to the attainment of the specified age as a condition subsequent in order to prevent the gift from being defeated in case the life tenant should happen to die before the remainderman should attain such age. In either of these situations the decision certainly does not turn upon the fact of a gift over. Furthermore, while in *Edwards v. Hammond*, 3 Lev. 132, the particular limitation over there involved, being to the settlor and his heirs,—a provision which would have been unnecessary had the gift not been vested,—clearly went to show that the preceding gift vested before the specified age was attained, that case cannot be taken as authority for the broad statement that any sort of a limitation over (as to a third person) would have the same effect.

¹²⁴ In *Raney v. Heath*, 2 Patton & H. (Va.) 206, it is said that while it must be admitted that the preponderance of authority is in favor of the rule that in a bequest of personality a limitation over has not the effect to vest the gift and to convert the words of a contingency into a condition subsequent whereby the vested estate of the legatee will be divested or defeated upon failure to attain the age prescribed, the doctrine is not a settled one, and that there is no reason why such rule should not be equally applicable to legacies as to devises.

The rule that a devise of lands to an infant when he shall become of age, with remainder over if he die under age, creates a vested estate, is well settled in regard to real estate, though the rule is different in some respects where the subject of the gift is personal property. *Manice v. Manice*, 43 N. Y. 380. L.R.A.1915C.

the legatee's death under twenty-one does not militate against the vested character of the bequest.¹²⁸

Where there is a limitation over, which, though expressed in the form of a contingent limitation, is in fact dependent upon a condition essential to the determination of the interests previously limited, the court is at liberty to hold that, notwithstanding the words in form import contingency, they mean no more in fact than that the person to take under the limitation over is to take

While a devise over in case of real estate often furnishes an argument in favor of an immediate vesting in the primary devisee, the rules as to bequests of personal estate are not identical, and have a different origin. *Smith v. Edwards*, 88 N. Y. 92.

¹²⁵ A gift over in case the legatee shall not attain the specified age furnishes a plausible argument that the subsequent words explain that the interest of the legatee is to be divested on that event, not that the vesting of the interest is to be postponed until the prescribed age. *Pearman v. Pearman*, 33 Beav. 394.

A gift over in case of the death of the legatee during minority, instead of suspending the vesting *ab initio*, denotes that the prior words point merely to the period when the legacy becomes absolute in enjoyment. *Re Lehman*, 2 App. Div. 531, 37 N. Y. Supp. 1086.

¹²⁶ See footnotes 219 and 220, *infra*.

¹²⁷ In *L'Estrange v. L'Estrange, Jr.* L. R. 25 Eq. 399, a doubt was expressed as to whether the rule that a gift over in the event of the first taker's failure to attain the specified age has the effect to vest a devise to him if he shall live to attain said age applies when the only limitation over is itself contingent, and when the latter contingency is one which cannot take effect till after the death of the first taker,—as where the limitation over is to a younger brother on his attaining the same age.

¹²⁸ *Skey v. Barnes*, 3 Meriv. 335, 17 Revised Rep. 91, 25 Eng. Rul. Cas. 593; *State v. Main*, 87 Conn. 175, 87 Atl. 38; *Caldwell v. Kinkaid*, 1 B. Mon. 228.

In *Hardcastle v. Hardcastle*, 1 Hem. & M. 405, 1 New Reports, 83, 7 L. T. N. S. 503, the principle that in ordinary cases a gift over on a contingency does not of itself prevent vesting in the first donee, though it may be a circumstance to be considered, was adverted to with approval.

In *Taylor v. Frobisher*, 5 De G. & S. 191, 21 L. J. Ch. N. S. 605, 16 Jur. 283, it was said that the observations of Sir John Leach in *Bland v. Williams*, 3 Myl. & K. 411, 3 L. J. Ch. N. S. 218, to the effect that if a gift over is simply on the death under the age specified, then the gift cannot vest before that age, obviously referred to the will then before him, and was not meant to be of general application.

subject to the interests so previously limited. But in order to the application of this principle the condition upon which the limitation over is made dependent must involve no incident but what is essential to the determination of the interests previously limited.¹²⁹

Where the only gift over is in event of the legatees' or devisees' dying without issue before attaining the given age, it is a circumstance tending strongly to show that the interests of such legatees or devisees are not contingent upon their attaining the age designated.¹³⁰

A provision that property devised shall sink into the residue in the event of the devisee dying under age goes to show that the rents and profits will not belong to the residue before this event, and gives color to the contention that the words relating to time only point out the time when an indefeasible estate is to vest.¹³¹

The fact that there is a gap in the testamentary disposition of the property, as where the limitation over fails to cover the whole ground, is a circumstance to be taken into consideration on the question of vesting. Thus, the fact that property directed to be conveyed to a devisee at his attaining the age of twenty-three is given over only in case of his death before attaining the age of twenty-one is an indication that the gift is to vest immediately, since a construction

of it as contingent upon his attaining the age of twenty-three will, in event of his death, after attaining the age of twenty-one, but before attaining the age of twenty-three, have the effect to produce an intestacy.¹³²

There is a difference of opinion as to whether, where there is a gift to one for life, and at his death to his children on their attaining a specified age, the fact that there is a gift over only in the event of the life tenant's dying without leaving issue, and not in the event of leaving issue to attain twenty-one, so that in case of the life tenant's death leaving issue who should fail to attain twenty-one, neither the gift to the issue (should it be regarded as contingent) nor the limitation over can take effect, is a circumstance indicative of vesting. For cases in which it has been so considered,¹³³ and cases in which it has been held insufficient,¹³⁴ see footnotes. Undoubtedly, though not conclusive, it is a circumstance to be considered.

i. Absence of gift over.

Notwithstanding that, as shown in the preceding subdivision, a limitation over in event of failure to attain the specified age is regarded as a strong, and as practically a controlling, circumstance in favor of vesting, it is likewise held, as well in cases involving realty¹³⁵ as in those involving

¹²⁹ *Maddison v. Chapman*, 4 Kay & J. 709.

¹³⁰ See *Bland v. Williams*, 3 Myl. & K. 411, 3 L. J. Ch. N. S. 218 (set out in VIII. 1, *infra*); *Maddison v. Chapman*, 4 Kay & J. 709 (set out in VIII. q, *infra*); *Lunt v. Lunt*, 108 Ill. 307 (set out in VIII. i, *infra*); *Cooper v. Pridgeon*, 17 N. C. (2 Dev. Eq.) 98 (set out in VIII. a, *infra*); *Newport v. Cook*, 2 Ashm. (Pa.) 332 (set out in VIII. i, *infra*); *RE PAXSON*, principal case (set out in VIII. g, *infra*); *Storrs v. Burgess*, 29 R. I. 269, 67 Atl. 731 (set out in VIII. i, *infra*); *Seabrook v. Gregg*, 2 S. C. 73 (set out in note 224, *infra*); *Battle v. House*, 4 Lea, 202 (set out in VIII. q, *infra*).

For instances in which the gift has been held contingent though there was a gift over only in case of death without issue, see *Barker v. Lea*, Turn. & R. 413, 24 Revised Rep. 85 (set out in VIII. g, *infra*); *Walker v. Mower*, 16 Beav. 365 (set out in III. q, *infra*); *Re Blake*, 157 Cal. 448, 108 Pac. 287 (set out in VIII. j, *infra*); *Lyman v. Parsons*, 26 Conn. 493 (set out in VIII. g, *infra*); *Seibert's Appeal*, 13 Pa. 501 (set out in VIII. j, *infra*).

¹³¹ *Phipps v. Ackers*, 9 Clark & F. 583, 6 Jur. 745.

¹³² *Peard v. Kekewich*, 15 Beav. 166, 21 L. J. Ch. N. S. 456.

¹³³ *Ingram v. Suckling*, 7 Week. Rep. 386 (set out in VIII. l, *infra*); *Re Bevan*, L. L.R.A.1915C.

R. 34 Ch. Div. 716, 56 L. J. Ch. N. S. 652, 56 L. T. N. S. 277, 35 Week. Rep. 400 (set out in VIII. j, *infra*); *Bree v. Perfect*, 1 Colly. Ch. Cas. 128, 8 Jur. 282 (set out in VIII. j, *infra*); *Teele v. Hathaway*, 129 Mass. 164 (set out in VIII. f, *infra*); *Wright v. Mercein*, 34 Misc. 414, 69 N. Y. Supp. 936 (set out in VIII. q, *infra*).

¹³⁴ *Re Wrangham*, 1 Drew. & S. 358, 30 L. J. Ch. N. S. 258, 7 Jur. N. S. 15, 3 L. T. N. S. 722, 9 Week. Rep. 156 (set out in VIII. g, *infra*); *Kidman v. Kidman*, 40 L. J. Ch. N. S. 359 (set out in VIII. l, *infra*); *Alexander v. Alexander*, 16 C. B. 59 (set out in VIII. g, *infra*); *Walker v. Mower*, 16 Beav. 365 (set out in III. q, *infra*); *Re Bank of Montreal*, 26 Grant. Ch. (U. C.) 420 (set out in VIII. f, *infra*).

¹³⁵ Where a devise is made to persons "when they attain twenty-one," the absence of a gift over should they fail to attain twenty-one may be taken as an indication that the event was regarded by the testator, not as imposing a contingency, but as marking a period of time. *Allan v. Vanmeter*, 1 Met. (Ky.) 264.

See also *Foster v. Holland*, 56 Ala. 474 (set out in VIII. q, *infra*); *Grisby v. Breckinridge*, 12 B. Mon. 629 (set out in VIII. g, *infra*); *Young v. Stoner*, 37 Pa. 105 (set out in VIII. i, *infra*), in which the absence of a devise over was taken into consideration.

personalty¹²⁶ or mixed gifts,¹²⁷ that the absence of a gift over may be taken as indicating that the testator regarded the gift as vesting immediately. The rule of testamentary construction in this respect is contrived, like the old negro's coon trap, to "ketch 'em both a-comin' and a-gwine." The inference, however, seems to be a reasonable one, especially where the subject of the gift is residue.¹²⁸

¹²⁶ The fact that the testator, though careful to provide how his other property should be disposed of in the event of the death of other beneficiaries before becoming twenty-one years of age, made no disposition whatever in case of the legacy in question, has been taken to show that the testator considered such portion of his estate as finally disposed of and that it would become vested as soon as his will took effect. *Warrent v. Hembree*, 8 Or. 118.

In *Goebel v. Wolf*, 113 N. Y. 405, 10 Am. St. Rep. 464, 21 N. E. 388, the fact that there was nothing on the face of the will to indicate that the testator contemplated the death of any of his children during minority, was considered, among other things, as indicative of testator's intention to give them immediate interests.

See also *Re Budd*, 160 Cal. 286, 135 Pac. 1131 (set out in III. b, 1, supra); *Wardwell v. Hale*, 161 Mass. 396, 42 Am. St. Rep. 413, 37 N. E. 196 (set out in III. b, 1, supra); *Robert's Appeal*, 59 Pa. 70, 98 Am. Dec. 312 (set out in VIII. b, infra); *Middleton's Estate*, 212 Pa. 119, 61 Atl. 808 (set out in VIII. f, infra); *Jones v. Mackilvain*, 1 Russ. Ch. 220, 25 Revised Rep. 32 (set out in VIII. h, infra); *Re Livingston*, 14 Ont. L. Rep. 161 (set out in III. b, 1, supra).

¹²⁷ The fact that the testator has failed to make a disposition of the gift in event of the legatee's death before attaining the specified age shows that the attainment of such age was looked upon as fixing the period for full enjoyment rather than as imposing a contingency. *Ordway v. Dow*, 55 N. H. 11.

See also *Robinson's Estate*, 13 Phila. 299 (set out in VIII. r, infra, where gift was to take effect at majority of third person); *Re Lincoln Trust Co.* 78 Misc. 325, 139 N. Y. Supp. 682 (set out in III. b, 1, supra).

¹²⁸ The absence of a limitation over in the event of a residuary legatee failing to reach the age of twenty-one goes to show that the legacy is not contingent upon his attaining such age. *Kelly v. Dike*, 8 R. I. 436.

¹²⁹ In determining the period of vesting it is always considered a material circumstance if the legacy be severed from the rest of the estate. *Re Couturier* [1907] 1 Ch. 470, 76 L. J. Ch. N. S. 296, 96 L. T. N. S. 560.

A legacy to be severed from a general estate instantan for the use and benefit of a legatee is a very different thing from a legacy to be severed from the estate only on the happening of a particular event. *L.R.A.1915c*.

j. Severance of legacy from estate.

The severance of the subject-matter of the legacy from the corpus of the estate, as by a direction that it be set apart by the executors, or given to trustees, for the purpose of paying the legacy, is considered as a circumstance indicative of an intention that the gift shall vest in interest immediately.¹³⁰ For instances in which it has

Lister v. Bradley, 1 Hare, 10, 11 L. J. Ch. N. S. 49, 5 Jur. 1034.

Where the subject of the gift is a specific fund separated from the rest of the testator's property, the court will seek a construction which will vest the gift at the earliest moment. *Re Vevan*, L. R. 34 Ch. Div. 716, 56 L. J. Ch. N. S. 652, 56 L. T. N. S. 277, 35 Week. Rep. 400.

Where a specific legacy is set apart from an estate for a minor legatee, to be given her at a time in the future, such legacy is vested. *Fox v. Hicks*, 81 Minn. 197, 50 L.R.A. 663, 83 N. W. 538.

Where the gift is to be severed instantan from the general estate for the benefit of the legatee, and in the meantime the interest thereof is to be paid to him, that is indicative of the intent of the testator that the legatee shall at all events have the principal, and is to wait only for the payment until the day fixed. *Warner v. Durant*, 76 N. Y. 133.

A direction that a legacy shall be severed from the general estate, and invested by the executors for the benefit of the legatees until the time arrives when they are severally entitled to the principal, is indicative of an intention that the legacy shall vest immediately. *Zartman v. Ditmars*, 37 App. Div. 173, 55 N. Y. Supp. 908; *Kessler v. Friede*, 29 Misc. 187, 60 N. Y. Supp. 891; *Harris v. Cook*, 98 Mo. App. 38, 71 S. W. 1126.

A bequest which, from being given when the legatee attains twenty-one, might not be held a vested legacy, becomes vested when coupled with a provision for the severance of the fund from the bulk of the estate, and an intermediate accumulation of the interest or the application of it for the benefit of the legatee. *Weyman v. Ringold*, 1 Bradf. 40.

The severance of a legacy from the body of testator's estate, to be invested to make a provision for the support and education of the legatee, is an indication of an intent to make him the beneficiary of the corpus of the legacy, especially where testator makes no limitation over in the event of the legatee's decease before attaining age. *Roberts's Appeal*, 59 Pa. 70, 98 Am. Dec. 312.

When the subject of the gift is separated from the rest of the estate, and vested in trustees for the benefit of the legatee, the gift, although in form contingent, will be held vested. *Middleton's Estate*, 212 Pa. 119, 61 Atl. 808; *Saunders v. Vautier*, *Craig & Ph.* 240, 10 L. J. Ch. N. S. 354.

been so considered, see cases cited in footnote. ¹⁴⁰ It is not, however, an absolute indication, but is merely one element to be taken into consideration in a doubtful case. ¹⁴¹

It has been made a question in some cases whether the testamentary directions therein involved amounted to a severance. It has been held that a direction to executors to invest, or otherwise to set apart, a fund for the payment of legacies when the legatees shall attain the prescribed age, ¹⁴² or

a gift to trustees for the purpose of paying such legacies, ¹⁴³ without provision for its return to the estate, constitutes a severance. It is, of course, immaterial that the legacy is given over to another in case the legatee fails to attain the age designated. But a direction to executors to pay out a sum of money forming the subject of a postponed gift is not a severance of the gift from the rest of the estate, as in the case of a bequest to trustees; ¹⁴⁴ nor is there a severance where the trust or direction to invest

¹⁴⁰ *Brennan v. Brennan* [1894] 1 I. R. 69 (set out in VIII. g, infra); *Re Couturier* [1907] 1 Ch. 470, 76 L. J. Ch. N. S. 296, 96 L. T. N. S. 560 (set out in VIII. g, infra); *Greet v. Greet*, 5 Beav. 123 (set out in VIII. f, infra); *Dundas v. Wolfe Murray*, 1 Hem. & M. 425, 1 New Reports, 429, 32 L. J. Ch. N. S. 151, 11 Week. Rep. 359 (set out in III. b, 1, supra); *Potts v. Atherton*, 28 L. J. Ch. N. S. 486, 7 Week. Rep. 331 (set out in VIII. n, infra); *Re Lyman*, 2 L. T. N. S. 662 (set out in III. b, 1, supra); *Ingram v. Suckling*, 7 Week. Rep. 386 (set out in VIII. i, infra); *Butler v. Butler*, 29 N. S. 145 (set out in VIII. g, infra); *Re Sproule*, 17 Ont. Rep. 334 (set out in III. b, 1, supra); *Goff v. Strohm*, 28 Ont. Rep. 553 (set out in III. b, 1, supra); *Fox v. Hicks*, 81 Minn. 197, 50 L.R.A. 663, 83 N. W. 538 (set out in VIII. i, infra); *Harris v. Cook*, 98 Mo. App. 38, 71 S. W. 1126 (set out in VIII. i, infra); *Fisher v. Johnson*, 38 N. J. Eq. 46 (set out in VIII. j, infra); *Paterson v. Ellis*, 11 Wend. 259 (set out in VIII. h, infra); *Re Maley*, 73 Misc. 195, 132 N. Y. Supp. 492 (set out in VIII. i, infra); *Crossman's Estate*, 15 N. Y. S. R. 841, 1 N. Y. Supp. 103 (set out in VIII. g, infra); *Rhode Island Hospital Trust Co. v. Noyes*, 26 R. I. 323, 58 Atl. 999 (set out in VIII. g, infra); *Hayes v. Robeson*, 29 R. I. 216, 69 Atl. 686 (set out in VIII. f, infra).

¹⁴¹ The fact that a fund is segregated at once from the estate, and devoted to the particular trust, is one of the tests to be used in doubtful cases in determining whether the legacy is vested or not, and most commonly arises in cases where there is an absence of language that can be construed into a gift as distinguished from a mere direction to pay; but when the language is not doubtful, and the intention of the testator, as shown by the language in the will, is clear that the legacy should not vest immediately, such rule of construction has no application. *Bennett v. Bennett*, 217 Ill. 434, 4 L.R.A. (N.S.) 470, 75 N. E. 339.

¹⁴² *Re Couturier* [1907] 1 Ch. 470, 76 L. J. Ch. N. S. 296, 96 L. T. N. S. 560 (set out in VIII. g, infra); *Brennan v. Brennan* [1894] 1 I. R. 69 (set out in VIII. g, infra); *Harris v. Cook*, 98 Mo. App. 38, 71 S. W. 1126 (set out in VIII. i, infra); *Fisher v. Johnson*, 38 N. J. Eq. 46 (set out in VIII. j, infra); *Crossman's Estate*, 15 N. Y. S. R. 841, 1 N. Y. Supp. 103 (set out in VIII. i, infra); *Re Maley*, 73 Misc. 195, 132 N. Y. Supp. 492 (set out in VIII. i, infra).

¹⁴³ See *Greet v. Greet*, 5 Beav. 123 (set out in VIII. f, infra); *Potts v. Atherton*, 28 L. J. Ch. N. S. 486 (set out in VIII. n, infra); *Fox v. Hicks*, 81 Minn. 197, 50 L.R.A. 663, 83 N. W. 538 (set out in VIII. i, infra).

¹⁴⁴ *Meredith v. Tooke*, 1 Ves. Jr. Supp. 324.

¹⁴⁵ In *Heath v. Perry*, 3 Atk. 101, where testator, who had given certain legacies to be paid to the legatees at their respective ages of twenty-one in case they should respectively attain that age, and not otherwise, further gave his executors full power and liberty, during the respective minorities of the legatees until they should attain their ages of twenty-one or the legacies should otherwise become void, to lay the money out in mortgages or other securities for the purposes and on the trusts of the will, it was held that, as the direction was not to lay out the money for the benefit of the particular legatees, but equally for the benefit of the residuary legatees, such direction did not amount to a severance of the gift from the corpus of the estate.

In *Re Nunburnholme* [1912] 1 Ch. 489, 81 L. J. Ch. N. S. 347, 106 L. T. N. S. 361, 56 Sol. Jo. 243, reversing [1911] 2 Ch. 510, 81 L. J. Ch. N. S. 85, 105 L. T. N. S. 666, 56 Sol. Jo. 34, where testator bequeathed all his shares in a certain business upon trust out of the income and profits to supplement, if necessary, the incomes of three daughters under certain specified circumstances, to pay out of the income the testator's debts and the estate duty payable on his death, and as to one-fourth part of said shares upon trust out of the income and profits arising therefrom (but subject to the aforesaid trusts), to pay to testator's son an annual sum not exceeding £3,000, if the said income and profits should amount to so much, until he should attain the age of twenty-six years, and when and so soon as he should have attained the said age to hold the one-fourth part and accumulations of interest arising therefrom, but subject to the preceding trusts, upon trust for said son absolutely, it was held, in view of the fact that the shares were left to the trustees not for the simple purpose of dividing them and holding them in trust for particular persons, but primarily for the execution of a trust which might be

is not for the benefit of the particular legatees, but for the purposes of the will generally; ¹⁴⁶ or the subject of the gift is to be held on trust for another purpose only. ¹⁴⁶

K. Intervention of trustees.

The fact that a legacy is given through the intervention of a trustee, who is directed to pay over and deliver the property held by him in trust upon the beneficiary's attaining a certain age, such property from

and after that time to belong to the said beneficiary, is not to be construed as indicating an intention to postpone the vesting of the legacy, but rather as declaring an intention that when the beneficiary shall attain the given age the property shall, from and after that time, belong to him and his heirs and assigns discharged from the trust. ¹⁴⁷ The fact that the property is given to trustees is always favorable to vesting, as showing a separation of the legacy from the bulk of the testator's estate,—

long continued, and which required them to apply the income of the shares in certain ways which could not be foretold, and provided for creating a charge upon the income which might, under certain circumstances, justify and oblige the trustees to resort to the corpus, there was no such severance of the gift from the estate as to vest the gift to the son, which was *prima facie* contingent upon his attaining the specified age.

¹⁴⁶ In *Re Jobson*, L. R. 44 Ch. Div. 154, testator gave his estate upon trust as to a specified leasehold, to permit his daughter Elizabeth to receive the rents and profits thereof for her life, "and from and after her decease the same premises shall be in trust for all the children of the said Elizabeth Jobson in equal shares as tenants in common on their respectively attaining the age of twenty-one years." It was held that, as the severance of the gift from the estate was only for the benefit of the life tenant, the fact of the severance could not be invoked to show that the children took vested interests. North, J., saying: "The trust is not for the children of Elizabeth Jobson in the first instance, but it is to permit her to receive the income for her life. There is no further segregation or appropriation of the fund, but only a trust from and after her death for all her children in equal shares on their respectively attaining twenty-one. It is said that there is a separation of the fund because the children take vested interests; and that they take vested interests because the fund is separated."

¹⁴⁷ *Ordway v. Dow*, 55 N. H. 11.

It makes no difference as to the vesting, whether the legal estate be devised to trustees who are required to convey according to the directions of the will, or whether the interest is provided to take effect without the intervention of trustees, nor that the trust provides for the accumulation of income until the period of payment or distribution arrives. *Tayloe v. Mosher*, 29 Md. 443.

For instances in which the legacy has been held to vest in interest, although given through the intervention of a trustee, see—

—gifts of personal property: *Bland v. Williams*, 3 Myl. & K. 411, 3 L. J. Ch. N. S. 318 (set out in VIII. l, *infra*); *Hart's Trusts*, 3 De G. & J. 202, 28 L. J. Ch. N. S. 7, 4 Jur. N. S. 1264, 7 Week. Rep. 28; *Saunders v. Vautier*, Craig. & Ph. 240, 10 L.R.A.1915C.

L. J. Ch. N. S. 354 (set out in VIII. n, *infra*); *Re Bartholomew*, 1 Macn. & G. 354 (set out in III. b, 1, *supra*); *Blease v. Burgh*, 2 Beav. 221, 9 L. J. Ch. N. S. 226 (set out in III. b, 1, *supra*); *Harrison v. Grimwood*, 12 Beav. 192, 18 L. J. Ch. N. S. 485, 13 Jur. 864 (set out in VIII. l, *infra*); *Walker v. Mower*, 16 Beav. 365 (set out in III. q, *infra*); *Re Smith*, 20 Beav. 197, 24 L. J. Ch. N. S. 466, 1 Jur. N. S. 220, 3 Week. Rep. 277 (set out in VIII. q, *infra*); *Brocklebank v. Johnson*, 20 Beav. 205, 24 L. J. Ch. N. S. 505, 1 Jur. N. S. 318, 3 Week. Rep. 341 (set out in III. b, 1, *supra*); *Tatham v. Vernon*, 29 Beav. 604, 7 Jur. N. S. 815, 4 L. T. N. S. 531, 9 Week. Rep. 822 (set out in VIII. f, *infra*); *Boulton v. Pilcher*, 29 Beav. 633, 7 Jur. N. S. 767, 4 L. T. N. S. 426, 9 Week. Rep. 626 (set out in VIII. h, *infra*); *Shrimpton v. Shrimpton*, 31 Beav. 425, 11 Week. Rep. 61 (set out in III. b, 1, *supra*); *Pearman v. Pearman*, 33 Beav. 394 (set out in VIII. l, *infra*); *Re Gosling* [1903] 1 Ch. 448, 72 L. J. Ch. N. S. 433, 88 L. T. N. S. 279 (set out in III. d, *supra*); *Fraser v. Fraser*, 1 New Reports, 430, 8 L. T. N. S. 20 (set out in III. b, 2, *supra*); *Potts v. Atherton*, 28 L. J. Ch. N. S. 486, 7 Week. Rep. 331 (set out in VIII. n, *infra*); *Jones v. Mackilwain*, 1 Russ. Ch. 220, 25 Revised Rep. 32 (set out in VIII. h, *infra*); *Leeming v. Sherratt*, 2 Hare, 14, 11 L. J. Ch. N. S. 423, 6 Jur. N. S. 683 (set out in VIII. q, *infra*); *Festing v. Allen*, 5 Hare, 573 (set out in III. b, 1, *supra*); *Re Ashmore*, L. R. 9 Eq. 99, 39 L. J. Ch. N. S. 202 (set out in III. d, *supra*); *Re Peek*, L. R. 16 Eq. 221, 42 L. J. Ch. N. S. 422, 21 Week. Rep. 820 (set out in VIII. l, *infra*); *Fox v. Fox*, L. R. 19 Eq. 286, 23 Week. Rep. 314 (set out in VIII. l, *infra*); *Re Bunn*, L. R. 16 Ch. Div. 47, 29 Week. Rep. 348 (set out in VIII. g, *infra*); *Chaffers v. Abell*, 3 Jur. 577 (set out in III. b, 1, *supra*); *Perrot v. Davies*, 38 L. T. N. S. 52 (set out in VIII. l, *infra*); *Re Lyman*, 2 L. T. N. S. 662 (set out in III. b, 1, *supra*); *Van v. Clark*, 1 Atk. 510 (set out in VIII. g, *infra*); *Wadley v. North*, 3 Ves. Jr. 364, 4 Revised Rep. 16 (set out in III. b, 1, *supra*); *Hammond v. Maule*, 1 Colly. Ch. Cas. 281, 13 L. J. Ch. N. S. 386, 8 Jur. 568 (set out in VIII. b, *infra*); *Equitable Guaranty & T. Co. v. Bowe*, 9 Del. Ch. 336, 82 Atl. 693 (set out in III. b, 1, *supra*); *Clafin v. Clafin*, 149 Mass. 19, 3 L.R.A. 370, 14 Am. St. Rep.

especially where some of the trustees are not executors.¹⁴⁸ And the vesting of a legatee's interest will not be postponed by a trust spelled out by implication.¹⁴⁹

The fact that a legacy is given to trustees until the attainment of a certain age by the beneficiaries of the trust does not militate against its vesting, where they hold it solely for the benefit of the persons ultimately entitled.¹⁵⁰

In the cases of devises of realty the effect of the devise of a precedent estate to a trustee until the ultimate devisee shall

reach the specified age has the effect, as explained in another place (III. f, ante), to give the devisee a vested remainder; and it is immaterial whether the remainder is legal after an equitable estate in trust, as in the case of a devise to A in trust until B should attain twenty-one, and then to B, or equitable, as in the case of a devise to A in trust until B should attain twenty-one, and then upon trust to convey to B.¹⁵¹ The fact that the property is to go to others, or to fall into the residue, in case the devisee fails to attain the specified age, is not

393, 20 N. E. 454 (set out in III. b, 1, supra); *Parker v. Glover*, 42 N. J. Eq. 559, 9 Atl. 217 (set out in VIII. q, infra); *Dusenberry v. Johnson*, 59 N. J. Eq. 336, 45 Atl. 103 (set out in VIII. n, infra); *Torrey v. Shaw*, 3 Edw. Ch. 356 (set out in VIII. q, infra); *Paterson v. Ellis*, 11 Wend. 259 (set out in VIII. h, infra); *Tucker v. Bishop*, 16 N. Y. 402 (set out in VIII. m, infra); *Everitt v. Everitt*, 29 N. Y. 39 (set out in VIII. i, infra); *Stevenson v. Lesley*, 70 N. Y. 512 (set out in VIII. j, infra); *Goebel v. Wolf*, 113 N. Y. 405, 10 Am. St. Rep. 464, 21 N. E. 388 (set out in VIII. q, infra); *Smith v. Parsons*, 146 N. Y. 116, 40 N. E. 736 (set out in VIII. g, infra); *Sawyer v. Cubby*, 146 N. Y. 192, 40 N. E. 869 (set out in VIII. g, infra); *Cammann v. Bailey*, 210 N. Y. 19, 103 N. E. 824 (set out in VIII. g, infra); *Williams v. Boul*, 101 App. Div. 593, 92 N. Y. Supp. 177, affirmed without opinion in 184 N. Y. 605, 77 N. E. 1138 (set out in III. b, 1, supra); *Zartman v. Ditmars*, 37 App. Div. 173, 55 N. Y. Supp. 908 (set out in III. b, 1, supra); *Braunsdorf v. Braunsdorf*, 23 N. Y. Supp. 722 (set out in III. b, 1, supra); *Clark v. Clark*, 23 Misc. 272, 50 N. Y. Supp. 1041 (set out in III. b, 1, supra); *Re Lincoln Trust Co.* 78 Misc. 325, 139 N. Y. Supp. 682 (set out in III. b, 1, supra); *Re Meikle*, 2 Connolly, 97, 20 N. Y. Supp. 88 (set out in VIII. q, infra); *Hooker v. Bryan*, 140 N. C. 402, 53 S. E. 130 (set out in VIII. g, infra); *Provenchere's Estate*, 1 Campb. (Pa.) 68 (set out in VIII. j, infra); *Re Arthurs*, 24 Pittsb. L. J. N. S. 28 (set out in VIII. q, infra); *McCall's Estate*, 11 Phila. 41 (set out in VIII. g, infra); *Middleton's Estate*, 212 Pa. 119, 61 Atl. 808 (set out in VIII. f, infra); *Rhode Island Hospital Trust Co. v. Noyes*, 26 R. I. 323, 58 Atl. 999 (set out in VIII. g, infra).

—gifts in which realty and personalty were blended: *Parsons v. Justice*, 34 Beav. 598 (set out in note 224, infra); *Farmer v. Francis*, 2 Sim. & Stu. 505, 4 L. J. Ch. 154 (s. c. in the court of Common Pleas, 2 Bing. 151, 2 L. J. C. P. 143) (set out in III. b, 1, supra); *Kevern v. Williams*, 5 Sim. 171 (set out in III. b, 1, supra); *Milroy v. Milroy*, 14 Sim. 48, 13 L. J. Ch. N. S. 266, 8 Jur. 234 (set out in VIII. q, infra); *Re Williams* [1907] 1 Ch. 180, 76 L. J. Ch. N. S. 41, 95 L. T. N. S. 759 (set L.R.A.1915C.

out in VIII. g, infra); *Eccles v. Birkett*, 4 De G. & S. 105, 19 L. J. Ch. N. S. 280, 14 Jur. 800 (set out in VIII. l, infra); *Knox v. Wells*, 2 Hem. & M. 674 (set out in VIII. j, infra); *Re Turney* [1899] 2 Ch. 739, 69 L. J. Ch. N. S. 1, 48 Week. Rep. 97, 81 L. T. N. S. 548 (set out in VIII. g, infra); *Higgins v. Waller*, 57 Ala. 396 (set out in III. b, 1, supra); *Re Reith*, 144 Cal. 314, 77 Pac. 942 (set out in III. b, 1, supra); *Bowditch v. Andrew*, 8 Allen, 339 (set out in III. b, 1, supra); *Daniels v. Eldredge*, 125 Mass. 356 (set out in VIII. n, infra); *Felton v. Sawyer*, 41 N. H. 202 (set out in III. b, 1, supra); *Safe Deposit & T. Co. v. Wood*, 201 Pa. 420, 50 Atl. 920 (set out in VIII. h, infra); *Smith's Estate*, 226 Pa. 304, 75 Atl. 425 (set out in VIII. p, infra); *Williamson's Estate*, 3 Pa. Co. Ct. 239 (set out in III. h, supra); *Sammis v. Sammis*, 14 R. I. 123 (set out in VIII. q, infra); *Storrs v. Burgess*, 29 R. I. 269, 67 Atl. 731 (set out in VIII. i, infra); *Withers v. Sims*, 80 Va. 651 (set out in VIII. o, infra); *Baker v. McLeod*, 79 Wis. 534, 48 N. W. 657 (set out in VIII. l, infra).

¹⁴⁸ *Pearson v. Dolman*, L. R. 3 Eq. 315, 36 L. J. Ch. N. S. 258, 15 Week. Rep. 120.

¹⁴⁹ *Canfield v. Fallon*, 26 Misc. 345, 57 N. Y. Supp. 149, affirmed on opinion of court below in 43 App. Div. 561, 60 N. Y. Supp. 1134, which is similarly affirmed in 161 N. Y. 623, 55 N. E. 1093.

¹⁵⁰ *Neilson v. Bishop*, 45 N. J. Eq. 473, 17 Atl. 962, and see *Love v. L'Estrange*, 5 Bro. P. C. 59 (set out in VIII. o, infra); *Re Cooke*, 8 Ont. Rep. 530 (set out in VIII. i, infra).

¹⁵¹ In *Stanley v. Stanley*, 16 Ves. Jr. 491, the Master of the Rolls, adverting to the point that the whole legal estate was vested in trustees until the devisee should attain the age of twenty-one, in trust to convey to him at that time, said that it was not material that the estate given by the will was to be settled by a conveyance directed afterward to be made, "as the right cannot in any degree depend upon the conveyance to be made; but that conveyance must conform to the rights as declared in the will, which operates as an equitable conveyance until the legal conveyance came to be made."

The doctrine that one who, had the devise been direct, would have taken a vested interest, will also take a vested interest

enough to show a devise in trust to convey to be contingent.¹⁵²

l. Appointment of trustee or guardian for minor legatee.

The appointment of a trustee for an infant legatee during minority is strong evidence of an intention to postpone not the

vesting, but the possession, until majority, there being no use of appointing a trustee unless there is a subject for trusteeship.¹⁵³

m. Direction to accumulate.

A simple bequest of a legacy to one, with an added direction to accumulate until the legatee attains a given age, and an express

though the property is devised to a trustee in trust to convey it to him at twenty-one, may be said to have been finally established by *Phipps v. Ackers*, 9 Clark & F. 583. On this point Lord Lyndhurst, Ld. Ch., there said: "The only question, therefore, that remains to be considered is this, whether a different construction should be put on this will, which conveys an equitable estate, from that which the learned judges have put upon the will as applied to a legal estate; or, in other words, whether the direction to convey makes any difference with respect to the disposition of the property. I am clearly of opinion that it does not; and I agree entirely in what fell from Sir William Grant, in the case of *Stanley v. Stanley*, supra, that the right is not affected by the direction to convey, but that the conveyance must conform to the right, and that the will itself is an equitable conveyance, until that is displaced by the legal conveyance which is directed to be made." And Lord Brougham said on this point: "It was contended that because the immediate interest is vested in the trustees, and that they are only directed to convey and to assign to George Holland Ackers when he is of age, the act done to entitle George Holland Ackers is postponed till that time, and his interest therefore only vests at that time. But there can be no doubt that the act which entitles him is the devise; from this he derives his interest, though an equitable interest; and the only difference between his case and that of a devisee without trustees interposed or directed to convey is that the legal estate remains in the trustees during his minority, and that the equitable estate vesting in him during that minority would be divested upon his decease under age. The inclination certainly should always be to make the rules of courts of equity conform as much as possible to the principles recognized at law; and I can see no reason whatever for dealing upon different principles with the vesting of an equitable and of a legal interest, in respect to the present question." And Lord Campbell, concurring, said that he thought that equity in such a case ought to follow the law.

And see also *Whitter v. Bremridge*, L. R. 2 Eq. 736, 35 L. J. Ch. N. S. 807, 14 Week. Rep. 912 (set out in note 152); *Doe ex dem. Cadogan v. Ewart*, 7 Ad. & El. 636 (set out in VIII. h, infra); *Jackson v. Majoribanks*, 12 Sim. 93, 5 Jur. 885 (set out in VIII. h, infra); *Greene v. Potter*, 2 Younge & C. Ch. Cas. 517, 7 Jur. 736 (set out in VIII. b, infra); *Smith v. Spencer*, 6 De G. M. & G. 631, 3 Jur. N. S. 193, 5 L.R.A.1915C.

Week. Rep. 136 (set out in VIII. n, infra); *James v. Wynford*, 1 Smale & G. 40, 22 L. J. Ch. N. S. 450, 17 Jur. 17, 1 Week. Rep. 61 (set out in VIII. g, infra); *Hempstead v. Dickson*, 20 Ill. 193, 71 Am. Dec. 260 (set out in VIII. q, infra); *Chapman v. Nichols*, 61 How. Pr. 275 (set out in VIII. r, infra).

¹⁵² The fact that property is devised in trust to convey to one so soon as he shall have attained the age of twenty-one years, and the will contains a declaration that in case the trusts therein should determine or become incapable of taking effect, the hereditaments should form part of the residue, is not of itself sufficient to show the devise to be contingent. *Re Mottram*, 10 Jur. N. S. 915.

In *Whitter v. Bremridge*, L. R. 2 Eq. 736, where testator gave his residue, both real and personal, in trust to invest and pay or cause to be paid "the said property and interest arising therefrom to my godson [name] on his attaining the age of twenty-four years; but in case of his not attaining that age or leaving male issue, I give, devise, and bequeath said properties" to others, it was held, following *Phipps v. Ackers*, 9 Clark & F. 583, 6 Jur. 745 (set out in VIII. l, infra), that the legatee took a vested interest subject to be divested in the events mentioned in the will.

But in *Hayes v. Goode*, 7 Leigh, 452, where testator devised lands in trust to convey to a grandson on his attaining the age of twenty-one years, or in case of his death before that age without leaving issue, to convey to another, the two members of the court were divided in opinion as to whether the estate in remainder vested in the grandson, one expressing the opinion that it did so vest, subject to be divested in favor of the devisees over on the said grandson's dying before the age of twenty-one without issue; the other saying that if there had been no trust created, and the devise had been immediate, there would have been strong reasons for considering the estate vested in order to prevent the overthrow of the testator's intention in the event of the grandson dying under age leaving issue, but that, there being an executory trust, the necessity for such construction disappeared.

¹⁵³ *Branstrom v. Wilkinson*, 7 Ves. Jr. 421; *Bowman v. Long*, 23 Ga. 242; *Nelson v. Pomeroy*, 64 Conn. 257, 29 Atl. 539; *Bayard v. Atkins*, 10 Pa. 15.

Where an estate is bequeathed or devised to one upon his becoming twenty-one years of age, or when he becomes twenty-one, and in the meantime the property is given to a parent, guardian, or trustee for the legatee's

direction to postpone payment until then, vests immediately.¹⁵⁴ And a bequest which, from being a mere direction to pay when the legatee attains twenty-one, might not be held vested, becomes vested when coupled with a provision for the severance of the fund from the bulk of the estate, and an intermediate accumulation of the interest or the application of it for the benefit of the legatee.¹⁵⁵ A direction to accumulate the rents of real property until the time when it is directed to be conveyed to the devisee is a circumstance indicating that the gift is to vest immediately.¹⁵⁶

The case is otherwise, however, where the income is directed to be accumulated for the benefit of whoever shall ultimately become entitled to the principal.¹⁵⁷

n. Provision for survivorship among legatees.

The vesting of a legacy is not prevented by a provision for survivorship among the legatees in case of the death of any under the age of twenty-one;¹⁵⁸ on the contrary, the fact that the will contains a clause of survivorship which would be wholly useless were the gift to such children only as should attain twenty-one is a circumstance going to show an intention to give an immediate interest.¹⁵⁹

The presumption arising from the pres-

ence of a survivorship clause is not, however, a very strong one, for the clause may have been added from excess of caution, or from inadvertence. Such a clause is not in itself sufficient to overcome the effect of words of gift by which the attainment of a specified age is annexed to the substance of the bequest or the description of the legatees.¹⁶⁰

Where there is a gap between the period of operation of the survivorship clause and the age at which the legacy is given, as where the survivorship clause is in case of death before twenty-one and the legacy is given at twenty-five, the desire to give the will a construction which will make all its parts harmonize may influence the court to hold that the legacy vests at the time when the survivorship clause ceases to operate.¹⁶¹

o. Effect of provision substituting the issue of any legatee who may die before division.

The existence in a will of a provision substituting the issue of any legatee who may die before division cannot be said to have any definite bearing upon the question of vesting.

It has been argued on the one hand that such a provision indicates that the testator did not contemplate a vesting before the

benefit, in such cases the interest will vest at the death of the testator. *Hooker v. Bryan*, 140 N. C. 402, 53 S. E. 130.

For other instances in which the appointment of a trustee or guardian of the legatee's estate, which consisted solely of the legacy, was relied on as a circumstance indicative of an intention that it should vest immediately, see *Van v. Clark*, 1 Atk. 510 (set out in VIII. g, *infra*); *Paterson v. Ellis*, 11 Wend. 259 (set out in VIII. h, *infra*); *Wade v. Dick*, 36 N. C. (1 Ired. Eq.) 313 (set out in III. b, 1, *supra*); *Green v. Green*, 86 N. C. 546 (set out in VIII. i, *infra*); *Rhode Island Hospital Trust Co. v. Noyes*, 26 R. I. 323, 58 Atl. 999 (set out in VIII. g, *infra*).

¹⁵⁴ *Re Couturier* [1907] 1 Ch. 470, 76 L. J. Ch. N. S. 296, 96 L. T. N. S. 560.

See also *Bull v. Johns*, Tamlyn, 513 (set out in III. b, 1, *supra*); *Blease v. Burgh*, 2 Beav. 221, 9 L. J. Ch. N. S. 226 (set out in III. b, 1, *supra*).

¹⁵⁵ *Weyman v. Ringold*, 1 Bradf. 40. See also cases cited in footnote 86, *supra*.

¹⁵⁶ See *Peard v. Kekewich*, 15 Beav. 166, 21 L. J. Ch. N. S. 456 (set out in III. b, 1, *supra*).

¹⁵⁷ See footnote 87, *supra*.

¹⁵⁸ *Deane v. Test*, 9 Ves. Jr. 146, 1 Smith, 112.

¹⁵⁹ *Re Bartholomew*, 1 Macn. & G. 354, 1 Hall & Tw. 565, 19 L. J. Ch. N. S. 237, 14 Jur. 181.

L.R.A.1915C.

See also *Wetherell v. Wetherell*, 1 De G. J. & S. 134 (set out in VIII. j, *infra*); *Tatem v. Tatem*, 1 Miles (Pa.) 309 (set out in VIII. q, *infra*).

¹⁶⁰ In *Barker v. Lea*, Turn. & R. 413, 24 Revised Rep. 85, it was held that, although a gift over to the survivors in the case of the death of any legatee unmarried and without issue, would in case of ambiguity have afforded a strong ground for contending that the original shares were vested interests, though not payable till the attainment of a specified age, it was insufficient of itself to overcome the effect of words of gift by which the attainment of such age was annexed to the substance of the bequest.

In *Russel v. Buchanan*, 7 Sim. 628, 5 L. J. Ch. N. S. 122 (set out in III. r, *infra*), interests were held contingent notwithstanding such construction rendered the survivorship clause superfluous. Another instance in which the survivorship clause was disregarded is *Bull v. Pritchard*, 1 Russ. Ch. 213, 7 L. J. Ch. 41, 25 Revised Rep. 27 (set out in note 223, *infra*).

In *Johnson v. Terry*, 139 Ala. 614, 36 So. 775 (set out in VIII. j, *infra*), a survivorship clause was relied on to show that a gift to children upon respectively attaining twenty-one was contingent.

¹⁶¹ See *Gunning's Estate*, Ir. L. R. 13 Eq. 203 (set out in VIII. i, *infra*).

time of division, as otherwise the issue would take anyway, by inheritance from their parent; on the other, that a substitutional clause implies the divesting of an already vested interest. The contradictory character of the decisions construing wills containing such a provision makes the statement of any general rule impossible. ¹⁶²

p. Assisting construction by reference to other gifts.

In some cases the construction of a testamentary gift as vested has been materially assisted by reference to other gifts, which were clearly vested, to persons standing in the same relation to the testator.

So, in the case of a gift to A, B, sons, and C, a granddaughter, provided C lives to attain twenty-one years, as A and B plainly take vested interests, C will be held to take a vested interest also, and the provision as to attaining twenty-one will be regarded as a condition subsequent. ¹⁶³ And a gift to grandsons may be considered vested because a gift to a granddaughter is clearly vested; ¹⁶⁴ and a gift to the children of a son may be vested because gifts to the children of other sons and daughters are clearly vested. ¹⁶⁵

The fact that children who are of full

age are to take immediately is a circumstance tending to show that a gift to those under age at majority is not upon a condition precedent of attaining full age. ¹⁶⁶

q. Assisting construction by reference to other limitations—reflecting contingency backwards and forwards.

Where the gift is in the alternative, as to children, and if but one child, to such child, and the contingency of attaining a certain age is attached to one or the other of the limitations, it may be a question whether it is reflected backwards or forwards from the one to the other, or, conversely, whether the absence of the provision contemplated the attainment of the specified age from the one gift shows that its insertion in the other gift was not meant to postpone the vesting.

It has been held that the contingency attaching to the gift to several children will not be imported into a gift to an only child, ¹⁶⁷ unless there is something to show that the testator did not contemplate that an only child might attain a vested interest by birth alone. ¹⁶⁸ In one of the decisions it is suggested that the effect of this construction is to impute a somewhat capricious intention to the testator; but it seems

¹⁶² For a case in which a provision substituting the issue of any legatee who should die in the meantime leaving issue has been held to indicate an intention that the legacy should not vest, see *Ross v. Ware*, 131 Ky. 828, 116 S. W. 241.

For note on "Character of remainder given by will as affected by a direction that children, etc., of a deceased remainderman shall take their parent's share," see 37 L.R.A.(N.S.) 728.

For an instance in which the legacy has been held contingent notwithstanding a provision for the substitution of issue, see *Martineau v. Rogers*, 8 De G. M. & G. 328, 25 L. J. Ch. N. S. 398, 4 Week. Rep. 502 (set out in VIII. a, *infra*).

For instances in which legacies have been held vested, subject to be divested by death leaving issue before distribution, see *Leeming v. Sherratt*, 2 Hare, 14, 11 L. J. Ch. N. S. 423, 6 Jur. 683 (set out in VIII. q, *infra*); *Murphy v. Murphy*, 20 Grant, Ch. (U. C.) 575 (set out in VIII. q, *infra*); *Butler v. Butler*, 29 N. S. 145 (set out in VIII. g, *infra*).

This list of instances does not purport to be complete.

¹⁶³ See *Simmonds v. Cock*, 29 Beav. 455, 7 Jur. N. S. 718, 9 Week. Rep. 517 (set out in VIII. d, *infra*); *Boling v. Miller*, 133 Ind. 602, 33 N. E. 354 (set out in VIII. d, *infra*).

¹⁶⁴ See *Hayes v. Robeson*, 29 R. I. 216, 69 Atl. 686 (set out in VIII. f, *infra*).

¹⁶⁵ See *Cropley v. Cooper*, 19 Wall. 167, 22 L. ed. 109 (set out in VIII. i, *infra*). L.R.A.1915C.

¹⁶⁶ See *Peterson's Appeal*, 88 Pa. 397 (set out in VIII. j, *infra*).

¹⁶⁷ See *Johnson v. Foulds*, L. R. 5 Eq. 268, 37 L. J. Ch. N. S. 260.

In *Walker v. Mower*, 16 Beav. 365, where testatrix gave leasehold premises in trust for her daughter for life, "and after her decease upon trust to assign the said leasehold premises . . . for the residue of the term therein unto and between all and every the children of her said daughter, to and for their own use and benefit, on their respectively attaining the age of twenty-one years. And if there should be but one child, then upon trust to assign the same unto such only child to and for his or her use or benefit," with a gift over in case the daughter should die without leaving any issue her surviving, the master of the rolls, referring to the discrepancy between the gift to the several children and to the only child, held that, though the meaning of the testatrix may have been capricious and singular, that if there should be two or three children they should not take vested interests until they attained twenty-one, but that an only child should take a vested interest at his birth, it would be inserting words into the will to hold that an only child was not to take unless he attained twenty-one.

¹⁶⁸ In *Re Fletcher*, 53 L. T. N. S. 813, testator gave the residue of his real and personal estate to trustees in trust to sell and to invest £4,000 and pay the income thereof to his daughter for life, "and at her death to pay and divide the same between

that a testator might reasonably enough desire that the gift should vest only in those of a class as should attain a specified age, and at the same time be unwilling to give the property in such a way that it would pass out of the family in case an only child should die under the specified age.

Where the gift in event of there being an only child is clearly contingent, the same construction has been put upon the gift to several children.¹⁶⁹ Similarly, if the in-

her children in equal shares, who being sons shall attain twenty-one, or being daughters attain that age or be married, and if only one child, then wholly to him or her; if no child who shall live to attain a vested interest, then the same fund . . . and the investments representing the same to be paid to" others. It was held that if the will had stopped at the words "then wholly to him or her," an only child would have taken, although it died before twenty-one, but that the words "if no child who shall live to attain a vested interest," in the following clause, showed that the testator did not contemplate that an only child might attain a vested interest by birth alone, and that the condition as to attaining twenty-one or marrying applied as well to an only child as to several children.

¹⁶⁹ In *Judd v. Judd*, 3 Sim. 525, 8 L. J. Ch. 119, 30 Revised Rep. 203, testator devised and bequeathed the whole of his real and personal estate upon trust as to one-third part thereof for the use and benefit of his daughter Sarah for life, and upon her decease in trust for the child or children of her body, and to be paid, assigned, and transferred to them by his trustees upon their respectively attaining the age of twenty-five years, but in case his said daughter Sarah should leave but one child surviving, then the whole of such one-third part or share of the residue should go to and become the property of such only child upon his or her attaining the age of twenty-five years, and be transmissible to his or her heirs, executors, or administrators, and in case his said daughter should leave no child to attain the age of twenty-five years, the property was given over to the other branches of his family. He similarly limited other shares of his residue to his two other daughters and their children, and finally declared that in default of issue of his three children who should attain twenty-five, his trustees should stand seised and possessed of the said residue in trust for his real and personal representatives. It was held that the gift in case the daughter Sarah should leave one child only her surviving was clearly contingent on that child attaining the age of twenty-five years, and that the same construction must be put upon the gift in case she should have more than one child. The will again being brought before the Vice Chancellor for con-

terest of an only child is clearly vested, this may, in an otherwise doubtful case, show that the gift, in event of there being several children, was also meant to be vested.¹⁷⁰

r. Effect of express direction as to vesting.

Even where the testator has explicitly declared that a devise or legacy shall be "vested" at a certain age, his declaration is not necessarily conclusive, inasmuch as

sideration in *Hunter v. Judd*, 4 Sim. 455, it was held that if the testator had simply declared that upon the death of his daughter Sarah his trustees should stand possessed of one third of his residuary estate in trust for her child or children, and to be paid, assigned, and transferred to them upon their severally and respectively attaining the age of twenty-five years, the gift would plainly have been independent of the time of payment, but that the discrepancy between that provision and the gift in case the daughter should leave but one child her surviving, and the general scheme of testamentary disposition, showed that the grandchildren were not to take vested interests before attaining the age of twenty-five years.

¹⁷⁰ In *King v. Isaacson*, 1 Smale & G. 371, where testator gave the residue of his estate, both real and personal, upon trust for his wife for life, and after her decease to pay two third parts of the income to his niece Mary Travis for life, and the remaining one third to his niece Latona Travis for life, and from and immediately after the decease of Mary Travis, upon trust to convey, pay, assign, transfer, or make over two equal third parts or shares of the residuary real estate and of the personalty "unto and among all and every the child and children of my said niece Mary Travis, as well daughters as sons, as and when they shall severally and respectively attain their respective ages of twenty-one years, to and for their own absolute use and benefit as tenants in common, and not as joint tenants, and to their several and respective heirs, executors, administrators, and assigns according to the nature and quality of such estates; and if there shall be but one child of my said niece Mary Travis, then to such only child," and after the decease of the other niece to make over the remaining third in like manner to her children.—Vice Chancellor Stuart said that, notwithstanding the difficulty created by the words used in this will with reference to attaining twenty-one, yet looking at the words of the whole gift, which was to operate on the estate upon the death of each niece, and at the ultimate gift of an absolute interest in case of there being only one child, he could come to no other conclusion than that every child on being born was to acquire a vested interest.

the word "vested" is capable of three meanings: First, as meaning vested in interest,—its primary and ordinary meaning; second, as vested in possession or enjoyment,—where it is, when used in connection with legacies, equivalent to "payable;" and,

third, as "not subject to be divested," or "indefeasible." For instances in which the context has been held insufficient to show that the word "vested" was used in other than its ordinary meaning,¹⁷¹ and instances in which the context has been held to re-

¹⁷¹In *Glanvill v. Glanvill*, 2 Meriv. 38, where testator gave and devised all the rest, residue, and remainder of his estate, both real and personal, unto and to the use of his son "to be a vested interest upon his attaining the age of twenty-one, provided that, in case my said son shall happen to die before attaining the said age of twenty-one, then all the rest and residue of my said real and personal estate so given and devised unto him shall go and belong to my daughter," the master of the rolls said that it would be difficult to get over the precise words of the will directing that the legacy should vest at twenty-one; that there could not be two periods of vesting, and by fixing one the testator must be taken to have excluded the other, and that the sentence itself was so worded that the direction as to vesting formed a necessary part of it, and the remainder could not be construed without it.

In *Balm v. Balm*, 3 Sim. 492, 30 Revised Rep. 192, where testator gave the residue of his personal estate to his executors upon trust to invest, and to pay, transfer, and make over the securities unto and equally between the children of a nephew, and their respective executors, administrators, and assigns, the shares of the boys to be payable and transferable to them at their respective ages of twenty-one years, and those of the girls at that age or day of marriage, which should first happen, and to accumulate for them in the meantime, with the usual benefit of accruer and survivorship in case of the death of any or either of them under the age or time aforesaid, and in case of the death of all the said children except one before their shares of the said residue became vested interests, then to pay, transfer, and make over the whole unto such only surviving child at the age or time aforesaid,—it was held that the testator had put a construction on the word "vested," and according to that construction there was no vesting until a boy should attain twenty-one or a girl should marry.

In *Russel v. Buchanan* (1836) 7 Sim. 628, where testator who, by his will, had devised all his realty to his wife during widowhood, and after her decease or marrying again, to a nephew for life, and after the decease of his nephew, to the children of his nephew, but in case there should be no child of his nephew living at the decease or marrying again of his wife, then to a niece for life, and after her decease to her children; and in case of the respective deceases of the nephew and niece without leaving any child who should be living at the decease or marrying again of his wife, then to others, and further gave the residue of L.R.A.1915C.

his estate after the decease or marrying again of his wife to the nephew and niece, share and share alike, with divers gifts over on certain events which did not happen,—by codicil directed that none of the beneficiaries named in the will, "nor any or either of their issue respectively," should "take or be considered as entitled to a vested interest or interests unless and until they shall respectively attain the age of twenty-one years," it was held that, giving the words used their natural legal import, the interests of the children were contingent on their attaining that age, though such construction rendered superfluous the further direction in the codicil: "In case of the death of any one or more of such children under such age, then the share of such child or children so dying shall go to the surviving brothers and sisters, or brother or sister, as the case may be, of such child or children so dying, their, his or her heirs and assigns respectively upon their respectively attaining the age of twenty-one years." The court of the exchequer had theretofore held upon the same will, in 2 Crompt. & M. 561, with respect to the real property embraced in the gift, that both the devisee to the children and the gift to the substituted devisees over failed of effect, the nephew having left children who, however, were under the age of twenty-one.

In *Comport v. Austen*, 12 Sim. 218, testator bequeathed £3,000 to trustees in trust, after certain life interests, for all the children of a certain person, naming them, equally to be divided between them share and share alike, the share or respective shares of such children to be vested interests in and to be paid, assigned, and transferred to them respectively as and when they should attain their respective ages of twenty-five years, provided that if any of them should die before their shares should become vested and payable, leaving issue, their shares should go to their issue; and directed the trustees in the meantime and until the shares of the children should become payable, assignable, and transferable to them, to apply the income for their maintenance. He also bequeathed £6,000 in trust for certain life interests for all and every the children of the same person, "born or hereafter to be born, equally to be divided between them share and share alike, and to be paid, assigned, and transferred to them at their respective ages of twenty-five years," and to be subject to the like descent to the lawful issue of such of them as should die under the age of twenty-five and under the like conditions and restrictions as were contained in the preceding bequest. It was held that as a legacy cannot vest at two different times, and as the

testator had directed that the legacies should become vested interests in and be paid, assigned, and transferred to the legatees at the age of twenty-five years, blending together as constituting the same fact the vesting, the paying, the assigning, and the transferring, and as the testator had made an express proviso for their shares going over in the event of their dying before their shares became vested and payable, the legacies did not vest in the legatees before attaining the age of twenty-five.

In *Re Thruston*, 17 Sim. 21, 18 L. J. Ch. N. S. 437, where testatrix, having a power of appointment over a fund, directed that it should be paid, assigned, or transferred to a certain person upon trust for his daughter, "to be vested in her on attaining the age of twenty-one years or day of marriage, which shall first happen," adding: "And I direct the interest and dividends of the said sum to accumulate for her benefit and be paid to her with the principal thereof at the time before mentioned,"—it was held that the words "to be vested in her" were not used as equivalent of "to be paid to her," it appearing plainly that the testatrix knew there was a difference between those two expressions, since she directed the fund to be paid to the trustee in trust for his daughter, to be vested in her on her attaining twenty-one, and then directed the interest to be accumulated for her benefit and to be paid to her with the principal at such time.

In *Griffith v. Blunt*, 4 Beav. 248, 10 L. J. Ch. N. S. 373, where testator bequeathed money in trust to accumulate for all and every the child and children of his two nephews, "equally to be divided between or amongst them, if more than one, share and share alike, *per capita*, and not *per stirpes*, the share or shares of such of them as shall be a son or sons, to be an interest or interests vested in him or them, respectively, at his or their age or respective ages of twenty-five years, and the share or shares of such of them as shall be a daughter or daughters, to be an interest or interests vested in her or them respectively, at her or their age or respective ages of twenty-five years, or day or respective days of marriage, with the previous consent of her or their parents or guardians, which shall first happen. And if there be but one such child, then to such only child, his or her executors, administrators, or assigns, absolutely, to be paid to such child, if a son, on his attaining the age of twenty-five years, or if a daughter, on her attaining that age or on her marriage, with such consent as aforesaid, which shall first happen,"—it was held that the vesting was not to take place till twenty-five or marriage.

In *Rowland v. Tawney*, 26 Beav. 67, testator made a bequest to his nephews and nieces for life, and afterwards to their children, and declared it to be his will that the legacy, share, or pecuniary interest which any person should take thereunder "shall be considered as a vested interest at the age of twenty-five years; and

if any such person shall die before the same shall become so vested, then such legacy, share, or pecuniary interest, as well original as accrued, shall go and accrue to the brothers or sisters or brother or sister of such person in like manner as their original shares; but in case any such person shall have left issue, then such issue shall have the share or shares, both original and accrued, to which their deceased parent or parents would have been entitled." Sir John Romilly, M. R., held that if the direction that the shares should be considered as vested at the age of twenty-five had stopped with the gift over to the brothers and sisters, he should have been disposed to think that it meant indefeasibly vested at twenty-five because it does not provide for the case of a person dying leaving issue, but that, testator having provided for such case, it was impossible to get over the literal meaning of his words.

Under a bequest in trust for the children of a certain person, "to be equally divided between or among the same children if more than one, share and share alike, and to be vested in such of the children as shall be a son or sons when he or they shall respectively attain the age or ages of twenty-five years," the vesting of the shares of such children is postponed until they reach the age of twenty-five, notwithstanding the will may also contain a maintenance and advancement clause. *Re Thatcher*, 26 Beav. 365.

In *Wakefield v. Dyott*, 4 Jur. N. S. 1098, 7 Week. Rep. 31, testator gave the residue of his personal estate upon trust as to one-third part thereof to apply the income, or so much thereof as might be necessary for the maintenance, support, and education of the two children of a deceased daughter, and as to any part of the sum as might not be required for these purposes to accumulate the same at compound interest during the minorities of his said grandchildren and until the younger of them should attain twenty-one, and from and after that event upon trust to pay and divide the principal equally between the said children, adding: "And I declare that each of my said granddaughters shall have a vested interest on her attaining the age of twenty-one years, or on the day of her marriage, which shall first happen: and if either of my said grandchildren shall happen to depart this life before she shall have attained a vested interest, then I give and bequeath her share unto the survivor." There was no gift over in the will. Stuart, V. C., said that though the court would struggle against a construction which led to an intestacy, and in a doubtful case would lean toward vesting, in this case the language of the testator was very clear and excluded all notion of the construction that either of the grandchildren was to take a vested interest if she died under twenty-one or before marriage; that there was no room for a limited construction of the word "vested," for nothing was to be taken except under the direction to pay, and that direction was not to operate until the happening of a certain event.

quire it to be read as referring to vesting in possession, or equivalent to "payable,"¹⁷²

In *Creeth v. Wilson*, Ir. L. R. 9 Eq. 216, testator devised and bequeathed certain freehold and leasehold property upon trust to pay two annuities to a son, to whom he also bequeathed a legacy of £1,000 payable out of his personal estate. He further directed: "As to the bequests hereinbefore made by annuity and legacy for my said reputed son, the said John Abbott, my will and desire is, and I hereby direct, that same shall not become payable or vest in him until he shall have attained the age of twenty-five years; nor then unless he shall have conducted himself orderly and respectably to the reasonable satisfaction of the trustees of this my will for the time being; but that my said trustees may in the meantime have full powers and authority to pay and advance such part of the provision so made for my said reputed son, either out of said annuities or the produce or principal of said legacy, for his maintenance and education or advancement or progress in life as they may consider most conducive to his well-being;" with a gift over in event of the son's becoming dissipated or vicious; "and I hereby also direct that my said reputed son shall not have any power in any manner whatever to dispose of or encumber said bequests and legacies until he shall have attained said age of twenty-five years and have otherwise become entitled thereto as aforesaid." It was held that as the word "vest" did not stand alone, but was coupled with the preceding words "become payable" in the disjunctive, and as there was no gift of interim income in the shape of maintenance, but only a power purely discretionary confined to a part of that income, the word "vest" must be interpreted in its primary meaning, and not as referring merely to the time of payment.

¹⁷² In *Barnet v. Barnet*, 29 Beav. 239, a testator who had given his residuary estate to his daughter for life, and afterward to her and the rest of his children and the issue of such as should have died in his lifetime leaving issue living at his decease, further declared that it should be lawful for the trustees to pay over to such issue who should be a son or sons the share or proportion of the said residuary estate coming to him or them, on his or their attaining the age of twenty-one years, "or, if my said trustees or trustee shall in their discretion see fit, at any time between that age and on his or their attaining the age of thirty years. But the share or portion coming to such of the said issue as shall be a daughter or daughters, I direct shall be vested in her or them at the age of twenty-one years or day or days of marriage, which shall first happen," also making provision for maintenance and advancement in the discretion of the trustees. It was held that the vesting referred to meant only vesting in possession, and that the right was previously vested in them on the death of the tenant for life.

In *Simpson v. Peach*, L. R. 16 Eq. 208, L.R.A.1915C.

where testatrix gave the sum of £4,000, payable at the decease of her sister, to a class, "to be equally divided amongst them share and share alike, the said shares to be vested interests on the majority or marriage of each, and the interest and income thereof, in the event of my sister's decease in the meantime, to be paid towards the maintenance and education of such child or children," it was held that the direction that upon the death of her sister the sum of £4,000 was to be "payable" to the legatees, being clear and distinct, was not to be overcome by the words "the said shares to be vested interests on the majority or marriage of each," and therefore that the word "vested" must be considered to mean "vested in possession."

In *Williams v. Haythorne*, L. R. 6 Ch. 782, testator directed his real and personal estate to be converted into money, and his trustees to stand possessed thereof in trust to pay the income to a niece during her life, and after her decease to pay and transfer the whole of the said principal money "unto and amongst all and every the children of my said niece already born or hereafter to be born, which shall be living at the time of her decease, if more than one, equally, share and share alike; and if only one, then wholly to such only child, and the same to be a vested interest in him or them respectively on their respectively attaining the age of twenty-one years, but not to be transferred until after the decease of my said niece." He further directed that in case any of such children should be under the age of twenty-one years at the time of his niece's decease, "then the dividends and interest of such of the legacies and shares as shall not then have become vested shall from time to time be applied by my said trustees for and towards the maintenance, education, and bringing up of the child or children who may be presumptively entitled thereto in the meantime until his, her, or their share or shares shall become payable as aforesaid." He further provided that the trustees might pay and apply "such part as they shall think proper of the legacy or legacies aforesaid as shall not have become vested, in putting the children who may be presumptively entitled thereto to any profession or business." The will did not contain any further disposition of the fund. It was held that the fact that the whole interest was to be paid for maintenance, and that the share was called the presumptive share of the child, went to show that a child having survived the tenant for life would become entitled, although there was no right to call for payment until twenty-one, and that the word "vested" must have been used in the sense of "payable."

In *Thompson v. Thompson*, 28 Barb. 432, testator directed his estate to be divided into a number of shares greater by one than the number of children whom he should leave him surviving; that his executors and

or as meaning "indefeasible,"¹⁷⁸ see cases set forth in the respective footnotes.

As to the effect of a direction that the legacy shall "vest" immediately, to keep a legacy charged upon land from sinking, see footnote 209, *infra*.

As to the effect of a declaration that the

trustees should hold and control the shares of the sons, and out of the interest thereof pay such amount or amounts as might be necessary or proper for their maintenance and support: and, upon his son or sons respectively attaining the age of twenty-one years, directed that his executors and trustees should pay over to his sons their respective shares, to be thenceforth had and holden by them and their respective heirs, executors, and administrators forever. He further declared that the principal sums bequeathed and devised to his children should vest in them respectively when and as they respectively arrived at the age of twenty-one years, and not before; provided that if any of them should die before attaining the age of twenty-one leaving lawful issue, such issue should stand in the parents' place; and in case of the extinction of all the lineal descendants of the testator, at any time before any or all of his estate so devised and bequeathed should have vested in interest, he gave the same, or so much as might not then have vested in interest, to others. It was held that the declaration that the principal sums bequeathed to the children should vest in them respectively when and as they should respectively arrive at the age of twenty-one years, and not before, must be taken to mean "vest in possession," and that the sons took immediate vested interests.

In *Johnson v. Valentine*, 4 Sandf. 30, where testator, who by his will had devised certain real estate to two grandsons, executed a codicil by which he devised such property to their stepfather in trust, first, to pay their indebtedness to him, and, second, to apply the rents and income to the support of the families of the said grandsons "until the youngest child of each shall respectively attain twenty-one years of age, at which time the estate so left by my will to the father shall vest in the children of such father or their heirs in fee and forever; such children or their issue to take as their father would have taken under my aforesaid will if this codicil had not been made,"—it was held that, especially in view of the declaration of an intention to give the children the same interest their fathers would have taken under the will, the vesting in interest did not depend upon the condition of surviving until the youngest child should attain the age of twenty-one.

¹⁷⁸ In *Taylor v. Frobisher*, 5 De G. & S. 191, testatrix gave a sum of money upon trust to pay the income to a daughter for life, and from and after her decease upon trust to pay, apply, and dispose of the principal sum and all interest due thereon "unto, between, or amongst all and every the

legatee is "not to have anything" unless he attains the specified age, or that the interest given is "to be an absolute interest on" attaining a certain age, or some equivalent expression, to render the gift contingent, see the subdivision of this note next following.

child and children of my said daughter in equal shares, or if there shall be but one child, then the whole to such only child, to be a vested interest or vested interests on their respectively attaining the age of thirty years; and if any child or children of my said daughter should die under the age of thirty without lawful issue, the share or shares of him, her, or them so dying, as well original as accruing by survivorship, shall go to the survivors or survivor in equal shares if more than one, and become vested at such ages or times as his, her, or their original share or shares; and upon this further trust, that they, my said trustees, do and shall, after the decease of my said daughter, and until the share or respective shares of such child or children as aforesaid shall become vested and payable, by and out of the interest, dividends, and annual products of the said sum of £1,000, pay and apply to or for the maintenance and education of the same child or children respectively, such yearly sum or sums of money as to them, my said trustees, shall seem meet, not exceeding the interest of the expectant share of such child or children respectively in the said principal sum;" and in case all of the daughter's children should die under the age of thirty years and without lawful issue, then to stand possessed of the said principal sum upon trust to pay or transfer it to a son of testatrix. It was held that the testatrix in this will had used the word "vested" not in its ordinary sense, but in the sense "not subject to be divested" or "indefeasible," since it was only by affixing this meaning to the word that her intentions, apparent on her will, could have been carried into effect in the events which were within her contemplation, the reasoning of the court on this point being contained in the following excerpt: "In the present case the testatrix, after the death of Ann Taylor, directs that her trustees shall pay, apply, and dispose of the principal sum of £1,000, and all interest due thereon, unto, between, or amongst all and every the child and children of Ann Taylor, in equal shares; and if there should be but one such, then the whole to such only child, to be a vested interest or vested interests, on their respectively attaining the age of thirty years; and if any child or children of Ann Taylor should die under the said age without lawful issue, the share or shares of him, her, or them so dying, as well original as accruing by survivorship, should go to the survivors or survivor in equal shares if more than one, and become vested at such ages or times as his, her, or their original share, or shares. In this disposi-

tion, as well as in what follows it, the testatrix contemplates that each child, before attaining the age of thirty years, was, in some sense at least, to be entitled to a share in the fund, which she designates as the share of such child. If the child should die under thirty without issue, his share is to go to the others. If, dying under the age of thirty, he should leave issue, his share is not to go to the others; the original gift of the share in that case remains unaffected. The conclusion appears to me irresistible that the testatrix intended the child so dying and leaving issue to retain his share as an interest transmissible to his representatives, and considered that he would do so by force of the original gift. It is impossible to impute to her the intention that, while the share of a child leaving no issue was to go to the others, the share of a child leaving issue was to be undisposed of, and to go to the persons, whoever they might be, who were to take in default of appointment. So, where the testatrix, in the ultimate disposition, gives the whole fund to Thomas Frobisher in the event of all the children of Ann Taylor dying under the age of thirty years and without issue, she must have meant that to be the only event in which, under the previous dispositions, the fund would be undisposed of. In the event of an only child dying under thirty years and leaving issue, the fund was not to go over to Thomas Frobisher; because the testatrix considered that, under the previous dispositions, the deceased child took an absolute interest in the fund. The object of the testatrix was to make a complete disposition of the fund; and in such cases the court always endeavors to construe the will so as to prevent an intestacy as to any part of it."

In *Berkeley v. Swinburne*, 16 Sim. 275, testator gave his residuary estate to trustees in trust for his mother for life, and after her decease in trust for all the children of his sisters, "to take in equal shares as tenants in common, their respective executors, administrators, and assigns, and to be a vested interest or vested interests in a son or sons on his or their attaining the age of twenty-one years, and in a daughter or daughters on her or their attaining that age or being married; and in case any one or more of the said children, being a son or sons, shall die under the age of twenty-one years, or, being a daughter, or daughters, shall die under that age without having been married, then as to the original share or shares of the said trust moneys, stocks, funds, and securities belonging to the child or children respectively, who shall so die as aforesaid, as also the share or shares thereof to which the same child or children respectively may become entitled under this present trust, in trust for the others or other of the said children.

... But in case there shall be no such only son or no such only daughter of either of them, my said sisters, or no such son or daughter who shall live to attain a vested L.R.A.1915C.

interest in the said trust moneys, then" over. He also provided that it should be lawful for the trustees to apply, settle, or appropriate the whole or any part of the principal trust moneys to which, under such trusts, such child or children "shall be entitled," for the advancement or benefit of such child or children notwithstanding he or she should not have attained the age of twenty-one years, or, being a daughter, without having been married. He further provided that in case at his mother's death any child or children of his sisters, "who, under the trusts hereinbefore contained, may be entitled to any vested or presumptive share or shares of the said trust moneys, stocks, funds, or securities," who should not, being a son, have attained the age of twenty-one, or, being a daughter, have attained that age or been married, then the trustees should place out or continue at interest, and from time to time call in and replace out, "the share or shares of such child or children respectively," and pay the income therefrom to the parents or guardian, to be applied in and toward the maintenance and education of such child or otherwise for their respective use and benefit. It was held that the provision for the maintenance of the children during their minority after the death of the tenant for life, the language used in the gift over in referring to the shares of the children, and the advancement clause, showed that the testator had not used the word "vested" in its strict technical sense, but as meaning "indefeasible."

In *Edmondson's Estate*, L. R. 5 Eq. 389, 16 Week. Rep. 899, testatrix bequeathed the residue of her estate, which consisted wholly of personality, upon trust as to one fifth share thereof to pay the income to a great nephew for life, and at his decease to pay the share unto and among all and every his child and children equally; and as to the other four fifths, upon like trusts for the benefit of other great nieces and nephews and their children. In the event of the death of any one or more of such great nephews and nieces without leaving issue, she directed that the share of the one so dying should be in trust for the survivor or survivors in like manner as the original shares. She then directed that none of the said shares should be "so paid to or become vested interests in" any of the said children until he, she, and they attain the age of twenty-five respectively, and that in the meantime it should be lawful for the trustees to pay any part of the income from "such shares respectively toward the maintenance and education of such children respectively." If any of the said children should die before attaining twenty-five, the share of the one so dying was directed to accrue to the survivors and survivor; and in case of the death of any other of the said children "before such accruing or surviving shares shall become vested as aforesaid," every such accruing or surviving share should again be subject to the same condition of accruer; provided,

s. Inferences from peculiarities of phraseology employed.

In numerous instances the courts have seized upon some turn of expression used as indicative of the testator's intention. Such expressions may be in themselves inconclusive, but are worth noticing for their cumulative effect.

Among the words or phrases indicative

nevertheless, that in case any of such child or children should have left issue, such issue should take such share in the trust funds as their deceased parent would have had if living; and such share or shares "to be paid to such issue at such age or time as thereinbefore was directed with respect to the payment of their parents' original shares." It was held that, there being nothing in the first part of the will to show that the gifts to the children of the persons named were not to vest immediately on the death of their parents, as the accruer clause would be otherwise superfluous, and as a different construction would render a partial intestacy possible, the word "vested" must be taken as meaning "indefeasible."

In *Re Baxter*, 10 Jur. N. S. 845, testator gave certain securities upon trust for a daughter for life, and after her death in trust for her husband for life, "he maintaining and providing for all and every the children by my said daughter now living or hereafter to be born, . . . until they shall respectively attain the age above mentioned;" and after the death of the survivor of the daughter and her husband on trust for all and every their children in equal parts, shares and proportions, "the share or shares of daughters to be considered a vested interest at the age of twenty-one years, and the share or shares of sons at the age of twenty-five years, notwithstanding the postponement of the payment or transfer of the shares of such children until after the decease of the survivor of them, my said daughter and her said husband; and in case of the death of any one or more of such children without having obtained a vested interest in his, her, or their shares, then I direct that the share or shares of him, her, or them so dying shall go and belong to the survivors or survivor of such children and be vested, paid, and transferred, together with their, his, or her original share, or shares, or so soon after as circumstances will permit;" and if there should be but one such surviving child, then in trust for such child, if a son, at the age of twenty-five and if a daughter, at the age of twenty-one; and in case of the death of all such children "without having obtained a vested interest in the said capital sum as aforesaid," then in trust for testator's daughter. It was held, upon the whole scope of the will, the other provisions in which showed no great accuracy in language that the testator looked upon "vesting" and "payment" as the same L.R.A.1915C.

of vesting are: "divided,"¹⁷⁴ or "division,"¹⁷⁵ "shall receive,"¹⁷⁶ and "give and bequeath"¹⁷⁷ employed in making the gift; the addition of the words "heirs,"¹⁷⁸ or "executors, administrators, or assigns"¹⁷⁹ to the designation of the legatee; and the use of the words "revert back" in a further limitation of the property.¹⁸⁰

The use of the word "share," or "portion," in referring to the interest taken by a lega-

thing; and in view of the expression used in the maintenance clause, "actual or presumptive share or shares," that, having regard to the strong words in the first limitation, and the weaker words, "to be considered a vested interest," and to the possibility of all dying before attaining a vested interest, and also to other gifts to the grandchildren, the word "vested" must be considered as having been used in the sense of "indefeasible."

¹⁷⁴ The use of the word "divided" implies that the legacy has already vested. *Shattuck v. Stedman*, 2 Pick. 468.

Directions to pay, or to transfer, divide, and partition, import a gift unless they are restricted by some inconsistent condition or limitation. *Collier v. Collier*, 40 Mo. 287.

¹⁷⁵ The term "division" implies an interest in the fund to be divided. *McLemore v. McLemore*, 8 Ala. 687.

¹⁷⁶ The use of the words "shall receive" implies that the legatee has a vested interest in the property before the time of payment. See *Devane v. Larkins*, 56 N. C. (3 Jones, Eq.) 377.

¹⁷⁷ The words "give and bequeath" in a testamentary paper import a benefit in point of right to take effect on the decease of testator and proof of the will, unless it is made in terms to depend upon some contingency or condition precedent. *Eldridge v. Eldridge*, 9 Cush. 516.

¹⁷⁸ The word "heirs," when used in the gift of a legacy, means "personal representatives," and may have the effect to make the legacy vested in cases where it would otherwise be contingent. See *Reed v. Buckley*, 5 Watts & S. 517, 40 Am. Dec. 531 (set out in VIII. f, *infra*); *Re Radford*, 37 Misc. 241, 75 N. Y. Supp. 255 (set out in VIII. n, *infra*).

¹⁷⁹ The words "executors, administrators, or assigns," although they will not prevent the lapse of a legacy by the death of the legatee in the lifetime of the testator, are not to be overlooked when the question is whether the legacy is vested before the age specified, because if it were necessary that the legatee should live to that age to be entitled to the legacy, then there would be no question about his representatives at that time. *Saunders v. Vautier*, Craig. & Ph. 240, 10 L. J. Ch. N. S. 354.

¹⁸⁰ The use of the words "revert back" in a further limitation of the property presupposes a vested title in the first taker. *Cooper v. Pridgeon*, 17 N. C. (2 Dev. Eq.) 98.

tee has been characterized on the one hand as indicative of an immediate vesting,¹⁸¹ and on the other hand as equivocal.¹⁸² The fact that the "share" of those dying under the specified age is given to other members of the class does not create so strong an implication of intention to vest the gift immediately as where the "share" is given over to a stranger.¹⁸³

The expression that the property shall go to the legatee "when he shall arrive at manhood, or is twenty-one years of age," has been held to show that the testator was reckoning the time when the legatee would become capable of taking control and management of his estate, rather than the time when his interest would vest.¹⁸⁴

The fact that the trustee was not directed to convey, but simply to deliver over and give the possession of the property, has been regarded as indicative of an intention that the devisee's estate should vest immediately.¹⁸⁵

A provision that the gift "does not become theirs until this age,"¹⁸⁶ or that it is "to be an absolute interest on" the legatee's attaining a certain age;¹⁸⁷ that the legatee "is not to have anything of my estate unless" he lives to attain the age specified;¹⁸⁸ that the legacy is to be paid to the children of a certain person as soon as they attain a certain age, "and not to go to his, her, or their heirs or assigns, or to any other person or persons on any pre-

tense whatsoever;"¹⁸⁹ and a direction that the legacy "shall be void" should the legatee die before reaching the specified age,¹⁹⁰ have been held indicative of an intention to make it contingent.

The fact that a bequest is expressed to take effect "from and after" the termination of an estate for life is some,¹⁹¹ although, it would seem, not conclusive,¹⁹² evidence of an intention to vest the gift at that time.

t. Miscellaneous.

A legacy is not rendered contingent by the fact that the fund out of which it is to be paid is not to be raised until a certain person becomes of age.¹⁹³

The fact that the legacy was a provision for an infant daughter, for whose support and education no other provision was made, so that, unless the legacy vested so as to give her the profits (there being no intermediate disposition of it to another), she would be wholly destitute, has been considered a strong circumstance in favor of vesting.¹⁹⁴

The fact that the legatee, or one of the legatees, is given a vested interest in the residuary estate, so that he will take the legacy, or a share of it, in all events, has been regarded as a circumstance indicative of an intention that the legacy shall vest immediately.¹⁹⁵

¹⁸¹ A reference to the interest taken by a legatee during minority as his "share," as in a gift over in case of death during minority, is significant of an intention to make a present vested gift, since, unless the minor has a vested interest, he can own no share. See *RE PAXSON* (set out in VIII. g, infra); *Smith's Estate*, 226 Pa. 304, 75 Atl. 425 (set out in VIII. p, infra).

¹⁸² The use of the words "shares" and "portions" in speaking of the interests of legatees is equivocal, and may indicate either a vested estate in the original legatee, to be divested in case of his death before payment, in favor of issue or survivors, or may mean a future estate to vest, in case of the legatee's death, in the issue or survivors as substituted legatees at the deferred period, and no decisive construction can be placed upon such words. *Smith v. Edwards*, 88 N. Y. 92.

¹⁸³ See *Re Turney* [1899] 2 Ch. 748, 69 L. J. Ch. N. S. 1, 48 Week. Rep. 97, 81 L. T. N. S. 548 (set out in VIII. g, infra).

¹⁸⁴ *Williams v. Williams*, 91 Ky. 547, 16 S. W. 361 (set out in VIII. i, infra).

¹⁸⁵ *Ellicott v. Ellicott*, 90 Md. 321, 48 L.R.A. 53, 45 Atl. 183 (set out in III. b, 1, supra).

¹⁸⁶ *Thomas v. Thomas*, 97 Miss. 697, 53 So. 630 (set out in VIII. i, infra).

¹⁸⁷ *Re Whittick*, 130 L. T. Jo. 440 (set out in VIII. g, infra).
L.R.A.1915C.

¹⁸⁸ *Morrow v. Morrow*, 113 Mo. App. 444, 87 S. W. 590 (set out in VIII. i, infra).

¹⁸⁹ *Re Bulley*, 11 Jur. N. S. 847, 13 L. T. N. S. 264 (set out in VIII. k, infra).

¹⁹⁰ *Heath v. Perry*, 3 Atk. 101 (set out in VIII. b, infra).

¹⁹¹ See *Andrew v. Andrew*, L. R. 1 Ch. Div. 410, 45 L. J. Ch. N. S. 232, 34 L. T. N. S. 82, 24 Week. Rep. 329 (set out in VIII. k, infra), and compare *Festing v. Allen*, 5 Hare, 573, in note 58, supra.

¹⁹² *Re Jobson*, L. R. 44 Ch. Div. 154, 59 L. J. Ch. N. S. 245, 62 L. T. N. S. 148 (set out in VIII. g, infra).

¹⁹³ In *Re Campbell*, 149 Cal. 712, 87 Pac. 573, where testator directed that his mining property should be held for certain prices until his daughter should arrive at the age of twenty-one years and that when that time should arrive the property should be disposed of for the best price obtainable, and the proceeds thereof divided as directed, it was held that the interests of the legatees in the proceeds vested upon the death of the testator, enjoyment only being postponed until the fund out of which payment was to be made should be realized.

¹⁹⁴ *Cooper v. Pridgeon*, 17 N. C. (2 Dev. Eq.) 98 (set out in VIII. a, infra).

¹⁹⁵ See *Guyther v. Taylor*, 38 N. C. (3 Ired. Eq.) 323 (set out in VIII. i, infra); *Fuller v. Fuller*, 58 N. C. (5 Jones, Eq.) 223

An intention to vest a legacy has been inferred from a provision that the executors shall not be liable for interest.¹⁹⁶

Where a provision is made for a devisee by way of recoupment for the charge of an annuity, beginning from testator's death, on the lands devised, it shows the devise to be immediate.¹⁹⁷

The circumstance of the testator's specifying an event in which the gift is to fall into the residue goes to show an intention that except in that event it is not to fall into the residue, and therefore evidences an intention to vest the gift immediately.¹⁹⁸

The fact that a provision made for the intermediate support of the legatee, which is independent of and less in amount than the dividends which the testator must have anticipated on a gift of stock given to him at the age of twenty-one, is indicative of an intention that the immediate dividends should become part of his estate, showing that the legacy was intended to be contingent upon the legatee's attaining twenty-one.¹⁹⁹

IV. The decisions considered with reference to the sufficiency of the context to vest the gift immediately.

As has already been pointed out (II. *supra*), the probative force of the various circumstances above considered can only be determined by an examination of the decisions themselves. Generalizations are,

(set out in VIII. i, *infra*); Sutton v. West, 77 N. C. 429 (set out in VIII. q, *infra*).

¹⁹⁶ See Roberts v. Brinker, 4 Dana, 570 (set out in VIII. i, *infra*).

¹⁹⁷ See L'Estrange v. L'Estrange, Ir. L. R. 25 Eq. 399 (set out in VIII. g, *infra*).

¹⁹⁸ See Pearson v. Dolman, L. R. 3 Eq. 315, 56 L. J. Ch. N. S. 258, 15 Week. Rep. 120 (set out in VIII. g, *infra*).

¹⁹⁹ See Colt v. Hubbard, 33 Conn. 281 (set out in VIII. i, *infra*).

²⁰⁰ Poulet v. Poulet, 1 Vern. 204; Smith v. Smith, 2 Vern. 92; Yates v. Phettiplace, 2 Vern. 418, Prec. in Ch. 140; Chandos v. Talbot, 2 P. Wms. 601; Gawler v. Standerwicke, 1 Bro. Ch. 105, note, 2 Cox, Ch. Cas. 15; Harrison v. Naylor, 3 Bro. Ch. 108, 2 Cox, Ch. Cas. 247; Pearce v. Loman, 3 Ves. Jr. 135; Phipps v. Mulgrave, 3 Ves. Jr. 613, 2 Revised Rep. 607; Watkins v. Cheek, 2 Sim. & Stu. 109, 25 Revised Rep. 181; Parker v. Hodgson, 1 Drew. & S. 568, 30 L. J. Ch. N. S. 590, 7 Jur. N. S. 750, 4 L. T. N. S. 762, 9 Week. Rep. 607; Tunstal v. Bracken, 1 Bro. Ch. 124 note, 1 Amb. 167; Boycot v. Colton, 1 Atk. 555; Carter v. Bletsoe, 2 Vern. 617, Prec. in Ch. 267, Gilb. Eq. Rep. 11; Murkin v. Phillipson, 3 Myl. & K. 257, 3 L. J. Ch. N. S. 148; Remnant v. Hood, 2 De G. F. & J. 396, 30 L. J. Ch. N. S. 71, 6 Jur. N. S. 1173, 3 L. T. N. S. 458.

²⁰³ If a legacy is given out of personal estate, payable at a certain time, or if given

from the nature of the subject, impossible, and all that can be done is to display the cases, arranged with reference to the form of expression involved, so that the reader may see for himself the elements entering into their determination, and choose for his instruction those decisions the elements in which most nearly correspond to those in the will which he seeks to construe. In order not to interrupt the continuity of the discussion, these cases will not be reviewed at this point, but will be found, set forth *in extenso*, in Appendix "B," *infra*.

It has also been pointed out that the existence of a separate antecedent gift conclusively shows that the provision relative to the attainment of a specified age has reference to the time of enjoyment, and the decisions which turn on the existence of such an antecedent gift are collected in Appendix "A," *infra*.

V. Legacies charged on real estate.

It has been a doctrine of the English courts that a legacy or a portion charged upon land, to be paid at marriage or the age of one and twenty years, will sink upon the legatee's death before the time of payment,²⁰² even though the legacy was one which, under the rules of construction applicable to gifts of personalty, would have been considered as vested in interest.²⁰³ This doctrine has been followed or recognized, albeit somewhat unintelligently,

at a certain time, and interest in the meantime, it is a vested legacy; but the rule as to legacies out of real estate is otherwise, for if given at a certain time or payable at a certain time, yet if the legatee dies before the time has come, it sinks into the inheritance; and when a legacy is given out of a mixed fund of real and personal estate at a certain time, or to be paid at a certain time, the construction is the same as if given out of real estate only. Van v. Clark, 1 Atk. 510.

A legacy charged upon realty will sink, although it is given to the legatee and made payable at twenty-one, with interest in the meantime, and is chargeable upon both the personal and the real estate. Parker v. Hodgson, 7 Jur. N. S. 750, 1 Drew. & S. 568, 30 L. J. Ch. N. S. 590, 4 L. T. N. S. 762, 9 Week. Rep. 607.

But in Cave v. Cave, 2 Vern. 508, testator devised £4,000 to a son, to be paid him at his age of twenty-five, and interest in the meantime, and he thereout to have a maintenance. The son died under age, and the £4,000 being to be raised out of trust estate, the question was whether it should be raised and paid to his representative, or merged in the land for the benefit of the heir. Decreed it should be raised, being an interest vested in the son, for although it was not payable until his age of twenty-five, yet it was to carry interest immediately.

by American courts.³⁰⁴ It has been erroneously conjectured to rest upon an English prejudice in favor of the heir or devisee,³⁰⁵ but is in reality based on the refusal of the English judges to follow, in cases relating to real property, what they regard-

ed as an artificial principle of the civil law, to which they yielded in cases relating to personality in order to conform their decisions to those of the ecclesiastical courts of concurrent jurisdiction.³⁰⁶ Legacies payable at majority were, they considered, pre-

The accuracy of the report of the foregoing decision is, however, doubted in *Boycot v. Cotton*, 1 Atk. 555, where Lord Hardwicke said that he had ordered the register to be searched, and as the case was there stated it was impossible that it could be made a question in the case; that it is settled law that whether a portion charged upon land be given with or without interest, by deed or by will, if the person dies before the age at which it becomes payable, it shall sink into the estate.

³⁰⁴ As a general rule, legacies charged on lands do not vest until the time for payment comes. *Roberts v. Malin*, 5 Ind. 21.

In *Spence v. Robins*, 6 Gill & J. 507, 20 Am. Dec. 587, it is said that the rules of law in relation to legacies make a distinction between such as are payable out of real, and such as are payable out of personal, estate; that legacies which are held to be vested and transmissible when payable out of personality will sink for the benefit of the heir or devisee when charged on the real estate.

The reason given in *Smith v. Wiseman*, 41 N. C. (6 Ired. Eq.) 540, for the rule that a legacy charged upon land will sink in event of the legatee's death before the time of payment is that such a provision creates a trust which is enforced in equity only upon the instance of the beneficiary, so that if the beneficiary dies before the required age, there is no one who can call for it, and the devisee is allowed to hold the land free of the charge.

Where a legacy is charged on land, and the legatee dies before the time of payment, the courts have inclined to the sinking of the legacy in favor of the owner of the land; and where a legacy is expressly given to a female for a marriage portion, and she dies before marriage, there is great reason for supposing that it was not intended to give it to her representatives. *Patterson v. Hawthorn*, 12 Serg. & R. 114.

And see also, as recognizing the existence of the rule, *Marsh v. Wheeler*, 2 Edw. Ch. 156; *Sweet v. Chase*, 2 N. Y. 73; *Donner's Appeal*, 2 Watts & S. 372; *Lyman v. Vanderspiegel*, 1 Aik. (Vt.) 275.

³⁰⁵ The doctrine of the English cases, that where a legacy payable *in futuro* is chargeable upon real estate, the real estate is relieved if the legatee dies before the time of payment arrives, even though the legacy may be vested and held as against the personal assets, is not a very satisfactory doctrine, resting rather upon the English prejudice in favor of the heir or of the devisee, who is, it is said, *factus hæres*, than upon any sound principle. *Pond v. Allen*, 15 R. I. 171, 2 Ala. 302.

In *Birdsall v. Hewlett*, 1 Paige, 32, 9 Am. L.R.A.1915C.

Dec. 392, it is said: "It is undoubtedly a general rule that legacies charged upon the real estate, and payable at a future day, are not vested, and become lapsed if the legatee dies before the time of payment arrives. This rule was at first adopted without any exceptions, and in direct opposition to that which existed in relation to legacies payable out of the personal estate. This was done for the benefit of the heir at law, who was a particular favorite of the English courts. I am not aware that it has ever been extended to a case where the estate was given to a stranger, upon the express condition that he paid the legacy charged thereon; and the rule has long since been much narrowed down, even as between the legatees and the heir at law."

³⁰⁶ In *Parker v. Hodgson*, 7 Jur. N. S. 750, *Kindersley, V. C.*, said: "There is no doubt, as a matter of general principle, that according to the law of England (irrespective of any position of law introduced from the civil law, first by the ecclesiastical court, and then by the court of chancery following that), if a sum of money be given to a person charged upon real estate, and that person, being an infant, was not to have the legacy immediately, but it was given either 'at twenty-one,' or 'payable at twenty-one,' if the child did not attain the age of twenty-one the legacy was not raised out of the real estate, but sank into it, as it was termed. The ground of this rule was that the attainment of the age specified was a condition annexed to the gift of the capital; and if the condition was not performed, then the legacy was not raisable; and it made no difference whether the gift of the legacy was to the infant 'at twenty-one,' or 'when he attains twenty-one,' 'provided he did attain twenty-one,' or to the child in the first instance, and then adding, 'payable at twenty-one.' The law of England equally considers this as a condition annexed to the gift. But then the ecclesiastical court, dealing with a legacy as payable out of personal estate, adopted from the civil law a principle established in the Roman law, and founded on a particular exigency of the Roman Republic existing when that law was passed, that there was this peculiar distinction in the law on this subject, namely, that if the legacy be given to the child 'at twenty-one,' then indeed there is a distinction, and it shall not be raised till twenty-one; but if to the child, and made 'payable at twenty-one,' on the artificial principle of '*debitum in presenti, solvendum in futuro*,' in that case it is vested. Although the child does not attain the age of twenty-one, still the legacy is raisable, and payable to the legal personal representative of the child. That was not

sumably intended as a provision for the legatee only in case he should reach maturity. Accordingly, where there was something further to show that such gift was not so intended, as where the legacy was given by a collateral person,²⁰⁷ or where payment

was postponed not from considerations personal to the legatee, but for the convenience of the estate, or the purpose of letting in an intermediate interest,²⁰⁸ or where the testator expressly directed that the legacy should vest immediately,²⁰⁹ the legacy

originally the law of England, but was introduced from the civil Roman law. It is in vain to refer to the question which is the most rational, though I cannot help saying that the English law is, in my opinion, the most rational, as many learned judges have said; and that if a testator gives a legacy to an infant 'at twenty-one,' he means it as a provision for the infant; and if he does not attain the age of twenty-one, he does not want it, and it is not raisable, and it is not the intention that it should be. The rule, as introduced from the civil law, is a merely artificial rule, applicable to a particular purpose, irrespective of which there is no question what is the English law, and it makes no difference whether the words are 'at twenty-one,' or 'payable at twenty-one.'"

²⁰⁷ In *Tunstal v. Bracken*, 1 Bro. Ch. 124, note, Lord Hardwicke said that although it is the general rule in chancery where legacies are to be raised out of land, and the legatee dies before the time of payment, the legacies lapse, that rule is liable to several exceptions, one of which is that a distinction is to be made between portions given by a parent to children, and legacies given by a collateral person; that the court will consider the intention of the testator; for in the case of portions to children the court considers the very purpose for which such portion is given, and if the child dies before such portion is wanted, it will sink into the estate for the benefit of the heir.

²⁰⁸ Where payment is postponed only for the convenience of the estate, the gift is not within the rule that if a legatee dies before the time of payment the legacy will sink into the land. *Murkin v. Phillpson*, 3 Myl. & K. 257, 3 L. J. Ch. N. S. 148.

In *Remnant v. Hood*, 2 De G. F. & J. 396, 30 L. J. Ch. N. S. 71, 6 Jur. N. S. 1173, 3 L. T. N. S. 458, it was said by Turner, L. J., that if the payment of the legacy or portion is postponed not from any considerations personal to the legatee or portioner, but simply for the convenience of the estate, the legacy or portion may vest notwithstanding the death of the legatee or portioner before the time appointed for payment. The court, seeing the purpose for which the payment was postponed, does not consider the postponement to draw with it the consequences which would otherwise attach upon it.

In *Marsh v. Wheeler*, 2 Edw. Ch. 156, it is said that the true rule with respect to the vesting of legacies payable out of real estate is this: Where the gift is immediate, but the payment is postponed until the legatee, for instance, attains the age of twenty-one years or marries, there it is contingent, and will fail if the legatee dies before the time of payment arrives; but where the payment is postponed in regard

to the convenience of the person and the circumstances of the estate charged with the legacy, and not on account of the age, condition, or circumstances of the legatee, in such a case it will be vested, and must be paid, although the legatee should die before the time of payment.

"There is a rule that where a legacy charged upon real estate is given to the legatee, to be paid to him at the age of twenty-one years, the charge fails unless the devisee lives to the time of payment. In such a case the payment is postponed with reference to the circumstances of the legatee of the money, and the legacy is regarded as given conditionally; that is, provided the legatee attains that age. But where the payment is postponed with reference to the situation and convenience of the estate charged with the legacy, it vests *instanter*." *Sweet v. Chase*, 2 N. Y. 73.

The rule that although a legacy to be raised out of personal estate would vest, yet where it is to come from real estate, and the legatee dies before she arrives at the specified age, it is not to be raised, but merges in the real estate for the benefit of the heir at law or the devisee of the land,—is subject to exception where the time of payment is postponed not on account of the minority of the legatee, but for the benefit of the estate or of the devisee of the land. *Donner's Appeal*, 2 Watts & S. 372.

The doctrine that where a legacy payable *in futuro* is charged upon real estate, the real estate is relieved if the legatee dies before the time of payment arrives, even though it would be considered vested as against the personal assets, applies, according to the modern statement of it, only where the payment is postponed for reasons personal to the legatee, as, for instance, where the legacy is to a minor, to be paid when he reaches his majority, and does not apply where the postponement is for the benefit of some person other than the legatee, who is meanwhile entitled to the use or income of the estate which is charged, or where it is merely for the convenience of the estate in settlement. *Pond v. Allen*, 15 R. I. 171, 2 Atl. 302.

When a legacy is given as a charge upon real estate only, and the legatee dies before day of payment, the legacy lapses unless it appears by the will that payment of the legacy was postponed as a convenience to the fund, and not to the person, in which case it does not lapse. *Lyman v. Vanderpiegel*, 1 Aik. (Vt.) 275.

And see also *Brown v. Wooler*, 2 Younge & C. Ch. Cas. 134; *O'Byrne v. Clagett*, 9 Md. 512, in note 211, *infra*.

²⁰⁹ *Watkins v. Cheek*, 2 Sim. & Stu. 199, 25 Revised Rep. 181.

was held not to sink upon the legatee's dying before the age appointed for payment.

The motive for postponement of payment of the legacy has accordingly been the subject of inquiry in a number of cases, in

some of which the postponement has been held to be upon considerations personal to the legatee,²¹⁰ while in others it has been held to be for the convenience of the estate.²¹¹

²¹⁰ In *Carter v. Bletsoe*, 2 Vern. 617, where testator devised all his lands to his eldest son, adding: "But it is my will nevertheless that my son shall pay out of said lands so devised to him . . . to my daughter Mary £200 at her age of twenty-one," it was held that such direction vested nothing in the daughter until she should attain twenty-one.

In *Parker v. Hodgson*, 1 Drew. & S. 568, where testator gave and bequeathed, upon the death of his granddaughter, to her children a legacy of £400 (which was charged on his residuary real and personal estate), "to be shared and divided equally between and amongst them, in case there shall be more than one, and if but one, then to such only child, and to be paid to such child or children respectively at his, her, or their respective ages of twenty-one years;" further directing that if any child should happen to die before his or her share of the said sum should become payable, then the share of the one so dying should go to the surviving brothers and sisters, and that the shares of such of them as should at the time of his granddaughter's death be under the age of twenty-one should bear interest from her decease, to be paid and applied toward their maintenance, education, and benefit until their respective shares of the principal should become payable,—it was held that, the personal estate being deficient, the legacy sunk upon the death of the granddaughter's only surviving child before attaining the age of twenty-one.

In *Smith v. Wiseman*, 41 N. C. (6 Ired. Eq.) 540, where testator devised certain lands, enjoining upon the devisee "to pay to each of Ebenezer's four children \$50 to each child as they arrive at the age of sixteen," it was held that although if the gift had been of a purely personal legacy it would have been considered vested, yet as it was charged upon land, it would, in the event of a child's death before arriving at the age of sixteen, sink in favor of the devisee of the land.

²¹¹ In *Murkin v. Phillipson*, 3 Myl. & K. 257, where testator bequeathed to his six grandchildren the sum of £50 each "when the youngest child shall come of age, and the said grandchildren . . . to receive the interest of the said £50 until the youngest child shall come of age, when" certain real estate was to be sold, adding: "If either of those children should not live to come of age, nor have an heir born in wedlock, said £50 to be divided equally among said surviving children," it was held that, though there was no direct gift until the youngest grandchild should attain the age of twenty-one years, yet inasmuch as interest on the legacy was given in the meantime from the death of the testator, so that the legacy, if given out of personal estate, could L.R. 1915C.

be considered as an immediate vested interest, and as payment might well have been postponed only for the convenience of the estate, and furthermore as the testator had directed that if any of the grandchildren should die under the age of twenty-one without leaving an heir born in wedlock, her legacy should vest in the survivors, in which case the legacy would not sink into the land, *a fortiori* he could not have meant the legacy to sink when a grandchild attained twenty-one and died leaving a child born in wedlock.

In *Brown v. Wooler*, 2 Younge & C. Ch. Cas. 134, where testator, who had charged certain real estate with the payment of legacies, gave and bequeathed to his daughters by name the sum of £300 apiece, and to his sons by name the sum of £400 apiece, the same to be paid and payable unto them, his said sons and daughters, or their respective lawful representatives, within twelve months next after the youngest of them should have attained his or her age of twenty-one years; and further directed that if the devisee of the land upon which the legacies were charged should think proper and find it more convenient to pay unto such of the sons and daughters as should attain the age of twenty-one years his or her legacy, or any part or parts thereof, when and as they should respectively attain such age, or at any time afterwards and prior to the time of the youngest of them attaining that age, then, and in that case, it should be lawful for him so to do at any time or times when most convenient to him,—it was held to be clear that the testator intended the legacies to vest notwithstanding the death of the legatee before the youngest child should attain twenty-one.

In *O'Byrne v. Clagett*, 9 Md. 512, testator directed that his real estate should remain in the possession of his wife, with power to manage it in her discretion until his son should attain the age of twenty-one years, at which time he directed one third of his personal estate to be sold and the proceeds divided between his wife and children. He then devised to his son a tract of land, and charged it with legacies to his daughters, "the interest on which shall be paid them by Terrence, my said son, from his maturity until they shall respectively marry, or attain the age of twenty-one years, at which times, or within six months thereafter, he shall pay to each, as she marries or attains that age, the sum of \$500, and the remaining \$500 within eighteen months." It was held that as the postponement of the satisfaction of the legacies to the daughters was made with reference to the ability of the real estate to pay the amounts charged, and not to circumstances personal to the daughters, their legacies vested.

In *Donner's Appeal*, 2 Watts & S. 372,

It seems, also, that a legacy charged on lands will not sink where the gift is independent of the direction for payment.²¹²

Where a legacy is directly charged upon both land and personal estate, the estates will not be marshaled for the purpose of preventing the legacy from lapsing, since to do so would be to charge the real estate indirectly; though the case is otherwise where the legacy is charged primarily upon the personal estate, and the land is only an auxiliary fund.²¹³

The rules as to vesting which apply to legacies charged on land are not applicable to legacies given out of money to arise from the sale of land.²¹⁴

testator devised to his son certain lands, "chargeable nevertheless with the payment of \$5,000 lawful money of the United States in yearly payments of \$333.33," which payments he directed to be made to each of his five daughters when each should arrive at the age of twenty-one, twenty-two, and twenty-three years. It was held that as the whole of each legacy was not payable at the majority of the legatee, it was clear that payment was postponed not because of the daughter's minority, but for the ease and benefit of the devisee; and therefore that the legacy would not lapse upon the death of any daughter before reaching the age of twenty-one.

²¹² See *Clark v. Wallace*, 48 Pa. 80, set out in VII. *infra*.

²¹³ *Pearce v. Loman*, 3 Ves. Jr. 135.

²¹⁴ *Re Hart*, 3 De G. & J. 202.

²¹⁵ *Hardcastle v. Hardcastle*, 1 Hem. & M. 405, 1 New Reports, 83, 7 L. T. N. S. 503; *McCartney v. Osburn*, 118 Ill. 403, 9 N. E. 210; *Bolger v. Mackell*, 5 Ves. Jr. 509.

In *Browne v. Browne*, 3 Smale & G. 568, it is said: "A devise in remainder to a class of children if they attain twenty-one is a contingent remainder. It is also a contingent remainder if it be a devise to a class of children equally at the age of twenty-one. And so also it is a contingent remainder if it be a devise in remainder to children who shall attain the age of twenty-one."

Where a devise or bequest is to such person or persons as shall live to a certain age, without any distinct gift to the whole class preceding such restrictive description, so that the uncertain event forms part of the description of the person or persons who are to take, the devise or bequest is necessarily contingent. *Fairfax's Appeal*, 103 Pa. 166.

In *Kelly v. Gonce*, 49 Ill. App. 82, it is said that a distinction is to be drawn between a gift to such children as shall arrive at legal age, and a gift to children to be paid when or as they arrive at legal age, since in the first instance the gift is contingent because it cannot be known at the death of the testator whether a donee will be found at the proper period of time to take, while in the latter instance the donee is known at the time of the testator's death, L.R.A.1915C.

VI. Contingency as a constituent part of the description of the legatee or devisee.

The statement has hereinbefore been made that a testamentary gift to take effect at a future time may be contingent as well where the person to whom, as where the event upon which, it is to take effect, remains uncertain. So where the attainment of a certain age is made part of the description of the objects of the gift, there can be no vesting until such age is attained.²¹⁵ The attainment of a specified age may, it seems, be considered a part of the description of an individual legatee,²¹⁶ but the age

and the gift accordingly vests in interest at once, payment only being deferred.

²¹⁶ In *Leake v. Robinson*, 2 Meriv. 363, 16 Revised Rep. 168, testator gave to his executors certain personal property upon trust to pay and apply an annuity of £54, 12s, toward the maintenance, education, or advancement of his grandson until he should attain twenty-five, and from and after his attainment of that age to pay him the said annuity during his life; and also gave the executors certain stock upon trust to apply the dividends thereof, or so much as they should think fit, towards the maintenance, education, and advancement of his said grandson until twenty-five, and upon attaining that age he gave to him the dividends of said stock during his life. He further devised and bequeathed to his executors all his real estate upon trust to apply the rents and profits, or such parts as they should think proper, towards the maintenance, education, or advancement of his said grandson until twenty-five, and after his attaining that age to pay to or permit him to have or receive the same during his life. After the grandson's death, in case he should leave any lawful issue, the trustees were to pay and apply the said several annual sums, dividends, rents, and profits, or such part thereof as they should think proper, unto and for the maintenance, etc., of all and every the child and children of the said grandson until, being sons, they should respectively attain twenty-five, or, being daughters, should attain such age or marry with consent, and then to pay, transfer, and assign an equal proportion of the trust property to each; but in case the said grandson should die without leaving issue at the time of his decease, or leaving such they should all die before attaining the specified age, then to pay, apply, and transfer the trust funds unto and amongst all and every the brothers and sisters of the said grandson. Sir William Grant, M. R., held that although there was some difference of expression in the different gifts of the will as to the attaining the age of twenty-five, yet as there was no antecedent gift of which the enjoyment could be postponed, so that the expressions used would be referable to the time of enjoyment, but, on the other hand, the

more clearly enters into the description in the case of gifts to a class. The first question to be encountered in this class of cases, therefore, is, When is the contingency of attaining the specified age made a constituent part of the description of the person or class to whom the gift is made? It is clearly a part of the description where the gift is to such persons or members of a class as

shall attain the specified age, or to all who shall attain, or live to attain, such age, or to each who may live to attain such age, or, where the gift is made when an individual member of a class shall attain a certain age, to such or as many as may then be living. It has been suggested that a gift to persons when they attain a certain age, or from and after their attaining such age, is

direction to pay was the gift, the attainment of twenty-five was part of the description of the legatee.

In *Locke v. Lamb*, L. R. 4 Eq. 372, 16 L. T. N. S. 616, 15 Week. Rep. 1010, it is said that the rule laid down by Sir William Grant in *Leake v. Robinson*, supra, was still the rule of the court, all the authorities which appeared to have impugned such decision containing particular circumstances which distinguish the gifts decided upon in those cases from that in *Leake v. Robinson*.

In *Stead v. Platt*, 18 Beav. 50, a testator possessed of a cotton mill and buildings devised the property to trustees upon trust to let, and out of the rents and profits therefrom to pay his wife one fifth part, and the other four fifth parts he directed to be paid toward the maintenance, education, and bringing up of his four children, naming them, for and during and until such time as they should respectively attain the age of twenty-five years, at which time and as they should severally attain that age, he gave, devised, and bequeathed "unto such of his said children as should attain that age" each one equal fifth part or share of the whole of his said real and personal estate, subject to the proviso that if any of them should die before or after attaining the age of twenty-five years, leaving no lawful issue, the share of the one so dying should go to the survivors. It was held that as it was obvious that, except the right to maintenance and education out of the rents, no interest was given to the children in the corpus of the estate except by the gift to such of them as should attain the age of twenty-five years, the case was disposed of by *Leake v. Robinson*, supra, and by the very long series of authorities which led to it, and therefore that anyone who died under twenty-five failed in attaining a vested interest.

In *Mackell v. Winter*, 3 Ves. Jr. 236, testatrix gave her residuary personal estate to her two grandsons and to her granddaughter, to be equally divided between them share and share alike; the shares of her said grandsons, with the interest or accumulations thereof, after a deduction for their maintenance and preferment, to be paid to them respectively upon their attaining the ages of twenty-one years, and the share of her said granddaughter, with the interest or accumulation thereof, at the age of twenty-one years or day of marriage, which should first happen. She further made provision for the maintenance and preferment of her grandsons, and declared that in case her granddaughter should happen to die

under the age of twenty-one years and unmarried, the share given to her, together with the interest thereon, should go to the two grandsons or the survivor of them; that in case either of her said grandsons should die under the age of twenty-one, his share should go to the survivor of them; and in case her said two grandsons should die under the age of twenty-one and her said granddaughter under twenty-one and unmarried, the whole of their respective shares of the residue of her personal estate, with the accumulations thereon, should go to and be paid to a nephew (who in such case would be testatrix' next of kin), and, in case of his death, to such child or children of the nephew as should then be living. Both the grandsons died under the age of twenty-one, but the granddaughter attained such age. The master of the rolls said that it was hardly possible to suppose that the testatrix could have intended that in the event that had happened the shares of the grandsons should become a vested interest in the survivor of them, but that he did not feel at liberty to supply a gift over to the granddaughter, notwithstanding the ultimate limitation over to the nephew could never take effect; that the time of payment was not annexed to the substance of the gift to the grandsons, who took a vested interest subject to be divested by the death of one of them in the lifetime of the other. But upon appeal (3 Ves. Jr. 536) the Lord Chancellor held that the conclusion reached by the master of the rolls resulted from an application of a general rule of construction to the literal terms of a will which was not by any means accurately drawn; that, having regard to the situation of the family and the relation of the parties, it was absurd to impute to the testatrix an intention to vest an interest in two thirds the bulk of the residuary estate in a grandson dying under the age of twenty-one; that it was a necessary term that the person to take should be a grandson in a state of majority or a granddaughter in a state of majority or having married, thereby bringing the case within the rule that where attaining a certain age is a necessary part of the description of a legatee the legacy is not vested, and avoiding the necessity of following the rule that a legacy to be paid at twenty-one is vested. The same will subsequently coming before the Lord Chancellor in *Bolger v. Mackell*, 5 Ves. Jr. 509, he held that the mere addition of a direction that maintenance should be deducted from the shares of the grandsons did not prevent the construction of the gift to them as being contingent.

the same thing as a gift to such as shall attain that age,²¹⁷ but it does not seem to have been so regarded by the courts generally. The attainment of the specified age does not form part of the description of the legatees or devisees where such words form an independent, superadded, restrictive de-

scription, as in the case of a gift "to the children of A, or to such of them as shall attain twenty-one."

The effect of words which apparently incorporate the contingency into the description of the object of the gift may be explained away by the context.²¹⁸

In *Duffield v. Duffield*, 3 Bligh, N. R. 260, testator devised to trustees certain land in case there should be one son of his daughter Amelia who should attain the age of twenty-one years, upon trust for such son and his heirs, and in case there should be two or more sons of Amelia who should attain the age of twenty-one years, then in trust for the second of such sons and his heirs; and in case there should be no son, upon trust for such of the daughters of Amelia, if any, as should first attain the age of twenty-one years. By codicil the testator directed and appointed that the son of his daughter Amelia who should first attain the age of twenty-one years "shall on attaining that age change his name to Elwes, and I give and devise to the said son of Amelia on his attaining the age of twenty-one years and changing his name to Elwes all my freehold property, lands, tenements, and hereditaments to hold to my said grandson, his heirs and assigns." It was held that the estates not being given to any particular children by name, but to such children as should attain the age of twenty-one, no one completely answered the description which the testator had given of those who were to be devisees under his will, and their attaining the age of twenty-one must be considered a condition precedent to vesting.

In *Sager v. Galloway*, 113 Pa. 500, 6 Atl. 209, where testator devised his house, after the decease of his children and the survivor of them, to the eldest son of his eldest daughter, and to his heirs and assigns forever, and if she should not have a son, then to the eldest son of his next daughter, and so on through a series of similar limitations, adding: "In all which devises above named to the sons of my above-named daughters and son Henry, and to my said nephew and niece, it is my meaning and intention that if a son, he shall take the same when he arrives at the age of twenty-one years, and if he dies before that age, the devise passes to the son of my next daughter, and so on as before specified,"—it was held that as the particular age was made a constituent part of the description of the object of the devise, the remainder did not vest before attaining such age.

In *Schuldt's Estate*, 199 Pa. 58, 48 Atl. 879, testator gave a sum of money to be held in trust for his five grandchildren, "the interest thereof to be paid to them annually until they have reached the age of twenty-one years, when the said principal sum of \$40,000 shall be divided equally amongst my surviving grandchildren." It was held in view of the language of the above provision, and the fact that other gifts to grandchildren throughout the will were subject to the

condition that should any of them die before reaching the age of twenty-one years, or without issue, the provision for such a one should be divided equally among the surviving grandchildren, that the case was one where an uncertain event was made part of the description of the devisee or legatee, and that the interest of each was therefore either contingent upon reaching the age of twenty-one years, or vested, subject to be divested by death without issue before reaching such age.

See also *Dawson v. Killett*, 1 Bro. Ch. 123, in note 51, supra.

²¹⁷ In *Leake v. Robinson*, 2 Meriv. 363, Sir William Grant, M. R., said: "If there were an antecedent gift, a direction to pay upon the attainment of twenty-five certainly would not postpone the vesting. But if I give to persons of any description when they attain twenty-five, . . . or from and after their attaining twenty-five, is it not precisely the same thing as if I gave to such of those persons as should attain twenty-five? None but a person who can predicate of himself that he has attained twenty-five can claim anything under such a gift."

In *Ex parte Styant*, Johns. V. C. (Eng.) 387, the Vice Chancellor, after referring to the conflict between *Festing v. Allen*, 12 Mees. & W. 279, 25 Eng. Rul. Cas. 604, and *Doe ex dem. Bills v. Hopkinson*, 5 Q. B. 223, 13 L. J. Q. B. N. S. 85, said that it is a question of serious difficulty whether any substantial distinction can be made between a gift to a class of children when they shall attain twenty-one, and a gift to all who shall attain twenty-one.

But in *Holmes v. Prescott*, 10 Jur. N. S. 507, 33 L. J. Ch. N. S. 264, 11 L. T. N. S. 38, 12 Week. Rep. 636, 3 New Reports, 559, it was said that there is a distinction between a gift to members of a class at or when they shall attain a certain age, and a gift to such persons as shall attain a specified age, as in the latter case the legatee is to be ascertained with the qualification of attaining the specified age tacked to his own description.

²¹⁸ Wood, V. C., in *Holmes v. Prescott*, supra, said that it would be absurd to say that even a gift to "such" of the members of a class "as may attain the age of twenty-one" cannot be explained by the context of the will so as to make the gift a vested one, since every possible expression a man may use may be explained away, however irreconcilable the two expressions may be, if you find two intents pervading his mind.

In *Browne v. Browne*, 3 Smale & G. 568, it is said that there is no distinction in point of force between cases where the

It seems at one time to have been supposed, in the case of gifts of real estate, that the effect of a contingent description might be overcome by the same considerations as where the contingency attaches to the event,—viz., the creation of an antecedent estate, or of a limitation over in event of failure to attain the specified age,²¹⁹—but this, since the case of *Festing v. Allen*, 12 Mees. & W. 279, 25 Eng. Rul. Cas. 604 (set out in note 223, *infra*) has been settled to the contrary.²²⁰

words of contingency incorporated into the gift apply to the event, and where they are applied to describe the person or persons who are the object of the gift. But the general opinion seems to be that words of contingency when applied to the description of the person or persons to take are with more difficulty, if at all, controllable by the context.

²¹⁹ In *Riley v. Garnett*, 3 De G. & S. 629, testator devised certain realty upon trust for a step-daughter for life, and from and after her decease in trust for all the children of the said step-daughter, "who, being a son or sons, shall attain the age of twenty-one years, or being a daughter or daughters, shall attain that age or be married, share and share alike as tenants in common, and not as joint tenants, and their heirs and assigns forever." He also empowered his trustees during the life of the step-daughter and after her decease in case she should have any child or children living at her decease, under the age of twenty-one years, then during the minority of such child or children, from time to time to demise or lease the premises bequeathed in trust for such step-daughter and her children. The Vice Chancellor, Sir J. L. Knight Bruce, held that by the true construction of the will, and upon the authority of earlier cases, including *Doe ex dem. Roake v. Nowell*, 1 Maule & S. 327 (set out in VIII. f, *infra*), there was an immediate equitable devise to all the children of the step-daughter, whether minors or not minors, living at the death of the step-daughter, subject to the contingency of their estates being divested upon their death in minority respectively. This case, in holding that where the contingency of attaining a certain age is part of the description of a devisee, and there is an antecedent estate or a gift over, the gift may be treated as vested, subject to be divested, rather than as contingent, is overruled by subsequent decisions. See 1 Jarman, Wills, * 776, note; *Theobald, Wills*, p. 574.

²²⁰ In *Patching v. Barnett*, 28 Week. Rep. 886, 49 L. J. Ch. N. S. 665, 43 L. T. N. S. 50, Malins, V. C., said that in personal estate a gift to a class of children or persons who shall attain a particular age has always been regarded as contingent, and that *Festing v. Allen*, *supra*, decided that a gift to a class of persons who attain a particular age, which is a contingent gift L.R.A.1915C.

The gift of the whole of the intermediate income to the prospective beneficiaries may suffice to show an intention to vest the gift immediately, turning what would otherwise be a condition precedent into a condition subsequent;²²¹ but the construction of a gift as contingent because the attainment of the specified age forms part of the description of the objects of the gift cannot be altered by reason of a gap in the provision of the will for a limitation over.²²²

Instances in which the attainment of the

in personal estate, is equally contingent in regard to real estate; that though he thought the decision in that case was in opposition to every decision down to the time it was given, he was bound to follow it because it had been subsequently approved of in many cases.

A limitation over will not have the effect to vest a legacy where the attainment of the prescribed age forms part of the original description of the legatee. *Williamson's Estate*, 3 Pa. Co. Ct. 239.

²²¹ See *Re Turney* [1899] 2 Ch. 739, 69 L. J. Ch. N. S. 1, 48 Week. Rep. 97, 81 L. T. N. S. 548, in note 223, *infra*.

²²² In *Re Edwards* [1906] 1 Ch. 570, where testatrix provided: "I give all my property, both real and personal, to my trustees in trust for my children or child who being sons shall attain the age of twenty-one years, or being daughters shall attain that age or marry, and if more than one, in equal shares as tenants in common."

. . . In the event of my death without leaving any children surviving me, I give all my property between my brothers and sisters," naming them, it was held that the gift was clearly contingent, and that the construction of it as such was not altered by the fact that the gift over was in the event of testatrix' death without leaving any children surviving her, and not in event of their failure to attain the age of twenty-one or marry.

In an earlier case, *Browne v. Browne*, 3 Smale & G. 568, testator, who had devised certain realty to trustees for a son for life and after his death to his children who should attain the age of twenty-one years, further provided that in case such son should die without leaving lawful issue the property should be held in trust for a grandson for life, "and from and immediately after his decease, in trust for and for the use and benefit of all and every the child and children of him, my said grandson Richard Staples, lawfully begotten at the time of my said son's decease, or to be lawfully begotten at any time afterwards, and who being a son or sons shall respectively attain the age of twenty-one years, and who being a daughter or daughters shall live to attain that age or be married, equally to be divided between and amongst all such children, if more than one, share and share alike as tenants in common, and not as joint tenants, and their respective heirs and as-

specified age has been held to be part of the description of the legatees,²²³ and instances

signs forever; and if there should be only one such child, then in trust for such only child, his or her heirs and assigns forever; but in case my said grandson, Richard Staples, shall die without leaving lawful issue, then in trust for" another grandson for life, with a similar limitation to his children, etc., and ultimately to the testator's own right heirs. The will also contained a clause directing and declaring that it should be lawful for the trustees immediately after the decease of his son, the first tenant for life, to receive the rents then due and to accrue due, and to apply the same towards the maintenance, education, and advancement in life of the person next beneficially entitled. The son having died without issue, the question raised was as to the construction of the gift over to the grandson's children. *Stuart, V. C.*, held that while a devise in trust for all and every the child and children of a person who should live to attain the age of twenty-one, uncontrolled by anything in the context, certainly creates a contingent remainder, in the case before him the prima facie meaning of the words of contingency were controlled by the context, the language of the gift over in default of issue being regarded as sufficient to show an intention that the gift over should not take effect if there were any children who might live to attain the age of twenty-one, and the clause which provides for the maintenance and education of the person next entitled after the death of the first tenant for life being taken to show that an infant child of the tenant for life living at his death was recognized by the testator as the person next entitled, although on the mere words of gift it was only to the child or children who should attain the age of twenty-one. But this case, in so far as it supports the doctrine that a devise to such of a class as attain twenty-one may be vested by a gift over, has been virtually overruled by subsequent decisions. See *1 Jarman, Wills*, p. 776, note; *Theobald, Wills*, p. 574.

²²³ In *Bull v. Pritchard*, 1 Russ. Ch. 213, where testator bequeathed the residue of his estate to his trustees and executors upon trust to pay the dividends to his daughter during life, and after her decease to pay, assign, or transfer the principal "unto and equally between and amongst all and every the child and children of my said daughter lawfully begotten, or to be begotten, who shall live to attain the age of twenty-three years, share and share alike, with benefit of survivorship, in case of the death of any or either of them under the age of twenty-three years, as tenants in common, and not as joint tenants; . . . and in case there shall be no such child or children, or, being such, all of them shall die under the age of twenty-three years, without lawful issue, then upon trust to pay, assign, or transfer the same" to others,—it was held to be clear that those children alone of the daughter were to take who attained the age of

twenty-three years, and that the attainment of that age was necessary to vest an interest in any of them. This case is referred to by Lord Denman, C. J., in *Doe ex dem. Dolley v. Ward*, 9 Ad. & El. 582, 1 Perry & D. 568, 8 L. J. Q. B. N. S. 154, as one which "is said to have failed to give satisfaction."

In *Newman v. Newman*, 10 Sim. 51, 8 L. J. Ch. N. S. 354, where testator devised his real estate to trustees in trust for a son for life, and after the son's death in trust to sell and stand possessed of the proceeds in trust for all his grandchildren "who shall attain the age of twenty-four years, equally to be divided among my said grandchildren attaining that age as tenants in common," it was held that as there was no gift except to such of the grandchildren as should sustain the character of attaining the age of twenty-four, the attainment of that age was part of the constitution of the character of the original taker, rendering the gift contingent.

In *Southern v. Wollaston*, 16 Beav. 166, testator bequeathed £2,000 consols in trust for a nephew for life, and after his decease upon trust for such of the nephew's children "as shall be living at his death and shall have attained, or shall afterwards live to attain, the age of twenty-five years; . . . and if all of them shall depart this life under the age of twenty-five years, then the said sum of £2,000 stock shall (subject to the life interest of my said nephew therein, and the power of advancement herein-after contained) sink into my residuary personal estate." He further directed that the interest, dividends, and annual produce thereof while any of the persons presumptively entitled should be under the age of twenty-five years, should be paid and applied for and toward the maintenance and support of the person or persons to whom the same should for the time being apparently or presumptively belong; and further declared that it might be lawful for his trustees "to pay and apply the whole or any part of the several provisions thereby by him intended for the children of his nephew, . . . for his, her, or their benefit or advancement in the world." It was held that notwithstanding the gift of income for maintenance and the provision for advancement, the attainment of the age of twenty-five was part of the description of the legatee, and therefore that there could be no vesting before that time. The case of *Bute v. Harman*, 9 Beav. 320, in which a contrary conclusion is reported to have been reached upon a similar will, is in this case stated to have been erroneously reported.

In *Read v. Gooding*, 21 Beav. 478, where a testator devised certain property in trust to permit his daughter to receive the rents, issues, and profits thereof during her natural life, and after her decease in trust to pay and apply such rents, etc., to or for the benefit of the children of said daughter living at her decease "until the youngest of

such children shall have attained the age of twenty-five years," the issue of any deceased child to be entitled to the share of their parent, and as soon as the youngest child should have attained such age of twenty-five years, in trust to sell and "to pay, divide, and dispose of the purchase money . . . equally amongst such of the children of my said daughter as shall be then living, and the issue of such, if any, of her children as may be then dead, but such issue to take only their parent or parents' share,"—it was held that as the contingency entered into the description of the devisees, there was no vesting until the time for distribution.

In *Thomas v. Wilberforce*, 31 Beav. 299, testator devised his estate to trustees to hold one third in trust for a daughter for life, "and immediately after the decease of my said daughter, as to as well the capital of the said one-third part or share as the annual income thenceforth to accrue due for the same, in trust for the son or daughter if only one, or all the sons and daughters if more than one, of my said daughter, who, either before or after her decease, shall attain the age of twenty-two years," but if no son or daughter should attain that age, then over. He further empowered his executors, "during the minority of my said grandchildren, to apply the whole or such part as they shall think fit of the annual income or fund to which each such grandchild shall be entitled in or towards the maintenance and education or otherwise for the benefit of such grandchild." It was held that as the age was part of the description of the persons to take, the gift was contingent, and that the situation was not helped by the provision for maintenance in the meantime, the power being only to apply such part of the income as the executors should think fit "during the minority," leaving a gap between the ages of twenty-one and twenty-two.

In *Merry v. Hill*, L. R. 8 Eq. 619, 17 Week. Rep. 985, testator bequeathed all his real and personal estate to trustees to sell and stand possessed of the proceeds, as to the sum of £10,000, for a certain person for life, and after her decease upon trust to assign and transfer the said sum to and amongst such of her children as should be living at her decease who should attain the age of twenty-one years, to be divided equally among them if more than one, and if there should be but one such child who should attain the age of twenty-one years, then the whole to such child for his or her absolute use and benefit, and as to the remaining surplus of the said trust fund, to assign and transfer it to and amongst all and every such child or children of the person named as should be living at testator's decease or born in due time after, to be equally divided among them if more than one, when they should attain the age of twenty-one years, and if there should be but one such child who should attain the age of twenty-one years, then the whole of such surplus or residue and the proceeds thereof

to such child for his or her absolute benefit. He further empowered the trustees to pay and apply the whole or part, at their discretion, of the annual income towards the maintenance and education of the said children until they attain the age of twenty-one years, and also, during the suspense of absolute vesting in such children or child, to accumulate the residue, if any, of the income for the benefit of the person or persons who should become entitled to the principal fund. It was held that looking to the whole frame of the will, it was clear that the testator never intended any child who was an object of his gift to take unless such child should attain the age of twenty-one years.

In *Re Hume* [1912] 1 Ch. 693, 81 L. J. Ch. N. S. 382, 106 L. T. N. S. 335, 56 Sol. Jo. 414, where testatrix bequeathed to her trustees a sum of money in trust to invest and pay the income therefrom to a daughter for life, and after her decease in trust for all or any of the children or child of the said daughter "who shall be living at her death, and being a son or sons shall attain the age of twenty-three years or survive the survivor of me and the said [daughter] for the period of twenty-one years, or being a daughter or daughters shall attain the age of twenty-three years or marry, and if more than one in equal shares as tenants in common;" with the usual advancement clause and a discretionary power to apply the income of the expectant, contingent, presumptive, or vested legacy or share of any grandchild of the testatrix under the trusts of the will for or towards his or her maintenance, education, or benefit,—it was held that attainment of the specified age was part of the description of the legatees.

In *Waters v. Waters*, 24 Md. 430, where testator created a trust to pay certain annuities, the surplus income to "be equally divided annually amongst all my children who may be of the age of twenty-one years or who may be married," it was held that the shares of those who attained twenty-one years or married became vested at the happening of either of those events, and upon their death survived to their personal representatives.

In *Webb v. Webb*, 92 Md. 101, 84 Am. St. Rep. 499, 48 Atl. 95, where testatrix bequeathed "to each of my grandsons . . . who may live to reach the age of twenty-one years the sum of \$1,000," it was held that these legacies were given upon the plain condition that each legatee must arrive at a given age to entitle him to take at all.

In *Haywood v. Rogers*, 43 N. C. (8 Ired. Eq.) 278, where testator directed certain land to be sold and the proceeds to be divided between certain grandchildren, "or as many as may be living, as they come of age," it was held that the phrase "or as many as may be living" showed the gift to be contingent, there being nothing to show that the testator was looking to the prob-

ability of the decease of his grandchildren in his lifetime.

In *McIntosh v. Elliott*, 1 Grant, Ch. (U. C.) 440, where testator devised his estate, real and personal, to trustees upon trust to pay the annual income therefrom to his wife during her widowhood, to be applied by her towards the maintenance and education of his children; and upon the further trust, upon the death or marriage of his wife, to pay and apply the income toward the support, maintenance, and education of his said children until they should respectively attain the age of twenty-one years or be married, and if at the time of the death or marriage of his widow any of the said children should be of the full age of twenty-one years or married, and if not, then so soon thereafter as any of them should arrive at that age or be married, then upon trust to pay each of his said children so arriving at the age of twenty-one years or being married one equal proportional part according to the number of children then living of the interest, moneys, and rents; and upon the further trust that so soon as all the surviving children should be married, or so soon as the youngest unmarried child should have arrived at the age of twenty-one, then to convey to each of the said children who should have arrived at the age of twenty-one years or have married, or in the case of the death of any of them after arriving at that age or being married, then to his or her heirs or appointees, an equal proportional part of the real and personal estate bequeathed to his said executors,—it was held that the children took contingent interests.

In *Re Stainsby*, 14 Ont. L. Rep. 468, where testator devised all his property, real and personal, to his wife for life, and directed that after her death and “on the arrival of the youngest surviving child at the age of twenty-one years, it is my will that the property be disposed of and be divided equally amongst all my children. . . . In the case of the death of any one of my children who shall be married, his or her share shall belong to and be divided equally among his or her children,”—it was held that the attainment of the age of twenty-one was part of the description of the legatees, and that there was no vesting until such age was reached.

In *Taylor v. Gould*, 10 Barb. 388, where testator gave to his daughter and such of her children as should at her decease be living and should have attained, or should thereafter attain, the age of twenty-one years, all his residuary estate, it was held that the remainder to the children was contingent on their survival of their mother and their arriving at twenty-one.

In *McBride v. Smyth*, 54 Pa. 245, where testator devised the residue of his estate to trustees to hold upon certain defined trusts until his youngest child who might be then living should attain the age of twenty-one years, and upon such event gave the trust fund “to such of my children as may be living when the youngest of them living shall

attain the age of twenty-one years, their heirs, executors, and administrators, share and share alike,” it was held that, there being no distinct gift to the whole class preceding the restrictive description, the interest of each member was contingent upon his surviving the time for distribution; and the consideration that this construction would exclude the widow and issue of any child who might die before the designated period of vesting arrived was held insufficient to warrant the opposite construction.

In *Darling v. Witherbee*, — R. I. —, 90 Atl. 751, where testator directed that the residue of his estate should be held in trust “for the child or children of such deceased child of mine living at the decease of the survivor of myself and such child of mine who shall, either before or after said time, attain the age of twenty-one years or marry under said age,” the contingency upon which the gift was to become payable was held to be annexed to the gift itself.

In *Festing v. Allen*, 12 Mees. & W. 279, 25 Eng. Rul. Cas. 604, a case sent by the Vice Chancellor to the court of exchequer, testator devised all his lands in trust to the use of his wife for life or widowhood, and from and after her decease or second marriage to the use of his granddaughter for life, and from and after her decease to the use of all and every the child or children of the said granddaughter who should attain the age of twenty-one years, if more than one, equally to be divided amongst them share and share alike, to hold as tenants in common, and not as joint tenants, and to their respective heirs and assigns forever, and if but one child, then to the use of such one child, his or her heirs and assigns forever. “And for want of any such issue” testator directed the trustees to stand possessed for others. The granddaughter died leaving children, none of whom had then attained the age of twenty-one years. It was contended that they took vested interests in fee immediately on the death of their mother, subject only to be divested in the event of their dying under twenty-one; but it was held that as there was no gift to anyone not answering the whole of the requisite description, and as the gift was not to the granddaughter's children, but to the children who should attain twenty-one, no one who had not attained his age of twenty-one was an object of the testator's bounty, and therefore that the words importing contingency could not be taken as only indicating certain circumstances on the happening or not happening of which the estate previously devised should be divested. The result of this construction was that, as no child had attained twenty-one when the particular estate determined by the granddaughter's death, the contingent remainder was defeated for want of an estate to support it, and that, as it was not possible to say that there was at her decease a failure of her issue who should attain the age of twenty-one years, she having left children all or any of whom might attain the prescribed

in which the attainment of such age has been held not part of the descrip-

tion,²²⁴ may be bound in the subjoined footnotes.

age, the alternative limitations were also defeated.

In *Jull v. Jacobs*, L. R. 3 Ch. Div. 703, 35 L. T. N. S. 153, 24 Week. Rep. 947, Vice Chancellor Malins referred to the case of *Festing v. Allen*, *supra*, as one which he had argued, and said that he thought that that case was properly overruled in another case which he had argued, of *Browne v. Browne*, 3 Smale & G. 568, though he believed it had been the subject of strife since.

In *Holmes v. Prescott*, 10 Jur. N. S. 507, 33 L. J. Ch. N. S. 264, 11 L. T. N. S. 38, 12 Week. Rep. 636, 3 New Reports, 559, testator (after previous limitations which failed) devised certain realty to his daughters, equally to be divided between them share and share alike, as tenants in common, and not as joint tenants, for their several and respective natural lives, "and from and after the determination of the estate limited to, or in favor of, his daughters severally and respectively, to the use of the above-named trustees and their heirs, during the natural life and lives of his daughters respectively, in trust to support the contingent uses and estates thereafter limited from being defeated and destroyed; and from and after the decease of each or either of his daughters, then, as to one fifth part or share of the daughter so dying, to the use of all and every the child and children of such daughter born or to be born, who, being a son or sons, had attained, or should attain, the age of twenty-one years, or, being a daughter or daughters, should attain that age or be married. . . . But if there should be no such child, who, being a son, should attain the said age, or, being a daughter, should attain that age or be married as aforesaid, then to the use of the others of his four daughters for their respective lives, in equal shares; with remainder, as to each share, to such child or children as she had, or might have, who had attained, or should attain, the like age, or be married as aforesaid, and their several heirs and assigns for ever." It was held that the attainment of the specified age being part of the description of the devisees, the remainders to the daughters' children were contingent.

In *Rhodes v. Whitehead*, 2 Drew. & S. 532, 13 Week. Rep. 800, testator devised certain realty to his two sons during their respective lives in equal shares as tenants in common, adding: "And from and after the decease of each of my sons, as to their respective undivided moieties in the said [property] to such uses or upon such trusts in favor of all or such one or more exclusively of the other or others of the children of my said sons respectively in such manner and form as they may respectively by any deed . . . or by will or codicil appoint, and in default of such appointment, and so far as any such appointment shall extend to the use of or in trust for all and every the children, or any the child of my L.R.A.1915C.

said sons respectively, who being sons or a son, shall attain the age of twenty-one years, or being daughters or a daughter, shall attain that age, or marry, if more than one, in equal shares and proportions, as tenants in common, and their, his, or her respective heirs, executors, administrators, and assigns;" and if there should be no such child of such one of the sons who should die leaving his brother him surviving, then as to the moiety given him and his children upon such trusts in favor of the survivor and his children as had been declared as to his and their original shares; and if there should be no child of either, who being a son should attain the age of twenty-one, etc., then the whole to the survivor of the sons. It was held that as according to the plain import of the devise the only persons to whom any gift was made by way of remainder were such children as should attain twenty-one, and as there was no gift whatever, either expressed or implied, in favor of any child who should not attain twenty-one, the contingency was a part of the description, and the remainders were contingent. The court was not dissuaded from this conclusion by the fact that the result was (the testator not having inserted the usual limitation to trustees to preserve contingent remainders) that the gift to a son's children was defeated by the termination of their father's life estate before any of them had attained the age of twenty-one.

In *McCartney v. Osburn*, 118 Ill. 403, 9 N. E. 210, an action for the partition of real estate, where testator directed that his residuary estate should be at interest "until there is a final division made of my estate, which I wish to be equally divided between the heirs [of a daughter] that may be living at the time of said division, and [a grandson], each to share and share alike. . . . I would rather prefer not to have a division made of my estate until the youngest child [of the daughter] arrives at the age of twenty-one years; but should any of the heirs after arriving to that age wish to engage in business, and wish to realize any portion of their interest in said estate, my executors can give them such an amount as they may think proper, and take their individual note or notes bearing interest to be added thereto and deducted from their respective portions of said estate on the final division of the same,"—it was held that by the terms of the will the element of futurity was annexed to the gift itself, and was descriptive of those who were to take, and therefore that the daughter's children did not take a vested interest; the court remarking that no special significance is to be attached to the fact that in the provision for advancements the testator spoke of the heirs' "interest in" or "portion of" the estate.

See also cases set out in note 216, *supra*.

²²⁴ In *Re Grove*, 3 Giff. 575, 9 Jur. N. S.

38, 6 L. T. N. S. 376, where testator devised realty upon trust to pay over the rents, issues, and profits unto "all and every the child and children" of a deceased sister to and for their own use and benefit until the youngest of them should have attained the full and complete age of twenty-one years, when the trustees were to sell the realty and to "pay, distribute, and divide the money to arise and which should be received from the sale thereof unto and equally between and among the said children," it was held that, though the gift was in the form of a direction to pay and divide, the objects of the gift were "all and every the child and children" of the sister, and as there was nothing to show that the rights and interests of the children who should not attain twenty-one were excluded, and the whole of the income being given to them in the meantime, they took vested interests.

In *Parsons v. Justice*, 34 Beav. 508, where testator gave his real and personal estate to trustees upon trust for his wife for life, and after her decease upon trust for all and every the child and children of his brother, who should be living at testator's decease or born afterwards, who should live to attain the age of twenty-one years, and to apply the income of the share of such children toward their maintenance and education until they should attain a vested interest in such share, or previously die, it was held that the brother's children took vested interests, subject to be divested if they should not attain twenty-one.

In *Hardcastle v. Hardcastle*, 1 Hem. & M. 405, testator bequeathed leaseholds in trust for a granddaughter for life, and from and after her decease upon trust "for all and every the child and children of the body of my said granddaughter lawfully to be begotten, until such child and children shall respectively attain the age of twenty-five years, or die leaving issue of his, her, or their body or respective bodies, and then upon trust for such child or children so attaining the age of twenty-five years, or dying and leaving such issue, equally as tenants in common, their respective executors, administrators, and assigns; and in case all such children save one shall die under the age of twenty-five years, without leaving such issue as aforesaid, or if there shall be but one such child, then in trust for such one or only child, until he or she attain the age of twenty-five years or die leaving issue as aforesaid; and then in trust for such one or only child," etc.; and in case there should not be any child, or, being such, if all should die before any should attain the age of twenty-five years without leaving issue, then over. He also gave his residuary personal estate in trust to apply so much of the income thereof as the trustees should think proper for and towards the maintenance, education, and bringing up of his said granddaughter till she should attain the age of twenty-one, accumulating the surplus in the meantime and thenceforth until she should attain the age of twenty-five years, to pay her out of L.R.A.1916C.

such income and the income of such accumulations a clear annual sum of £500, and accumulate the surplus during that period, and afterward pay and apply the whole of the income to his said granddaughter during her life, and from and after her death to stand possessed of the trust fund in trust for all and every the child and children of said granddaughter "until such child and children shall respectively attain the age of twenty-five years, or die leaving issue of his or her body or respective bodies; and then in trust for such child and children so attaining the age of twenty-five years or dying and leaving issue, in equal shares, their respective executors, administrators, and assigns," and so on as in the case of the leaseholds. It was held that, having regard to the use of the word "such" throughout the will, the words as to age were not so attached to the children as to form a necessary part of the description, the regular antecedent of the word "such" being "all and every the children;" and the whole interest furthermore being given to the objects of the bequest, they took vested interests, subject to be divested by death under twenty-five without issue.

In *Muskett v. Eaton*, L. R. 1 Ch. Div. 435, where testatrix devised a farm to a nephew for life, adding: "And in the event of his leaving a lawful son born or to be born in due time after his decease, who should live to attain the age of twenty-one years, then I give the same farm and hereditaments unto such son and his heirs, if he shall live to attain the age of twenty-one years; but in case my said nephew should die without leaving a son who should live to attain the said age of twenty-one years, then" to another,—it was held that the gift being to "a lawful son born or to be born in due time after his decease," the interposition of the words "born or to be born," etc., prevented the words "who should live to attain the age of twenty-one years" from forming part of the description of the devisee so as to bring the case within the rule that where a contingency is a constituent part of the description of the person or class to whom the gift is made, it is contingent, since the testatrix must be taken to have known the course of nature, and if a child should be born within nine months after the death of the tenant for life, he could not be twenty-one at the time when the particular estate determined.

In *Re Turney* [1899] 2 Ch. 730, 69 L. J. Ch. N. S. 1, 48 Week. Rep. 97, 81 L. T. N. S. 548, testator bequeathed a sum of £12,000 to trustees upon trust to pay the income thereof to a daughter during her life; and after her death "as to as well all capital as the annual income of the said trust fund" upon trust for all the children of his said daughter when they should attain the age of twenty-five years, but not before; and in case there should not be "any such child," then he directed that the fund should form part of the residue of his estate. The testator empowered his trustees to apply all or any part of the income arising from the

expectant share of any grandchild of his under his will after the death of the preceding owner for life thereof, for the maintenance and education of each such grandchild, and directed his trustees to invest and accumulate the unapplied income in augmentation of the capital of such share. It was held, in view of the maintenance clause, and more especially in view of a direction that until the sum in question should be invested or otherwise provided for, the trustees should pay to the daughter, or in the event of her decease to her children, interest on their respective portions, the legatees were all the children of the daughter, and not merely the children of the daughter who should live to attain twenty-five, and therefore that the children took vested interests, subject to be divested in case they did not attain twenty-five.

In *Williamson's Estate*, 3 Pa. Co. Ct. 230, testator, who had given his estate upon trust for his children during their respective lives, directed that, upon the decease of each of them, one equal fourth part of the corpus or principal should be held to and for the only proper use of his or her child or children "who shall have attained or shall attain the age of twenty-five years, and the issue of any such who shall have died or shall die under that age leaving issue, in equal shares," the issue of any deceased child to take only its parent's share, but in default of issue, then upon trust for the use and benefit of testator's other children and their respective issue. It was held that as a reference to the grandchildren in a codicil, the exact terms of which are not here material, showed that he was not thinking of them as a class, but as several persons answering one description, and especially in view of the limitation over to the testator's surviving children upon the death of a child without issue living, the testator's intention was to give his grandchildren vested interests.

In *Rivers v. Fripp*, 4 Rich. Eq. 276, where testator, after giving to his only son, subject to a life estate in his widow, certain real and personal estate during his life, devised and bequeathed the same property from and immediately after the death of his wife and son, unto the lawfully begotten issue of his said son living at the time of his death, who should live to attain twenty-one years of age, or who, dying before that time, should leave issue to live until the parent would have attained twenty-one years of age, with a gift over in default of such issue, it was held, in view of the general structure of the will and the presence of the limitation over in case of the failure of the son's issue to attain twenty-one, that they took vested estates, subject to be divested.

In *Seabrook v. Gregg*, 2 S. C. 73, where testator, after giving a life estate in certain realty to his son, devised it "unto the issue of my said son [name] living at the time of his death who attain the full age of twenty-one years of age, or die before that time leaving lawfully begotten issue

who shall attain the full age of twenty-one years, living at the time of the death of the said" son, with a gift over to the survivors in default thereof, and a further limitation over should the son die without leaving lawfully begotten issue who should attain the age of twenty-one years living at the time of his death, or, dying before that time, leaving lawfully begotten issue to live until the parent or parents, if alive, would have reached twenty-one years of age,—it was held that the devise was vested by the gift over in case of the death of the remaindermen under twenty-one without issue, subject, however, to be defeated in the event of their dying without attaining the full age of twenty-one.

VII. Appendix A. Cases which turn upon existence of antecedent gift, apart from direction to pay, convey, or divide.

Gifts of realty, or legacies charged thereon.

In *Snow v. Poulden*, 1 Keen, 186, where testator directed: "The rest of my property to be invested in land and given to my grandson, . . . and not to be of age to receive this until he attains his twenty-fifth year," it was held that the grandson took an immediate vested interest in the land, subject to be divested if he should not attain the age of twenty-five years. Mr. Jarman, in commenting on this case, says: "No reasons are reported; but the express direction that the property should be 'given to' the grandson may well have been taken to constitute an immediate devise, independently of the subsequent clause postponing the right of the 'receipt.'" 1 Jarman, Wills, 6th ed. p. 788.

In *Montgomerie v. Woodley*, 5 Ves. Jr. 522, where a devise of real estate was followed by a direction that none of the devisees should take or come into possession before the age of twenty-five, such direction did not operate to render the devise contingent.

In *Peard v. Kekewich*, 15 Beav. 166, 21 L. J. Ch. N. S. 458, where testator, having a power of appointment over certain real estate, appointed it to trustees in trust for his son, "his heirs, executors, administrators, and assigns; and to be respectively conveyed, assigned, and assured to him when and as he should attain the age of twenty-three years;" and in case such son should die before he should have attained the age of twenty-one years, to the use of the second, third, fourth, and all and every the other son and sons of his, the said testator's body, in succession in tail, and to be conveyed to them as they should attain twenty-three, it was held that the word "and," in the phrase "and to be respectively conveyed," etc., made a distinction between the gift to the son and the period when he was to have the complete and absolute enjoyment of the property by conveyance; and that this was made clear by the subsequent direction to accumulate the rent until the age of twenty-

three years, and still more distinct by what followed, because it directed that in case the son should die before he attained twenty-one years of age, then the estate was to go over, so that a construction of the gift as contingent upon his attaining the age of twenty-three would, in event of his death after attaining the age of twenty-one but before attaining the age of twenty-three, have the effect to produce an intestacy, the gift over in such case not being operative.

In *Penny v. Commissioner for Railways* [1900] A. C. 628, 69 L. J. P. C. N. S. 113, 83 L. T. N. S. 182, it was held that under a devise to certain persons, or to such of them as should be living at the death of the testator's widow and attain twenty-one, all the devisees took vested interests, subject to be divested as regards each devisee dying in the lifetime of the widow, in favor of those, if any, who should survive her and attain twenty-one.

In *Ryan v. Cooley*, 15 Ont. App. 379, reversing 14 Ont. Rep. 13, where testator devised real estate to his executors in trust for his four children "until they or the survivor or survivors of them shall have attained the age of twenty-one years, said real estate to be divided amongst the said four children share and share alike, and in case any of them shall have died leaving issue, the said issue shall take the share which otherwise would have gone to his, her, or their parent," also directing that the children should be educated out of the income of such property during their minority, and that the surplus be invested during their minority, it was held that as the devise was not one in trust for the children when they should attain twenty-one, or provided they should attain twenty-one, but was from the very first for the children, there was an immediate devise to them of the beneficial estate, subject to be divested by death before the time of division leaving issue.

In *Re Cust*, 13 West. L. Rep. (Can.) 102, where testator, after devising certain lands to each of his nephews, added: "The above-named farms not to become the absolute property of my said nephews until the youngest, Richard Cust, has reached the full age of twenty-one years," it was held that the devisees took a vested interest, subject to divestment by death before the youngest should reach the age of twenty-one.

In *Fitch v. Miller*, 20 Cal. 352, where a will by which real estate was devised to certain children provided that the devisees might each "take out" half of his share upon coming of age, and the other half not until all the other children should come of age, it was held that the title to the property undoubtedly vested in the devisees on the death of the testator.

In *Re Budd*, 166 Cal. 286, 135 Pac. 1131, testatrix, who wrote her own will, provided: "I will, bequeath, and give to my said nephew," naming him, certain described realty, "to be distributed and delivered to him upon the following conditions: First, when he shall have attained the age of

twenty-one years; and, second, when he shall have, after attaining the age of twenty-one years," performed a certain other condition (which was held void for indefiniteness), going on to provide: "It being expressly understood and agreed and it is my will that should my nephew [name] survive me and attain the age of twenty-one years, and [perform the other condition], then and in that event he shall take in fee simple [the realty described]; should my said nephew [name] die before he attains the age of twenty-one, or, having arrived at the age of twenty-one, fail to conform to the requirements of this will, the said [realty] shall then remain a part of my general estate, and in such event I give, devise, and bequeath" the said realty to another. It was held that the effect of the words of present devise with which the above testamentary provisions begin was not altered by the words which follow so as to render the devise contingent upon attaining the age of twenty-one.

In *Hamilton v. Lewis*, 13 Mo. 184, where testator devised to his grandson certain lands and a slave, "to be given into his possession when he arrives at the age of twenty-one years, to him and his heirs forever," it was held that the gift was clearly a vested one.

In *Re Mahan*, 98 N. Y. 376, where testatrix devised to her executor certain realty in trust to pay from the income such sum as might be necessary, not to exceed \$40 per month, to her mother so long as she survived, and from the balance to pay such sums as might be necessary for the education and maintenance of her son James, and the remainder, if any, during the minority of James, to be divided equally between her other children, and, upon the death of her mother before James should attain the age of twenty-one, to apply the net income and profits of certain premises for the use of James until he should attain the age of twenty-one, and upon the death of her mother, and upon her son James attaining the age of twenty-one, testatrix devised the said premises "and all accumulations, if any, of the income and profits thereof to my son James, his heirs, executors, administrators, and assigns forever," adding: "And all the rest, residue, and remainder of my property and estate I do then give, devise, and bequeath to" the other children, "the survivor or survivors of them, share and share alike," it was held that the provisions of the will brought the case within the principle that if there be a direct gift to legatees, a direction for payment at the happening of a certain event shall not prevent its vesting; that the limitation of the residue of the estate to the other children after her mother's death must be deemed, therefore, to have taken effect as a valid remainder on the death of the testatrix.

In *Aldrich v. Green*, 48 Hun. 619, 16 N. Y. S. R. 535, 1 N. Y. Supp. 549, where testator gave an estate to his widow during widowhood, and then gave the real estate to be divided equally between his two children,

adding: "If they should be of the age of twenty-one years; if not, to remain under the control of my hereinafter named executor till they shall have attained the age of twenty-one years each, then I will the said estate to be equally divided between my two children, their heirs and assigns,"—it was held that the children took vested remainders.

In *Braunsdorf v. Braunsdorf*, 23 N. Y. Supp. 722, where testator devised his estate to his executors in trust to pay a certain annuity, and the remainder of the income to his wife for life, and upon her death gave all his said estate, subject to the payment of the said annuity, to his children then surviving and the issue and descendants of any deceased child, adding: "Should any of my said children be under the age of twenty-five years at that time, then until they shall become twenty-five years of age respectively, only the income of their respective share is to be paid to them respectively, and their respective share to be paid over or transferred to them respectively, as they shall each arrive at the age of twenty-five years; but in case any child or children shall die before reaching the age of twenty-five years, leaving issue him or her surviving, then the share of such child shall be transferred to such issue at once,"—it was held that the title to the lands vested in testator's children at the time of his death, subject to the trust declared in his will, and subject to the power of sale conferred upon the executors.

In *Gallatin v. Gallatin*, 48 Hun, 614, 15 N. Y. S. R. 323, where testator, after devising unto each of two grandsons certain real estate, "subject, however, to the trust and limitations hereinafter declared," went on to provide: "Inasmuch as my two grandsons are minors, and it is my will to defer the possession of the said devisees respectively until they shall attain the age of twenty-five years, I give to the executors of my will the possession of the said devised lands in trust to let the same and apply the income to the use of my said grandsons respectively until they shall severally attain the full age of twenty-five years, and that any surplus in their hands not needed for the education and maintenance of my grandchildren respectively shall be accumulated while under the age of twenty-one years for their use,"—it was held that the grandsons took vested interests.

In *Clark v. Wallace*, 48 Pa. 80, where a testator gave to a daughter the sum of \$3,000, "to be and remain a lien on my real estate during her natural life, and the interest accruing thereon to be paid to her annually during her said life, . . . said legacy to remain a lien upon my real estate during her life and until her children shall become of lawful age, and at her death the said sum of \$3,000 to be equally divided amongst her children, if they shall have arrived at the age of twenty-one years, but should my daughter Mary die before her children shall have arrived at lawful age, the share that they shall be

entitled to shall not be paid until they arrive at lawful age,"—it was held to be too clear for argument that this was a vested legacy in the children, payable on their arriving respectively at the age of twenty-one years.

Possibly *Taylor v. Richards*, 153 Mich. 667, 117 N. W. 208, set forth in VIII. g, *infra*, is also a case of this kind.

Gifts in which realty and personalty are blended.

In *Kevern v. Williams*, 5 Sim. 171, where testator gave his residuary estate, both real and personal, in trust for his wife during her natural life, and after her decease upon trust "to preserve the then remaining part of my estate . . . to and for the use and benefit of the grandchildren of my said brother, Charles Kevern, to be by them, and each of them, received in equal proportion to the effects in hand and remaining, when they and each of them shall severally attain the age of twenty-five years, and not before; and when the youngest thereof shall have attained the full age of twenty-five years as aforesaid, and he or she shall have received their final dividend or share of my said estate, the trust shall then cease and determine,"—it was held that the time of gift was at the decease of the tenant for life, enjoyment only being postponed until the grandchildren should reach the age of twenty-five.

In *Farmer v. Francis*, 2 Sim. & Stu. 505, (s. c. in the court of Common Pleas, 2 Bing. 151) testator gave the residue of his estate, both real and personal, upon trust for his wife for life, and after her decease for a daughter for life, and from and after the decease of his said wife and daughter, "upon trust for, and I do hereby give, devise, and bequeath the said residuary trust estates, hereditaments, and premises, and the principal of the said residuary trust fund property and effects, unto and amongst all and every the lawful issue, child, or children, of my said daughter Mary Francis, as shall be living at the time of the decease of the survivor of them, and my said wife and daughter, equally amongst them, if more than one, to be divided share and share alike when and as they shall respectively attain the age of twenty-four years, and to their respective heirs, executors, administrators, and assigns forever, to take as tenants in common," and if only one, then to such one upon attaining the said age; but in case there should be no such issue, child, or children, of his daughter living at the time of the decease of the survivor of the wife and daughter, or, being such, all should die without lawful issue under the age of twenty-four years, then upon trust for testator's sons. The Vice Chancellor having directed a case to be stated for the opinion of the court of common pleas as to the construction of this clause so far as it related to real estate, that court replied that the children living at the death of the tenants for life took vested equitable

estates in fee as tenants in common; and the Vice Chancellor held that the same construction was to be put upon the will in so far as it disposed of personalty, the time of division only being postponed until the legatees should attain the ages of twenty-four years.

In *Beckton v. Barton*, 27 Beav. 99, testator devised and bequeathed all his property to trustees upon trust to pay out of the income an annuity to his wife "for so long time as she should continue his widow, for the maintenance of herself and for bringing up, maintaining, and educating" their children, further providing: "And from and immediately after the death or marriage again of my said wife, then upon further trust to apply such part of the said rents, interest, and annual proceeds for the maintenance, education, and advancement in life of all my said child and children as shall be then under the age of twenty-one years, as they in their discretion shall see necessary and proper, and when the youngest of my said children shall attain the said age, then upon further trust to call in all my moneys and pay, divide, distribute, and convey all my property between my children, share and share alike," and in case of the death of any of the children leaving lawful issue, the share or shares of such parent to go to the child or children of such parent. It was held that, reading the whole will together, the division was to take effect upon the death or marriage of the widow, and not upon the youngest of the children attaining twenty-one.

In *Higgins v. Waller*, 57 Ala. 396, where a testatrix gave all her property to her husband in trust for the support and education of their children while they should remain infants or unmarried, further providing that when any one of them should arrive at age or marry, an equal share of the estate should be set apart for such child, it was held that an estate given to a child was vested, although to be "set apart" at a future time.

In *Andrews v. Russell*, 127 Ala. 195, 28 So. 703, where testator directed his executors to keep his estate together, and to expend such of the income as should be necessary for the maintenance and education of his minor children, until his said children should marry or the youngest child should arrive at the age of twenty-one years; further directing that when and as his children not then of age or married should arrive at the age of twenty-one or marry, his executors should pay them respectively a certain sum of money as an advancement; and that when his youngest child should arrive at the age of twenty-one, or all of his children should marry, the executors should convert the estate into money for final distribution among his widow and children:—it was held that the children took vested interests.

In *Re Reith*, 144 Cal. 314, 77 Pac. 942, it was held that under a will by which testatrix gave her estate to trustees "to be so L.R.A.1915C.

protected by them that my children shall receive at the age of twenty-five half of all that is due, and at thirty the remaining half," further enjoining upon the trustees the duty of maintaining and educating the children, the title in fee vested in the children at the death of the testatrix by virtue of a direct testamentary gift to them, subject only to the trust.

In *State v. Raughley*, 1 Houst. (Del.) 561, where testator bequeathed his residuary estate to be equally divided among all his grandchildren, "the money to be paid by my executors when they arrive at lawful age," it was held that the language used imported a present vesting, with postponement of payment only.

In *Silvers v. Canary*, 114 Ind. 129, 16 N. E. 166, where a testator provided: "To [certain persons] jointly I bequeath one fifth part of my estate after my just debts are paid, and not otherwise disposed of, to remain in the hands of my executor until they become of age;" and further that in case of the death of either before arriving at age, the whole should be paid to the survivor,—it was held that the foregoing provision vested in the legatees a present and equal interest in the entire legacy, subject to the right of the survivor to take the whole in case of the death of either before arriving at the prescribed age.

In *Ross v. Ayrhart*, 138 Iowa, 117, 115 N. W. 906, testator provided: "To my sons, John Orr and Tony Orr, I give each the sum of \$200 to be paid to them at the time my son Tony becomes twenty-one years of age." His residuary estate he gave to a daughter and to his said sons, with the proviso "that no part of my said property shall be delivered or paid to my said children until the time when my said son Tony becomes twenty-one years of age. That until that time all of my property shall be held and controlled by my executor, and my said children shall receive no interest therein and no right thereto until the time when my youngest son arrives at twenty-one years of age." It was held that there were three reasons which should be given controlling weight in negating a construction which would render the devise to the three children of shares in the property contingent on their surviving until after the younger son should become of age: First, that a plain and unambiguous devise of a vested interest should not be limited or rendered contingent by a subsequent provision inconsistent therewith, unless the language of the will, taken as a whole, absolutely requires such construction; second, that the law favors vested rather than contingent devises; and, third, that the will should be so construed, if possible, as to prevent any intestacy of any portion of the property of the testator.

In *Ellicott v. Ellicott*, 90 Md. 321, 48 L.R.A. 58, 45 Atl. 183, where a testatrix bequeathed certain property to a grandnephew "for the purpose of securing to him a liberal education," requiring him to finish a collegiate course at one of two specified universities, and providing that the property

should pass from him if "through his own disinclination or incapacity or the indifference of his parent or guardians he shall fail to carry out these intentions;" with a further provision that until he is twenty-five years of age the property should be held by a trustee who should "deliver over the property and estate into his hands and possession" when he is twenty-five years old, if the directions of the will should have been carried out; expressing also a special desire that the grandnephew should not sell a certain place until he should attain the age of twenty-five years,—it was held that, taking the whole will into consideration, the testatrix intended to vest an equitable estate in the properties mentioned in her grandnephew at the time of her death, subject to the condition subsequent as to completing a collegiate course.

In *Webb v. Webb*, 92 Md. 101, 84 Am. St. Rep. 499, 48 Atl. 95, where testator bequeathed certain shares in a cemetery company and some cemetery lots to the sons of a deceased son, or to the survivor or survivors of them, "at such time or times as my executors hereinbefore named may find convenient and in accordance with their best judgment, but in no case before they or either of them shall have reached the age of twenty-one years; to whom (or to the survivors or survivor of them) 'I also desire my executors to give, under the above limitations as to age and time or times, the sum of \$5,000 each,'" it was held that the devise and legacies given to the grandsons were vested, the direction as to the time of payment not being of the substance of the gift; and that the expression "the survivors or survivor of them" was to be referred to the death of the testator, as its presence in the will in the connection in which it was used did not manifest an intention on the part of the testator to postpone the time of vesting.

In *Emerson v. Cutler*, 14 Pick. 108, testator gave his residuary estate to his children, "to be equally divided between them, and to be distributed to them as they shall respectively arrive at the age of twenty-one years, and not before; so far as the same can be done consistently with the lien hereinafter created; to hold to them, their heirs and assigns forever." He then charged such residuary estate with the payment of certain annuities, and authorized and empowered his executors to receive the income, and thereout to pay the annuities, and to apply the whole or any part of the balance, in their discretion, to the support and education of testator's children until they should respectively arrive at the age of twenty-one years. It was held that as the property was in terms given directly to the children and their heirs, and not, either in terms or by implication, to the executors in trust till they should respectively arrive at full age, the estate vested in the children immediately upon testator's decease.

In *Packard v. Packard*, 16 Pick. 191, it was held that under a devise to testator's two sons of certain real property and farm-

ing tools, "to be equally divided between them as they should live to become of age, otherwise it is my will it should go to one of them," the sons took a vested estate, determinable as to the one who might die first upon the contingency of his dying under twenty-one years of age.

In *Winslow v. Goodwin*, 7 Met. 363, testator directed his residuary estate to be divided into seven equal parts, one of which was to be held in trust for a daughter, to be made over to her at her husband's decease, but if she should die in her husband's lifetime, then to hold in trust for her children, and if such daughter should die in the lifetime of her husband "such of her children as may then be of full age are to receive their respective shares of said seventh or what may remain thereof; and as to the parts of such children of said Sarah as may then be minors, my trustees are authorized and empowered to apply and use so much of each one's share for his or her support and education as said trustees may think necessary, and to pay over and convey to them the residue, if any, of his or her share respectively on coming to full age." It was held that in view of the devising clause, which gave the estate to the children generally, the provision relating to arrival at age was intended merely to fix the time or times when the children should respectively be entitled to the possession of the devised property.

In *Bowditch v. Andrew*, 8 Allen, 339, testator devised the residue of his estate, both real and personal, in trust to pay an annuity to his wife for life, and to pay over to her from time to time such sums of money as should seem to be necessary for the maintenance of testator's family and the support and education of his children, and after her death upon trust "to divide the same equally among all my children, and the representatives of any deceased child or children and to pay over and convey the same to my said children, their representatives or heirs at law, in the manner following, viz.: the portions of personal estate, and of the real estate, if the same shall not have been sold by said trustee, of such of my sons as shall be of age at the death of my wife, shall be paid over and conveyed to them severally, as soon as may be after the death of my said wife, by the said trustee; and to such of my sons as shall not be of age at the death of my said wife, their portions shall be paid over and conveyed by said trustee as they severally become of age; the portions of real and personal estate of my daughters shall be held and retained by said trustee, after the death of my said wife, upon the trust to receive the income of the said portions, and pay over said income to my said daughters, in the proportion to which they are severally entitled, during their lifetime; and after their death to pay over and convey the portion of each of them to their heirs at law." It was held that the whole equitable interest in the residue of the estate vested immediately in the children, subject to the discretionary dis-

position of the income during the life of their mother, the possession only being postponed till the death of the widow.

In *Wright v. White*, 136 Mass. 470, testator bequeathed a fifth part of his residuary estate in trust to pay the whole net income thereof to a son for life, adding: "And at his decease I give said one fifth part of my estate to his children then living, equally if more than one, in fee simple, the issue of any deceased child taking his or her parent's share by right of representation. If at the time of my said son's decease any child of his shall be under the age of twenty-one years, his or her share of said trust fund shall continue to be held and managed as aforesaid by my trustees, and paid over to him or her only as he or she shall respectively come of age. If any child of said John shall die under twenty-one years of age, his or her share of the principal of this trust fund shall be paid and conveyed to his or her issue, if any, in fee simple, otherwise to his or her surviving brothers or sisters (if any) in fee simple, the issue of any deceased brother or sister (if any) taking his or her parent's share by right of representation. But if my son shall leave no issue living at his decease, or if all his children shall die under the age of twenty-one years and without leaving issue living at their decease," the principal of the trust fund was given over at the death of the son or of the last survivor of such children. It was held that the infant children of the son on his death took vested interests, subject to be divested on their dying under twenty-one years of age.

In *Minot v. Purrington*, 190 Mass. 336, 77 N. E. 630, where testator, who had directed the payment of a share of income to the children of his son Henry during their natural lives, further provided: "Upon the decease of my said son Henry's children I direct that one quarter part of the residue and remainder of my estate be distributed among his grandchildren, such grandchildren representing their parents and receiving their shares as they respectively attain the age of twenty-one years, and in the meantime to receive the income of their respective shares,"—it was held that as the words used import a personal gift to the grandchildren, and the shares are referred to as "their shares" and "their respective shares," and as there was nothing to take the case out of the general rule that such estates are to be deemed vested on the death of the testator unless it plainly appears that he intended them to be contingent upon a future event, the language as to the time of distribution should be considered merely as postponing the time of payment, and not the time of vesting.

In *Scott v. James*, 4 How. (Miss.) 307, where testator directed his residuary estate to be kept together in the hands of his executors until his daughter should become of lawful age or marry, when it was his desire that it might be equally divided between his widow and daughter, giving the whole to the widow should the daughter die with-

out issue, it was held to be evidently the general intent of the testator to give an immediate interest in his property to his wife and daughter.

In *Felton v. Sawyer*, 41 N. H. 202, testator gave all his estate, after paying debts and funeral expenses, in trust for his daughter, to be managed and disposed of and paid over to her as follows: To be invested as the trustee should deem most for the daughter's interest, and to pay over for or to her, from time to time, until twenty-one years of age, such sums of money, not exceeding 6 per cent, as he should think fit, provided not over one third, with its income and increase, should be paid over before she was twenty-five years old, nor more than two thirds when she should attain the age of thirty years; but the whole was to be paid by the time she was thirty-five years old. It was held that as the whole property was given to the daughter, though with the intervention of a trustee, and as the terms which looked to the future applied to the time and mode of payment, and not to the gift itself, and as there was nothing in the will to indicate an intention to postpone the vesting of the legacy, but, on the other hand, the daughter's intermediate support was provided for, she took a vested interest which upon her death passed to her representatives.

In *Kimble v. White*, 50 N. J. Eq. 28, 24 Atl. 400, where testatrix gave to a certain person the residue of her estate, adding, "a sufficient amount to be used to educate him before he comes to the age of twenty-one years, if he does not live to heir it, then to go" to another, it was held that the addition of the clause quoted was not sufficient to render contingent a gift which otherwise is clearly vested.

In *Haggerty v. Hockenberry*, 52 N. J. Eq. 354, 30 Atl. 88, where testator bequeathed his residuary estate to the children of a son in equal shares, and directed that the same should be held in trust and invested by his executors, and that as such children should arrive at the age of twenty-one they should be paid their respective shares, with accrued interest, it was held that the gift was immediate in right, enjoyment only being postponed.

In *Colby v. Doty*, 158 N. Y. 323, 53 N. E. 35, where testator gave to his daughter all his residuary estate, "the same to be held and managed by . . . a trustee for that purpose until the said Electa shall arrive at the age of twenty-one years, then the same to be made over to her by my said executor, if she shall be then living," further providing for the event of the death of the daughter without lawful issue her surviving, it was held that by giving force and effect to all the language implied, and keeping in mind the fact that the testator was dealing with his only child, a daughter nine years of age, it was apparent that the daughter took a vested interest, subject to be divested by her death before attaining her majority without lawful issue of her body surviving.

In *Doubleday v. Newton*, 27 Barb. 431, where testator gave his residuary estate to the children of his daughters, "to be equally divided between them as they respectively arrive at the age of twenty-one years," and further gave to his executors the possession, management, and control of the property so bequeathed and devised to such children during the minority of said children, authorizing them from time to time to make such advances of money or property to his said daughters or either of them for their comfortable support and for the education of their said children as their circumstances might from time to time require, it was held that the language of the gift to the daughters' children imported a present bequest.

In *Van Camp v. Fowler*, 59 Hun, 311, 13 N. Y. Supp. 1, where testator gave his residuary estate to his executor in trust for and during the lifetime of his wife, to pay to her the net income for the support and maintenance of herself and his son, and further provided: "And from and immediately after the decease of my said wife, unless such decease shall occur before my said son arrives at the full age of twenty-one years, and in such case when he, my said son, shall arrive at such age of majority, I give, bequeath, and devise all that shall then remain of said trust estates, and the use and profits thereof, unto my said son,"—it was held that as the gift to the son was direct, the use of the expression "when he, my said son, shall arrive at such age of majority," did not prevent the vesting.

In *Bascom v. Weed*, 53 Misc. 496, 105 N. Y. Supp. 459, where a testator, after giving his residuary estate in trust, directed that the net income of a fourth part thereof should be paid to a son for life, and that upon the death of said son the said one fourth part should be paid over to the lawful children of the body of said son then surviving and the issue of any deceased child, went on to provide: "Should any of said beneficiaries be infants at the time, then their portion shall be paid to them as and when they shall severally reach the age of twenty-one years, the income meantime to go to their support severally,"—it was held that the latter clause did not prevent the children's interests from vesting during minority.

In *Re Lincoln Trust Co.* 78 Misc. 325, 139 N. Y. Supp. 682, where testator ordered his executors to retain and hold in their hands a seventh part of his residuary estate, and pay the income thereof to a son for life, and upon his decease, if the son should leave lawful issue him surviving, to pay the whole of the principle thereof to such lawful issue, share and share alike, as they should arrive at the age of twenty-one years, it was held that the language of the testator, and his failure to make an alternative provision for the distribution of the property in the event of such issue not reaching the age of twenty-one, indicated that he intended that the property held in trust during the life of his son should vest immediately

upon his death in his lawful issue then surviving, but that the payment of the money or the actual transfer of the possession of the property should be deferred until such issue arrived at the age of twenty-one.

In *Wiley v. Bricker*, 21 Ohio C. C. 109, 11 Ohio C. D. 429, where testatrix gave to the children of her brother a share of her residuary estate, adding: "Said bequest to the children of my brother . . . to be shared by them equally and to be paid to them respectively as they arrive at the age of majority, the shares of said children to be kept at interest by my executor until so paid,"—it was held that the gift was a present one in which the children living at the death of the testatrix took vested interests, subject to open and let in afterborn children.

In *Corbin v. Wilson*, 2 Ashm. (Pa.) 178, testator expressed the "wish and desire that all my grandchildren should have the whole of my estate, not otherwise disposed of by this will, equally between them; that, on my eldest grandchild arriving at the age of twenty-one," such grandchild should receive his or her proportion according to the valuation of the estate and the number of grandchildren then living, and so on in succession until final division should be made to the last grandchild, at which time such an arrangement was to be made, if practical, as would place all the grandchildren on an equal footing. He further provided for the event of their being no grandchild or grandchildren to "inherit" his property. It was held that as the perusal of the will showed that the great and leading objects of his bounty were his grandchildren, and as no provision was made in the case of the death of a grandchild leaving issue, before distribution, although it was obvious that testator contemplated his estate going to his contingent legatees only in the event of there being no lineal descendants of his own blood to "inherit it," the legacies must be considered as vested in present interest, though postponed as to enjoyment.

In *Lightner v. Lightner*, 127 Pa. 468, 17 Atl. 986, where testator divided all the residue of his estate equally between his two sons, desiring that one of them receive \$1,000 as soon as he should arrive at the age of twenty-one years, and that the remainder of his share be invested in a farm of which he was to have full control and management, with remainder to his issue, and a limitation over in default of issue, it was held that the gift itself was of a present and absolute interest for life in the fund, though postponed as to full enjoyment till majority.

In *Middleton's Estate*, 212 Pa. 119, 61 Atl. 808, where testator gave his residuary estate in trust to pay the net income to his wife until his grandson should attain the age of twenty-five years, and when he should attain such age, or at his death, whichever event should first occur, then in trust to carry out certain dispositions of the principal, "and in trust, upon the attaining

of the age of twenty-five years by my said grandson, to assign, transfer, and convey the remainder of my said residuary estate absolutely and in fee simple to my said grandson," it was held that as the direction to pay was only the sequence of an antecedent gift, the designation of time did not enter into the substance of the gift, its effect being merely to postpone its payment.

In *Smith's Estate*, 7 Pa. Dist. R. 236, affirmed in 189 Pa. 587, testator bequeathed the entire income of his estate to his step-daughter and her son, one half to the step-daughter for life, and the other half to her son until he should arrive at the age of thirty-five years, when he was to receive the principal or one half of the estate, and should his mother die prior to his reaching the said age he was to receive the whole income until that period, "and then take all or the whole of my estate." Testator also directed that should the said son die leaving issue, the property should go "to his heirs, if any, in form devised to him; that is, the interest of one half during his mother's lifetime, and the principal at the period he would have arrived at the age of thirty-five years, say, on December 9, 1906, or the whole interest if his mother dies before that period, and principal likewise at her death, if after 1906." It was held that the gift to the "heirs" of the son was a present gift, with no element of contingency, and, further, that the intermediate gift of income would do away with the words of seeming contingency if they existed.

In *Irvine's Estate*, 31 Pa. Super. Ct. 614, where testator gave his residuary estate to his grandchildren born and to be born, "to be paid to each as he or she respectively becomes twenty-one years of age, reserving sufficient invested in the lands or under the control of my executors to provide for the payments of any other grandchild that may subsequently be born, and the realty which passes by this residuary devise to come fully into the possession of the said residuary devisees when the youngest shall reach the age of twenty-one years," it was held that the legacies to the grandchildren vested on the death of the testator, opening on the birth of each succeeding grandchild to admit those later born.

In *Taveau v. Ball*, 1 M'Cord, Eq. 7, where testator gave and devised his plantations and all the negroes, stock, plantation tools, and implements belonging to the same, to and amongst all his sons to be equally divided amongst them, their heirs, executors, administrators, and assigns forever, adding: "And it is my will that the divisions of the said plantations, slaves, stock, and other articles shall not take place until the youngest of my said sons shall attain the age of twenty-one years,"—it was held that the time of the division was not all connected with the substance of the gift, and that the children therefore took an immediate vested interest.

In *Chestnut v. Strong*, 1 Hill, Eq. 122, where testator directed the remainder of his estate to be equally distributed between L.R.A.1915C.

certain persons, adding: "And I allow my under-named executors to retain the aforesaid children's parts that I have herein bequeathed to them in their hands until the children arrive at the years of maturity,"—it was held that the bequest gave a present vested legacy, the direction that it be retained by the executors till the legatees should attain the age of twenty-one only fixing the time of payment.

In *Wells v. Houston*, 23 Tex. Civ. App. 629, 57 S. W. 584, where testator devised a fourth of his property to his wife, and the balance to his children, share and share alike, expressing a desire that there should be no partition of his estate until all his children should have married or reached their majority, and that the whole of the estate should be held intact and undivided until that time, that it should be managed and controlled by his executor, and that the revenue arising therefrom in excess of what was necessary for the proper maintenance, support, and education of the children should be judicially invested by the executor, it was held that the title of the entire estate vested, upon the death of the testator, in the devisees.

See also in this connection *Dodson v. Hay*, 3 Bro. Ch. 404 (set out in VIII. a, *infra*); *Simmonds v. Cock*, 29 Beav. 455, 7 Jur. N. S. 718, 9 Week. Rep. 517 (set out in VIII. d, *infra*); *McLemore v. McLemore*, 8 Ala. 687 (set out in VIII. j, *infra*); *Ordway v. Dow*, 55 N. H. 11 (set out in VIII. f, *infra*); *Hoxie v. Hoxie*, 7 Paige, 187 (set out in VIII. i, *infra*); *Torrey v. Shaw*, 3 Edw. Ch. 356 (set out in VIII. g, *infra*); *Clark v. Peters*, 68 Misc. 252, 124 N. Y. Supp. 961 (set out in VIII. g, *infra*).

Gifts of personalty only.

In *Acherley v. Wheeler*, 1 P. Wms. 783, 9 Mod. 68, 10 Mod. 518, *Fortescue*, 183, *Comyns*, Rep. 381, 513, a legacy to a niece "payable to her at her age of twenty-one or marriage, which should first happen," was held vested presently.

In *Harvey v. Harvey*, 2 P. Wms. 21, legacies to children payable at their respective ages of twenty-one were held vested.

In *Nicholls v. Osborn*, 2 P. Wms. 149, a legacy of residue to a niece to be paid to her at her age of twenty-one years, with a gift over should she die before twenty-one or marriage, was treated as immediately vested, subject to be divested upon the legatee's failure to attain twenty-one.

In *Skey v. Barnes*, 3 Merin, 335, where testator gave his personal estate in trust to pay the interest to a daughter for life, and after her decease "to pay and divide the whole of the said trust moneys to and amongst all and every the child or children of the body of my said daughter lawfully to be begotten and the lawful issue of a deceased child," in such proportions as the daughter should by will appoint, and in default of appointment to the children share and share alike, "the portion or portions, parts or shares of such of them as shall be

a son or sons to be paid at his or their respective ages of twenty-one, and the portion or portions of such of them as shall be a daughter or daughters to be paid at her or their respective ages of twenty-one or days of marriage first happening; but in case there shall be no such issue of the body of my said daughter, or all such issue shall die without issue, before his or their respective portions should become payable as aforesaid," then over,—it was held that the mere circumstance of all the shares being given over on a contingency did not prevent them from vesting in the meantime, the words of bequest being in other respects sufficient to pass a present interest, and that the shares of the residue were so given as to vest immediately in the children of the daughter, though liable to be devested by their all dying without issue under twenty-one.

In *Crickett v. Dolby*, 3 Ves. Jr. 10, a bequest to two nieces of a sum of money "to be paid to them respectively at their respective ages of one and twenty years, or day or days of marriage, which shall first happen," was held vested.

In *Wadley v. North*, 3 Ves. Jr. 364, testator gave all his estate in trust, first to pay the income therefrom to his mother and sister and the survivor for and during the term of their natural lives, and from and after the death of the survivor of them in trust to pay and apply the same to and for the use and benefit of all the children of his aforesaid sister "which shall or may be living at the time of her death, share and share alike, each receiving his or her respective share of the principal thereof upon his or her attaining the age of twenty-one years, and if but one child should be so surviving, then in trust to pay and apply the whole to such surviving child upon his or her attaining the age of twenty-one years as aforesaid." It was held that if the testator had stopped at the words "each receiving his or her respective share of the principal thereof upon his or her attaining the age of twenty-one years," there could be no doubt that it would be a vested interest, the principal being given, but payment postponed; and that as the words "so surviving" in the following clause referred to the child's survivorship of its mother, and not the age of twenty-one, they did not render the gift contingent. The court was also influenced by a consideration that the contrary construction would create an intestacy should all the children die before the age of twenty-one; and by the consideration that the time pointed out was that at which the law would put the legatees in possession.

In *Blease v. Burgh*, 2 Beav. 221, where a testatrix gave the residue of her estate to trustees in trust for all and every the child and children of her son, "and to be paid, assigned or transferred to him, her, or them, being a son or sons, on attaining the age of twenty-three years; and being a daughter or daughters, at the like age of twenty-three years or day or days of marriage, which should first happen;" and in case of the death of any of them before the happening

of such events, to the survivor; and in case all should die before the happening of such events, then in trust to pay, assign, or transfer the trust fund, and all accumulations thereof, to others,—it was held that as the words in which this trust was declared, taken by themselves, import a present gift with a direction to pay at a future time, the children of testatrix's son took an immediate vested interest at the time of the death of the testatrix, which was not made contingent by the direction to accumulate until the time of payment should arrive; and that the gift over, which was too remote, and void, could not defeat the vested interests previously given.

In *Brocklebank v. Johnson*, 20 Beav. 205, testator devised his real and personal estate to trustees to convert and invest and pay the income to his daughter for life, and after her decease to divide the fund among "all and every child or children of my said daughter as shall be then living if more than one, or if there shall be only one such child then unto such child only, provided all such children may then have attained the age of twenty-one years." Should they not then have attained such age, he directed the fund to be placed out at interest, and the interest to be applied for the maintenance and bringing up of all such children until the youngest should attain twenty-one, when the fund was to be divided amongst such children as should be then living and the issue of such of them as should be dead, the issue to take their parent's share. Sir John Romilly, M. R., remarking that the will was very obscurely worded and difficult to reconcile, held that the first part of the clause gave a clear vested interest to the children who survived their mother, the words "provided all such children may then have attained the age of twenty-one years" being regarded as not delaying the vesting, but as merely expressive of the testator's desire that the legacies should not be paid until the youngest child should attain twenty-one; and that this part of the clause, being less equivocal, must prevail over the latter part containing the direction, "and when and so soon as the youngest of such child or children shall have attained the age of twenty-one years, then upon trust to pay and divide amongst all and every such child or children," etc.

In *Thruston v. Anstey*, 27 Beav. 335, where a testator gave a pecuniary legacy for the benefit of his nieces, to be retained and invested by his executors, "to the intent that the same respectively, as to the interest thereof, may be secured for their respective sole and separate use during their respective lives; and as to the principal thereof, that they shall respectively have power by will or codicil to dispose thereof to their respective children. And, if no will or codicil, then that the said legacies shall go to their respective child or children, equally if more than one, at twenty-one years of age;" further providing that in failure of children of either of the nieces the survivor should have the benefit of the whole of the said "lega-

cies," and that the "principal of the same" should go to the child or children of the survivor of them if any at his, her, or their age aforesaid; and if both nieces should die without leaving a child or children who should attain that age, that the principal of the said two legacies should go to the personal representative of the survivor,—it was held that the interests taken by their children were not contingent on attaining the age of twenty-one.

In *Cooper v. Cooper*, 29 Beav. 229, where testator bequeathed his personal estate in trust to apply it for and toward the maintenance, education, apprenticing, bringing up, and support of his children until the youngest of them should have attained the age of twenty-one years, then upon trust to pay, share, and divide or transfer and assign the then residue of his personal estate unto and between his said children in the manner and proportions following, that is to say, unto his son William, one fifth part thereof, etc., it was held that although the children constituted a class to whose maintenance the income of the fund was devoted before the division, yet as the gift was not to a class to be ascertained when the youngest of the children had attained twenty-one, the shares were vested immediately.

In *Shrimpton v. Shrimpton*, 31 Beav. 425, where testator devised a house upon trust for a daughter for life, and immediately after her death upon trust to sell and "to pay and divide the produce thereof between and amongst all and every the child or children of" his said daughter, which he directed to be paid "as and when such child or children should respectively attain the age of twenty-one years, and that in the meantime the interest and dividends of the share of such of them as should not have attained the age of twenty-one years should be paid and applied for and towards the maintenance, education, and support of such child or children until they respectively attain the age of twenty-one years," with a gift over in case his daughter should die without leaving any child, it was held that as there was a clear distinction between the gift and the time of payment, and, in addition, a direction that the whole interest and dividends should be applied in and towards the maintenance, education, and support of the daughter's children during minority, they took vested interests.

In *Breedon v. Tugman*, 3 Myl. & K. 289, 3 L. J. Ch. N. S. 169, where testator bequeathed a third of his personal property to his daughter, adding: "And in case of my decease to have the interest therein and principal when she arrives at the age of twenty-five years," it was held that this was plainly an absolute gift to the daughter, and that payment only was postponed; that the testator meant not to qualify or restrict the nature of the previous gift, but to distinguish between the time when she was to receive the interest and the time when she was to receive the principal; and that upon both grounds, therefore, the daughter

must be held to have taken an immediate vested interest.

In *Re Bartholomew*, 1 Macn. & G. 354, testator bequeathed a sum of money to trustees in trust for a daughter for life, and after her decease upon trust to pay the same or assign the security or securities whereon it might then be placed or invested, unto or amongst all and every the child and children of said daughter, "as and when they shall severally attain the respective ages of twenty-one years, in equal shares and proportions, share and share alike, to whom I give and bequeath the same accordingly, with benefit of survivorship to and amongst such child or children, in case of the death of any one or more of them before such share or shares of and in the said £2,000 shall become payable; . . . and upon further trust that they, my said trustees, shall in the meantime, after the death of my said daughter Mary Ann, pay and apply the interests and dividends of the said £2,000 for and towards the maintenance, clothing, and education of such child or children of my said daughter Mary Ann, until their respective shares thereof shall become payable, in proportion to their respective shares therein as they, my said trustees, shall in their discretion think fit." It was held that as the words "to whom I give and bequeath the same accordingly" amounted to a direct gift to "all and every the child and children of my said daughter," as there was a clause of survivorship which would have been wholly useless if the gift had been to such children only as should attain twenty-one, and as the whole of the interest and dividends of the £2,000 was given for the maintenance, clothing, and education of the children, the mode of application only being left to the discretion of the trustees, the children took vested interests.

In *Josselyn v. Josselyn*, 9 Sim. 63, testator gave the residue of his personal estate to one John Josselyn, adding: "And I order and direct my executors, or the survivor of them, etc., to place the same out on government or good real security, and the interest arising therefrom, as the same shall become due, to place out on the like securities, so as to accumulate, and the principal to be paid to the said John Josselyn at his attainment of the age of twenty-four years, and to pay and allow thereout the sum of £60 per annum for the board and education of the said J. Josselyn, until his attainment of the age of twenty-four years: . . . but in case the said John Josselyn shall happen to die under the age of twenty-one years and without leaving issue of his body lawfully begotten then living, and which shall be living until his, her, or their age or ages of twenty-one years, then" the residue was given to others. It was held that there was an actual gift to the legatee, and that the words which followed were merely directory as to the future management of what was before given.

In *Bull v. Johns*, Tamlyn, 513, it was held that under a bequest of residue to trustees in trust for the children of certain per-

sons, "to be equally divided between them for their separate use; the dividends to be laid out by the said trustees as shall be most advantageous for them, not one farthing of which is to go for their board or education, but to accumulate for them until they come to the age of twenty-one years,"—the children born at the death of the testatrix took vested interests.

In *Williams v. Clark*, 4 De G. & S. 472, where testator bequeathed to a daughter the sum of £4,000, directing that £2,000 should be paid to her within twelve months after his decease, and that his executor should within the same period lay out and invest the balance upon trust to pay and apply the interest to the daughter for life, and from and after her decease to any surviving husband for life, and after the decease of said daughter and her husband, "to pay and divide the said principal sum of £2,000, and the interest, dividends, and annual produce thereof, to and among all and every the children of my said daughter Ann, if more than one equally to be divided between and among them, share and share alike, as and when they shall attain their several and respective ages of twenty-one years, and if but one, then the whole thereof to such one child, his or her executors, administrators, and assigns; and in case my said daughter shall depart this life without leaving any child or children, then to pay the whole of the said principal sum of £2,000 to the executors, administrators or assigns of my said daughter,"—it was held that there was a gift to the daughter's children independently of the direction to pay, and accordingly that they took vested interests, the ground for the decision being that the other construction would render superfluous the words "if more than one equally to be divided between and among them."

In *Dundas v. Wolfe Murray*, 1 Hen. & M. 425, 1 New Reports, 429, 32 L. J. Ch. N. S. 151, 11 Week. Rep. 359, where testatrix, having a power of appointment over a certain fund, directed the trustees thereof to raise thereout the sum of £5,000 and to pay the same equally between the five children of her sister, naming them, the shares of such of them as were sons to be paid to them on their respectively attaining the age of twenty-one years, and the shares of such of them as were daughters to be paid to them on their respectively attaining that age or being married, which should first happen, with benefit of survivorship between such five children in case of the death of any one or more of them, being a son or sons, under the age of twenty-one years, or being a daughter or daughters, under that age without having been married; then going on to deal with what remained of the fund,—it was held that the whole sum of the legacies to the sister's children being taken out of the fund in mass, and the direction as to the time of payment being in a subsequent branch of the sentence, the legatees took a vested interest.

In *Westwood v. Southey*, 2 Sim. N. S. 192, where testator bequeathed to a son the L.R.A.1915C.

income from a certain investment for life, and from and immediately after his decease gave and bequeathed the principal sum unto all and every the children of said son, to be equally divided between them, share and share alike if more than one, but if there should be but one such child, then the whole to such only child, "the same to be paid or transferred to him, her, or them on their severally and respectively attaining the age of twenty-one years, the interest and produce thereof to be in the meantime applied for and towards their maintenance and education,"—it was held, that a son's child took a vested interest at his birth.

In *Storrs v. Benbow*, 2 Myl. & K. 46, where testator directed his executors to pay out of his personal estate "the sum of £500 apiece to each child that may be born to either of the children of either of my brothers lawfully begotten, to be paid to each of them on his or her attaining the age of twenty-one years, without benefit of survivorship," it was held that the gift was immediate at the death of the testator.

In *Lister v. Bradley*, 1 Hare, 10, where testator gave to each of his children "£1,000 currency each, to be paid them respectively when or if they attain twenty-one years; in the interim or during their respective lives the last-mentioned four legacies to be put to interest on separate deeds, which I wish should specify the name of the respective legatee, and to be of undeniable security; also that the interest thereof be made payable half-yearly to the said Eleanor Plunkett, their mother, for their support and education,"—it was held that as the gift and the direction to pay were separate from each other, as the whole interest was given for the benefit of each legatee, and as the testator had directed the four legacies to be immediately severed from his general estate and put to interest on separate deeds, which were to specify the names of the respective legatees, the words "when or if they attain twenty-one years" must be construed as having been used for the convenience only of the legatees themselves, and not for the purpose of making their interests contingent upon their attaining such age.

In *Chaffers v. Abell*, 3 Jur. 577, where testator bequeathed certain sums of stock to trustees to pay an annuity to his daughter for life, and from and after her decease to pay, assign, and transfer a certain part of the trust fund equally amongst all and every the child and children of his daughter, share and share alike, "to be paid and transferred to them when and so soon as the youngest of such children should attain his or her age of twenty-one years," and upon trust that the yearly income of said sum should, after the decease of his said daughter, at the discretion of his said executors and trustees, be applied and disposed of for and towards the better maintenance, education, and bringing up of all and every her child and children,—it was held that there being a clear gift to all the children in the shape of a direction to pay and transfer, distinct from the direction to pay and transfer when

and so soon as the youngest of them should attain the age of twenty-one, the daughter's children took vested interests.

In *Festing v. Allen*, 5 Hare, 573, testator gave his residuary personal estate to trustees upon trust out of the income to pay certain annuities, including one of £40 to a granddaughter for life; and from and after the decease or second marriage of his wife, and the decease of the said granddaughter, directed that his trustees should, by and out of the said trust moneys and the interest and annual produce thereof, advance and pay the value or amount of the said annuity of £40 unto all and every the child and children of his said granddaughter, if more than one to be equally divided amongst them, share and share alike, when and as they should respectively attain the ages of twenty-one years, and if there should be but one, then the whole to such child. There was a gift over in case of the death of the granddaughter without issue who should attain the age of twenty-one years. The Vice Chancellor held that the words "to be divided" should be read as equivalent to the words "to be paid," so as to make the gift to the children immediate, with a postponement only of the time of payment, treating the words "from and after" as evidence of such an intention.

In *Re Lyman*, 2 L. T. N. S. 662, where a testator gave a certain sum to trustees upon trust to place out at interest until his youngest child should attain the age of twenty-one years, with trusts for maintenance, etc., of his children generally, "and when and so soon as his said youngest child [name] should attain the age of twenty-one years, upon trust that they, his said trustees, their executors or administrators, should call in the said principal sum of £550 and pay, apply, and divide the same to the persons and in the proportions following;" then proceeding to distribute such sum in various amounts to and among his wife and children, concluding: "To whom I give and bequeath the same respectively accordingly,"—the court, acceding to the contention of counsel that as the legacy had been set apart from the corpus of the estate, and as, after declaring the proportions to be paid at the period of division, the testator had said, "to whom I give and bequeath the same respectively accordingly," so that there was a gift independent of the direction to divide, held that a son took a vested interest in his share, although he did not live to attain his age of twenty-one years.

In *Maier v. Maier*, Ir. L. R. 1 Eq. 22, where testator bequeathed to each of his children who should be living at his death a sum of money "to be paid to each of them as they respectively attain the age of twenty-one years or marriage, which shall first happen, provided such marriage shall in each case be with the consent in writing of my executors," it was held that as the words of gift were not annexed to, but were independent of, the time of payment, the legacies were vested.

In *Brennan v. Brennan* [1894] 1 I. R. 69, L.R.A.1915C.

where testator directed that a sum of \$500 should be invested as his executors should think fit, "for the benefit of my younger children in equal shares," to be paid to each "on attaining twenty-four years if a boy, or if a girl on marriage with consent," and subsequently directed his executors to invest for the maintenance and education of his children during their minorities, or if girls until their marriage, all the moneys to which they might respectively be entitled under his will it was held that, as the fund was to be severed from the estate immediately, and as the intermediate income was given for maintenance and education, the children took a vested interest; and that, apart from that, there was a complete gift to them apart from the direction for payment, the words "shall be invested for the benefit of my younger children" being equivalent to an immediate gift to each.

In *Re Lambert* [1910] 1 I. R. 280, 44 Ir. Law Times, 199, a father by his will gave his residuary estate in trust to pay the interest and dividends thereof to his son for life, and thereafter apply the principal to his children or any one or more of them in such manner as the son might appoint, or, in default of appointment, to and among them equally. The son by his will appointed that a sum of £5,000 should be paid to each of his younger sons and daughters on their attaining twenty-one, and the remainder to his eldest son. It was held that the will of the father and the appointment, which constituted one disposition, must be read together, and accordingly that there was a gift to the children, apart from the direction to pay at the age of twenty-one, contained in their father's will, and therefore that their interests were not contingent upon attaining twenty-one.

In *Re Baillie*, 3 B. C. 350, where testator bequeathed to such of his wife's children as should be alive at the time of his death his money on deposit, "said money to be divided between each of said children, share and share alike, when they shall attain the age of twenty-one years. Until such time the said money and interest as aforesaid is to remain untouched except as hereinafter provided,"—it was held that the legacy vested on the death of the testator, payment only being deferred until they were twenty-one.

In *Re Livingston*, 14 Ont. L. Rep. 161, where testator, who had bequeathed to his children certain property and insurance money, went on to provide that in no case should any of them receive any of the property or moneys given to them before attaining the age of thirty years; that the interest on each child's share should, if such child be of the age of twenty-one years, be paid to such child, and if any of his children should at the time of his death be under the age of twenty-one years, his executors might expend such portion of the interest from such child's share for his or her benefit as they should think proper until he or she attained the age of twenty-one years, when the interest should thereafter be paid to such child;

that all moneys invested in a business in which testator was a partner should remain in the business as long as the copartner should desire, and the annual profits therefrom be added in specified proportions to the shares of his daughters and sons, and upon the dissolution of the partnership the amount so added should be paid to those entitled in the same manner and upon the same terms and conditions as above set forth,—it was held that the use of the words "property or moneys given to them in this my will," in the clause deferring payment over, the provision for the payment of interest to the beneficiaries on each share until paid over, the absence of any provision disposing of the share of any child dying before attaining the age of thirty years, and a provision giving the sons the first right to purchase the daughters' interest in the partnership business, therein recognizing the right of the daughters to sell and the transmissibility of their shares, showed that the gifts to the children were not contingent, but vested at testator's death, the enjoyment of the possession of the corpus only being deferred until they should respectively attain the age of thirty years.

In *Re Sproule*, 17 Ont. Rep. 334, where testator bequeathed pecuniary legacies to certain of his children, "to be paid to them when they come of age," and directed his executor to "invest the moneys devised to my children in good legal securities until they arrive at age, and the interest obtained from such investments to be paid to my wife to assist her in supporting and educating my family," it was held, in view of the form of the gift and the direction for the disposition of the intermediate income, that the legacies to the children were immediately vested.

In *Goff v. Strohm*, 28 Ont. Rep. 553, a bequest to a girl of a sum of money "and interest to be paid on her twenty-fourth birthday, said amount to be placed in" a certain bank, was held to be vested.

In *Lenox v. Lenox*, Hayw. & H. 11, Fed. Cas. No. 8,246a, a will by which a testator expressed the desire that his sons should receive a good education, and that the expense thereof, together with their maintenance, should be chargeable to the estate until they should respectively arrive at the age of twenty-one and be entitled to their separate proportions thereof; and that during the period between their arriving at the age of twenty-one respectively and the division and distribution of the estate they should be allowed therefrom a sum sufficient for their prudent support, to be afterwards deducted from their separate portions; and further gave and bequeathed all his stocks to his aforesaid children, share and share alike, but directed that no distribution should be made until the youngest should be of age,—was held to evince a clear intention to vest the shares of the sons at testator's death, though they were payable at a future date.

In *Cox v. McKinney*, 32 Ala. 461, it was held that legacies given to testator's chil-

dren in a will by which he gave to his wife and children "all my personal estate, to be equally divided between them share and share alike, to them, their heirs and assigns forever; and my will is that each child shall draw their shares as they come of lawful age or marry,"—were clearly vested.

In *Blackburn v. Hawkins*, 6 Ark. 50, where testator gave and bequeathed to his son two thirds of his estate, adding, "and it is my will that my said estate remain in the hands of my executors hereafter appointed until my said son arrives at the age of twenty-one years," at which time the two thirds was to be ascertained and delivered to the son, it was held that the direction that the legacy should be paid on the son's arrival at the age of twenty-one related only to the payment, and not to the time of vesting.

In *Campbell v. Campbell*, 13 Ark. 513, testator bequeathed all his property to brothers and sisters, to be equally divided among them "after deducting therefrom \$5,000, which I bequeath to Viney" (who was his daughter by one of his slaves), adding: "I wish my sister Mary to take charge of the above-named Viney, and take care of her until she arrives to the age of fifteen years, when she is to be free and receive her legacy. . . . Should the girl Viney die before she arrives to the age of fifteen years it is my wish that the legacy go to my sister Mary." It was held, as the bequest to Viney was by present words of gift, her legacy must be regarded as a present one, with a present gift of freedom.

In *Loftis v. Glass*, 15 Ark. 680, where testator directed his executor to convert his property into money and to place it at interest until his lawful heirs should become of age, among whom at that time it should be equally divided, their interests were held to vest immediately.

In *Dale v. White*, 33 Conn. 294, testator bequeathed shares of stock to the present and future children of his daughters, "to be equally divided between all my grandchildren when youngest shall become of age; the interest or dividends thereon before that time to be drawn by their parents, and equally divided among the whole of said grandchildren according to their number at the time of drawing, and applied for the use of said grandchildren by and at the discretion of their parents." The case was held to be one of absolute gift, followed by a direction postponing the right to possession.

In *Harrison v. Moore*, 64 Conn. 344, 30 Atl. 55, it was held that the language of the will by which testator bequeathed to a daughter a third of his residuary estate, "the same to be loaned on real estate security, free and unencumbered, worth double the amount loaned," or invested in bank stock or certain bonds, "so to remain until she is twenty-three years old, when she shall come in full possession of the same; but the income as far as necessary may be used for education and support,"—made it certain that testator's intention was to give such daughter a third of his residuary estate ab-

solutely, to vest in right at his death, the possession and enjoyment being postponed until she should reach the age of twenty-three years.

In *State v. Main*, 87 Conn. 175, 87 Atl. 38, where testator gave to his grandson a sum of money, "to be paid to him on his arriving at the age of twenty-one years," it was held that as the bequest was couched in the language of an absolute present gift, the qualifying language immediately following was to be considered as merely postponing the time when the right to possession should attach, notwithstanding the testator went on to provide that in case of the grandson's death before that time such sum should be divided equally among testator's children living at that time, as such provision embodied a condition subsequent, and not precedent.

In *Equitable Guarantee & Trust Co. v. Bowe*, 9 Del. Ch. 336, 82 Atl. 693, where testator, after expressing a purpose "to provide for some of my sons who have a greater number of children than the others," gave and bequeathed \$10,000 for each of the children of such sons in trust "to pay over the net income for the maintenance and education of said grandchildren until they arrive at the age of thirty years, and as they respectively arrive at the age of thirty years to pay over to them the share of the principal sum to which they are entitled,"—the case was held to be one of a present gift in trust, with a postponement of payment until the beneficiaries should attain the age of thirty years, and with a gift of the whole income in the meantime for the maintenance and education of the beneficiaries.

In *Hall v. David*, 67 Ga. 72, it was held that a bequest to a daughter of certain negroes and personalty, "to be delivered to her by my executors when she become twenty-one years of age or marries," clearly manifested an intention that the title should pass at the time of testator's death, the delivery only being postponed.

In *Kelly v. Gonce*, 49 Ill. App. 82, it was held that a bequest to "each of said children of my wife Mary an equal share of all the net proceeds of my real estate" was not made contingent upon such children's arrival at legal age by the following clause: "I direct that after the death of my wife my real estate be sold and distribution be made among her said children as they cease to be minors," there being nothing in the language of the bequest to indicate that testator intended to affect the gift otherwise than to fix a time for the payment, so that the donee should not enter into possession and control at an immature age.

In *Wallingford v. De Bell*, 15 B. Mon. 551, where a testator, who by his will had directed his estate to be sold and divided among his living children, directed by a codicil that whatever might fall to the lot of one of such children "is not to be given up to him, but is to be held and kept by my executors, and equally divided between his children, and paid over when they severally arrive at lawful age to receive it," it L.R.A.1915C.

was held that the qualification of arriving at age not being annexed to the gift, but to its payment, the legacy was vested, even though the result was to give the father, whom testator apparently meant to pass by, the share of one of the children who died in infancy.

In *Hall v. Ayer*, 32 Ky. L. Rep. 288, 105 S. W. 911, where testator bequeathed to a granddaughter a sum of money, "to be paid to her when she arrives at the age of twenty-one years, or, in the event she should marry before she is twenty-one years of age. And my executors hereafter named are hereby constituted trustees to hold and control said legacy until my said granddaughter is twenty-one years of age or married,"—it was held that the language employed clearly showed that the qualification as to the granddaughter's arriving at age or marrying was annexed not to the gift itself, but merely to the time of payment, and accordingly that the legacy vested immediately.

In *Verrill v. Weymouth*, 68 Me. 318, testatrix bequeathed the residue of her personal property, including bank shares, to her son, further appointing a guardian for him during his minority, and directing that such guardian should hold in trust certain bank shares until the son should arrive at the age of twenty-five years, when he should come into full possession. She thereafter executed a codicil reciting that she had given by her will to her son certain bank shares in trust to be delivered to him when he should attain the age of twenty-five years, and directed that, for good and sufficient reasons, such stock should be held in trust until he should attain the age of thirty-five years. It was held, in view of the facts that it appeared to be the intention of the testatrix to dispose of all her estate, that her son was the special object of her bounty, that the direction that the bank stock should be held in trust followed the words of gift, that it was given over only upon the contingency of his dying without issue, and that in the codicil she declared that she had given the stock to her son to be delivered to him on his attaining the age named,—that the time was not annexed to the legacy, but to its possession only.

In *Von der Horst v. Von der Horst*, 88 Md. 127, 41 Atl. 124, legacies given by a testator to each of his grandchildren by name, "to be paid to them as they respectively arrive at the age of majority, but should, however, either one or more of said children die before arriving at the age of majority, then the share to which such child would have been entitled to if living shall go into the residue of my estate,"—were held vested but defeasible upon their dying before majority.

In *Keerl v. Fulton*, 1 Md. Ch. 532, where testator devised property in trust for a daughter during her life, and after her death in trust for any child or children she might have, with the further direction and declaration that the trustees should, after the death of his said daughter, convey and assign to her children, if she should have or leave any

at the time of her death, in equal proportions, absolutely, the trust fund, "provided, always, that no such conveyance or assignment should be made until the child or children to whom the same was to be made shall have severally attained the age of twenty-one years,"—it was held that the time was annexed only to the conveyance and transfer, and not to the gift of the legacy, so that the daughter's children took vested interests.

In *Clafin v. Clafin*, 149 Mass. 19, 3 L.R.A. 370, 14 Am. St. Rep. 393, 20 N. E. 454, where testator gave the residue of his personal estate in trust to sell and dispose of the same and to pay one third part thereof to a son "in the manner following; namely, \$10,000 when he is of the age of twenty-one years; \$10,000 when he is of the age of twenty-five years; and the balance when he is of the age of thirty years,"—it was held that there was no doubt that the son's interest in the trust fund was vested absolutely.

In *Wardwell v. Hale*, 161 Mass. 396, 42 Am. St. Rep. 413, 37 N. E. 196, where testator gave to his son the sum of \$10,000, "to be paid to him at my decease if he shall then have arrived at the age of twenty-one years; if he shall not then be twenty-one years old the same to be paid to him when he shall attain that age. I also give to him the sum of \$20,000, to be paid to him when he shall attain the age of twenty-five years, together with the further sum of \$20,000, to be paid to him when he shall attain the age of thirty years,"—it was held that, as it is impossible to distinguish between these legacies, and to hold that the first vested at the death of the testator, and that the last two did not, as there was no specific gift over in case the son should die before attaining the ages mentioned (although there was a residuary clause disposing of such property as was not otherwise disposed of), and as another provision showed that the testator knew how to use apt words when he intended that a pecuniary legacy should be contingent until the legatee should reach the age when it was to be paid to him, the several legacies to the son vested in him on the death of the testator, the time of payment being postponed until he should reach the ages respectively prescribed.

In *Brown v. Brown*, 44 N. H. 281, it was held that a bequest to a grandson of a sum of money, "to be paid to him by the executor of my said will when he should attain the age of twenty-one years," was vested.

In *Sanborn v. Clough*, 64 N. H. 315, 10 Atl. 678, where testator directed "the rest and residue of all my money in banks, stocks, and bonds to be paid to Arthur W. Evans . . . for his own. But not until said Arthur W. Evans shall have become of age (twenty-one years of age), prior to which time, should occasion demand, I order this bequest to be held by my executor for said Arthur W. Evans at his maturity,"—it was held that the provision as to the legatee reaching the age of twenty-one was not a limitation annexed to the substance L.R.A.1915C.

of the gift, but related to the time of payment.

In *Parker v. Leach*, 66 N. H. 416, 31 Atl. 19, a legacy to the sons of a certain person, "payable on their arriving at the age of twenty-one years respectively, without interest," was held to vest immediately.

In *Kearney v. Kearney*, 17 N. J. Eq. 59, a legacy to a daughter, "to be paid to her on reaching the age of sixteen years. If, however, she die before that age, this legacy to become part of my residuary estate,"—was held vested, liable to be devested by her death before reaching the age of sixteen.

In *Davis v. Davis*, 39 N. J. Eq. 13, where testator bequeathed to a son's children a sum of money, "to be paid to them by my executor when they shall arrive at the age of twenty-one years," it was held that the gift was immediate, and vested on the death of the testator.

In *Neilson v. Bishop*, 45 N. J. Eq. 473, 17 Atl. 962, where testatrix gave a sum of money in trust to pay over one half of the income to a grandson, and the other half to the guardian of a great-grandson, until the great-grandson should become of lawful age, when the executors were to pay over the principal to the beneficiaries, further providing that should either die his survivor should have the whole of the interest on said sum, and that should both die without children, then their and each of their shares should revert to the estate, it was held that as the time specified was annexed not to the gift but to its payment, the legatees took vested interests, subject to be devested in event of the death of both without issue before the great-grandson should attain his majority.

In *Male v. Williams*, 48 N. J. Eq. 33, 21 Atl. 854, it was held that under a bequest "unto the child or children of" a girl, who was fourteen years of age at the testator's death, of a sum of money "to be put out at interest until her child or children come of age," with a gift over should she die leaving no child or children, the postponement of the payment or distribution of the legacy until all of the children should have arrived at the age of twenty-one years did not prevent its vesting in each of such children at birth.

In *Smith v. Edwards*, 88 N. Y. 92, it was held that under a bequest to grandchildren of \$1,000 each, "said \$1,000 to be paid unto each on their severally arriving at full age, or, if granddaughters, on their sooner being lawfully married," the legacy vested in each grandchild immediately upon its birth, payment only being postponed.

In *Bushnell v. Carpenter*, 92 N. Y. 270, where testatrix bequeathed to her two grandchildren "the sum of \$1,000 each, to be paid to them respectively as they arrive at the age of twenty-five years," it was held that there was nothing to indicate that the bequest was contingent.

In *Re Smith*, 131 N. Y. 239, 27 Am. St. Rep. 586, 30 N. E. 130 (affirming 12 N. Y. Supp. 105), legacies to each of testator's grandchildren, "to be paid to them on their,

severally attaining the age of twenty-five years," the intermediate income to be paid to the respective mothers, if living, or if not, to be added to the principal fund, with a limitation over to surviving grandchildren in the event of the decease of any one of them prior to attaining the age of twenty-five years, were held vested.

In *Williams v. Boul*, 101 App. Div. 593, 92 N. Y. Supp. 177 (affirmed without opinion in 184 N. Y. 605, 77 N. E. 1198), a bequest of certain bonds, though accompanied by a direction that the said bonds should be held in trust for the legatee, and that he should receive the interest of them semi-annually "until he become thirty years of age, and then to be given to him," was held to vest immediately.

In *Hone v. Van Schaick*, 20 Wend. 564, where testator gave to each of his grandchildren who should be living at the time of his death a certain sum of money, to be paid to them respectively upon their attaining the age of twenty-one or marrying, such payments, however, not to be made without the approbation of their parents, it was held that the case was one of a present gift, with postponement of the time of payment.

In *Burrill v. Shell*, 2 Barb. 457, a legacy of a sum of money to the issue of a certain person, "to be at their own disposal as soon as they shall have respectively and severally attained the age of twenty-five years," the interest in the meantime to be paid to them, was held not contingent upon their attaining majority.

In *Re Lehman*, 2 App. Div. 531, 37 N. Y. Supp. 1086, it was held that under a bequest to a granddaughter of a sum of money, "to be paid to her when she arrives at the age of twenty-one years, with interest to be computed from the date of my death at 5 per cent per annum. Should my said granddaughter die before arriving at the age of twenty-one years, then the bequest hereby made shall go to her issue, and in default of issue" then to others,—the legatee took a vested interest, the period of enjoyment in possession only being postponed.

In *Clark v. Clark*, 23 Misc. 272, 50 N. Y. Supp. 1041, where the testator bequeathed to a grandson a sum of money, to be held in trust for him "until he shall have arrived at the age of thirty years, when said trustees or their successors shall pay over to him the principal of this bequest, together with such additions thereto as may then be remaining in their hands;" further directing that the income from such fund should be paid semiannually to the grandson's guardian until he should have attained his majority, and then semiannually to him until he should have attained the age of thirty years; with a limitation over in the event of the grandson's death before attaining the age of thirty years,—it was held that as there were strong words of present gift, the legacy was a vested one, with postponement of actual delivery.

In *Re Becker*, 59 Misc. 135, 112 N. Y. Supp. 221, it was held that under a bequest to granddaughters of a sum of money, fol-
L.R.A.1915C.

lowed by the proviso: "But they shall not receive the money until they are twenty-five years of age,"—the legatees took vested interests, subject to be defeated in the event of dying before attaining the age of twenty-five.

In *McEwing v. Bertine*, 3 Bradf. 194, testator bequeathed to his children all his residuary estate, directing it to be sold and the proceeds divided into shares, which he distributed among his children, adding: "The several divisions can take place after my decease, when my sons arrive severally at the age of twenty-one and my daughters when they arrive at the same age or get married." It was held that the interests of the children vested on testator's decease, subject to a proviso in the will for the education of the three younger children, and a direction respecting the management of a certain cotton mill.

In *Wade v. Dick*, 36 N. C. (1 Ired. Eq.) 313, where testator bequeathed negroes to certain legatees, "to be equally divided among them when James [one of the legatees] arrives to the age of twenty-one years; . . . and I request my friend James Williamson to act as trustee to the above-named negroes for the use of" the legatees,—it was said that there could be no question but that the bequest passed a present interest.

In *Spruill v. Moore*, 40 N. C. (5 Ired. Eq.) 284, 49 Am. Dec. 428, testator, after giving to his four daughters certain negroes, and, after the death of his wife, certain other negroes and their increase, went on to provide: "It is my will that no division of the said negroes between my daughters take place until the eldest daughter then living arrives to the age of twenty-one; and at that age to take her proportional share of the said negroes and increase, if she thinks proper, and so on until the youngest arrive at twenty-one. Also it is my will, that if either of my said daughters should die without lawful issue, then and in that case the survivors or survivor of my said daughters shall have all the said negroes and their increase forever." It was held that as the will contained words of immediate gift, either in possession or remainder, there could be no doubt that each of the daughters took a vested interest in the slaves, subject to be divested upon her death without leaving issue.

In *Croom v. Whitfield*, 45 N. C. (Busbee, Eq.) 143, a legacy to a child, "to be due and paid when he comes to twenty-one years of age, out of the proceeds of the sale of my lands," was held vested because the land was directed by the will to be converted into personality.

In *Hathaway v. Leary*, 55 N. C. (2 Jones, Eq.) 264, where testator directed all his real estate to be sold, and that his negroes and other property "should be held in joint stock" by his wife and children, that the negroes be hired out and the hire appropriated to the support of his wife and children, any surplus income being divided

among them, adding: "The property herein devised to remain in joint stock until my children shall have attained the age of twenty-one, then their portion shall be set apart to them,"—the interests of the legatees were, without discussion of the question, held vested.

In *Warren v. Hembree*, 8 Or. 118, where testator bequeathed to a nephew a tenth of his personal property, "the said one tenth to be given to him when he is twenty-two years of age," it was held that the gift and time of payment being distinct, the legacy was a vested one; the inference from the language of the bequest being supported by the circumstances that while the testator was careful to provide how his other property should be disposed of in the event of the death of his wife and son before the latter should become twenty-one years of age, he made no disposition whatever in regard to the one-tenth part bequeathed to the nephew in case of his death, showing that he considered this portion of his estate as finally disposed of.

In *Magoffin v. Patton*, 4 Rawle, 113, where testator bequeathed to each of his children the sum of \$6,000 apiece, "to be paid them respectively as they severally arrive to lawful age, or on the day of marriage, whichever may first happen," and further gave the residue of his estate to be equally divided among all his children when the youngest should arrive at lawful age, with the proviso that if any of such children should happen to die under lawful age and without leaving any lawful issue, then the part or share given to such one should go to and be equally divided among the survivors and the lawful issue of any child or grandchild then deceased, it was held that the context showed that the word "as" was not to be understood in a conditional sense, but that it clearly referred to a certain point of time; and that even if it could be understood in a conditional sense it would not change the character of the legacies, which would still be vested, because it was merely annexed to the payment, and not to the gift of them.

In *Bayard v. Atkins*, 10 Pa. 15, testatrix directed that a portion of her residuary estate, which she had devised in trust, should "be invested for the use and benefit of Thomas Astley Atkins, and that the said trustees shall appropriate so much of the income thereof as may be necessary for the suitable maintenance and education of the said T. A. A., until he shall arrive at the age of twenty-one years; and that, after he shall arrive at the age of twenty-one years, the income of the whole sum so invested shall be paid to him semiannually, during his life; and if the said T. A. A. shall live and arrive at the age of twenty-one years, I give him full power to dispose of the principal sum by last will and testament. But if he shall die before arriving at the said age, or if he shall die leaving no last will and testament, the said principal sum shall revert and descend to the heirs at law of me, the said Sarah H. Astley." L.R.A.1915C.

It was held that there was nothing in the will, either in the directed appropriation for education and maintenance of the legatee, or the contingent gift over, to take the case out of the rule that where a legacy is given to a person, to be paid or payable at or when he shall arrive at the age of twenty-one, the interest in the legacy shall be considered to be vested immediately on the testator's death.

In *Bowman's Appeal*, 34 Pa. 19, where testator gave to his three grandchildren the sum of \$400 each, "to be paid them respectively when they severally arrive at the age of twenty-one years, making the sum of \$1,200 to them jointly," it was held that, there being a substantive gift independently of the time fixed for payment, and nothing in the will to control the effect of the words used, the legacies vested immediately in the several legatees.

In *Cooper v. Scott*, 62 Pa. 139, where testator gave and bequeathed to a certain legatee \$2,000, adding: "And I direct that my executor shall expend such portion of said \$2,000 as shall be necessary to give to said [legatee] a thorough classical education, if said [legatee] should desire such education; and I direct that what amount of said \$2,000 may not be expended in the education of said [legatee] shall be paid to him by my executor when he becomes of age,"—it was held that, as there was a substantive gift independent of the mode and time fixed for its payment, the legacy was vested.

In *Kerr v. Bosler*, 62 Pa. 183, a legacy to a granddaughter, "to be paid to her when she shall arrive at the age of twenty-one years, but if she should die before she arrives at the age of twenty-one years without lawful issue, then" to another, was treated as vested.

In *Dewart's Appeal*, 70 Pa. 403, where testator bequeathed, in trust for a grandson, a sum of money, "to be paid to him between the ages of twenty-one and twenty-five years, at the discretion of [the trustee], and I hereby charge my farms . . . with the payment of the same. In case of the death of my grandson before the age of twenty-five, this legacy to lapse,"—it was held that time was annexed to the payment, and not to the gift, and accordingly that the legacy was vested.

In *Yost's Estate*, 134 Pa. 426, 19 Atl. 692, where testatrix bequeathed unto each of the children of certain persons "the sum of \$1,000, to be paid to them respectively on arriving at the age of twenty-one years," adding: "And in case either of them die before attaining the age of twenty-one years, and without lawful issue, then I direct the share of him or her so dying to be given to the survivor or survivors of them, share and share alike,"—it was held that the gift being independent of the direction in regard to the time of payment, the legacies were vested.

In *Harding v. McAlpin*, 12 Leg. Int. 278 (as reported in *Century Dig.*, title "Wills," § 1476), the words of a will providing a

legacy were as follows: "I will and bequeath to my grandson, J. M., \$2,000, the interest to be paid his guardian during his minority, and the principal to himself when of age." Held, that this was a vested legacy.

In *Thomas v. Benton*, 4 Desauss. Eq. 17, where testator, who had bequeathed to each of his grandsons certain negro slaves, went on to provide: "It is my will and desire that the above-mentioned negro slaves given by me to my grandchildren shall be and remain on the above-mentioned plantations, under the directions of my executors hereafter mentioned, until such times as my grandchildren marry or come of age, and then to take their part." It was held that there being an absolute gift in the first instance, the slaves vested in interest immediately, possession only being postponed.

In *McReynolds v. Graham*, — Tenn. —, 43 S. W. 138, where testator, who in a previous clause had given to his wife for and during her natural life all of his real and personal estate "except \$1,500 to be paid to my daughter Martha McReynolds's three children hereinafter mentioned," went on to provide: "I further will and bequeath that each of said children [naming them] have \$500 as before mentioned in this will, to be paid to them when each arrive at the age of twenty-one years; should any necessity arise by which it should become necessary for their education and maintenance to be paid sooner,"—it was held that the language of the will made it clear that there was a distinct present gift to the three children in severalty, the time of payment merely being postponed until the majority of each.

See also, in this connection, *Nelson v. Pomeroy*, 64 Conn. 257, 29 Atl. 534; *Wood v. Cone*, 7 Paige, 471; *Shattuck v. Stedman*, 2 Pick. 468.

VIII. Appendix B. Cases in which the sufficiency of the context to overcome the implication of contingency is considered.

The grouping of the following decisions is adopted only as a matter of convenience in arrangement, and does not betoken a basis of distinction between the cases now to be reviewed.

a. Gifts "if" a certain age shall be attained.

Instances in which the gift has been held vested.

In *Edwards v. Hammond*, 3 Lev. 132, a devise to A and his heirs if he live to twenty-one, but if he die before twenty-one, then to remain to the use of the testator and his heirs, was held, taking all the words together, not to be upon a condition precedent of attaining the age of twenty-one, but a present devise subject to and defeasible upon condition subsequent.

In *Bromfield v. Crowder*, 1 Bos. & P. N. L.R.A.1915C.

R. 313, where testator, after giving successive life estates to A and B, at the decease of the longest liver of them gave all his real estate to his godson if he should live to attain the age of twenty-one years, but in case he should die before attaining that age, then over, it was held that though the word "if" imported a condition precedent, it was controlled by the apparent intention of the testator that no one else should take his estate unless in the event of the godson's dying under twenty-one.

In *Morton Trust Co. v. Chittenden*, 81 Conn. 105, 70 Atl. 648, where testator directed that at the death of his wife his estate should be divided into three equal parts, one of which he gave in trust for his daughter and for her children during their minority; and further directed that if such daughter should die leaving a child or children under twenty-one years of age the income should be apportioned by the trustee for the use and benefit of the children; and that "if after the death of my daughter Sophie her son Charles H. Bonestell, should be living and attain to the age of twenty-five years, then I give and devise to him" a half interest in the property given his mother for life, the other half being given to a granddaughter when she should attain to the age of twenty-one years,—it was held that the half interest given to the grandson vested at the death of the testator, subject to the interest given to his mother. The fact that a different construction would result in a partial intestacy, notwithstanding the testator's expressed intention to dispose of all his property, was of weight in determining the meaning of the somewhat ambiguous terms of the gift.

In *Furness v. Fox*, 1 Cush. 134, 48 Am. Dec. 593, where testator bequeathed to a grandson a sum of money "if he shall arrive to the age of twenty-one years, then to be paid over to him by my executor," it was held that, although the testator's meaning is obscured by the unfortunate collocation of the words above quoted, and the inartificial punctuation of the sentence, the most natural construction is that the testator meant to make an immediate bequest to the grandson.

In *Cooper v. Pridgeon*, 17 N. C. (2 Dev. Eq.) 98, where testator, after giving and bequeathing to his daughter a tract of land, a negro, and \$600 in cash, to her and her heirs forever, went on to provide: "It is my will and desire that if my said daughter [name] lives to arrive to the age of eighteen years, for her to receive her said legacy that I have left to her and take possession of it; and if she should die without a lawful heir begotten of her body, then the said property to revert back" and to be divided among testator's other children,—it was held that as the gift was by distinct words importing an immediate bequest, and in view of the gift over of the property expressly upon the daughter's dying without issue, the fact that the legacy was a provision for an infant daughter, for

whose support and education no other provision was made, so that unless the legacy vested so as to give her the profits she would be wholly destitute, and the use of the words "revert back" in creating the limitation over, which presupposes a vested title to have been in the daughter,—the clause quoted must, notwithstanding the use of the word "if," be taken as relating to the payment or personal possession of the property.

In *Glasscock v. Tate*, 107 Tenn. 486, 64 S. W. 715, where testatrix "loaned" the residue of her real estate to her two sons during their natural lives, "and at their death, then to go to the heirs of their body, if said heirs shall live to be of age," it was held that the children of the sons took vested interests in remainder, subject to be divested by death under twenty-one.

Instances in which the gift has been held contingent.

In *Martineau v. Rogers*, 8 De G. M. & G. 328, where testator, by an instrument headed "Instructions for a will," but which he executed as a will, gave to each of two nephews and a niece certain sums of money "if they respectively survive me and attain the age of twenty-one years, when the legacies to my nephews are to be paid. In case of the death of either of my said nephews or my said niece leaving issue, such issue to take the parent's legacy as by his or her will directed. But in case of the death of either of my said nephews or niece before his or her legacy payable, his or her legacy to go to survivors of said nephews and niece. During the minority of the said nephews and niece, or any of them, trustees to apply income of legacy for maintenance or education,"—it was held that the gifts were conditional on the nephews' surviving the testator and attaining twenty-one.

In *Nixon v. Robbins*, 24 Ala. 663, where a testator gave to his daughter the use of certain slaves during her natural life, "with this proviso, that if her son Thomas Nixon, now an infant, should live to be twenty-one years of age, I give unto him, the said Thomas Nixon, three of the negroes," designating them, the rest of the negroes being given at the daughter's death to her children, it was held that there was nothing in the context to overcome the presumption from the form of words used that the legacy was intended to be conditional on the grandson attaining the age of twenty-one.

In *Patching v. Barnett*, 28 Week. Rep. 886, testator devised the whole legal estate in certain realty in trust for his wife for life, and from and immediately after her death directed that it should "be held upon the trusts following, viz., if the youngest of the grandsons of my said maternal uncles [naming them], who shall be living at the time of the death or marriage of my said wife, shall then be under the age of twenty-one years, to receive and take the rents and profits of the said" realty, and to apply so much thereof as the trustees, in their absolute discretion, shall think proper towards

the maintenance or for the benefit of such youngest grandson until he should attain the age of twenty-one years or die; and from and immediately after his attaining that age on trust until he should attain the age of twenty-five years or die, to pay him for his maintenance and benefit a sum not exceeding £200 a year, and until he should attain the age of twenty-five or die to accumulate the residue of the rents and profits, and if he should attain the age of twenty-five years, "then but not otherwise," to stand possessed of the accumulations upon trust for him, but if he should die under that age, then on certain other trusts. The trustees were also empowered to apply such part of the accumulations as they should think proper for the advancement of such youngest grandson. It was held that the attainment of the age of twenty-one was a condition precedent to vesting.

In *Butcher v. Leach*, 5 Beav. 392, where testator, after directing the investment of his residue, ordered his executors to pay to his widow all the interest and proceeds for the maintenance and education of his children, and further "declared it to be his will that after the decease of his wife all his effects and property should be shared equally amongst all his children if they should have attained the age of twenty-one; and if any had not attained that age, then that his executors should act as trustees until the eldest attained that age, and then pay him his share, and each one as he or she attained that age, unless his executors were not satisfied with his or her conduct; then and in that case he ordered and directed his executors to detain the money of such an one until he or she should be twenty-five,"—it was held that a child who died under twenty-one in the lifetime of her mother had not a vested interest.

b. Gifts "in case" a certain age shall be attained.

Instances in which the gift has been held vested.

In *Hammond v. Maule*, 1 Colly. Ch. Cas. 281, 13 L. J. Ch. N. S. 386, 8 Jur. 568, where testator gave a sum of money in trust to pay the interest thereon to a woman for life, and immediately after her decease to transfer and pay the trust fund to her daughter in case she should then have attained the age of twenty-one years, but in case the daughter should not have attained her age of twenty-one at the decease of her mother, then upon trust to pay to or apply the income for the maintenance and support of the said daughter until she should attain such age of twenty-one years, and upon her attainment thereof upon trust to transfer the trust fund to her for her own use and benefit,—it was held that the case fell within the rule that where a legacy is given in terms importing a gift at a future time, but the whole fruit and produce of the legacy in the meantime is given to the legatee, it is not conditional.

In *Roberts's Appeal*, 59 Pa. 70, 98 Am.

Dec. 312, where testator directed his executors "to vest in stock or in the purchase of good real estate in the county the sum of \$1,000, the dividends, rents, or profits of which to be applied to the support and education of my nephew [name] until he attains the age of twenty-one years, and in case he live to attain that age I give the said stock, money, or land to him and his heirs,"—it was held that the implication of contingency arising from the employment of the words "in case" was overcome by the fact that the legacy was severed from the body of the estate, the absence of a limitation over in the event of the nephew's decease before attaining age, and the provision for support and education during minority.

In *Greene v. Potter*, 2 Younge & C. Ch. Cas. 517, testator devised certain realty in trust, in case his daughter should live to attain the age of twenty-five years or marry with consent, to permit her to occupy the premises or receive the rents and profits thereof for her natural life, and after her decease, then upon trust for her issue, adding: "Provided always, and my mind and will is that in case the said Betty Phillips shall marry without the consent and approbation of my trustees for the time being, then I revoke and make void all and every the devises and bequests contained in this my will to or in favor of the said Betty Phillips and her issue." In enumerating his residuary estate testator included "likewise my estate and premises hereinbefore devised to my said trustees for the benefit of the said Betty Phillips in case she shall happen to die under the age of twenty-five years unmarried and without issue, as aforesaid." It was held that, taking the disposition of the property in question in connection with the two limitations above quoted, the gift to Betty Phillips was, upon *Boraston's Case*, 3 Coke, 19a, 25 Eng. Rul. Cas. 579 (set out in VIII. i, *infra*), and other cases of that description, immediate in equity.

In *Boies v. Wilcox*, 40 Barb. 286, where testatrix gave to her son, "in case he lives until he arrives at the age of twenty-one years," her residuary estate; further providing that in case he should die under the age of twenty-one years, then the property should go to others; and further gave to her husband "the entire management and control of the property, both real and personal, to which my son shall, by the provisions of this will, be entitled when he arrives at the age of twenty-one years, for the support, education, and necessary use of my son [name] while he is under the age of twenty-one years, and I hereby appoint my husband . . . testamentary guardian of my son,"—it was held that though the bare terms of the gift to the son, standing alone, would not warrant the inference that he took a vested interest, yet when taken in connection with the provisions of the will constituting the father the testamentary guardian of the son, and conferring upon him the entire management and control of the property given to his

ward for the support, education, and necessary use of the latter during his minority, they operated to vest the property in the son, subject only to be divested by his death under the age of twenty-one.

Instances in which the gift has been held contingent.

In *Heath v. Perry*, 3 Atk. 101, testator gave £1,000 apiece to five persons, "to be paid to them at their respective ages of twenty-one in case they should respectively attain that age, and not otherwise; and if any of them should happen to die before they attain their respective ages of twenty-one, that then and in such case the legacy or legacies of £1,000 so given to them respectively shall be utterly void and of no effect." He further provided: "And I do hereby give my executors full power and liberty during the respective minorities of the five legatees until they shall attain their ages of twenty-one, or the legacies otherwise become void, to lay the money out in mortgages or other securities for the purposes and on the trusts of this my will." Lord Hardwicke said that if the testator had stopped after the words, "in case they should attain their age of twenty-one, and not otherwise," he should have thought it had not been merely a postponing by reason of their nonage and for the legatees' convenience, but that he intended that they should not vest till twenty-one, and that this construction was supported by the following explicit declaration, that should any of them die before majority, in such case the legacy of the one so dying should be void; that the clause authorizing the executors to lay the money out during the minority of the legatees was not a direction to lay it out for the benefit of the particular legatees, but was equally for the benefit of the residuary legatees, and therefore that it did not show that the legacies were vested.

c. Gifts "in event of" attaining a certain age.

In *Travis v. Morrison*, 28 Ala. 494, where a testator, leaving a widow and two infant daughters, gave his plantation, negroes, live stock, farm utensils, etc., to his executors for the support of his family and the education of his children, further provided that in the event of the marriage of his wife or children, or their arrival at the age of twenty-one years, then there should be a division of his property among his wife and children, it was held that the entire will taken together, and the words of the particular clause, indicated an intention on the part of the testator that the time appointed for the division should be of the substance of the gift, and that the legacies should not vest until some one of the contingencies set forth in the will should occur. The court further relied on the circumstance that testator gave in the same will, by plain and unambiguous language, a vested legacy to a child of a former mar-

riage. This decision is rather disparagingly spoken of in *Foster v. Holland*, 56 Ala. 474, where it is suggested that the case was "materially shaded" by the apparent hardship of an opposite construction, and that the principle of the decision should not be extended.

d. Gifts "provided" or "providing" a certain age is attained.

Instances in which the gift has been held vested.

In *Simmonds v. Cock*, 29 Beav. 455, 7 Jur. N. S. 718, 9 Week. Rep. 517, testator, after giving his wife the income of all his estate for life, after her decease gave, devised, and bequeathed all his real and personal estate unto and to the use of his sons and his granddaughter, "provided she lived to attain the age of twenty-one years." It was held that attaining the age of twenty-one was a condition subsequent, and that the granddaughter took a vested remainder.

In *Boling v. Miller*, 113 Ind. 602, 33 N. E. 354, where the testator directed that at the death of his wife the whole of his estate should be divided into three equal shares, one of which he gave and devised to a grandson, "provided he attains the age of twenty-one years," adding: "Should my grandson die without issue, then I will and direct that the share he would have received shall be divided equally between" testator's son and daughter, or their descendants,—it was held that the language of the will fairly imported that it was the intention of the testator that his grandson should take the same interest in the estate as would the legatees of the other shares thereof, subject, however, to be divested on failure to arrive at twenty-one years of age or to have issue,—especially as any other construction would leave the undivided one third of the estate undisposed of until the grandson arrived at the age of twenty-one years.

In *Hersey v. Purington*, 96 Me. 166, 51 Atl. 865, testatrix devised her estate to her daughter, "provided she dies leaving issue, or provided further that she does not die before she reaches the age of twenty-one years and without leaving issue, then I dispose of my real and personal property as follows," etc. She further directed her executrix to apply all, or whatever should be necessary, of the income of the estate, and, should such income be insufficient, the principal, for the support and education of such daughter. It was held that though if the first article of the will stood alone there could be no question but that the daughter took a contingent estate only, the word "provided" being an apt and appropriate word to indicate an intention to give contingently, yet as there was a present, and not a future, gift to the daughter, and as the testatrix devoted to the daughter's support and education the income and principal of the entire estate if required for

that purpose, an equitable fee simple conditionally vested in the daughter on the death of the testatrix, subject to be divested on her dying under twenty-one years of age and without issue, which condition was itself subject to the condition that the estate should not have already been disposed of for her maintenance and education.

In *Bean v. Staples*, 75 N. H. 597, 74 Atl. 542, a bequest to a certain person, "provided he reach the age of twenty-one years," of a sum of money, was held vested at testator's death.

In *Foster v. Wick*, 17 Ohio, 250, where testator willed certain real estate "to the three children of Thomas L. Wick, providing they live to legal age," it was held, in view of the fact that such children were shown by other provisions in the will to be special objects of testator's bounty, the fact that it seemed to have been his understanding that the income of the land would go for their benefit, and the fact that in another part of the will he used the same expression, "providing they live to legal age," when it could hardly have been understood by him as excluding the children until of age from the benefit of the provision in their behalf,—that such children took vested interests, subject to be divested upon their dying before coming of age.

In *Raney v. Heath*, 2 Patton & H. (Va.) 206, where testator gave and bequeathed his estate, both real and personal, to his brother's children, "providing either of them shall live to the age of twenty-one. If neither of them live to be twenty-one, it is my desire that" other relatives should have it,—it was held that the terms of the bequest to the brother's children, standing alone and unaccompanied by the limitation over, would have imported a contingent legacy as to the personalty and a contingent devise as to the realty, but that the effect of the limitation over was to vest both the realty and personalty. The court further invoked, in aid of the construction in favor of a vested rather than a contingent interest, the circumstances that the gift was both residuary and to a class; the fact that such construction avoided intestacy, and the necessity of hoarding up and accumulating the profits until a distant day, while those for whom both principal and interest were intended might be in want thereof; and the disherison of issue of the first takers in event of their dying before attaining the age of twenty-one.

Instances in which the gift has been held contingent.

In *Atkinson v. Turner*, 2 Atk. 41, Barnard, Ch. 74, where testator gave a part of his stock in trade to his grandson, "provided he shall attain his full age of twenty-one years, but if he die before twenty-one, then" over, the master of the rolls said that considering it upon the words of the will, it was a very strong case as a condition precedent, and that the estate could not vest until the infant attained the age of twenty-one.

e. Gifts "should" a certain age be attained.

In *Gairdner v. Gairdner*, 1 Ont. Rep. 184, testator gave and devised to his wife, as long as she should remain unmarried, the homestead farm on which he resided, with the use of all his household goods, stock, and farming implements, in trust for the maintenance and support of whatever family might survive him, until he or they should attain the age of twenty-one years, and thereafter for the maintenance and support of his wife so long as she remained unmarried. In the event of his wife marrying again he desired that the homestead, farming stock, etc., should be taken possession of by his executors in trust to be disposed of as thereafter mentioned, making in the meantime such provision as might be required for the maintenance, education, and support of his surviving child or children if still in his or their minority. He devised to his son Thomas the homestead, together with the household goods, farming stock, etc., on the decease or second marriage of his wife, should he have attained his twenty-first year, but should he be still in his minority, to be taken possession of by his executors till he attained his majority. In case his son Thomas should not survive him or attain the age of twenty-one years, and in case he should have no other surviving child who should attain twenty-one years, or in case he should have no grandchild, he directed his real and personal estate to be divided amongst his brothers and sisters. It was held that the gift of the intermediate income for the maintenance of the family, and the provision that if Thomas survived the wife while a minor, the executors should hold the property till he reached his majority, showed that the attaining twenty-one was not deemed by the testator to be a contingency upon which Thomas's right should depend, but that he took a vested remainder, subject to be divested by his death under twenty-one without leaving a child.

In *Bowman v. Long*, 23 Ga. 242, where testator bequeathed to his grandson certain slaves and real estate, "should he live to be twenty-one years of age, but should my said grandson die before he arrives at twenty-one years of age, then said property I give to my other lawful heirs," it was held that though taking the words of the bequest alone they would indicate that the grandson took upon a condition precedent that he should attain the age of twenty-one, their natural import was controlled by the fact that there was a gift over of the property, and the further fact that a trustee was appointed for such infant grandson; and accordingly that he took a vested interest, subject to be divested by his death during minority.

In *Devane v. Larkins*, 56 N. C. (3 Jones, Eq.) 377, testator expressed the desire that his residuary estate, both real and personal, should go to the benefit and support of his wife and minor children during the wife's L.R.A.1915C.

widowhood and the minority of said children, adding: "But should my wife marry again, it is my will that she shall receive her distributive share or child's part out of my estate; and should any of my children named in the clause live to attain to the age of twenty-one years, then such child or children shall, upon reaching said age, receive his, her, or their distributive share or shares, it being equally divided among my wife and three last children named." It was held that the income in the interim being given to the legatees, and the term "shall receive" plainly implying that they respectively had vested interests in the property before that time, the respective shares of the widow and children were all vested immediately upon the death of the testator.

f. Gifts "at" a specified age.

Instances in which the gift has been held vested.

In *Hoath v. Hoath*, 2 Bro. Ch. 3, a legacy to one at his age of twenty-one, the interest in the meantime to be paid to his mother for his maintenance, was held vested.

In *Gregg v. Bethea*, 6 Port. (Ala.) 9, a provision that negroes not specially bequeathed shall remain on the plantation until the debts of testatrix should be fully satisfied was held to show that a legacy of negroes to a grandson, "to be given to him at the age of twenty-one years by my executor, . . . provided that should my said grandson die leaving no widow or legally begotten children, then said negro girls with their increase shall return to my three daughters,"—was intended to vest immediately.

In *Reed v. Buckley*, 5 Watts & S. 517, 40 Am. Dec. 531, where testator directed "that the net proceeds of my estate heretofore ordered by me to be disposed of shall be equally divided between my remaining children, share and share alike, and at the times of their severally arriving at the age of twenty-one years," it was held that the word "and" indicated an ellipsis following it, which it was necessary to fill up with the word "paid" to make the sense clear; that the reasonable construction of this item was that there was to be one division, but several payments, namely, to each child as it came of age; and accordingly that each took a vested interest.

In *Eckert v. Lingle*, 1 Legal Gaz. 66, a bequest to the testator's grandsons of a certain sum "at the age of twenty-one years" was held a vested legacy, on the ground that the testator must have intended a present gift, with postponement of the time of payment, the court saying that to insert the words "to be paid" is merely filling up an hiatus in the sentence, such as it may be supposed the testator would have done had his wishes been expressed in full.

In *Walcott v. Hall*, 2 Bro. Ch. 305, where testator bequeathed to his godson a sum of money, to be paid to him at the age of

twenty-one years or day of marriage, which should first happen, the same to be put out at interest in the name of his executors and administrators, the interest arising therefrom from time to time to be applied towards his maintenance and education, and if he should die before twenty-one or marriage, testator gave the legacy to charity,—it was held that the giving of the interest vested the legacy, though it was subject to be devested on the legatee's dying under twenty-one.

In *Greet v. Greet*, 5 Beav. 123, testator gave the residue of his property, both real and personal, to the use of a nephew for life, and directed that at his death £5,000 should be deposited in the hands of trustees for accumulation, and placed in the Bank of England, in the name of the nephew's eldest son, for his use "at his attaining the age of thirty years; and the rest and residue to be equally shared, male and female equal alike, the eldest son taking an equal share in addition to the £5,000 funded for him. This general division to take place as each respectively attains the age of twenty-four years." It was held that although the case was one in which it was impossible to come to any conclusion which could be considered as entirely satisfactory, the nephew's eldest son had a vested interest in the sum of £5,000 at the moment the severance was to be made, namely, on the death of his father; and further, that as the testator could never have meant that a general division of the whole fund should take place at different times, the shares of the residue also vested at the death of the nephew, though not payable until each of the legatees should attain the age of twenty-four.

In *Ordway v. Dow*, 55 N. H. 11, testatrix gave her residuary estate in trust for her grandson "until he shall attain the age of twenty-five years, at which time I order and direct the said [trustee] to pay over and deliver to the said [grandson] all and singular the estate so by him held in trust as aforesaid, from and after that time to belong to the said [grandson], his heirs and assigns forever. Provided nevertheless that if it shall be found necessary to expend any portion of said estate so holden by said [trustee] for the support of said [grandson], then so much and no more may be so appropriated for his support until he shall attain the aforesaid age of twenty-five years." It was held that, it appearing from the will that the testatrix intended to dispose of her whole property, the clause in question being a residuary clause, and there being no gift over in case of the grandson's failure to reach the prescribed age, so that a construction of the gift to him as contingent upon his attaining that age would in case of his prior death produce an intestacy,—time was not annexed to the substance of the gift as a condition precedent, but payment only was postponed.

In *Middleton's Estate*, 212 Pa. 119, 61 Atl. 808, where testator gave his residuary L.R.A.1915C.

estate in trust "to put aside a sum of \$10,000, and to invest the sum and collect and receive the income therefrom, and after deducting all proper and legal charges, to pay over the net income to my grandson [name] until my said grandson shall attain the age of twenty-five years, at which time my said trustees are to pay to my said grandson the principal thereof," it was held that as time was not annexed to the substance of the gift, but to the date of payment, as there was no limitation over, and as the subject of the gift was separated from the rest of the estate, and as the net income was given to the legatee in the meantime, he took a vested interest.

In *Hayes v. Robeson*, 29 R. I. 216, 69 Atl. 686, where testatrix gave to a son, in trust for a granddaughter, the sum of \$5,000, "to be held and the income thereof to be accumulated and added to the principal sum until she shall reach the age of eighteen years, after which the annual income shall be paid to her as it accrues; and at the age of twenty-five years the principal with its earnings shall be made over to her for her sole and separate use; . . . and in case of her death without issue before the age of twenty-five years the said trust fund shall become the property of" others,—it was held that the severance of the gift from the estate, and the gift of the intermediate income, showed that the granddaughter took a vested interest.

In *Shattuck v. Stedman*, 2 Pick. 468, where testator gave to a niece the interest of a sum of money for life, adding, "and at her decease I give and bequeath the said principal sum to be equally divided among her children and payable to them at the respective ages of twenty-one years, with interest," it was held that though by the general rule the legacy to the children would be contingent because of the word "at," yet the intention seems to have been to make an immediate gift, enjoyment only being postponed.

In *Shannon v. Pentz*, 1 App. Div. 331, 37 N. Y. Supp. 304, where testatrix, after giving to her husband half the income of her estate during his lifetime, and to her daughter the other half during her lifetime, provided: "Should my husband die and my daughter die, the estate to be divided equally between my daughter's issue at the age of twenty-one,"—it was held that the case was one for the application of the rule that a gift or devise to a person at his majority, or a direction of payment or transfer to him at that time, imports a condition subsequent, not precedent, which permits the vesting of the estate or interest, and merely defeats it on the nonfulfilment of the condition. This decision is based upon a gross misapprehension of the English authorities cited in its support, as pointed out in subdivision III. a, of this note.

In *Benner v. Mauer*, 133 Wis. 325, 113 N. W. 663, where testator directed his property to be invested and the interest thereon paid annually to his two sons dur-

ing their lives, further providing: "After the death of my sons the principal shall go to their living children at the age of twenty-one," it was held that though the gift was in the form of a direction to divide and distribute to the sons' children, yet as nothing appeared expressly as to the disposition to be made of the interest after the termination of the life estates, and as the direction to pay to the children named only the principal, it was necessary, in order to avoid a construction that would leave the interest undisposed of, to hold that the testator's purpose was to bequeath the principal of the invested fund to the grandchildren living at the termination of the life estates, payment to them as to principal to be made on their severally arriving at the age of twenty-one years, and as to interest annually for their use.

In *Doe ex dem. Roake v. Nowell*, 1 Maule & S. 327, testatrix devised all her freehold estates to a nephew for life, and on his decease devised said estates "to and among his children lawfully begotten equally at the age of twenty-one and their heirs as tenants in common; but if only one child shall live to attain such age, to him or her and his or her heirs at his or her age of twenty-one. And in case my said nephew John Roake shall die without lawful issue or such lawful issue shall die before twenty-one then I devise all the said estate" to others. It was held, upon the authority of *Bromfield v. Crowder*, 1 Bos. & P. N. R. 313 (set out in VIII. a, supra) that the nephew's children took vested remainders. This decision was affirmed by the House of Lords in *Randoll v. Doe*, 5 Dow. P. C. 202.

In *Doe ex dem. Dolley v. Ward*, 9 Ad. & El. 582, 1 Perry & D. 568, 8 L. J. Q. B. N. S. 154, testator devised a freehold to his daughter Sarah for life, and from and after her decease "to such of her children as she now has or may have, if a son or sons, at his or their ages of twenty-three," if a daughter, at her or their ages of twenty-one, in fee; and in case of the death of any son or daughter under the prescribed age, his or her share to go to the survivors and survivor of them all attaining the prescribed age; the rents and produce of the devised premises to be applied by the trustee to the maintenance of the said grandchildren until they should attain the above ages; with a devise over if all should die under the prescribed ages. It was held, upon the authority of *Doe ex dem. Roake v. Nowell*, supra, that the daughter's children took vested estates in the remainder immediately upon the death of the testator, and that the express devise over to the other children in event of one dying under twenty-three, which was wanting in the case relied on, would not make such a distinction as to escape from the authority of that case.

In *Tatham v. Vernon*, 29 Beav. 604, where a testator gave shares of his estate to each of his daughters during the term of her natural life, "and from and after the decease of such daughter, in trust to pay and divide her share to and amongst

the issue lawfully begotten of such daughter equally, share and share alike, at their several ages of twenty-five years, and in the meantime the interest and dividends of such daughter's share to go and be applied in the maintenance, support, and education of such child's issue during his, her, or their respective minorities in equal portions,"—it was held, in view of the gift of the whole of the interest during the minority of the daughter's children, and the fact that the gift was not to such of them as should attain the age of twenty-five, the effect was that the words "at twenty-five" meant the time intended by the testator for the payment of the capital, and therefore that on the decease of each daughter the share of that daughter vested in her children who were then alive.

In *Teale v. Hathaway*, 129 Mass. 164, testatrix gave her residuary estate in trust, in case her daughter should be left a widow, to pay over to her during her widowhood the interest thereon, and directed that in case such daughter should leave any child or children "the amount in said trustee's hands shall be paid over to such child or children at their maturity, or when of full age of twenty-five years," and in case such daughter should leave no child or children, then the trust fund was given to others. It was held that as the will was inartificially drawn, no importance was to be attached to the fact that the gift to the daughter's children was not in the form of a direct gift, but of a direction to the trustees to pay over to them at their maturity; that as there were no decisive indications of an intention that the gift should not vest in right until the majority of the daughter's children, but on the other hand it seemed clearly to have been the intention of the testatrix to dispose of all her estate, and a construction of the gift as contingent might result in an intestacy; and as if the equitable estates of the daughter's children did not vest until their maturity, then in case one of them should die before maturity leaving issue such issue would take nothing,—vesting was not postponed until the children respectively became of age.

Instances in which the gift has been held contingent.

In *Cruise v. Barley*, 3 P. Wms. 20, 2 Eq. Cas. Abr. 543, pl. 15, where testator devised his real and personal property to a trustee in trust to sell, and, after paying debts, to apply the proceeds amongst testator's five children in manner thereafter mentioned, namely, to the testator's eldest son £200, which the testator gave him at his age of twenty-one; all the rest and residue thereof to and amongst his four younger children, share and share alike, at their respective ages of twenty-one or days of marriage, which should first happen, and if any of his four younger children should die before such age or marriage, his or her share to go to the survivors,—it was held that the legacy to the eldest son never vested, it being by the will given to him

at his age of twenty-one, and not payable at his age of twenty-one, so that the age was annexed to the gift, and not to the time of payment.

In *Re Bank of Montreal*, 26 Grant. Ch. (U. C.) 420, where testator bequeathed a sum of bank stock to his daughter for life, and "if she marry and have children to the number of four or less, that the said sum or principal shall be equally divided amongst them, and be at their disposal and under their own control and management at any time they come to age after her death, but not sooner. But if she have no children, then after her decease the aforesaid principal be at the disposal of my son Robert, provided he be twenty-five years of age or upwards; . . . but if she shall have more children than four, then and in such case she shall be at liberty to will the aforesaid principal after her death to her children respectively in way and manner she may think proper,"—it was held that the gift and condition of enjoyment being blended in the one sentence, no interest vested in children of the daughter dying during infancy and in their mother's lifetime.

In *Butler v. Freeman*, 3 Atk. 58, where testator gave all the rest and residue of his personal estate to his grandson at his age of twenty-one, and if he should die before that age, then to another, the legacy was held contingent.

In *Bentinck v. Portland*, 4 L. J. Ch. 13, where testator bequeathed certain sums of money upon trust to pay the interest, dividends, and proceeds to one during her natural life, and after her decease to another for his natural life, and from and after his decease in trust to pay, transfer, and assign the capital sums and all arrears of interest to the children, if more than one, of the body of such other person, share and share alike, "and in case of one only child, to pay, transfer, and assign the same to such one child, the share and shares of such of the said children, if more than one, as shall be a son or sons at his or their age or respective ages of twenty-one years, and to such of them as shall be a daughter or daughters at her or their age or respective ages of twenty-one years or day or respective days of marriage,"—it was held that the bequest fell within the rule that where there is no gift except the direction for payment, a legacy does not vest till the time of payment arrives, the case being distinguished from *Skey v. Barnes*, 3 Meriv. 335, 17 Revised Rep. 91, 25 Eng. Rul. Cas. 593 (set out in VII. *supra*), on the ground that in that case there was an absolute gift apart from the direction for postponement of payment.

In *Chance v. Chance*, 16 Beav. 572, testatrix bequeathed certain securities in trust to pay the dividends to certain persons for life, and after the death of the survivor gave, bequeathed, and directed the principal sum to be divided into two equal half parts or shares, and one such half part or share to be transferred or paid L.R.A.1915C.

unto and equally divided between all the children of her son Charles "at the age of twenty-five years, with all interest and dividends thereon." She then bequeathed the other moiety to the children of her son George in the same terms, and directed that if Charles should not have any children who should live, to attain the age of twenty-five years, the first-mentioned moiety should go to the children of George. It was held that there was nothing to take the case out of the rule that if there is no gift except in the direction to pay at a particular age, the legatee must attain that age before the legacy vests in him.

g. Gifts "on" or "upon" a specified age.

Instances in which the gift has been held vested.

In *Goodright ex dem. Revell v. Parker*, 1 Maule & S. 692, where testator devised his leasehold houses held for a term renewable, to J. T. Steele "to and for his own use and benefit on his attaining his age of twenty-one years, upon trust that they my trustees hereinafter named shall pay and perform the rents and covenants on the lessee's part and behalf to be performed, and to renew the same from time to time as occasion shall require, and for that purpose to make such surrender of the lease so to be renewed as shall be requisite and necessary in that behalf, and out of the rents, issues, and profits of the said premises to raise such money as shall be sufficient for paying the several fines and other necessary charges of renewing the said lease from time to time, and subject thereunto, and also to permit and suffer my trustees to receive the rents and profits of the said several houses during the minority of the said J. T. Steele, and the maintenance and support of the said J. T. Steele during his minority to be taken and paid out of the rents and profits of the said houses." It was held that the devise was in effect a devise to the trustees till J. T. Steele attained the age of twenty-one, remainder to J. T. Steele, in which case the remainder, vested presently.

In *Attwater v. Attwater*, 18 Beav. 330, 23 L. J. Ch. N. S. 692, 18 Jur. 50, 2 Week. Rep. 81, it was held that under a devise to one "on attaining the age of twenty-five years" the words quoted were indicative merely of the time when he was to be put into possession of the property, and therefore that he took a vested interest, liable to be divested by his death under the age of twenty-five.

In *Jull v. Jacobs*, L. R. 3 Ch. Div. 703, 35 L. T. N. S. 153, 24 Week. Rep. 947, where a testator gave to his daughter real and personal estate "during her lifetime, and after her decease the property to be equally divided between her children on their becoming of age," it was held that the daughter's children took a vested remainder.

In *Re Couturier* [1907] 1 Ch. 470, where testatrix directed her executors to set apart

certain sums of money for certain grandsons, "these said sums to be free of duty and to be paid respectively as to £50 part thereof on their attaining the ages of twenty-one years, and as to £50 part thereof on their attaining the ages of twenty-five years," and the balance of the legacy to each to be paid him on his attaining the age of thirty years, with no gift over in the event of the legatees dying before the period fixed for payment, it was held that as the legacies were not merely severed from the rest of the estate, but were directed to be set apart for the legatee and to be free of duty, and as the income in the meantime was not otherwise disposed of, the legacies vested immediately.

In *Brennan v. Brennan* [1894] 1 I. R. 69, testator directed his executors to invest a sum of £10,000, with the interest of which they should pay an annuity which he gave to his wife, "the said sum of £10,000 to be distributed share and share alike amongst all my children to each respectively, if a boy, on his attaining the age of twenty-four years, and to my daughters upon their marriage" with consent. He subsequently directed his executors to invest for the maintenance and education of his children during their minorities, or, if girls, until their marriage, all the moneys to which they might respectively be entitled under his will. It was held that as the gift to the children was not to them as a class, but of an equal and divided share to each, as the words "to be distributed" were equivalent to "to be paid," and as the subject of the gift was directed to be invested for the special purpose, subject to the annuity, of providing a fund for the payments to the children, necessitating a severance from the general personal estate immediately on the death of the testator, and as the words "may be respectively entitled" in the maintenance clause showed that there was no intention to throw the whole income into one common fund for the maintenance and education of all, but to apply the income of the bequest to each for the benefit of the owner, the interests of the children were not contingent upon attaining the age of twenty-four.

In *Marcon v. Alling*, 5 Grant, Ch. (U. C.) 562, where testator devised to his grandson, "upon his attaining the full age of twenty-one years, and to his heirs forever," certain realty, adding: "And my executors are hereby required to make whatever use or benefit they can or may for the advantage of my said grandson during his minority, and pay to him . . . whatever the said lots may have produced of clear profit during the said term of his minority," it was held that the case came within the rule laid down in *Boraston's Case*, 3 Coke, 19a, 25 Eng. Rul. Cas. 579 (set out in VIII. i, *infra*) and other authorities of that class, and accordingly that the grandson took a vested interest.

In *Butler v. Butler*, 29 N. S. 145, testator directed his executors to invest a certain sum, and pay the income therefrom L.R.A.1915C.

to and for the use and benefit of his son "until he shall have arrived at the full age of twenty-eight years, and upon his attaining said age to pay said sum and its accumulations and unapplied income, if any, or deliver the securities representing the same, to him. In case he should die before me, or having survived me should die before he has actually received into his possession said sum or securities, without leaving a child or children him surviving, and no child or children of his shall be living at my decease, then and in either of said cases said sum shall revert to my estate and form part of the residue thereof." He further gave the son a power of appointment by will after he should attain the age of twenty-one, and added: "In the event of his dying either before or after me, and a child or children of his shall survive me, then said sum shall go to those of his children who may survive me in equal shares." It was held that as the sum in question was by the express direction of the testator to be separated from the rest of the estate and applied for the son's sole use and benefit, as he was entitled to the whole income arising from the fund, as he was permitted to make a will disposing of it when he became twenty-one, and as there was nothing in the will indicative of a different intention except the direction postponing the payment until he should attain twenty-eight years of age, the legacy was a vested one, although the consequence of this holding was that the court was obliged to declare all the subsequent provisions and directions in respect to its disposition to be repugnant and void.

In *Butler v. Butler*, *supra*, where testator directed his executors to invest a sum of money, and to apply and pay so much of the income thereof as should be necessary for the support, education, and maintenance of testator's son "until he shall have attained the full age of twenty-one years, and thereafter to pay him the whole income until he shall have attained the full age of twenty-eight years, and upon his attaining said last-named age to pay said sum and its accumulations and unapplied income, if any, or deliver the securities representing the same to him," it was held that the legacy was vested, the testator having bequeathed to the son the whole fund, with all the interest, merely giving directions as to its expenditure during his minority.

In *Richardson v. Penicks*, 1 App. D. C. 261, where a testator devised to his mother certain real estate, "to have and to hold during her natural life, and after her death to my son [name] upon his attaining his majority," further providing that in event of his mother's death before his son should arrive to the age of twenty-one, testator's sister should enjoy the use of the property until his son should become twenty-one, and, in event of the son's death before that of testator's mother, gave the property to such sister absolutely, it was held that as it could not be said that testator

intended that no interest should vest in his son unless he should live to become twenty-one, it must be held that it was the enjoyment only of the devised estate which depended upon this contingency. The court was also influenced by the fact that a different construction would, in event of the son's death before majority, have resulted in a complete intestacy as to the reversion after the determination of the life estate.

In *Young v. McKinnie*, 5 Fla. 542, testator directed that all his property should be equally divided between his wife, his daughter, and his son, adding: "It is further my will and desire that all my property be kept together for the use and benefit of my said wife and children unless my said wife should marry or the children become of age, in which event or events I wish the property divided as above." It was held in view of the fact that there was an intermediate gift of the whole income of the estate, and no other provision was made for the support of his wife and children, the bequest came within the principle that the gift of the interest on stock or money bequeathed vests the stock or capital immediately on the death of the testator, although by the words of the will enjoyment of such stock or principal is postponed to a future period.

In *Grigsby v. Breckinridge*, 12 B. Mon. 629, testator gave his wife all his lands, stock, etc., until the expiration of the minority of his oldest son or her remarriage. He further devised to his son, "on his arriving at age," a certain farm and negroes, and bequeathed to his son \$1,000 "on his arriving at age," to purchase stock for "his farm." It was held that as the will contained no expression indicating an intention to protract the vesting of the estate to any future period beyond the death of the testator, but, on the other hand, the testator employed no language importing contingency, but had spoken of his son's arrival at majority as an event that would certainly happen, and had referred to the farm as "his (the son's) farm," and had made no devise over in case the son should not arrive at majority, the son took a vested interest.

In *Taylor v. Richards*, 153 Mich. 687, 117 N. W. 208, where testator, who by his will had devised to A a farm and the farming tools, implements, and stock thereon, the income being appropriated for the support and education of the devisee, to go to him upon his arriving at the age of twenty-one years, by codicil provided that the farm so devised "I hereby devise to said [devisee] upon his arriving at the age of twenty-five years, instead of at once as in said will provided, the control of the same to remain in the hands of my executors until he arrives at that age, the use and income thereof to be appropriated for the support and education as in said will provided, the title thereto to remain in my executors until he arrives at twenty-five years of age, when if he shall show himself worthy and of steady habits my said

executors shall, if they deem it safe and for his best interest, transfer and convey said farm" to him, or, should it have been sold by them, the proceeds thereof,—it was held that the contingency referred to did not apply to the gift itself, but merely to the time when the devisee should come into its full enjoyment.

In *Sawyer v. Cubby*, 146 N. Y. 192, 40 N. E. 869, where testatrix gave her residuary estate to her executor in trust to pay the income therefrom to an adopted son "until he shall arrive at the age of thirty-five years, and upon his arriving at the age of thirty-five years to pay, and I direct my said executor to pay, the principal of such rest, residue, and remainder over to said" adopted son, it was held that as the whole accruing interest was given the son, his estate was vested, its enjoyment only being postponed.

In *Cammann v. Bailey*, 210 N. Y. 19, 103 N. E. 824 (reversing 156 App. Div. 87, 141 N. Y. Supp. 41), testator, who had given to his son, Edmund S. Bailey, certain shares of stock, "which are to be kept by my executors until he reaches twenty-one years of age, when the same shall be transferred to him, together with all income that may have been collected thereon from the time of my decease," after reciting that a provision made by a deceased relative for his other children had produced an inequality in their pecuniary circumstances, went on to provide that in order to remedy such inequality his trustee should set apart from his residuary real estate for the benefit of his son Edmund, before its division into shares as thereafter directed, the sum or value of \$20,000, to be added to the aliquot share of such son in the balance of his residuary estate, and to be held for his benefit and belong to him subject to the provisions as to the income and principal of the residuary estate and the trust shares therein. He further gave the rest of his estate, both real and personal, to trustees in trust to manage during the life of his wife, and to pay to her from the net income \$20,000 per annum, and to pay over to his son Edmund, or to apply to his use so long as he shall remain a minor, the proportion of such balance of the residuary income as should be earned by \$20,000 thereof, and to apply the balance of such income to the use of testator's surviving children or descendants of children during minority, or to pay over their shares to those who then should have reached majority. He further provided that after the death of his wife the whole of his residuary estate should be divided by the trustees, subject to the above-recited provision for the increase of the share therein of testator's son Edmund, into as many equal shares as testator should leave children or descendants of children, to apply the income from each share for the benefit of the person or persons for whom it is held during infancy, and after majority to pay the net income directly to the beneficiary, adding: "Upon the attaining of the age of thirty years by

either of my sons the principal of the share until that time held for such son shall after the death of my wife be paid over, transferred, or conveyed to him." Testator's son Edmund having died before attaining the age of thirty, the question arose as to whether he had any vested interest in the income or principal of the estate of his father which would pass under his, the son's, will. It was held that the language used by the testator in directing that the \$20,000 set apart for Edmund should be added to his aliquot share of the residuary estate, "and be held for his benefit and belong to him," the fact that there was no apparent distinction to be made between such sum and the balance constituting the aliquot share of such son in the residuary estate, and the fact that the testator in speaking of the actual division of the residuary estate after the death of his widow, and of the same being held for the benefit of his sons respectively, referred to such shares as "until that time held for" such sons,—showed his intention to be to make vested gifts to his son Edmund, subject to the provision made for his widow, and also postponing the time when his son should have possession of such gifts. Cullen, Ch. J., concurring in the result, said that, assuming that the gift of \$20,000 was vested, he could not perceive how that tended to prove that the testator intended his other gift, made in entirely different language, to be vested, and still less how it would tend to vest the share in the residuary estate of the other son, who might also have died under the age of thirty years; that in his judgment the decision could safely be rested on one ground alone, which is, that the construction of the gift as vested would prevent the disinheritance of the issue of any child who might marry and die before the expiration of the trust period.

In *Re Crossman*, 15 N. Y. S. R. 841, 1 N. Y. Supp. 103 (affirmed on other grounds in 113 N. Y. 503, 21 N. E. 180), where testator directed his executor to set apart a fund the income whereof was to be applied to the use of his wife during her natural life, and upon her death to be paid over to her adopted son, if he should then have arrived at the age of twenty-eight years; "but if at the decease of my wife he shall not have arrived at the age of twenty-eight years, then my executors are directed to keep the same invested until he shall have arrived at that age, and that they apply the interest or income to his use, and on his arrival at the age of twenty-eight years, the said principal and accumulated interest (if any) is to be paid to him," but if he should die before arriving at such age without leaving issue, then the fund was given to others,—it was held that the words used indicated an absolute gift, with the time of payment only being postponed.

In *Hooker v. Bryan*, 140 N. C. 402, 53 S. E. 130, where testatrix gave "the residue of my real estate to my beloved

nephew, Roscoe Hooker, upon his becoming twenty-one years of age, and lend the same to my beloved sister, Ella Bonner, until my nephew, Roscoe Hooker, is twenty-one years old,"—it was held that the phrase "upon his becoming twenty-one years of age" referred to the time of enjoyment, and therefore that the nephew took a vested remainder.

In *Clark v. Peters*, 68 Misc. 252, 124 N. Y. Supp. 961, where the testator gave to a daughter the use of a share of his estate during her natural life, and after her death gave such share to her two children, share and share alike, or to the survivor of them, on his or her attaining lawful age, it was held that the children took vested interests, subject to be divested.

In *James v. Wynford*, 1 Smale & G. 40, freehold and leasehold estates were devised upon trust, after certain trusts that failed, to receive the rents, and pay them for the benefit of the testator's daughter's son Robert, "and all and every son and sons as she should happen to have, until he or they should attain his and their age and ages of twenty-five years; and on his and their attaining that age, in trust for the heirs, executors, administrators, and assigns of the said Robert, and all and every other son and sons as his said daughter Bridget should happen to leave and attain the age of twenty-five years;" but in case his daughter should leave no son or sons, and they should all happen to die without attaining the age of twenty-five years, then in trust for all and every the daughter and daughters of his said daughter Bridget that should attain the age of twenty-five years; but in case his daughter should leave no son or daughter at her decease living that should attain such age, then testator devised the property to nephews. He also gave certain realty in trust for his daughter for life, and from and after her decease upon trust to pay and apply the rents and profits thereof, or so much as should be necessary, to and for the support, education, and maintenance of his said daughter's son Robert, and all and every other son and sons as she might happen to leave, until he and they should attain the age or ages of twenty-five years, and on his and their attaining that age, then in trust for the said Robert and such other son and sons and their assigns for and during the term of their natural lives, remainder to their sons in tail, etc. It was held to be clearly the intention of the testator that Robert and all the other sons of his daughter should, on her death, take a beneficial interest in the rents and income, which on attaining the age of twenty-five was to become absolute and indefeasible, but that it was defeasible in case of death under twenty-five.

In *L'Estrange v. L'Estrange*, L. R. 25 Ir. Eq. 399, where testator devised lands to his son Thomas "on his attaining the age of twenty-five years; and should he not live to attain said age, I devise said estate to my son Patrick on his attaining said age

of twenty-five years;" and by codicil charged an annuity, which was to begin from testator's death, upon "the lands . . . devised to my son Thomas," and charged other lands with an annuity for the same amount for his son Thomas, to be payable to him during the life of the first annuitant,—it was held that the charge of the first annuity, and the appointment of the second annuity obviously by way of recoupment, showed that testator meant to give his son a vested estate, subject to be divested by his death under twenty-one.

In *RE PAXSON*, testator devised and bequeathed a share of his residuary estate to his three grandchildren, "share and share alike, on their arrival respectively at the age of twenty-one years," adding: "And in case of the death of either of my said grandchildren before his or her arrival at the age of twenty-one years without leaving issue him or her surviving, then his or her share so dying shall go to and be divided between the survivors or survivor thereof. And until the arrival of my said grandchildren at the age of twenty-one years respectively, I will and direct that one-half part of the income, interest, and dividends of their respective shares shall go to and be paid to their mother, Ella Paxson, for their education and support during their minority respectively." By a codicil he recited that "whereas I have given two thirds of my residuary estate to my three grandchildren, share and share alike, on their arrival respectively at the age of twenty-five years.

. . . Now I hereby ratify and confirm my said will, and I do furthermore direct my executors" to pay one half of the income of each share to the mother of such grandchildren for support and education, and to accumulate the remaining half to be paid along with the principal. It was held that, although there was no antecedent substantive gift, the fact that the gift over upon the death of either grandchild before attaining the age when payment was to be made was dependent on death "without leaving issue him or her surviving," the provision that a moiety of the income should be employed for the education and support of the legatees during minority, the reference in the clause providing against the death of either of the grandchildren in his or her minority to "the shares" of the one so dying, and the expressions used in the codicil,—disclosed a clear intention on the part of the testator to vest his gift in his grandchildren.

In *McCall's Estate*, 11 Phila. 41, where testatrix gave to her executors a sum of money in trust to pay the income thereof to a nephew during his life, and after his decease to pay the income to another "until he arrives at the age of twenty-five years; and on his arriving at twenty-five years to pay over to him the principal sum of \$2,000, with any accumulation thereon;" further providing that if the legatee should die before arriving at twenty-five years of age without marrying or leaving child or children him surviving, the said

sum of money should go to another, but if the said legatee should die under the age of twenty-five years leaving a child or children, such sum should go to his child or children him surviving in equal shares,—it was held that the provision above summarized showed the intention of the testatrix to be to give the legatee a present and immediate interest in the legacy, subject to being divested only in the event of his death under twenty-five years of age without marrying or leaving issue.

In *Van w. Clark*, 1 Atk. 510, where testator directed a sum of money to be paid to a certain person in trust for his daughter, directing that he should pay it to the said daughter for her own use and benefit upon her attaining the age of eighteen or marriage, if that should first happen, it was said that the legacy was not contingent upon her attaining eighteen or marriage.

In *Re Bunn*, L. R. 16 Ch. Div. 47, where testator gave his residuary personal estate in trust to convert and invest "and pay the annual income arising therefrom unto my nephew Enoch Bunn for his maintenance and until he shall attain the age of thirty years, and upon his attaining that age shall pay over or transfer the said trust moneys and securities to the said Enoch Bunn for his absolute use and benefit," it was held that the gift of intermediate income vested the gift of capital.

In *Re Williams* [1907] 1 Ch. 180, where testator gave his residuary estate to trustees upon trust as to one-third part thereof "to pay the income thereof, or such part thereof as my trustees shall think fit, to my son [naming him] for his advancement, preferment, or benefit, by equal weekly instalments until he shall attain the age of thirty-five years, and upon his attaining that age then I direct my trustees to pay him the corpus of the remaining third of my estate," it was held clear that the testator intended the son to have the whole of the income until he attained the age of thirty-five, with an ultimate gift of the corpus at that age, so as to bring the case within the rule that a gift of the income in the meantime vests the legacy at once.

In *Dobbie v. McPherson*, 19 Grant, Ch. (U. C.) 262, where testator devised certain lands to trustees "for or on behalf of my two sons William and James, and of any other son or sons to be hereafter lawfully begotten by me," directing that the land should be conveyed to them upon their coming of age, charged with certain payments to his daughters, it was held that the sons took an equitable fee vesting at the death of the testator, the personal enjoyment only being postponed.

In *Illinois Land & Loan Co. v. Bonner*, 75 Ill. 315, where a will provided that the executor should hold certain property as trustee for a certain person and his sister; that upon the sister's arriving at eighteen years of age he should convey one moiety thereof to her, and upon the brother's arriving at the age of twenty-one years,

convey the other moiety thereof to him; that in case the sister should die without issue before the full execution of the directions of said will, leaving the brother surviving, then the whole of the estate should be conveyed and delivered over by said executor to him upon his arriving at twenty-one years of age; and that in case both said sister and brother should die without issue prior to attaining the ages of eighteen and twenty-one years respectively, then said executor should convey to other persons,—it was held that in view of the words used, which refer to both attaining the specified ages as an event, rather than as a contingency, and the devise over in case of the sister's death without issue, the devisees took a vested interest.

In *Weyman v. Ringold*, 1 Bradf. 40, where testator directed his executors to invest the sum of \$4,000, and to pay and apply the interest thereof to the support and maintenance of a great niece and great nephew "until thy shall respectively attain the age of twenty-one years, and upon their so attaining the age of twenty-one years to pay the said principal moneys to them or their assigns in equal moieties; and in case they shall die without leaving lawful issue before they attain the age of twenty-one years, that the said money shall fall into and become a part of the residue of my estate,"—it was held that although there was no absolute direct gift in express terms to the legatees, yet the directions of the testator as to the severance of the sum of \$4,000 from the estate, its investment, the application of the interest to the support of the legatees, and the payment to them of the principal fund on their severally attaining majority, were decisive circumstances evincing an intention to make the gift vested.

In *Pearson v. Dolman*, L. R. 3 Eq. 315, testatrix gave the proceeds of her life insurance policy upon trust "so long as my nephew Thomas shall be in solvent circumstances, and shall not have become bankrupt, or made any composition with his creditors, or have pledged his property for the benefit, to pay the dividends, interest, and annual produce of the said trust moneys, stocks, funds, and securities, to my said nephew, until he shall attain the age of twenty-five years, so that his receipts alone shall be good discharges for the same, and so that he may not deprive himself thereof by sale, mortgage, or otherwise by way of anticipation. For in either of the events aforesaid, I direct that my said nephew shall lose all benefit of this provision, and that no assignees, creditors, or other persons shall derive any benefit therefrom, my object being for the personal wants of the said Thomas Watkins until any such event as aforesaid shall have happened, and then for the good of his family." On the happening of any such event the trustees were to stand possessed of the trust fund and the income therefrom in trust for all and every the lawful children of the nephew, who, being a son, should at-

tain twenty-one years, or daughters, should attain that age or marry; but in case the nephew should not then have any lawful children or child, then she directed that the trust fund should fall into the residue. She further directed the trustees to pay the proceeds of the policy to her nephew on his attaining twenty-five; in case he should die under twenty-five leaving any child or children him surviving, the said trust moneys, stocks, funds, and securities, and the interest, dividends, and annual produce thereof, were directed to remain and be in trust for all and every the children of her nephew, who, being sons, should attain twenty-one, or, being daughters, should attain that age or marry under that age. It was held that though the question was one of some nicety, yet there being a gift of the intermediate income, and the fund being given to trustees, showing a separation of the legacy from the bulk of the estate, and the circumstance that there was one event in which it was to go back to the residue, going to show an intention that except in that event it was not to go back, the gift vested immediately, subject to defeasance in the event of the nephew's alienating in part or dying under twenty-five and leaving children.

In *Rhode Island Hospital Trust Co. v. Noyes*, 26 R. I. 323, 58 Atl. 999, testator gave and bequeathed certain shares of stock and a sum of money in trust to pay from the net income a certain annuity to testator's sister, and to pay or apply the residue of said net income, or so much thereof as the trustee should deem advisable, to the use or benefit and education of testator's grandson until he should attain the age of twenty-one years, and after he should attain such age and until he should attain the age of twenty-five years to pay over such residue to him for his own use. "And upon his attaining the age of twenty-five years, my said trustee shall pay over to him my said grandson the whole of this fund and all accumulations thereof, that may then be remaining in the hands of my said trustee for his own absolute use. But if my said grandson shall decease before attaining the age of twenty-five years, then in that event immediately upon his decease, my said trustee shall pay over and distribute the said fund to his issue, if any then living, . . . and in default of such issue then as a part of and in such manner as is hereinafter provided respecting my residuary estate." It was held that upon consideration of the language of the will, showing an immediate separation of this fund from the corpus of the estate, and the appointment of a trustee for and the gift of interim income to the grandson, the language used in the devise over, and the strong presumption in favor of vested as opposed to contingent interests, the grandson took a vested interest in the fund in question, subject to be divested upon his death without issue under the age of twenty-five years.

In *Vivian v. Mills*, 1 Beav. 315, it was

held that under a will by which testator provided: "My estate subject to the above annuities to be equally divided among my legitimate children on their attaining the age of twenty-one years respectively; my executors will use their discretion in causing any moderate advances to be made for the purpose of placing my children in a profession from their respective portions of my estate," the children took vested interests.

In *Armitage v. Williams*, 27 Beav. 346, where a testator directed certain property to be invested, the interest arising therefrom to be applied to the education of the children of certain persons, in equal shares, "and on their attaining the age of twenty-one years the whole to be sold and divided equally between them,"—it was held that the interest of such children vested at birth.

In *Brennan v. Brennan* [1894] 1 I. R. 69, where testator bequeathed the residue of his property in equal shares to all his children upon their attaining the age of twenty-four years respectively, and directed his executors to invest for the maintenance and education of his children during their minorities, or if girls, until their marriage, all the moneys to which they might respectively be entitled under his will, it was held that the maintenance clause was sufficient to vest the gift immediately.

In *Bird v. Maybury*, 33 Beav. 351, where testator devised and bequeathed his real and personal estate to trustees upon trust to sell and to stand possessed of the proceeds, and to pay the interest or dividends arising therefrom to his wife, "to be applied by her towards the support and maintenance of herself and my said children until my said children shall respectively attain the age of twenty-one years, and upon their severally attaining that age I direct the moneys so invested as aforesaid to be divided between my said wife and children, share and share alike,"—it was held that a son who died under twenty-one had a vested interest.

In *Re Jobson*, L. R. 44 Ch. Div. 154, testator gave his estate upon trust as to a specified leasehold to permit his daughter Elizabeth to receive the rents and profits thereof for her life, adding: "And from and after her decease the same premises shall be in trust for all the children of the said Elizabeth Jobson in equal shares as tenants in common on their respectively attaining the age of twenty-one years." The will contained no directions as to the application of the rents of the leasehold during the minority of the daughter's children after her death. It was held that the words "from and after her decease" did not amount to a complete dedication of the property to the daughter's children upon her death, whether they should live to attain twenty-one or not, so as to turn their contingent into vested interests, but that such expression only meant, "subject to the interest of the tenant for life." Upon this point, North, J., said: "That this is the true meaning is, I think, clear from L.R.A.1915C.

these considerations. Suppose that, instead of a child surviving her mother and then dying under twenty-one, she had attained twenty-one and had then died in the lifetime of her mother, if the gift to children is only to take effect 'from and after' the death of the mother, that child, though she had attained twenty-one, would take no interest whatever in the house. It seems to me impossible to hold that a construction which would produce such a result can be the right construction." The case of *Andrew v. Andrew*, L. R. 1 Ch. Div. 410, 45 L. J. Ch. N. S. 232, 34 L. T. N. S. 82, 24 Week. Rep. 329, was distinguished upon the ground that the court in that case was strongly influenced by the wish to avoid the extremely improbable construction that the infant son, who was to take the whole interest in the property at twenty-one, was to lose the whole of the income during his minority, and that, moreover, there was a gift over in default of the tenant for life having a son.

In *Lake v. Ascher*, 132 App. Div. 684, 117 N. Y. Supp. 465, where testator gave a share of his residuary estate to the children of a grandson, to be equally divided between them, the executors and trustees of the will being directed to divide said share into parts according to the number of such children, and to pay and deliver to each of said children one of such parts upon his or her arriving at the age of twenty-five years, in the meantime applying the income to the support, education, and maintenance of each of said children, it was held that the interests of the children were not contingent upon their reaching twenty-one.

In *Re Turney* [1899] 2 Ch. 739, 69 L. J. Ch. N. S. 1, 48 Week. Rep. 97, 81 L. T. N. S. 548, where testator, who had given his residuary real and personal estate upon trust for his two sons in equal shares absolutely, by codicil revoked the absolute gift of one moiety to his son James, and instead thereof directed it to be held in trust to pay the income thereof to James during his life, and after his death upon trust for his child or children absolutely upon their attaining the age of twenty-five years; and in event of the death of either or all of the children of his son James before attaining such age, then upon trust to pay the share of the child or children so dying to his other son,—it was held that though the language was obscure, the use of the word "absolutely" in the phrase "after his [the son's] death upon trust for his child or children absolutely upon their attaining the age of twenty-five" and the fact that in the gift over the testator treated the children of his son as having "shares" although dying before attaining twenty-five, showed that the testator probably meant to give such children vested interests, subject to be divested by their death under twenty-five.

In *Smith v. Parsons*, 146 N. Y. 116, 40 N. E. 736, where testator empowered his executors to divide a portion of his estate

into as many equal shares as he should leave children him surviving, and to invest and reinvest each share, and to apply so much of the income as they might deem necessary to the use of the child for whom the share is intended, "and to accumulate the remainder of said income until the said child shall attain the age of twenty-one years, or sooner die, and upon such child attaining the age of twenty-one years to pay over all accumulations of such income to such child, and thereafter to apply the income and interest of such share to the use of such child during the remainder of his or her natural life; and upon the death of such child before or after his or her attaining the age of twenty-one years, to assign, transfer, and set over such share to the children, if any, of such child," and in default of children, then to testator's surviving issue,—it was held that, taking the whole will together, it was the intention of the testator that all accumulations of income during infancy should vest at once, and only the time of payment or enjoyment was postponed until majority.

In *Re Ranken*, 101 App. Div. 189, 91 N. Y. Supp. 933 (affirmed without opinion in 182 N. Y. 519, 74 N. E. 1124), where testatrix devised her residuary real estate to her executors upon trust to collect and receive the rents, issues, and profits thereof during the minority of a son, and during his minority to accumulate such income, and to apply so much thereof as should be necessary toward his support, maintenance, and education, and further provided: "Upon my said son [name] reaching the age of twenty-one years, I do hereby give and devise the said real estate and appurtenances thereunto belonging to him, my said son [name], together with any surplus income accumulated therefrom during his minority, absolutely to have and to hold the same to him, his heirs and assigns forever,"—it was held, following *Smith v. Parsons*, 146 N. Y. 116, 40 N. E. 736, that the accumulations vested at once, and that only the time of payment or enjoyment was postponed until majority.

Instances in which the gift has been held contingent.

In *Alexander v. Alexander*, 16 C. B. 59, where testator gave and devised to his son all his realty for and during the term of his natural life, and from and immediately after his decease gave and devised the same unto the second son of the body of such son lawfully begotten, "on his attaining the age of twenty-one years, but in default of there being a second son," then to another, it was held that the second son took a contingent remainder expectant on the determination of the life estate of his father.

In *Love v. Love*, Ir. L. R. 7 Eq. 306, testator bequeathed all his land to a nephew "on his attaining the age of twenty-three." It was held that as there was nothing to L.R.A.1915C.

control the effect of the words of contingency, there being no separate direction as to enjoyment, as to which they could be referred, as they formed a portion of the gift itself, there being no gift of intermediate rents and profits, either for the benefit of the devisee or any other person, no prior interest given, nor any gift over in case the devisee should not attain the prescribed age,—the gift was contingent upon the nephew's attaining the age of twenty-three.

In *Ruthven v. Ruthven*, 25 Grant, Ch. (U. C.) 534, where testator bequeathed "the sum of \$500 to each of the four children of my brother George Ruthven on their attaining their twenty-first year," it was held that the legacies were contingent upon the legatees respectively attaining their majority.

In *Grigsby v. Breckinridge*, 12 B. Mon. 629, the bequest to a son of \$1,000 "on his arriving at age, to purchase stock for his farm," was, in view of the terms in which the bequest was made and the object to which the money was to be applied, considered as a contingent, and not a vested, legacy.

In *High v. Pollock*, 114 Md. 580, 80 Atl. 43, testator charged the lands devised to his two sons with the payment of an annuity to a daughter during her life, and upon her death to her son "until he has reached the age of twenty-four years, and upon the said [son] arriving at the age of twenty-four years, provided he arrives at that age after the death of his said mother, or if the said [son] is twenty-four years of age at the death of his mother, then each of my said two sons shall pay the sum of \$1,000 to," the son of said daughter. It was held that the language used by the testator clearly disclosed an intent on his part to make the vesting of the legatee's interest contingent upon his reaching the age of twenty-four years, the creation of the charge being regarded as made with the intention of securing the payment of the annuities, rather than with the intention of vesting the legacy.

In *Re Whittick*, 130 L. T. Jo. 440, where testator directed his trustees to set apart a sum of money, and to pay the income therefrom to his wife during widowhood, and after her death or remarriage upon trust for his daughter, "to be an absolute interest on her attaining the age of twenty-one years, and to be held by her for her sole and separate use and benefit," it was held that the daughter's interest was conditional upon her attaining the age of twenty-one years.

In *Lyman v. Parsons*, 26 Conn. 493, testator, after making a provision for his wife which included an annuity to be paid from his estate until her decease or remarriage, gave the residue of his estate in trust for the sole use and benefit of his son and daughters, directing that during their minority the trustee should expend such sums for their support and education as might seem expedient, charging the sums ex-

pended for each towards his or her share of the estate. He then directed the trustees to pay to his son on his attaining the age of twenty-one years the sum of \$5,000; and, if they should judge best, a further sum not exceeding \$500 if they should think it to be for his interest; to pay to him on the attaining of twenty-three years such an amount as they should deem it best for his interest to receive, not exceeding \$10,000; on his attaining to the age of twenty-five years, to make a similar discretionary payment; and to continue to make such payments from one period of two years to another until the son's share should be fully paid off and discharged. He likewise directed the trustees to pay to each of his daughters on their respectively attaining the age of twenty-one the sum of \$2,000, and a like sum every two years thereafter. He further provided that if his son should die before receiving payment of his share as aforesaid, leaving no lawful issue, then that his share remaining in the hands of said trustees should be paid and delivered over in equal shares to his daughters; and made a similar provision in case any one of his daughters should die before receiving payment. If any of his children should die leaving lawful issue, such issue were to be entitled to the share of their parent. The question having arisen as to the right of the children to be paid from time to time the accruing rents and interest on their respective shares, it was held that as testator contemplated that his estate should be kept together until its ultimate distribution in the manner above detailed, the legacies to the children would not be considered as vested until the time of payment.

The same will was under construction in *Lyman v. Parsons*, 28 Barb. 564, where it was likewise held (reversing 4 Bradf. 268), that the interest of the children in their unpaid shares could not be said to be vested.

In *Dickerson v. Sheehy*, 156 App. Div. 101, 141 N. Y. Supp. 35 (affirmed without opinion in 209 N. Y. 592, 103 N. E. 717), testator gave his residuary estate in trust to pay two fifths of the income thereof to his widow during her life, and to divide the other three fifths into two equal parts, and apply so much of one part as they should deem proper to the maintenance and education of his son Edward until he should attain the age of twenty-one years; and upon his attaining that age to pay over to him such part from time to time until he should attain the age of twenty-five years, further providing: "Upon my said son attaining the age of twenty-five years, to convey, transfer, and pay over to him three tenths of all the rest, residue, and remainder of all my real estate, and one half of all the rest, residue, and remainder of all my personal estate, together with all unexpended interest, income, and profits of the said one of the said two equal parts mentioned in [the preceding paragraph] to my said son, Ed- L.R.A.1915C.

ward C. Sheehy, his heirs, representatives, and assigns forever." It was held that as there were in the will no direct words of gift to the son, no immediate severance of his share from the estate, and no intervening estate which necessitated the postponing of the transfer of the estate to him until he should arrive at the age of twenty-five, there was nothing to take the case out of the operation of the rule that where a gift is in the form of a direction to pay and divide, futurity is annexed to the substance of the gift.

In *Re Kottmeier*, 24 Misc. 58, 53 N. Y. Supp. 392, where testator gave to his five children and his grandson all his estate, to be equally divided between them, further directing that his executor should hold the share of his estate devised to his grandson in trust during his minority to apply the income thereof, or such portion of the principal sum as they might consider proper, to his support, maintenance, and education, and upon his arriving at the age of twenty-one years to pay over to him the said principal sum not so expended and all accumulations thereof, with a gift over should the grandson die before attaining majority leaving no lawful child or children,—it was held clearly to be the testator's intention not to vest the absolute ownership of any part of his estate in his grandson unless he arrived at the age of twenty-one years.

In *Wadry v. Geddes*, 1 Russ. & M. 203, testatrix gave the income from her residuary estate to her sisters for life, adding: "And on the death of my sisters, I will and direct that the interest of their respective shares shall, at the discretion of my executors, be applied in the maintenance and education or accumulate for the benefit of the children of each of my sisters so dying, until they shall severally attain the age of twenty-two years; and, upon any of their attainment to that age, they shall be entitled to their proportion of their mother's share of the principal; and in case of any of their decease under that age, leaving lawful issue, such issue shall be entitled to their respective parent's share at such time as such parent would have been entitled, if living, thereto, with the benefit of the interest or produce thereof in the meantime;" with benefit of survivorship in default of such issue. It was held by Sir John Leach, M. R., following *Leake v. Robinson*, 2 Meriv. 363, 16 Revised Rep. 168 (set out in note 216, supra), that as there was no gift but in the direction to pay, the interests taken by the children were contingent upon their attaining the specified age.

In *Re Wrangham*, 1 Drew. & S. 358, 30 L. J. Ch. N. S. 258, 7 Jur. N. S. 15, 3 L. T. N. S. 722, 9 Week. Rep. 156, where testator bequeathed to his daughter the interest or dividends arising from certain securities, "and after her decease the principal of the said stock to her child or children in equal proportions on their attaining the age of twenty-one years," but

should the daughter die without leaving any issue, then in such case the stock to revert to testator's son, it was held that by the ordinary interpretation of the language used the gift was contingent on the daughter's children attaining the age of twenty-one; that the subsequent clause giving the fund over to the son in the event of no issue surviving the daughter did not show that the children were to take vested interests, only liable to be divested in the event of all the daughter's issue predeceasing her, but that its object was to provide for the event of one or more children attaining twenty-one in the life of their mother, and all of them and all her children predeceasing her; and that the possible disherison of great-grandchildren was not sufficient to warrant a contrary construction.

In *Anderson v. Bell*, 29 Grant, Ch. (U. C.) 452, where testator bequeathed his residuary estate to his grandchildren, "share and share alike, on their coming of the age of twenty-five years each, to be finally determined and paid to them on the youngest coming of the age of twenty-five years; provided, nevertheless, that each one on coming to the age of twenty-five years receive a portion of not more than one half what their share will be on the youngest coming of age,"—it was held that as in the gift itself the time for enjoyment was defined, it was thereby made contingent on attaining twenty-five.

In *Marson v. Purdy*, 31 N. Y. S. R. 130, 9 N. Y. Supp. 579, affirmed without opinion in 126 N. Y. 667, 27 N. E. 854, testator devised real estate to his executors "in as many equal shares as shall be the number of my surviving children, in trust as to each share for one such child out of and upon the following trusts:" During the widowhood of the wife to apply the net income "to the use of such child, or, should such child die during the widowhood of my wife, to the use of the descendants of such child, if any, and if none, to the use of my wife. And in further trust, should my wife die or remarry before such child shall reach the age of twenty-one years, until such child shall reach that age or die, if he or she shall die before attaining that age, to apply the same to the use of such child. Upon the death or remarriage of my wife, whichever shall first happen, if such child shall then have reached the age of twenty-one years, I give, devise, and bequeath such share to such child. . . . If such child shall not then have reached the age of twenty-one years, I give, devise, and bequeath such share to such child on his or her reaching that age. If such child shall then have died, I give, devise, and bequeath such share to and among those who would have inherited the same from such child if dying seized thereof in the share in which they would have inherited the same. And if such child shall die after the death or remarriage of my wife, but before reaching the age of twenty-one years, upon the death of such child I give, L.R.A.1915C.

devise, and bequeath such share to and among those who would have inherited the same from such child." It was held, as the devise which the testator made was first to take effect upon the death or marriage of his widow, and in the event also of the child to be benefited by it attaining the age of twenty-one years, the case was within the general principle that where the only gift is found in a direction to divide at a future time, it is contingent; and that such was the purpose and design of testator was further disclosed by the additional direction that if at the time of the decease or marriage of the widow, the child to be benefited had not attained the age of twenty-one years, then the devise should be further dependent upon the subsequent occurrence of that event, and the further provisions in the event of the child's death before attaining the age of twenty-one.

In *Barker v. Lea*, Turn. & R. 413, where testator bequeathed all the residue of his estate, both real and personal, unto the children of his brothers and sisters, "who shall be living at the time of my decease, on their, his, or her respectively attaining the age of twenty-five years, in equal shares," the principal of all such moneys to be employed by the executors as they should think most advantageous, and the profits and produce to be in the meantime applied for and toward their maintenance, education, and support equally until they should respectively attain the age of twenty-five years, adding: "And in case of the death of any or either of them unmarried and without issue, then I give and bequeath the part or share of him, her, or those so dying without issue, unto the survivor and survivors of them equally, share and share alike, and to be paid to them respectively at the same time along with their own original shares,"—it was held that the words "on their, his or her respectively attaining the age of twenty-five years" were annexed to the substance of the bequest, and accordingly that the gifts were contingent on attaining that age, notwithstanding the effect of this construction was that it gave no effect to the gift over in case of the death of any of them without issue.

In *Boughton v. James*, 1 Colly. Ch. Cas. 26, 8 Jur. 329, where testator gave and devised his property on trust, *inter alia*, to pay to and for the use, education, and maintenance of each of the daughters of his two nephews, whether born in his lifetime or afterwards, the yearly sum of £40 apiece until they should respectively attain the age of twenty-five years or be married with the consent of their parents, and on their respectively attaining that age or being previously married with such consent, in trust to pay each of them the sum of £1,500 for their respective uses and benefit, it was held that the legacy of £1,500 was not so given as to vest in a daughter of a nephew upon her coming into existence, subject to a postponement of

same, or subject contingently to be afterwards divested, but was given only when, and not before nor unless, she should attain the age of twenty-five years, or marry under that age with consent.

In *Walker v. Mower*, 16 Beav. 365, where testatrix gave a moiety of the residue of her real estate in trust for a daughter for life, "and after her death upon trust to convey and assure" the same "unto and equally between all and every the children of her said daughter on their respectively attaining twenty-one years of age, to and for their absolute use and benefit," with a gift over in case the daughter should die not leaving any child her surviving, Sir John Romilly, M. R., said that it was new to him if there was any case in which it had been held that where an estate is given to trustees in trust to convey to children on their attaining twenty-one, there is any vested interest before the time for conveying arrives; and that the case was governed by *Leake v. Robinson*, 2 Meriv. 363, 16 Revised Rep. 168 (set out in note 216, supra), which involved a gift of personality. He adhered to the view that the gift was contingent, although the result was an intestacy, the gift over not taking effect because the tenant for life did not die without leaving any child.

In *Re Grimshaw*, L. R. 11 Ch. Div. 406, testator gave to his testamentary trustees the sum of £3,000 upon trust to pay the income to his son-in-law and his wife during their joint lives and the life of the survivor, and after the decease of the survivor to apply the income thereof, or so much as they should think proper, to the maintenance, education, and bringing up of their child or children during their respective minorities, "and upon their attainment to the age of twenty-one years, do and shall pay and divide the same principal sum with the accumulations thereof, unto and equally amongst such child or children, and if there be no such child, unto" another. Hall, V. C., said that though it might perhaps be considered to be a somewhat critical mode of construing wills like the one before him, to notice whether the gift of the capital fund comes first, or whether the direction for maintenance does, the circumstance that such direction comes first was one which, in the then present state of authorities, could not be disregarded; that considering the words of the direction for maintenance critically, it was not a trust for maintenance declared in respect of the income of the whole fund, but only of so much of the income of the whole fund as the trustees should think proper, and that there not being a trust for the whole income for the benefit of the children, he could not hold that the direction for maintenance vested the capital fund.

In *Murray v. Tancred*, 10 Sim. 465, where testator gave his residuary estate, both real and personal, in trust for a nephew for his life, and after his decease "to transfer the whole of such residuary estate to his children by any lawful marriage on the day of L.R.A.1915C.

their attaining the age of twenty-one years," in such shares and proportions as the nephew should have appointed, and in default of such appointment, to the eldest son, if there should be one, otherwise to all the daughters equally; and in case the nephew should die without issue, or none of the issue should live to attain the age of twenty-one, the testator gave the property to others,—it was held that the time of payment was so annexed to the gift that it was necessary for the children to attain twenty-one in order to entitle them to take any share of the property under an appointment by their father.

In *Bailey v. Buffalo Loan, Trust & S. D. Co.* 75 Misc. 23, 132 N. Y. Supp. 513 (reversed on other grounds in 151 App. Div. 166, 135 N. Y. Supp. 344), where testator created a trust for the purpose of paying certain annuities, and directed that the principal of the trust fund should be held in trust for the children of a son, and that each child of said son "shall have and receive his or her proportion of said trust fund upon his or her arriving at the age of twenty-one years, and then to take such proportion of said principal sum as the number of children then living and minors shall bear toward the principal sum then undivided," with a further limitation should the son have no children to attain the age of twenty-one years,—it was held that the share of each child depended upon the contingency of its reaching the age of twenty-one, and the amount of such share depended upon the further contingency of the number of minor children then living.

h. Gifts "after," "from and after," or "from and upon" a specified age.

Instances in which the gift has been held vested.

In *Lane v. Goudge*, 9 Ves. Jr. 225, 7 Revised Rep. 163, where testatrix, after giving a sister an annuity for life, gave the remaining income from certain personal property to a godson for the education of his second daughter till she should attain the age of twenty-one years, and, after she should attain to the age of twenty-one years, gave the said interest to her and her heirs forever; and also after the decease of the sister bequeathed the annuity given to her to the godson till his second daughter should attain to the age of twenty-one years, and after she should attain to the age of twenty-one, then to her and her heirs forever,—it was held that the case was one in which there was an exception out of the generality of the bequests to the godson's second daughter, which accordingly were held vested.

In *Paterson v. Ellis*, 11 Wend. 259, testator provided: "My will further is, that immediately after my decease, the further sum of \$20,000 . . . be placed at interest in the name of my infant daughter Eliza Emily, . . . and that the interest or income of the said sum be received by my said executors, . . . as the guard-

ians of the estate of my said infant daughter, during her said minority, and that my said executors do pay out of the said interest or income the sum of \$500 annually to my said wife, to be appropriated by her to the education and maintenance of my said daughter Eliza Emily, during the minority of my said daughter unless my said daughter shall marry before she arrive at full age; in which case my will is, that my said executors do pay the whole of the interest or income of the said sum . . . to my said daughter." He further directed that the residue of the interest, over and above the sum appropriated for the daughter's education and maintenance, be reinvested, and "that the whole of the said principal sum, together with the accumulation of the interest therefrom, be at her own free and absolute disposal after she shall attain the age of twenty-one years." In case the daughter should die during her minority, leaving issue, such issue were to take the legacy; in case she should die without issue before arriving at the age of twenty-one years, the fund was to be distributed as directed. It was held that although the clause in question contained no absolute bequest in terms, and notwithstanding the use of the word "provided," which is an apt expression of contingency, the facts that the legacy was separated from the mass of the estate, that it was vested in the name of the legatee, that guardians were appointed of her estate, she having no other estate but this legacy, that the interest was all appropriated to her use and vested in her name and for her benefit, and that the whole was to be paid to her when twenty-one years of age,—evinced an intention that she should take immediately, the time of payment only being postponed.

In *Hodgson v. Gemmil*, 5 Rawle, 99, where testator devised to his grandson certain lands "to hold to him, his heirs and assigns forever from and after he arrives at the age of twenty-one years," it was held that such devise was of a remainder in fee, vesting in interest immediately upon the death of the testator.

In *Taylor ex dem. Smith v. Biddal*, 2 Mod. 289, where testator devised lands to his sister "for so long time and until her son Benjamin Wharton should attain his full age of twenty-one years, and after he shall have attained his said age then to the said Benjamin and his heirs forever; and if he die before his age of twenty-one years, then to the heirs of the body of" another, it was held that the son took a vested remainder.

In *Arnold v. Buffum*, 2 Mason, 208, Fed. Cas. No. 554, where testator gave and bequeathed to his wife the use and income of his homestead for the support and education of his young children until his son should attain the age of twenty-one years, and after said son should attain the age of twenty-one, directed that she should have the profits of one half of the said land during her natural life or widowhood, adding: "And after my said son Peleg attains the L.R.A.1915C.

age of twenty-one my will is that he enter into possession of one moiety thereof. And at the death or marriage, if that should happen, of my said wife, my said son Peleg enter into possession of the other half of the aforesaid lands and premises, with all the appurtenances thereunto belonging. And I do hereby devise and dispose of the whole of the reversion of all the aforesaid lands and real estate unto my said son Peleg Arnold. . . . But if my said son Peleg should die before he attain the age of twenty-one or without lawful issue, then the aforesaid devised premises, with all the appurtenances, to descend to my male heir in fee simple,"—it was held that the estate devised to Peleg was a vested estate in remainder, to take effect in possession upon the regular determination of the preceding estate, as to one moiety upon his attaining twenty-one years of age, and as to the other moiety upon the decease or marriage of testator's wife.

In *Doe ex dem. Cadogan v. Ewart*, 7 Ad. & El. 636, testator devised his real estate upon trust to receive the rents and issues thereof, and to pay and apply the same unto the use of testator's wife during life or widowhood, and from and after her decease or marrying again, then "upon trust to apply the said rents, issues, and profits towards the maintenance and support of my said daughter Isabella until she shall attain the age of twenty-five years; and from and after her attaining that age, then upon trust" for said Isabella, her heirs and assigns forever. It was held, without discussion of the point, and upon the authority of *Boraston's Case*, 3 Coke, 19a (for statement of which see VIII. i, infra), and other cases, that the daughter took a vested estate upon the death of the testator, before attaining the age of twenty-five years.

In *Griffith v. Griffith*, 29 Grant, Ch. (U. C.) 145, where testator directed the proceeds of his estate and the rents of certain realty be applied in the support, maintenance, and education of his two daughters and in paying any encumbrances on the realty, and further provided: "Should one of my said two daughters die or become a Roman Catholic, her share to go to the other, and should both die without issue or become Roman Catholics, then my estate is to go to my sister. . . . I direct that my trustees shall divide the proceeds of my estate equally between my two daughters, allowing each during their minority or until the marriage of one or other of them, a sum sufficient to maintain and educate them, and after they come of age an equal share of all proceeds to be secured and paid them,"—it was held that the interests attained by the daughters were vested interests, but subject to be divested upon the happening of the events mentioned before attaining the age of twenty-one.

In *Jackson v. Marjoribanks*, 12 Sim. 93. 5 Jur. 885, testator gave his real and personal estate to trustees, and directed them to invest his personal estate in the purchase of land, and to pay the rents to his

son for life, and in case his son should die leaving behind him legitimate issue, then at the end of six months after the eldest male child then living of his son should have attained twenty-five, or in default of male issue, the eldest female child then living of his son should have attained twenty-one, to convey all the estates to such child and to his or her heirs of his or her body lawfully begotten absolutely forever. He further provided that in case his said son should die during the minority of the said eldest male or the said eldest female child, then that from and after the decease of said son the annual sum of £500 should be appropriated for the maintenance and education of such child until he or she should have attained their respective ages before expressed and declared; and in case his son should not die during such minority, then that all his said estates should continue on the trusts aforesaid until six months after the decease of his said son, and at the expiration of that period pass to the said eldest male child or to the said eldest female child, as the case might be, in the manner already expressed and declared. It was held that the case was precisely within the principle of *Boraston's Case*, 3 Coke, 19 (for statement of which see VIII. i. infra), and therefore that a grandchild took a vested remainder.

In *Jones v. Mackilwain*, 1 Russ. 220, testator devised and bequeathed to his executors all his real and personal estate upon trust to sell and invest a moiety of the proceeds, the income from which was to be paid to a daughter during her life, and from and immediately after her decease upon trust to stand possessed thereof to pay an annuity to her husband in case he should survive her, and as to the remaining part of the annual income therefrom to pay and apply the same for and toward the maintenance and education of the children of said daughter "for and until they shall severally attain their several and respective ages or age of twenty-one years; and from and after they shall severally and respectively attain his, her, and their ages or age of twenty-one years, as to all the said principal moneys or stock so arising from the sale of my said real and personal estate, as and when they and each and every of them shall attain his, her, and their respective ages or age of twenty-one years, in trust to pay and dispose of the same unto and amongst all and every such child and children, their executors, administrators, and assigns in equal shares and proportions." It was held that the bequest being a gift of residue, and to trustees absolutely, and to them for the benefit of the daughter's children, the yearly interest being given to such children till they should attain twenty-one, and when they attain that age the principal to pass into their possession, and there being no gift over in event of their death, the children, though they did not attain twenty-one, took vested interests.

In *Safe Deposit & T. Co. v. Wood*, 201 L.R.A.1915C.

Pa. 420, 50 Atl. 920, testatrix gave to her son one sixth part of her estate in trust to pay over one third of the net income to his wife, and out of the other two-thirds part to apply so much as might be necessary for the suitable maintenance, education, and support of his child or children, and to invest the surplus, if any, in the same trust for use and benefit of his said child or children. Testatrix further directed that said trust should continue during the term of the natural life of her son, and that in case of his death after his child or children should all have arrived at the age of twenty-one years, the trust should cease and the trust estate be divided, one third thereof to his wife, and the other two-thirds part to his child or children or the issue of any deceased child. In case the son should die leaving children surviving him, all of whom should not then have arrived at the age of twenty-one years, testatrix directed the trust to be continued until all of such children should have arrived at the age of twenty-one years; at which time the said trust estate was to be divided in the manner above directed. It was held that the provision for the immediate enjoyment of the income of the estate by the son's wife and children indicated the intention of the testatrix that what she gave them should vest immediately, although their interests were subject to be defeated by their death without issue in the son's lifetime.

In *Boulton v. Pilcher*, 29 Beav. 633, 7 Jur. N. S. 767, 4 L. T. N. S. 426, 9 Week. Rep. 626, where a testator bequeathed leaseholds in trust for his wife for life, and from and immediately after her decease to pay and apply the rents, issues, and profits for and toward the maintenance and education of all and every his children who should be living at the time of his decease, and after all his said children should have attained the age of twenty-one years, then upon trust to sell the said leasehold premises, and to pay and divide the residue between and amongst all and every his said children equally, share and share alike, if more than one, and if but one or one surviving child, then to such child for his or her own use and benefit absolutely,—it was held, in view of the gift of the whole of the intermediate income, that all the children who survived the testator took vested interests.

In *Glading's Estate*, 13 Pa. Dist. R. 314, where testator, who by his will had given a sixth of his estate in trust for a daughter-in-law for life and at her death to her children, by codicil revoked the gift to the daughter-in-law for life, and directed his executors to pay the income of such sixth to her children, naming them, "until their arrival at the age of twenty-five years. And from and immediately upon the arrival of my said grandchildren at the age of twenty-five years, then I order and direct my said executors to pay the whole of the one sixth part . . . unto my said grandchildren [naming them] or the survivor of

them, their heirs, executors, administrators, and assigns forever," with a gift over in case said grandchildren should die without leaving lawful issue,—it was held that though the codicil was far from clear in its expression, the fact that the gift to them by the will of a remainder interest was absolute, and the intermediate gift of income until they should reach the age of twenty-five, showed that they were meant to take a vested interest, subject to be divested by death before reaching the prescribed age.

Instance in which gift held contingent.

In *Barker v. Southerland*, 6 Dem. 220, testator bequeathed all his estate, both real and personal, to a trustee "to hold the same in trust during the minority of my son Andrew Stout McConville, and after he shall arrive at the age of twenty-one years, I give, devise, and bequeath the same to said Andrew Stout McConville, his heirs and assigns forever. In case said Andrew Stout McConville shall die before arriving at the age of twenty-one years, then" another disposition was made. It was held that under the language of the will the son's estate was contingent upon his arriving at the age of twenty-one years.

1. Gifts "when" a certain age shall be attained.

Instances in which the gift has been held vested.

In *Manfield v. Dugard*, 1 Eq. Cas. Abr. 195, Gilb. Eq. Rep. 36, a man devised certain lands to his wife till his son and heir apparent should attain to his age of twenty-one years, and when his son should attain to his age, then to his son and his heirs. The son having died before attaining twenty-one, it was held that the wife's estate determined on his decease, and that the remainder vested presently in the son upon the testator's death, and was not expectant upon the contingency of his attaining the age of twenty-one.

In *Boraston's Case*, 3 Coke, 19a, testator devised realty to certain persons for a term of eight years, and after the term of said eight years to remain to his executors "until such time as Hugh Boraston shall accomplish his full age of twenty-one years, and the mean profits to be employed by my executors towards the performance of this my last will and testament: and when the said Hugh shall come to his age of twenty-one years, then I will he shall enjoy the said [realty] to him and to his heirs forever." It was contended that as in the case of a lease till one should attain his full age, if such one should die before his full age, the lease would be ended, and as a remainder is contingent where the particular estate may determine before the remainder can begin, the remainder devised to Hugh was contingent; but it was held that the case of a devise differs from a lease or grant made in a like manner, for the

devisor is intended to be *inops consilii*, and therefore the law will be his counsel, and, according to his intent appearing in his will, will supply the defect of his words, and that therefore the term given to the executors should be read as limited "until such time as Hugh Boraston should have come to his full age of twenty-one years;" and so, as the remainder would have begun in possession at the end of the term, it was vested. "And as to the uncertainty, it was said that the case at bar is no other in effect but that a man devises his lands to his executors (for the payment of his debts) until his son shall or should have come to his full age of (twenty-one years), the remainder to his son in fee; for although these are adverbs of time, 'when, etc.,' 'and then,' etc., yet they do not amount to make anything to precede the settling of the remainder, no more than in the common case. A man leases land for life or years, and after the decease of the lessee, or the term ended, the remainder to another, yet it shall remain presently; for when these adverbs refer to a thing which must of necessity happen, there they make no contingency, and it is certain that every man must die, for *statutum est hominibus semel mori*, and every term will end; for *tempus edax rerum*: and in the case at bar certain it is that Hugh would or might have accomplished his age of twenty-one years, which are, in this case of a will, all one in construction of law. So that these adverbs (then and when) in our case are demonstrations of the time when the remainder to Hugh shall take effect in possession, as in the said cases of a lease for life, and lease for years, and not when the remainder shall vest; *quod fuit concessum per totam Curiam*."

In *Fonereau v. Fonereau*, 3 Atk. 645, 1 Ves. Sr. 118, where testator gave a legacy to a certain person, when he should have attained the age of twenty-five, of £1,000, which the testator empowered the executors to lay out on such securities as they should think fit, the interest or income thereof to be for or towards the education of the infant as they should think fit, as also part of the principal to put him apprentice, the remainder to be paid him when he should have attained his age of twenty-five, it was held that the gift of interest in the meantime, and the provision empowering the executors to dispose of any part of the principal to put the legatee apprentice, showed the legacy to be vested.

In *Rofe v. Sowerby*, Tamlyn, 376, where testator directed his personal property to be invested in the hands of his executors for the sole use and maintenance of, bringing up, and supporting of his daughter "until she arrives at the age of twenty-one, and when she attains the age of twenty-one to receive the overplus," should there be any remaining after paying the expenses incurred for her maintenance, support, and education, it was held that the daughter took a vested interest.

In *Cloberry v. Lampden*, 2 Freem. Ch.

24, A gave to B £500 when she should attain the age of twenty-one years or be married, which should first happen, to be paid with interest. It was resolved that the legacy was not a contingent gift, though it would have been so if the words "to be paid with interest" had been omitted.

In *May v. Wood*, 3 Bro. Ch. 471, where testator gave to his daughters certain stock "and all the dividends and proceeds arising therefrom, to be equally divided between them, and all my estate at St. Osyth to be equally divided between them when they shall arrive at twenty-four years of age," it was held that the word "when" could not be otherwise considered than as denoting the period of payment, and did not create a condition precedent on which the legacy was to vest.

In *Re Hart*, 3 De G. & J. 202, testator, after giving his mother a life estate in all his realty, gave and devised it from and immediately after her decease to trustees upon trust to sell and stand possessed of the proceeds, and therefrom to pay to his daughter a sum of money when she should attain the age of twenty-five years, directing that the legacy should carry interest from the time of his mother's decease, which interest should be paid in and towards the maintenance, education, and support of his said daughter until she should attain the age of twenty-five years. It was held that the legatee took an absolute interest.

In *Branstrom v. Wilkinson*, 7 Ves. Jr. 421, where a legacy was given to two children "when they shall attain the age of twenty-one years," the use of the word "when" was held to be controlled by a provision for the appointment of a trustee for them during their minority.

In *Holby v. Wilkinson*, 28 Grant, Ch. (U. C.) 550, testator, after giving his wife a life estate in all his property, "subject to the further provisions of this my will," devised to an adopted son "when he is of the age of twenty-three years" certain lands. It was held that though the words of the devise to the son alone would create a contingent interest only, the gift of the intermediate interest to the wife had the effect to make the son's estate a vested one.

In *McCoppin v. McGuire*, 34 U. C. Q. B. 157, where testator gave and bequeathed to a son William "when he comes of age" a part of his homestead farm, the rest of which he devised to his son Peter "when he comes of age," adding: "Out of which said homestead farm I will and bequeath that my said wife shall have her maintenance and support for the term of her natural life, and also when my son William shall come of age to have for her own use and benefit the new part of the house lately erected," etc. "I moreover will that my said wife shall dwell in my said house of the homestead farm, and receive the rents and proceeds of the said farm to bring up and support my said children while she remains my widow,"—the court, although finding it unnecessary to decide the point, L.R.A.1915C.

expressed the opinion that as there was an obvious intent that the wife should have the rents and proceeds of the homestead farm to bring up and support the testator's children, there was such a disposition of the intermediate interest during their minorities as would turn the words of contingency into a condition subsequent.

In *Re Cooke*, 8 Ont. Rep. 530, testator bequeathed to his wife his bank stocks, "such stocks to be held for the interest of my son Arthur S. Cooke when he shall have arrived at the age of twenty-four years," appointing his wife guardian of such son, "to take charge of all remaining money that shall accrue from all sources; such money to be used for the necessary expenses of education, board, and clothing for my son;" and further expressed the desire that his wife should have "control of all money coming to my son Arthur S. Cooke till he is of the age of twenty-four years, and at that time all rents and other property shall come into his possession, save and except \$500 to be paid to my wife, Mary S. Cooke." It was held that an immediate gift to the son, to come into possession (except as to the \$500 a year to his mother) upon his attaining the age of twenty-four years, was plainly expressed on the face of the will.

In *Moffit v. Varden*, 5 Cranch, C. C. 658, Fed. Cas. No. 9,689, a devise of all testator's property, both real and personal, to be equally divided among the children of a brother and of a sister when they should arrive at the age of maturity, was treated as vested, subject to open and let in after-born children, and subject to be divested by death before the eldest should reach the age of twenty-one.

In *Kerlin v. Bull*, 1 Dall. 175, 1 L. ed. 88, where a testator gave and bequeathed to his son, "when he arrives at the age of twenty-one years," certain lands, "to hold to him, his heirs and assigns forever," it was held that as the absolute property was given to the son when he should arrive at age, and the use and profits in the meantime to his mother for the maintenance and education of all the children, and as the son was the principal object of the testator's bounty, the gift should be held immediate, possession only being postponed. The court was further influenced by the consideration that had the gift been contingent upon attaining twenty-one, and the son had died before that time, any children which he might have had would have been disinherited.

In *Scott v. Logan*, 23 Ark. 351, testator bequeathed to his son certain real estate and negroes "when he arrives at mature age or marries," further directing that the income arising from the property until his children should arrive at age or marry should be applied to the maintenance of his father and mother and the schooling of his children. It was held that the property vested immediately, though not to be divided until a future time.

In *Nelson v. Pomeroy*, 64 Conn. 257, 29 Atl. 534, where testator gave sums of money

to each of his grandchildren by name "when twenty-one years of age," appointing trustees for each of them then under age, it was held that the appointment of the trustees, in connection with the language of the gift, clearly showed that the legatees took a present vested interest.

In *Roberts v. Brinker*, 4 Dana (Ky.) 570, where a testator directed his executors to convert his property into money and make an equal division among his children, and then declared, as to the children of one of his daughters, that his executors should "retain in their hands one equal share of my estate, which they are directed to give in equal portions to my three grandchildren [naming them], equally, when they marry or come of age; and my executors are not to be charged with interest on that portion willed to [such persons], until after they marry or come of age," an intention that such legacies should vest was inferred from the provision that the executors should not be liable for interest, such declaration implying that the testator believed that without some such reservation they would be liable, and further amounting to a gift to the executors of the use of the principal fund until, according to the will, it should become distributable, thereby bringing the case within the rule in *Boraston's Case*, 3 Coke, 19, supra.

In *Danforth v. Talbot*, 7 B. Mon. 623, testator, intimating clearly an intention to dispose of his entire estate, directed that a certain farm should be for the use and support of his wife for and during her natural life, and that "on the decease of my said wife, the above-described farm, etc., shall become the property of my son Cyrus when arrived at the age of twenty-six years. . . . But after providing for the support and comfort of his mother, he may be entitled to all the profits arising from the same." It was held that as the adverb "when" is not ordinarily to be construed as creating a contingency, but only as relating to the time of enjoyment; that as the testator made no devise over in the event of the son's failure to arrive at the age of twenty-six years, as he would most certainly have done if he had regarded the happening of the event as uncertain or its not happening as a contingency which would give a different direction to the estate; and that as the son was entitled, from his father's death, to so much of the profits of the farm as might remain after providing for his mother's support,—the clear inference as to the intention of the testator, and the import of the clause, was that the farm, subject to the wife's interest, should vest immediately in the son, postponing the full and absolute enjoyment until the death of his mother and his arrival at the age specified.

In *Williams v. Williams*, 91 Ky. 547, 16 S. W. 361, where testator stated it to be his will that his wife should have one third of his landed estate during her natural life, adding: "and at her death the whole of my landed estate goes to my son, Henry H. Williams, or his heirs," and further expressed

it as his will that when his son "shall arrive at manhood or is twenty-one years of age, then all my property [except a specific legacy], personal and real, shall go to my son, Henry H. Williams, or his heirs,"—it was held that as the expression "when he shall arrive at manhood or is twenty-one years of age" showed that the testator was reckoning the time when his son would become capable of taking control and management of his estate, rather than the time when his interest would vest, and as the effect of a construction which would postpone vesting would leave the use of the estate (except for the gift to the widow and the specific legacy) dormant until the son's arrival at age, and as the provision in the first clause that the whole landed estate should go to the son or his heirs at the death of the widow, which might occur before the son was twenty-one years of age, shows the latter event was not intended to be a contingency upon which, nor time when, his interest in any part of the estate would vest, the son took a vested interest; the phrase "or his heirs" being read "and his heirs," to effectuate testator's intention.

In *Eldridge v. Eldridge*, 9 Cush. 516, testator gave to his grandchildren legacies twice expressed in the will; in the first instance where he charged the payment thereof upon a devisee, directing that he should "pay over the several sums hereinafter mentioned in the following manner . . . also to my grandson [name] the sum of \$2,000 when he become twenty-one years of age; also to my four granddaughters [naming them] the sums of \$1,000 each at twenty-one years. And I furthermore will and decree the above-mentioned grandchildren (5) be supported during their minority, each out of the legacy which I have bequeathed." The direct gift was in these words: "Also I give and bequeathe to my grandson [name] the sum of \$2,000. I also give and bequeathe to my granddaughters [naming them] the sum of \$1,000 each, when they severally become of age, excepting what may be necessary for their support during their minority." It was held to be a decisive circumstance in favor of vesting, that the legacies were charged with the support of the legatees during minority.

In *Rock River Paper Mill Co. v. Fisk*, 47 Mich. 212, 10 N. W. 344, testator gave his son "when he arrives at the age of twenty-one years, \$3,000, and \$1,000, annually thereafter until he arrives at the age of twenty-five years; and if at that time he shall have used what he has received, as above stated, in a judicious, frugal manner, and not wasted and squandered it (in the opinion of my executors herunto appointed), he shall then receive \$10,000 more; and if, at the age of thirty years or sooner, if in the opinion of my said executors he shall have managed, and will continue to do so, what he has already received, in a judicious, frugal manner, he shall receive \$15,000 more; and if, at the age of thirty-five years or sooner, if in the opinion of said executors he shall have and will still continue to use

what he has received, as before stated, in a frugal, economical, and judicious manner, he shall come into full possession of all my estate, personal and real, not otherwise disposed of by this will or otherwise. But if, after having received \$10,000 at the age of twenty-five years, he shall have squandered and wasted what he has already received, or in the opinion of said executors he will waste and squander what he receives, he shall thereafter receive but \$1,000 annually, and all my estate, real and personal, not otherwise disposed of, shall go to the legal issue or children of my beloved son, Francis M. Sibley; but in case he dies without said issue or children, then in that case it shall go to my legal heirs and representatives equally." It was held that as upon the construction of the foregoing provision the son took by direct gift, and not through the medium of a trust, his estate was a vested one.

In *Hogan v. Hogan*, 102 Mich. 641, 61 N. W. 73, where testator gave certain land to two nephews, providing that it should be sold when the nephews became of age and the proceeds divided between them, and further directed that his widow should have control of such land until the nephews should become of age, it was held that the devise to the nephews must be regarded as of a present vested remainder.

In *Harris v. Cook*, 98 Mo. App. 38, 71 S. W. 1126, where testatrix gave to a certain person a sum of money "when he shall arrive at the age of twenty-six years," directing it to be loaned out on good real estate security, and the interest accruing therefrom to be paid to such legatee, it was held that had the bequest ended with the words "when he shall arrive at the age of twenty-six years," the legacy would have been a contingent one, but that the clause following showed the intention of the testatrix to be that the gift should immediately vest on her death, the payment only being postponed.

In *M'Affee v. Gilmore*, 4 N. H. 391, where testator provided that his wife "should have the use and improvement of the other two thirds of my real estate, until my daughters Sally and Mary severally arrive to eighteen years of age, in case my said wife Polly support, clothe, and educate my said children, until said period. I give and bequeath to my said daughters Sally and Mary, when they severally arrive to eighteen years of age, the last two thirds above mentioned, in equal shares between them,"—it was held that the daughters took a vested estate of inheritance at the decease of the testator, subject to the chattel interest of their mother.

In *Johnson v. Baker*, 7 N. C. (3 Murph.) 318, 9 Am. Dec. 805, where testator gave his residuary estate to his wife "till my son comes to lawful age, when I will that the same shall belong to him; and in the meantime it is my will and desire that he be maintained and educated at a reasonable expense out of my estate in proportion to

the value of all my property and its general profits and income," it was held that even if the case were considered on the ground of intention merely, no doubt can exist that the testator meant an immediate vesting of the remainder in his son, and not to place it on the contingency of his arrival at age, as otherwise if the son should marry, have issue, and die before twenty-one, that issue would be unprovided for; and that the inference of such intention was strengthened by the circumstance that the enjoyment of the property was evidently postponed with the two-fold view of benefit to the wife, and that his son should be qualified to manage it when he came to the possession.

In *Guyther v. Taylor*, 38 N. C. (3 Ired. Eq.) 323, testator directed that his negroes and stock should be kept on his plantation until his son Kinchen should attain the age of twenty-one years, and, among other specific dispositions, gave to his son Joshua \$1,000 "to be raised from the farm," which he devised to his son Kinchen. He further bequeathed to his three daughters and his son Kinchen, "to be equally divided between them, my negroes, when my son Kinchen arrives to the age of twenty-one years" and gave the residue of his estate to his son Kinchen. It was held that though because of the position in the sentence of the subject of the gift, "my negroes," it was impossible to speak with any certainty as to the testator's intention as to the vesting of the gift, looking only to the words used, yet that having regard to the leaning in the court toward vesting, and the fact that as one of his daughters was married and had a son, to whom the testator made a bequest, he could not have been oblivious of the possibility of his children marrying and having issue who might be precluded from sharing should the gift be construed as contingent, together with the circumstance that the gift of the negroes was not to the four children jointly, nor by a general description under which such of them as should be living when Kinchen came of age would be entitled to take the whole, but was to the four by name, equally to be divided between them, so that in no event could any of them receive more than one fourth under that clause, but that, on the other hand, Kinchen, by virtue of the residuary gift, would be entitled to the share of anyone dying before distribution, thereby disturbing the apparent equality intended between him and his sisters, and the further consideration that the postponement was for the maintenance of the children and the raising of the legacy of \$1,000 to Joshua,—the interests of the legatees were vested.

In *Williams v. Smith*, 57 N. C. (4 Jones. Eq.) 354, where testator directed that certain slaves "be hired out to support and school my three youngest children," naming them, adding: "When the youngest of the above-named children becomes of age, then I wish for [such slaves] to be sold and the money equally divided between" the children named and another child,—it was held that as there was nothing like an expres-

sion of contingency annexed to the gift, there was no reason to doubt that the children took vested interests in the proceeds of the slaves.

In *Fuller v. Fuller*, 58 N. C. (5 Jones, Eq.) 223, where testator gave to his daughter "when she arrives at lawful age or marries" certain slaves and personal property, the implication of contingency contained in the word "when" was held to be negated by the facts that to those of his children who were of age the testator gave vested legacies; that as the use of his residuary estate was given to his widow for life, one purpose for postponing the possession and enjoyment of the property by the legatee was to give the wife the benefit of the services or hire of the slaves during the time she was charged with the daughter's support; that vested interests in the residue were given at the death of the wife to some of the children, including the daughter; and the fact that a contrary construction would lead to difficulties in the distribution of the testator's estate from time to time.

In *Green v. Green*, 86 N. C. 546, where testatrix gave to her youngest daughter a sum of money "when she becomes of age, also one bed and furniture to have at my death," and also appointed a guardian of the person and estate of such daughter during minority, it was held that the implication of contingency arising from the phrase "when she becomes of age" was overcome by the appointment of the guardian of her estate, she having no estate other than that bequeathed to her by the will.

In *Stark v. Molleson*, 8 Watts, 432, where testator gave to his son John the use of certain lands, charging him with the maintenance of two minor children until each should arrive at the age of fifteen years, and with the payment of a third of the net income to his mother during widowhood, until he should arrive at the age of twenty-one years, adding: "When my beloved son, Joseph Molleson, arrives at the age of twenty-one years, then this farm to be equally divided between my sons John Molleson and Joseph Molleson,"—it was held that as the testator surely never contemplated that issue left by either devisee before the age of twenty-one should be dis-inherited, and as it was plain that the intermediate interest was given for the support of the family, the interests of the sons vested immediately.

In *Young v. Stoner*, 37 Pa. 105, where testator, after bequeathing to a brother the income of certain realty until two nephews should arrive at the age of twenty-one, gave and bequeathed to such nephews "when they arrive at the age of twenty-one years, all my before-mentioned real estate, subject to such payments and disbursements hereinafter mentioned, to have and to hold to them, their heirs and assigns forever," and then charged such devisees with the payment of money legacies, it was held that the absence of a devise over, and the charge of money legacies to be paid by the devisees on coming into possession, showed the re-

mainder interest taken by them to be vested.

In *Gourley v. Thompson*, 2 Sneed, 387, where testator provided: "It is my will that James R. Walsh shall receive \$3,000 of my estate when he becomes twenty-one years old," it was held that the time could only be understood as annexed to the period of payment, and not to the gift.

In *Re Gunning*, Ir. L. R. 13 Eq. 203, testator bequeathed to a son a sum of money "when he attains the age of twenty-five years; in the meantime from my decease until he finishes his education he is to get £100 per annum; when his education is finished, to be apprenticed to whatever trade or profession or business he may chose, subject, however, to the approval of my trustees or executors." He further bequeathed any residue which might be left after the payment of debts and legacies to all his sons and daughters, share and share alike, and also directed "that should any of my sons or daughters die before attaining the age of twenty-one years, that the legacy hereby bequeathed or share of the residue of my estate of such sons or daughters shall go to my other surviving sons and daughters, share and share alike." It was held that though the words of gift, taken alone, were *prima facie* contingent, yet taking the limitation over into consideration, the legacy must, in order to make all the clauses of the will harmonious, be construed as vested at twenty-one, though not payable until twenty-five.

In *Lunt v. Lunt*, 108 Ill. 307, testator bequeathed his residuary estate in trust to expend so much of the income as should be necessary for the support of the testator's wife and the support and education of his children, "until they, or the survivor, shall arrive at the age of twenty-one years, when one third of two thirds of my said property shall go to and vest absolutely in each of my said children or the survivor of them. . . . When my said children, or the survivor, shall arrive at the age of thirty years, if my wife still survive, the remainder of said two thirds of my property shall go to and vest in my said children equally, or in the survivor, and the issue of the deceased, if any exist, equally, or if both die leaving issue, then at such period as the youngest of my said children would have been thirty years of age the same shall vest in the issue of each of my children equally, the children taking a parent's share, and if both die without issue, then to my heirs at law." It was held that the limitation over showed an intention that the estate should vest at the testator's death, with the enjoyment deferred until such time as the youngest child should attain the age of thirty years.

In *Hughes v. Hughes*, 12 B. Mon. 115, where testator devised to certain grandchildren "when they become of age or marry" a tract of land, and also bequeathed to each of them "when of age" a negro, adding: "This property in the event of the death of any one or more of said children, the survivors to inherit,"—it was held that the

limitation over showed that the devisee took an immediate vested interest in the land and slaves, defeasible upon dying before the time specified, at which the estate was to become absolute.

In *Newport v. Cook*, 2 Ashm. (Pa.) 332, testator, who had given certain real estate to his several granddaughters and grandsons "as they shall respectively arrive at the age of twenty-three years," and "when he shall arrive at the age of twenty-three years," directed the accumulation of a fund from the rents of his real and investments of his personal estate, which he declared to be for the advancement of his grandchildren then born or thereafter to be born, "as they shall respectively arrive at the age of twenty-three years." Of the fund thus accumulated each of certain living grandchildren were to receive one tenth part "when he arrives at the age of twenty-three years." It was held that the effect of the word "when" was overcome by the context, which contained a general executory bequest over to the other surviving grandchildren in the event of either dying "without leaving children or the lawful issue of such children."

In *Fulton v. Fulton*, 24 Grant, Ch. (U. C.) 422, the following bequest: "The money in the Bank of Commerce I bequeath to Herbert Fulton, son of Christopher and Amanda Fulton, when he becomes of age, to receive it in full, with the interest. Should he not survive them, his next heir shall become inheritor,"—was held to vest presently, the court saying that the gift of the interest was of itself cogent evidence of the vesting.

In *Re Dennis*, 5 Ont. L. Rep. 46, where testator devised a farm to his grandson "when he arrives at twenty-one years of age, the said farm to be kept in repair by my executors hereinafter appointed, to expend at least \$50 each year in improvements over and above taxes and insurance. Proviso in case of the death of one or more of my above-named grandchildren before receiving the share or shares devised to them, then that share or shares to be equally divided among the survivor or survivors of them, share and share alike;"—it was held that the grandson took a vested estate, subject to be divested should he die before attaining twenty-one.

In *Roome v. Phillips*, 24 N. Y. 463, where testator gave a life estate in certain realty to his father, and then gave and devised it to his son "after the decease of my father, and when he, the said child, shall become twenty-one years of age and become married and has children," and in case of his decease before that period, then over,—the remainder was held to vest in the son immediately, subject to be divested on his dying before attaining the age of twenty-one years.

In *Re Maley*, 73 Misc. 195, 132 N. Y. Supp. 492, where testatrix directed her executrix to deposit a sum of money in a savings bank for the benefit of a certain person, "and to pay said sum, with all interest thereon, over to [such person] when he shall attain L.R.A.1915C.

the age of twenty-one years; in case of his death before such period, to pay said sum and interest to his said mother,"—the legacy was held vested upon the death of the testatrix, subject to be divested by the death of the legatee before reaching the age of twenty-one.

In *Burrows v. Stumm*, 22 How. Pr. 169, where testator devised a remainder estate in certain realty to his son "when the said child shall become twenty-one years of age and becomes married and has children," and in case of the child's decease before that period, then over, it was held that attaining the age of twenty-one was not a condition precedent to vesting, but that the limitation over introduced a condition subsequent upon which the estate was to be divested.

In *Fox v. Hicks*, 81 Minn. 197, 50 L.R.A. 663, 83 N. W. 538, where testator bequeathed to his executors a sum of money to be held in trust for a granddaughter, and to be paid to her as follows: Said sum was to be kept invested until the granddaughter should have arrived at the age of twenty-one years, at which time the executors were to pay to her all the accumulated interest, leaving the principal sum invested for her benefit, she to receive the interest thereon annually thereafter until arriving at the age of thirty years, when she was to receive the principal,—it was held that as the provisions of the will contemplated that the legacy should be set apart, and no provision was made for its return to the estate, the legacy was vested.

In *Storrs v. Burgess*, 29 R. I. 269, 67 Atl. 731, testator gave the residue of his estate in trust to pay the whole income to his wife should she survive and remain unmarried till his daughter should attain the age of twenty-five, further directing that when his daughter should attain such age the half of the income should be paid to her, and should his wife die before such time that the whole income should be held in trust for the daughter and used in her behalf till she should attain that age, "and then to be transferred to her with the whole estate, and the trust to cease." Should she marry and die before the age of twenty-five leaving issue, then at her death the half of the trust estate to become vested in such issue. Should her mother survive her, and the daughter die without issue, the whole income was given to the mother for life, and the principal to others at her decease. It was held that the limitation over in event of the daughter's death without issue showed that she took a vested equitable remainder in fee, subject to be divested by her death under the age of twenty-five or before her mother.

In *Everitt v. Everitt*, 29 N. Y. 39 (reversing 29 Barb. 112), testator declared that the whole residue of his estate should be held in trust for the benefit of such of his three younger children as should be living at the time of his decease; that if he should not die until after the youngest of them then living should have attained the

age of twenty-one years, the executors should pay over to said children or the survivors of them, in equal proportions, share and share alike, such residuary estate; that if he should die while any of such children should be under the age of twenty-one years, the executors should hold and manage such estate until all of said children or the survivors or survivor of them should become of age, when they were directed to pay over such funds and the accumulations thereof in the same manner as above provided. He also authorized the executors in their discretion to make advances to the two elder ones after their majority, in anticipation of the receipt by them of their shares. He also constituted his executors the guardians of said minor children, and directed them to apply the income, and, if necessary, the principal, for their support, maintenance, and education during minority, such expenditures to be chargeable on the trust fund generally, and not against the share of any one separately. He further directed that in case any of them should die before becoming entitled to be paid in full the amount coming to her for her share, leaving lawful issue, her share should belong to and go to such issue; but if she should die without such issue, then her share should go to the survivors or survivor. It was held that in view of the provision allowing the whole income and such parts of the capital as might be necessary to be expended in their education and support, and the direction for the advancement of portions to the two elder, and of outfits to any of them in case of marriage under age, out of their respective shares, and of the language requiring that the residue should be held for their benefit immediately upon the testator's death, and that it should be paid to them at once if they were then all capable by their age of managing it,—each took a vested interest in one third of the residue, in absolute property, subject only to an executory limitation, in the case of the death of one or more of them under age and without issue, in favor of the survivor or survivors of them.

In *Cropley v. Cooper*, 19 Wall. 167, 22 L. ed. 109 (reversing 7 D. C. 226) a testator leaving at his decease a widow, two sons who were married and had children, an unmarried son, and a married daughter having a child, gave to the daughter certain realty for and during her life, to be sold at her decease, and the avails therefrom to "become the property of her child or children when he, she, or they have arrived at the age of twenty-one years, the interest in the meantime to be applied to their maintenance." To his two married sons he gave property for life, and at their death to their children in equal shares. To the unmarried son he gave the use of certain property, and, if he should marry and have lawful issue at his death, such property or its avails to be equally divided among his children when they should arrive at the age of twenty-one, the interest in the meantime

to be applied to their maintenance; but if such son should die without issue, then the said property or its avails to be equally divided among testator's other children. It was held that as the gift to the children of the married son was absolute, and the entire failure of issue of the unmarried son at his death, or the failure of such issue to reach the age named, was the condition of the gift over to his brothers and sister, the will evinced an intention that the children of the daughter should take an immediate vested interest.

In *Security Co. v. Cone*, 64 Conn. 579, 31 Atl. 7, it was held that under a will by which testator devised his entire estate in trust for the care of his wife and children during their lives, with a provision that "the full fee" should go to his grandsons "when they attain the age of twenty-one years, if their parents are dead," and with a gift over in default of grandchildren, the grandchildren living at the decease of the testator, or, if none were then born, the first born thereafter, took, as and in behalf of a class opening to let in afterborn grandchildren, a vested remainder interest in fee in the entire estate.

In *Hubbard v. Lloyd*, 6 Cush. 522, 53 Am. Dec. 55, where testator bequeathed his residuary estate "unto all the children of" certain persons and to two persons especially designated, "equally or *per capita* when they shall severally attain the age of twenty-five years; and in case one or more of them shall die before he, she, or they shall arrive at the age of twenty-five years, then his, or her, or their share so dying shall be equally divided between the survivors, or become the property of the survivor if there be only one,"—it was held that the legacy vested when the first of the legatees attained the age of twenty-five, the shares of the younger members of the class being subject, however, to be divested in case of death before that age.

In *Hoxie v. Hoxie*, 7 Paige, 187, where testator gave the residue of his estate as follows: "Also that the remainder of my property, after paying the charges incident to my sickness, and after releasing one year's rent to M. & F. of the farm they now occupy, to be divided equally among the children of my sister Mary, my brother Solomon, and my brother John, when they shall severally become of age,"—it was held that as the devisees were *in esse* and ascertained at the death of the testator, and nothing could prevent the estate from vesting in possession if the devisees lived until the time appointed for that purpose, the estate or interest which was given to the infant devisees was a vested estate, not given to them if they should arrive at the age of twenty-one, but given immediately, to be divided among them when they should respectively attain such age.

Instances in which the gift has been held contingent.

In *Herberton v. McClain*, 135 Fed. 226,

a legacy of a sum of money to a daughter "when she is eighteen years old" was held contingent.

In *Colt v. Hubbard*, 33 Conn. 281, where testator bequeathed to a nephew "an annuity of \$2,000 per year until he shall arrive at the age of twenty-one years, for his support and maintenance and education; also when he shall have arrived at the age of twenty-one years a legacy of \$5,000 in gross and 500 shares of the stock of" a certain company,—it was held that in view of the independent form in which the gift was expressed, and the fact that there was a provision for the intermediate support of the legatee independent of and less in amount than the dividends on the stock, which the testator must have anticipated, indicating an intention that the intermediate dividends should become part of his estate, the legacy was intended to be contingent upon the legatee's attaining the age of twenty-one.

In *Allen v. Whitaker*, 34 Ga. 6, testator bequeathed to a granddaughter certain negroes "at the death of my wife, or when she marries or becomes twenty-one years of age, to her and her heirs forever." It was held that the gift was on its face one to take effect *in futuro*, and that there was nothing that the court could lay hold of to indicate an intention upon the part of the testator that the legacy should be more than a contingent interest, dependent upon the legatee being in life at the happening of some one of the specified contingencies.

In *Gifford v. Thorn*, 9 N. J. Eq. 702, a bequest of residuary estate to a certain person "when he arrives at the age of twenty-one years, to him and his heirs forever," was held, in view of the use of the word "when," to be contingent.

In *Snow v. Snow*, 49 Me. 159, where testator devised to his wife the use of his real and personal estate during widowhood, and further devised to his son certain real estate and such of his personal property as should exist after the decease of his wife, adding: "Said Edward shall come into a possession of the above-named estate when he shall arrive at the age of twenty-one years, or at the decease or marriage of" testator's widow,—it was held that an examination of the whole will left no doubt that the time when the son would be entitled to the possession of the personal property was annexed to the legacy itself, and was contingent upon his arriving at the age of twenty-one.

In *Giles v. Franks*, 17 N. C. (2 Dev. Eq.) 521, a legacy to a certain person "when he shall arrive at the age of twenty-one" was held to be within the rule which annexes the time to the substance of the legacy, and makes the right dependent upon the arrival of the legatee to the age described.

In *Jackson's Estate*, 209 Pa. 520, 58 Atl. 890, where testatrix gave her residuary estate to a granddaughter "when she shall arrive at the age of twenty-one years," the legacy was held contingent.
L.R.A.1915C.

In *Lemacks v. Glover*, 1 Rich. Eq. 141, where a bequest was to one "when he attains the age of twenty-one years or day of marriage," it was held that time was annexed to the substance of the legacy, making the legatee's right to depend upon his being alive at the period fixed.

In *Re Rogers*, 94 Cal. 526, 29 Pac. 962, testator gave to a grandson a sum of money, "to be paid to him as hereinafter directed, and only after the death of my said wife Caroline if she survive me. The income from the said \$10,000 is to be paid to said Stephen Roy Rogers personally for his own private use from the time he be fifteen years old till he be twenty-one years old, and then, when he be twenty-one years old, I direct that he be paid \$5,000 being half of the above-named bequest; and that from the time he be twenty-one till he be twenty-five (25) years old, I direct that the income from the remaining \$5,000 be paid him annually for his private use, and then when he, the said Stephen Roy Rogers, be twenty-five years old, I direct the remaining \$5,000 paid to him personally for his own and exclusive and private use. If my said grandson die before arriving at the ages herein named, then the remaining or unpaid amounts of said bequest, together with the income thereon, I direct shall be distributed as the other portion of my estate shall be or shall have been distributed, namely, to the brothers and sisters of myself and wife, Caroline, share and share alike." It was held that an intention was evinced in the clause last above quoted not to make an absolute bequest, but a conditional one to take effect only if the legatee should reach the ages named for its payment.

In *Morrow v. Morrow*, 113 Mo. App. 444, 87 S. W. 590, a bequest to a grandson to be given to him when he should become twenty-one years old, and a bequest to a granddaughter to be given to her when she should become eighteen years old, with cross-limitations between the legatees should they die before attaining the ages specified, and should both die, then to others, accompanied by the declaration that the granddaughter "is not to have anything of my estate unless she lives to be eighteen years old and become eighteen years old," and that the grandson "is not to have anything of my estate unless he becomes twenty-one years old and lives to the age of twenty-one years,"—were held contingent.

In *Mackie v. Alston*, 2 Desauss. (S. C.) 302, where testator gave and devised his residuary estate to his daughter "and to her heirs and assigns forever, when she attains the age of twenty-one years or at the day of her marriage, which ever shall first happen; but if my said daughter should die before the above-mentioned periods, then" to others, it was held that the words "when" and "if" were so strong to show that the time the devise was to vest was annexed to the substance of the gift as

to leave no room in the mind to doubt testator's intention.

In *Kent v. Watson*, 17 N. C. (2 Dev. Eq.) 366, testator, after giving to his two granddaughters "when they arrive at age, \$1,000, to be paid them out of my estate," went on to provide: "If either of my granddaughters . . . should die before they arrive at lawful age or marry, I wish the survivor to heir that one's part that should so die, and in case both should die before arriving at lawful age or marrying, I wish their legacies to return to my estate." The legacies were held contingent upon the legatees coming of age or marrying, and, in the event of marriage before twenty-one, not to be payable until then.

In *Brooklyn Trust Co. v. Phillips*, 134 App. Div. 697, 119 N. Y. Supp. 401, affirmed without opinion in 201 N. Y. 661, 95 N. E. 1124, testator gave to his executors a sum of money in trust to pay the interest to a certain person for life, and after her decease then upon trust to pay and divide such sum equally among her two children "if they or either of them shall have arrived, or when either of them shall arrive, at the age of twenty-one years, and if at the death of their said mother only one of the said children should be living, and he has arrived at that age, and if not, then when he has arrived at that age, the whole of the said sum . . . shall be paid to such surviving child to and for his own use and benefit. And in the meantime and until both or either of the said children shall arrive at that age the interest on the said last-mentioned sum shall be applied to their or either of their support, clothing, maintenance, and education as it may be required." It was held that as there were no words of direct gift, but the legatees were to take through the medium of a power in trust, and as there was nothing in the language used by the testator or the general scheme of the will to take the case out of the rule that where a future interest is devised not directly to a given person, but indirectly through the exercise of a power conferred upon the trustees, the devise is designed to be contingent, it was the intention of the testator that the trust fund should not vest before the time appointed for its payment.

In *Lewisohn v. Henry*, 179 N. Y. 352, 72 N. E. 239, testator directed his executors to divide his residuary estate into as many shares as would equal the number of his children, including such as should have died before him leaving issue. He gave one share absolutely and in terms to the issue of each child dying before him, and the remaining shares to his executors to have and to hold as trustees, one share upon a separate trust for the benefit of each child who outlived him, to apply the net income to the use of the child until he or she could reach the age of twenty-five years, when they were to convey and pay over one fourth of the capital of the shares set apart for them simple and absolutely" to such child. After L.R.A.1915C.

this the net income of the residue was to be applied to the use of the child until he or she should become thirty years old, when one third of the trust estate then remaining was to be conveyed and paid over "in fee simple and absolutely" to such child. Thenceforth the net income of the remainder then left was to be applied to the use of the child during life. Upon the death of the child the trustees were directed to convey and pay over the trust fund to the appointees of such child, and in default of appointment to the issue then surviving, and in default of issue to the next of kin of such child. It was held that as there was no present gift to any child, but a direct gift to the executors, who were to convey to the child only when or provided the child reached the age specified, and as it appeared to be the primary object of the testator to prevent his children from disposing of any part of the capital of the shares set apart for them respectively until they reached a certain age, and then to keep a part of the principal intact as long as his children lived, so that they might have an assured income, no title vested in them prior to the date named for distribution.

In *Hall v. Hall*, 123 Mass. 120, where testator gave a sum of money in trust to invest and accumulate "until my said grandchildren last mentioned respectively attain the age of thirty-five years, when a proportionate part of said fund and accumulation (dividing by the number of said grandchildren then living who shall not have received their share) is to be paid over to each of them; and in case of the [death of the] last beneficiary, before attaining the age of thirty-five years, I direct that the remainder of said fund and accumulation be considered as part of the residue of my estate,"—it was held that as there was no provision for the maintenance of the grandchildren, or any enjoyment by them of the principal or income of the trust fund until they should reach the prescribed age, as the accumulations accrued after the death of the testator and could not vest at that time, as the persons who were to take at the period of distribution and the amounts to which they would be entitled were uncertain, and as a gift over was made in the case of the death of the last surviving grandchild before reaching the age of thirty-five,—it must have been testator's intention that the interests of the grandchildren should not vest until the contingency of their arriving respectively at the prescribed age should happen.

In *Engles's Estate*, 167 Pa. 463, 31 Atl. 681, where testatrix gave the residue of her estate in trust to pay over one eighth part of the income thereof to a sister for life, and upon her death to pay, out of the principal, sums of money to certain persons "when they shall respectively attain the age of nineteen years, and in case either of them shall die before attaining that age, then to pay his legacy to the survivor, and in case they shall both die before attaining

that age, then upon the death of the survivor to pay the amount of both their legacies to their father and mother,"—it was held that as there was no express gift, and the direction to pay was descriptive of the legatee because conditioned on his attaining a given age, the legacies were contingent.

In *Re Sweitzer*, 1 Woodw. Dec. 295, where testator gave to his widow interest on two thirds of his estate until his children should respectively arrive at the age of fourteen years, from which time until the children should arrive at the age of twenty-one it was directed that the interest should accumulate, "when" the fund was to be equally divided among those of the children who should survive, it was held that the case was within the rule that a legacy to one "when" he attains a certain age is contingent upon his doing so.

In *Thomas v. Thomas*, 97 Miss. 697, 53 So. 630, a will provided: "I direct that after the death of my three sons, that the remaining principal and its income or interest, if there be any, of the said Mary E. Thomas estate is to go to my legitimate grandchildren, to be theirs as a bequest, at the death of all my children, and when they (my grandchildren) arrive at the age of (21) twenty-one years or more of age, it does not become theirs until this age, and all my own children dead, each set of grandchildren is to have their father's *pro rata* part. If any of these grandchildren die before this age or conditions, without brothers or sisters, what would have been their part goes to my surviving grandchildren wherever they may be when proper age and conditions are fulfilled, but any of these grandchildren can after the death of my children have the income from this said estate for educational purpose or even for a living, if their mother proves she has not a sufficiency for their maintenance, or education, but this fact must be proven." It was held that under the express terms of the will no estate vested in the grandchildren who should survive the sons until they should attain the age of twenty-one years.

In *Major v. Major*, 32 Gratt. 819, where testator directed his estate to be converted into money and the net proceeds to be divided into four parts, three of his brothers "to have each a fourth part, and the other fourth part to be divided among my brother William Major's children, each to have the amount of his share when he arrives at the age of twenty-one," it was held that as the testator did not use the words "to be paid" or "payable," but the words "to have" and "when," it was plainly his intention that the legacies to the brother's children should not vest at his death, but should be contingent on their attaining the age of twenty-one.

j. Gifts "as" a specified age shall be attained.

Instances in which the gift has been held vested.
L.R.A.1915C.

In *Steadman v. Palling*, 3 Atk. 423, where testatrix provided that the residue of her property "shall be equally paid and divided to and between my two grandchildren at such time as they shall severally attain their respective age of twenty-one, or sooner if my daughter shall think fit," it was held that though there was no bequest made to the grandchildren but what is contained in the direction of payment, the words "or sooner if my daughter shall think fit" made the mother a trustee of the bequest to the children, and so showed that it was intended to be vested.

In *Bigelow v. Bigelow*, 19 Grant, Ch. (U. C.) 549, testator made a will as follows: "My will is that Josiah Bigelow, my son, shall have the homestead, and that the property be divided in the following manner: First, that all my just debts be paid out of the personal property, and then two thirds of the whole to be given equally among my six boys as they come of age, and the other third to be equally divided among my seven girls as they come of age or marry, or as it can be raised from the estate. . . . The family to be maintained on the place with every necessary thing for their use. That the younger branch of the family receive a common education equal with the rest of the family." It was held that the devise to the boys and girls were not gifts to a class of sons and a class of daughters, but, by reason of the specification by the testator of the number of his children of each sex, were a devise to the children individually; that there was in the words "the family to be maintained on the place with every necessary thing for their use" a sufficient gift of an intermediate interest commensurate with the minority of the youngest child to bring the case within the rule that an intermediate estate carved out does not prevent the vesting.

In *McLemore v. McLemore*, 8 Ala. 687, where testator gave such of his estate as should remain after payment of debts, and as his executor should think proper, to his wife, to rear and educate his children during her life, and, after further providing for specific bequests to some of the children, directed, "As the balance of my children become of age I will that they receive such a part of their part of my estates as my executors shall think proper to give them at that time. . . . When my youngest child comes of age, or my wife should marry, then in either case I will that there be a division take place between my wife and my children, and each one share an equal part of all my estate. I also will, should any of my children die without a lawful heir of their body, that part they receive from my estate shall be equally divided among the balance of my children. And I will at the death of my wife all my children to share all my estate equally,"—it was held evident from the general conception of the will, as well as from the particular expressions employed,

that the legacies were intended to vest immediately.

In *Allan v. Vanmeter*, 1 Met. (Ky.) 264, testator, after devising certain land and slaves to each of two adult grandsons, gave to another grandson "when he arrives at the age of twenty-one, 200 acres of land to be bought by my executors, equal in value to each of the lands I have given to" the two adult grandsons, further providing that he should have negroes of equal value to those given to such grandsons. He further directed that the balance of his lands be rented for the benefit of the estate, "and as the others of my grandchildren become of the age of twenty-one years, each one shall draw from the estate 200 acres of my land" and two negroes. It was held that though the expressions used referring to the arrival of the infant devisees at the age of twenty-one, taken literally, import a contingency, the fact that there was no devise over in case any grandchild should die before attaining the age of twenty-one showed that the testator did not regard that event as a contingent one, and that this, together with testator's evident intention to leave no portion of his estate undisposed of by his will, and that it should be enjoyed by his grandchildren, infants as well as adults, upon terms of perfect equality, and the carving out, by the provision that the lands be rented for the benefit of the estate, of a prior interest for the benefit of the ulterior devisees, extending over the whole period for which the possession and enjoyment are postponed, warranted a construction of the will as giving the minor grandchildren vested interests.

In *Cornelison v. Million*, — Ky. —, 124 S. W. 366, testator provided "that all the cash and cash notes and any debts that may be owing me after my debts have been discharged shall be Eli's and Ernest Cornelison's, and if there be any other heir, full brother or sister to them, they shall share equally. This money shall be loaned, and the interest shall be used for the benefit of the children, to clothe and to educate them, and as they become of age each shall draw his part of the principal." It was held that as the purpose of the testator was plainly to give the fund in question to the legatees named, who were his grandchildren, and not to such of them as might live to be twenty-one years of age, the grandchildren took vested interests.

In *Fisher v. Johnson*, 38 N. J. Eq. 46, testator directed his executor to place at interest a sum of money sufficient to pay each of certain persons a legacy as they should severally arrive at age. It was held that as the legacies were to be at once severed from the general estate, and as no further disposition of the fund was made, or provision in case any of the legatees should die before attaining to majority, and as the direction to invest the money for the payment of the legacies was a gift of the legacies, and the postponement of the time of payment was for the benefit of the

estate, the legacies vested upon the testator's decease.

In *Wood v. Cone*, 7 Paige, 471, where testator directed his executors to convert his estate into money, to invest the proceeds, and pay the interest to his wife during widowhood, and after her decease to a daughter, should she be then a widow, during her natural life or widowhood, "and immediately after the death or marriage of my said daughter Anne, I will that all the moneys due and then remaining shall be paid to the children or legal heirs of the body of my said daughter Anne as they shall respectively arrive at age, that is to say, the male children at the age of twenty-one and the female at the age of eighteen, to be paid to them in equal proportions, share and share alike,"—it was held that at the daughter's death each of her children then living took a vested interest in an undivided share of the fund, including the interest thereon from the death of the testator's widow, there being an immediate gift to them at that time, although the payment was postponed until they should arrive at age.

In *Vanhook v. Vanhook*, 21 N. C. (1 Dev. & B. Eq.) 589, testator directed his executors to hire out his negroes and apply the income therefrom toward the support of a son for life, and the overplus, if any, toward the support of another son's family, and further directed that after the death of the life beneficiary the negroes, with their increase, should be equally divided between the second son's children "as they come to full age, and their heirs." He further directed his residuary estate "to be equally divided between my son Bird's children as aforesaid." It was held that as the law leans in favor of the vesting of legacies, more especially when given to children or those standing in a like relation to the testator, because it presumes that the testator's natural desire that the families of legatees who die before the time for actual receipt of the legacy shall succeed to the provision made for their parents, and also because the law will not intend that the testator meant to die partially intestate, the children designated took vested interests as they came into being.

In *Haywood v. Rogers*, 43 N. C. (8 Ired. Eq.) 278, where testator directed certain negroes "to be hired out until my youngest grandchild arrives at lawful age, and then sold and divided between" certain grandchildren, and further directed the residue of his property to be sold and the proceeds divided among his grandchildren "as they come to lawful age," it was held that the grandchildren took vested legacies upon the death of the testator.

In *Stevenson v. Lesley*, 70 N. Y. 512 (affirming on this point 9 Hun, 637) testator gave his residuary estate in trust for his grandchildren "and the survivors of them, share and share alike, to be paid and conveyed to each of said children respectively as they each become of age, in equal shares, and in the meantime the income of

my said estate shall be applied to the necessary support, maintenance, and education of each of said children." It was held that each of the grandchildren took a vested remainder in fee in his or her share, expectant upon the termination of the trust at his or her majority.

In *Provenchere's Estate*, 1 Campb. (Pa.) 68, where testator bequeathed property "upon trust as to one moiety" to invest and pay over the income thereof to a daughter-in-law during her widowhood, "and after her decease or marriage to hold the same to the use of [certain grandchildren], share and share alike, the income to be applied to their maintenance and education, and the capital to be paid to them as they respectively attain the age of twenty-one years. In case the daughters marry in their minority their shares to be paid at the time of marriage,"—it was held that as no decisive words of contingency were used; as the case was one where the enjoyment was divided into successive periods; as the general intention, evinced by the fact that the grandchildren were named and were to take "share and share alike," was not to provide for them as a class, but as individuals; and as there was no provision for the issue of any grandchild; and no limitation over,—time would be taken as annexed to the enjoyment, and not to the substance of the gift. This construction was approved by the Supreme Court in 67 Pa. 463.

In *Wetherell v. Wetherell*, 1 De G. J. & S. 134, where testator directed that "the annual interest only of all the residue" of his property should be divided into as many parts or shares as there might be children living of certain persons, "share and share alike, as each of the said children come of age. And in case any one of the said children shall die without any children of their own lawfully begotten, then in that case his or her share of the said annual interest (as the case may be) shall devolve to the surviving children, share and share alike, and so on successively until the whole amount of the said interest of the said residue comes into the hands of the grandchildren and the great-grandchildren of" the persons named,—the Lord Chancellor held that the words used, collocated as they are, seem to point out the age of twenty-one as the period when the enjoyment or perception of the interest by the different children was to arise, and that as it was clear from the gift over that upon the death of any child under the age of twenty-one years and without leaving children, the share of the child so dying would be transmitted to the surviving children, it was impossible to refuse to hold that the children took immediately a share in the estate, and that the period for the enjoyment only was indicated by the words "as each of the said children come of age."

In *Re Bevan*, L. R. 34 Ch. Div. 716, where testatrix, after giving the interest of £5,000 secured to her by bond to a sister for life, and after the sister's death to a

daughter, added: "Further, I will that my said daughter having married with the full consent and approbation of my executors, but not otherwise, and dying leaving children, the interest to be appropriated for the maintenance and education of such children, of whom I hereby constitute my executors guardians as to the due application of the same according to their wisdom and uncontrolled discretion, and the principal to be divided amongst them as they shall severally attain the age of twenty-five years. I do hereby likewise will and appoint that after the demise of my sister, and in the event of my daughter marrying without the consent of her guardians, or marrying with such consent and dying without leaving issue, then the said principal sum of £5,000, with its accumulations (if any), shall become the absolute property of" another,—it was held that the subject of the gift being a specific fund, separate from the rest of the estate, and the gift over being on the death of the daughter without leaving issue, so that a construction of the gift as contingent might possibly produce an intestacy in event of the daughter's children failing to attain the age of twenty-five, and as such construction would also render the gift to the children void for remoteness, the children living at the daughter's death took vested interests.

In *Sterling v. Ives*, 78 Conn. 498, 62 Atl. 948, whether testator, who had given a son a life interest in a share of his estate, directed that upon the death of such son his children should have two thirds of the income which their father had formerly enjoyed until one of them should become of full age, and "as they respectively attain said age, I give, devise, and bequeath to them respectively, their heirs and assigns, in equal portions, forever, so much of the principal of my estate as is herein devised and bequeathed for the use and benefit of such deceased son"—it was held that under the canon of construction that the law favors vested estates, the gift to them as they respectively came of age being accompanied by a gift, in the case of any who should be minors, of the income meanwhile from their father's death, passed to each on that event a vested estate in his proportionate share.

In *Canfield v. Fallon*, 26 Misc. 345, 57 N. Y. Supp. 149 (affirmed on opinion of court below in 43 App. Div. 581, 60 N. Y. Supp. 1134, which is similarly affirmed in 161 N. Y. 623, 55 N. E. 1093), testator, after giving his wife the use of all his property for life, gave to his executors in trust for and during the natural life of one of his daughters the income and profits from one half of his estate, further providing: "And after her death I order the said half of my estate to be equally divided among her heirs as they shall attain the age of twenty-one years each, if any shall be minors at the time of her death." He similarly disposed of the other half of his estate to his other daughter and her

children, and then provided that if either of his daughters should die "before their heirs shall have attained the age of twenty-one years I order said heirs to receive their proportion of the income to which their mother was entitled while living, in half-yearly payments." It was held that as the postponement was for the purpose of letting in intermediate interests, the children of the daughters took vested interests at testator's death.

In Peterson's Appeal, 88 Pa. 397, testator, who had devised all his estate in trust, *inter alia*, for the payment to each of his eight children of the income of one eighth part of his residuary estate during their respective lives, went on to provide that "from time to time as any of my said children [naming them] shall die leaving lawful issue, such issue, if under lawful age, shall be entitled to receive the interest and income of their parent's share equally among them—if one, solely, and if more than one, in equal parts; and as they severally attain such lawful age they are to receive and be paid their share and portion of the principal or capital fund of which their parent had received the interest and income, . . . and those of my said children leaving lawful issue of lawful age, such issue shall receive and be paid the said principal or capital fund of which their parent had received the interest and income. . . . But in case any of my said children should die without leaving such lawful issue, then and in that case the share and part of such child so dying, as well the real as the personal estate, shall lapse and fall back into my estate and be divided among such of my said children as may be then living and the issue of such as may be dead, in the way and manner as I have directed in relation to their particular share of my estate." It was held that as there was nothing to indicate that any of the issue of a child under age was not on equality with those of full age, the attainment of such age was not intended by the testator to be a condition precedent.

In Bree v. Perfect, 1 Colly. Ch. Cas. 128, 8 Jur. 282, where testatrix gave to her executors a sum of money upon trust to pay the interest to a niece for life, and at her death directed "that the said principal sum of £3,000 shall be equally divided among such of her children as shall be living at the time of her death as they respectively attain the age of twenty-one," but if she should die without leaving issue, then to others, the Vice Chancellor, although of the opinion that if the probability of the death of any of the niece's children after that of their mother but before attaining the age of twenty-one had occurred to testatrix, she would have solved the question in favor of the surviving children, said that the court must be governed by the words used; and that, taking the whole disposition together, and especially considering that the limitation 'over is upon the niece dying without leaving issue, the true construction of the will was that the L.R.A.1915C.

shares vested in the children on the death of their mother. The correctness of this decision is, however, doubted in *Re Edwards* [1906] 1 Ch. 570, 75 L. J. Ch. N. S. 321, 54 Week. Rep. 446, 94 L. T. N. S. 593.

In Johnson's Appeal, 12 Serg. & R. 317, testator directed his executors to put one half of the residue of his personal estate to interest on good security, and to apply one half of the interest therefrom to the support and education of a son's children until they should respectively arrive to fourteen years of age, the interest arising afterward being given to them as they should respectively arrive to lawful age. The other half of the said interest was given to testator's son during his life, and after his decease the principal to his children. It was held that the whole principal vested in the children immediately, but was not payable to them until their arrival at twenty-one and the death of their father.

In Knox v. Wells, 2 Hem. & M. 674, testator devised certain freehold and leasehold property upon trust out of the rents and profits to pay an annuity to his son James and his wife jointly, and to the survivor of them, and to accumulate the residue for the benefit of the child or children of James, advancing and laying out from time to time such sums for their maintenance, education, and advancement as the trustees should think necessary, and as each child should attain the age of twenty-one to pay him or her £200; and further directed that after the death of James, and provided that all his children should at that time have arrived at the age of thirty years, but not otherwise, the said freehold and leasehold estates were to be valued and an equal division made, subject to the annuity to their mother (if living), to and among such children of his said son James, and if only one, then the whole to such one as should be living at his death; and if any such child or children should be dead, though not having attained the age of thirty years, leaving issue, such issue were to take equally between or amongst them the share to which the deceased parent would have been entitled if living; but if at the death of his said son James, any of his children should be under the age of thirty years, then such valuation and division should not be made, but the same should stand over until such child or children should have arrived at that age; and if there should be no child or issue or a deceased child living at the death of the said James, the property should fall into the residue. The Vice Chancellor said: "The first clause, speaking of the division, might have been so construed, but for the provision at the end of it, as to make the gift contingent, and therefore void; but the provision at the end makes it clear: 'If any of such children shall die, not having attained thirty.' 'Such children' must mean, not 'children who have attained thirty,' but 'children of James,' and therefore they all take vested interests. Then he provides

that immediate division shall not be made, but shall stand over till they have all attained thirty,—not the gift, but the division. And then comes the last clause, which I have already read. Taking all the words together, there is a very clear intent that all the children should take."

In *Davies v. Fisher*, 5 Beav. 201, testatrix directed her trustees to stand possessed of her residuary estate upon trust during the life of William Davies, to pay the income thereof to him, and from and after his decease, in trust for his children "as they severally attained the age of twenty-five years, equally to be divided between them if more than one, and if but one, then the whole to such one child, the income to be applied during their respective minorities by the guardian for the time being of the said children or child, for their respective support, maintenance, and education. And in case no child of the said William Davies should live to attain the age of twenty-five years, then in trust for the children [of another person] as they severally attained the age of twenty-five years, equally to be divided between them if more than one, and if but one, the whole to such one child, the income to accumulate in the intermediate time and be paid with the principal;" and in case none of them should attain the age of twenty-five years, then to others. It was held that notwithstanding the gift was in the form of a direction to divide, the gift of interest in the meantime, implied from the direction to apply it for the benefit of the children during their respective minorities, had the effect to give them vested interests; and that the gift over was not inconsistent with that conclusion.

Instances in which the gift has been held contingent.

In *Seabrook v. Seabrook*, M'Mull. Eq. 201, testator directed his executors to lay out a certain sum in the purchase of lands and negroes for the use of his estate, that the lands and negroes so to be purchased, together with certain other lands and negroes, should be kept together and improved to the best advantage until his eldest child should reach the full age of twenty-one years, when he directed the lands and negroes to be divided into five equal shares among his five children, and gave, devised, and bequeathed one of the said shares to each of the said children as they should respectively attain the full age of twenty-one years, each to take "the share or portion of lands that may be allotted to them respectively for and during their respective natural lives," and from and after the deaths severally of the said children, to the issue of each in the manner therein particularly declared, directing that the income of the shares of those under age should fall into and form a part of the residuary estate, and that each child during minority should receive only a proper education and a reasonable maintenance and support out of the income of the said estate, and should any of them die without leaving is-

sue living who should live to attain the age of twenty-one years, or dying before that time leaving lawfully begotten issue to live until the parent, if alive, would have reached twenty-one years of age, "then the share and shares respectively, in the said lands of such child, or children, respectively, so dying, shall revert to my estate; and I give, devise, and bequeath the share and shares of the said lands, so reverting, unto my own right heirs forever. It being my wish and will that the shares in my lands given to my said five children respectively shall go to their issue respectively so long as the law will permit the said lands to be so limited and no longer. And that on the failure of their said issue respectively within the period so limited, the share and shares in the said lands of such issue, and of such issues, so failing, shall revert to my estate." It was held that the language used by the testator clearly indicated his desire to keep the lands in his family so long as the law would permit, and that the devise to each of his sons were contingent on their attaining the age of twenty-one.

In *Johnson v. Terry*, 139 Ala. 614, 38 So. 775, a testator leaving a widow and three infant children gave to his executor the management of his estate, with power to appropriate so much of the income thereof as should be necessary for the support of his family and the maintenance of his children. He further directed that as the two elder should respectively arrive at the age of twenty-one years, the executor should pay to such child a one-fourth part of the estate, and that when the youngest should arrive at the age of twenty-one years the remainder should be divided between such child and testator's widow. He further directed "that in the event either of my said children die before attaining the age of twenty-one years, or if my wife should die before the majority of my child Lizzie, then the share of my estate of such deceased shall be divided in equal parts between the survivors." It was held that in view of the fact there were no words in the will of a present gift payable in future, the clause last above quoted evinced an intention that the interest taken by each child should be contingent upon reaching the age of twenty-one.

In *Collier v. Slaughter*, 20 Ala. 263, where testator directed that his estate should be kept together until his daughter should marry or attain the age of twenty-one years, the income in the meantime to be applied to the support and education of such daughter and testator's three stepchildren; that when his daughter should become of age or marry she should have certain realty and half the personal estate, the other half to be equally divided among the three stepchildren as they should respectively become of age; further providing that in the event that any or all of them should die before arriving of age, then the amount devised to them or either of them should go elsewhere,—it was held that the gift over showed that the legacy to the step-

children did not vest absolutely upon the death of the testator.

In *Re Blake*, 157 Cal. 448, 108 Pac. 287, testator directed his residuary estate to be held in trust to pay over the net income therefrom in equal proportions quarterly to his daughters and to a granddaughter "until they shall respectively arrive at the age of thirty years; and as each of my said daughters and granddaughter arrives at the age of thirty years she shall have the right to demand and receive one third of the rest and residue of my said estate as her distributive share thereof, and to have and to hold the same to her and her heirs forever; and if either of my said daughters or granddaughter shall die without issue and before she receives her distributive share of my estate, it is my desire that her share of my said estate shall go to the surviving daughter, daughters, or granddaughter as the case may be, share and share alike." The question having arisen as to the nature of the remainder devised to the granddaughter, it was held that the testator had so plainly and definitely fixed the time when the corpus of the trust property should vest, both in title and in possession, in the beneficiary, that there was no necessity of applying any technical or arbitrary rules of construction in aid of discovering his intent; that the gift of the title, as also the right of possession, was what the testator intended the beneficiaries should take under the right "to demand and receive" on the contingency that they attain the age of thirty years, and therefore that the attainment of such age was a condition precedent to the vesting; and that notwithstanding the gift of the income the case was one where there is no separate and antecedent gift independent of the direction to pay at a certain time. This conclusion was further supported by the presence of a devise over, the court saying that although there is a conflict in the authorities elsewhere as to the effect of a devise over in determining whether a remainder which is not fixed by direct words of devise is contingent or vested, in California the rule is that a devise over is to be construed as indicating an intention on the part of the testator not to make a vested devise.

In *Meredith v. Tooke*, 1 Ves. Jr. Supp. 324, testatrix ordered her executrices to lay out a certain sum of money in the purchase of government securities in their own names, to pay the interest or dividends thereof to a grandson during his natural life, and from and after his decease to deliver and transfer the said securities to the children of the said grandson, "to be divided amongst them share and share alike as they shall respectively attain his or their age of twenty-one years, if sons, or if daughters, at their ages of twenty-one years or marriage, or if there shall be but one child of my grandson, then I give the whole security to such one child at his or her age of twenty-one or marriage." She further directed that the dividends or interest should, from the death of the grandson, be from

time to time laid out in the purchase of government securities, to be also delivered to the child or children of the grandson in the like manner as the securities representing the principal fund, adding: "And in case of the death of any of the said children before the age or marriage before mentioned, I will that their respective shares shall go to the survivor of them." Lord Hardwicke held that as the whole provision consisted of a direction to the executrices, there was no severance of the sum of money from the rest of the estate, the case being different from that of a bequest to trustees; that as in the latter part of the clause where the testatrix put the case of an only child, time was plainly annexed to the gift itself; and as there were no words in the general disposition to show the intent of the testatrix that the legacy should vest in any case, or in that of there being several children; and as the reference of the words "as they shall attain their age of twenty-one years" must go to the delivery and transfer as well as to the division,—it was plainly the intent of the testatrix that the gift should be suspended till some of the children attained twenty-one.

In *Locke v. Lamb*, L. R. 4 Eq. 372, 16 L. T. N. S. 616, 15 Week. Rep. 1016, a bequest of a sum of stock to be equally divided between all the children of a certain person "as they should attain his or her age of twenty-one years," was held (following *Leake v. Robinson*, 2 Meriv. 363, 16 Revised Rep. 168) to be contingent on attaining twenty-one.

In *Chamberlain v. Young*, 9 Ky. L. Rep. 270, 5 S. W. 380, where testator, stating that the husband of his daughter "has neither fitness nor taste for the life of a husbandman," gave to such daughter and the children born of her body a sum of money charged upon certain property which he had devised to his sons, "to be paid in the following manner: Within one year from the time the parties get possession the first payment of \$600 to be made to my daughter for the support of herself and children, and a like amount every year after, till her first child marries or becomes—, on the happening of either of which events such child may demand and receive his or her equal share of the principal of the ten thousand; my daughter still to receive from my executor the interest yearly on the remainder at 6 per cent per annum, and her other children their share as they marry or become of age, the principal of her own share to be paid by my executors after her death in such manner as she may desire,"—it was held that although the language of the will imported a gift to the children, and the interest on the fund was applied to their support, the signification of those particular expressions was controlled by the evident intention of the testator that the daughter's husband should in no way directly benefit from testator's estate, and therefore that the interests of the grandchildren must be regarded as contingent upon their arriving at full age or marrying.

In *Seibert's Appeal*, 13 Pa. 501, where testator, after directing all his estate to be sold, and giving one third of the proceeds to a daughter for her sole and separate use, further provided that after the decease of such daughter "the one third shall be divided among her children, share and share alike, as they arrive at the age of twenty-one years; but in case the said Margaret should not have any lawful issue or children, and living, then in that case the remaining one third shall descend to her two sisters,"—it was held that the case was within the rule that where there is no separate and antecedent gift which is independent of the direction as to time of payment, the legacy is contingent. The court was also influenced by the consideration, which, however, was said not to be in itself a decisive reason on which to base a construction, that the testator seemed to have had in view the exclusion of the husband of his daughter from any participation in his estate.

In *Grothe's Estate*, 237 Pa. 262, 85 Atl. 141, where testator gave and bequeathed to the sons of a son "living at the time of my death the sum of \$1,000 each as they become twenty-five years of age," it was held that the contingency was annexed to the substance of the gift.

In *Re Wilcox*, 194 N. Y. 288, 87 N. E. 497, where testator gave a third of his residuary estate to his executors in trust to pay the income to a daughter for life, adding, "and at her decease I give, devise, and bequeath to her issue, share and share alike, such income, and as each of her said issue shall attain the age of twenty-one years, I give, devise, and bequeath to it one equal undivided share of the principal," with a gift over in case the daughter should die leaving no issue to attain the age of twenty-one years, the gift to the issue was regarded as contingent upon reaching majority.

In *Blagrove v. Hancock*, 16 Sim. 371, where testator devised real estate to trustees in trust to apply the rents and profits to the support and maintenance of his wife and his present and future grandchildren during the life of his said wife, and immediately on her decease upon trust to convey and surrender such property "unto and to the use of all my present and future grandchildren as they respectively attain the age of twenty-five years. . . . And in case of the death of any of such grandchildren under the age of twenty-five years, the share and interest of such deceased grandchild shall go and belong to such grandchildren or grandchild as attain the said age; and the interest and dividends, rents and profits of any property to which any grandchild may be entitled or presumptively entitled may be applied towards such grandchild's education, support, and advancement,"—it was held that vesting was postponed until the devisees should attain the age of twenty-five.

In *Campbell v. Robertson*, 62 Ga. 709, testator gave his residuary estate after the death of his wife in trust for the benefit of

all his grandchildren, the survivors or survivor of them, "until majority or marriages, and as each one arrives at the age of twenty-one years or marries, then to take out and convey to him or her in fee simple one equal share thereof according to the number then entitled upon their majority or marriage." It was held that the clear intention of the testator was to create a fund out of which to furnish a portion to each of his grandchildren when he or she should arrive at majority or marry, and that none but such as fulfilled the condition of majority or marriage were entitled to participate.

k. Gifts "as soon as" or "so soon as" a certain age shall be attained.

Instances in which the gift has been held vested.

In *Andrew v. Andrew*, L. R. 1 Ch. Div. 410, where testator devised certain realty to his son for life, adding: "And from and after his decease I give, devise, and bequeath the said lands, tenements, and hereditaments unto his eldest son lawfully begotten, if he shall have arrived at the age of twenty-one years, or so soon as he shall arrive at that age; and in default of his having a son, then" to another,—it was held that though it might be conceded that the words of gift taken by themselves would have been a mere gift of a future contingent interest, yet such gift being expressed to be "from and after" the death of the tenant for life, it must have taken effect upon his decease, and accordingly that the words of contingency must be taken as creating a condition subsequent.

In *Re Mottram*, 10 Jur. N. S. 915, 10 L. T. N. S. 866, where testator devised a rent charge in trust to receive the rents during the minority of a certain person, and to apply the net income in the maintenance, education, and support of such person during his minority, and to invest the residue, if any, and to pay and transfer all accumulations, together with the rent charge, unto the said person, his heirs and assigns, so soon after the termination of the preceding estates as he should have attained the age of twenty-one years, it was held, upon the authority of *Boraston's Case*, 3 Coke, 19, and *Phipps v. Ackers*, 9 Clark & F. 583, 6 Jur. 745, that the person named took a vested interest, although he did not live to attain the age of twenty-one, and although the will contained a declaration that in case the trusts should determine or become incapable of taking effect, the hereditaments should form part of the residue.

In *Burrill v. Sheil*, 2 Barb. 457, where testator gave to a sister the interest of a share of his residuary estate, and at her death gave such share to her issue "as soon as they shall have respectively and severally attained the age of twenty-five years, the interest thereof to be paid to them or to some proper person in their behalf, . . . until they shall have respectively and severally attained the age of twenty-five years as aforesaid, or in case of death, to

the issue in like manner,"—it was held that the bequest to such issue was of a vested interest.

In *Kinsey v. Lardner*, 15 Serg. & R. 192, testator devised to his wife all the rents, issues, and profits of certain real estate for the support and maintenance of herself and the maintenance, clothing, and education of their children, during her natural life or widowhood, and at the death of his said wife or upon her second marriage, gave and devised to his children or the survivors of them the said real estate to be divided between them equally, "share and share alike, and their respective heirs and assigns forever, as soon as they or either of them, my said children by my said wife Ann, shall have arrived at the age of twenty-one years." He further vested in his wife full power and authority, if she should think proper, at any time to order a division of the estate so devised to said children, in which case she was to become entitled to a certain income therefrom. It was held that the postponement being to let in an intermediate interest, and in view of the authority given to the widow to divide the estate among the children in her lifetime and before her second marriage, the children took a vested remainder; the court being also influenced by the consideration that it was unlikely that testator should have intended to disinherit the issue of any of his children who might happen to die in the lifetime of the widow and before her second marriage.

Instances in which the gift has been held contingent.

In *Knight v. Knight*, 2 Sim. & Stu. 490, 25 Revised Rep. 253, where testator gave to each of the daughters of a certain person, "as soon as they attain the age of twenty-one years, the sum of £2,000, with interest at the rate of 5 per cent per annum," it was held that according to the intention expressed by the words used, there was no gift, either of principal or interest, until the daughters should attain twenty-one.

In *Moore v. Smith*, 9 Watts, 403, where testator directed: "My executor shall pay unto my grandson, John Moore, £100 like money as soon as he arrives to be twenty-one year of age," it was held that as there was no gift other than that implied in the direction to pay, the legacy was contingent.

In *Re Bulley*, 11 Jur. N. S. 847 (affirming 11 Jur. N. S. 791) where testator gave the residue of his real and personal estate to trustees upon trust for sale and conversion, and to pay the interest and dividends to a daughter for life, and after her death to her husband for life, and from and after the decease of the daughter and her husband directed that the trust moneys should be "paid to all and every the surviving child and children" of his daughter "as soon as they shall arrive or come to the ages of twenty-two years respectively, and not to go to his, her, or their heirs or assigns or to any other person or persons on L.R.A.1915C.

any pretense whatsoever; that is to say, the share of each child which may happen to die after the deaths of the said [daughter and her husband] and before it shall arrive at the age of twenty-two years shall go amongst the other child or children which may arrive at the age of twenty-two years, share and share alike; and if any or more of the said children so begotten as aforesaid should happen to be under the ages of twenty-two years after the deaths of the said [daughter and her husband], then in such case, and my will is, and I hereby direct, that only the interest or yearly produce of the share or shares of such child or children shall be paid to him, her, or them, or for his, her, or their use and benefit until each shall arrive or come to the age of twenty-two years respectively,"—it was held to be clearly the intention of the testator not to make any gift before the children reached the age of twenty-two, and that the provision for the payment of the interest accruing while any of the children should be under the age of twenty-two did not vary this construction.

l. Gifts "when and as," "as and when," or "when and so soon as" a certain age shall be attained.

Instances in which the gift has been held vested.

In *Goodtitle ex dem. Hayward v. Whitby*, 1 Burr. 228, where testator devised all his realty to trustees in trust to lay out, employ, and bestow the rents and profits of the devised premises for the maintenance, education, bringing up, and putting forth into the world of the two sons of testator's sister during their minority, "and when and as they shall attain their respective ages of twenty-one, my will and desire is that the said premises shall be and remain to them [naming them] and their heirs equally,"—it was held by Lord Mansfield that the absolute property being given, and the particular interest being given in the meantime, the words "when and as" did not operate as a condition precedent, but as a description of the time when the remaindermen were to take in possession. He further remarked: "Here, upon the reason of the thing, the infant is the object of the testator's bounty; and the testator does not mean to deprive him of it, in any event. Now suppose that this object of the testator's bounty marries, and dies before his age of twenty-one, leaving children, could the testator intended in such an event to disinherit him? Certainly, he could not. And as to the testator's heir at law, his heir at law is only to take what the testator has not devised away from him."

In *Baker v. McLeod*, 79 Wis. 534, 48 N. W. 657, testator devised all his estate in trust to pay debts and legacies, and to remain in possession of all the residue and remainder thereof until his only child, a daughter, should attain the age of twenty-one years, and from time to time to pay

and apply the whole of the rents, profits, and income, or such part thereof, or such part of the whole estate as should be deemed for the advantage of the daughter, for and toward her maintenance and education. Testator further directed that the corpus of the trust estate "shall be paid and transferred to my said child . . . as and when she shall attain the age of twenty-one years. But if the said [child] shall die under the age of twenty-one years, then" the corpus of the estate was to be immediately distributed in the manner specified. It was held that as the manifest purpose of the provisions of the will thus referred to was amply to provide for the care, nurture, education, maintenance, and support of the testator's only child during her minority, and to preserve the remainder of the estate for her benefit, she took a vested equitable estate at testator's death, subject to be divested upon the happening of the contingency on which the gift over was limited,—into which, however, the court read the words "and without issue," in order to prevent the disherison of a child who survived the daughter.

In *Bland v. Williams*, 3 Myl. & K. 411, testator gave his residuary estate to trustees upon trust to convert into money, invest and pay out of the income therefrom an annuity to his daughter for her life, "and from and after the decease of my said daughter, upon trust to receive the said rent, interests, dividends, and proceeds of all my estate and effects, and to pay, apply and dispose of the same, or a sufficient part thereof, for and towards the maintenance, education, and bringing up of all and every the child or children of my said daughter, until they shall severally and respectively attain their ages of twenty-four years; and when and as they shall severally and respectively attain that age, then upon trust to pay, assign, transfer, and convey all the said residue of my estate and effects, with the interest, dividends, and proceeds thereof, as shall not have been applied for and towards their maintenance, education, and bringing up, equally unto and amongst all her said children, when and as they shall severally and respectively attain their said age of twenty-four years;" and in case any should die before attaining that age and without leaving lawful issue, then to convey to such of them as should live to attain his, her, or their respective ages of twenty-four years; and should all die before attaining that age and without leaving lawful issue, then to pay over the trust fund to another. It was held that as the gift over was not simply upon the death of a legatee under twenty-four, but upon death under twenty-four without leaving issue, so that if upon a death under twenty-four, at whatever age, issue was left, then the gift over was not to take place, it was in effect a vested interest with an executory gift over.

In *Harrison v. Grimwood*, 12 Beav. 192, 18 L. J. Ch. N. S. 485, 13 Jur. 864, testator directed his residuary estate to be

invested upon trust to pay and apply one third of the interest to his daughter for life "for the support of herself and what issue she might have," and after her decease "upon trust to pay, apply, and divide one-third part of the said principal trust money unto and among all and every" her children "when and as they should severally and respectively attain the age of twenty-six years," with benefit of survivorship if any should die under twenty-six years of age without issue. He further provided that if at the time of his daughter's decease any of her children should be under twenty-one years of age, the share of such child should be put upon trust during the minority of such child or children, to pay, apply, and dispose of the interest and proceeds, or a competent part thereof, in, for, and towards the maintenance and education of such child or children. He further empowered his trustees and executors to make advancements for the benefit of such children; and in case his daughter should die without leaving any child, or leaving only children who should die under the age of twenty-six years without issue, he directed that the principal trust money so given to her so dying and to her issue, and all accumulations of interest thereof, should go over as in the will mentioned. Lord Langdale, M. R., though observing that the case, partly from the nature of the subject and partly from the state of the authorities, was a very doubtful one, held that, observing the right given to the children to be maintained out of the interest or income given to their mother, and arising or accruing on the share eventually given to them, and observing the directions in the case of minority, to place out that share and apply the interest or a competent part thereof, and also the power given to the trustees to advance the children, he thought that he ought to conclude that a vested interest was given to the children of the daughter.

In *Ingram v. Suckling*, 7 Week. Rep. 336, where testator bequeathed certain leaseholds upon trust for his wife for life, and after her death upon trust for his two daughters for their lives as tenants in common in equal shares, and from and immediately after the respective deaths of his daughters, then upon trust for their respective children as and when they should respectively attain twenty-one years, share and share alike, as tenants in common, and in case his daughters should die without leaving lawful issue, then upon trust for others, it was held that as the trust was not one to convey at a given period, as there was a separation of the leaseholds from all the rest of the testator's estate, as the gift over was in the event of the daughters' dying without leaving issue, so that in case of their death leaving issue who should fail to attain twenty-one, neither the gift to the issue (should such gift be regarded as contingent) nor the limitation over could take effect,—all this was so inconsistent with the general purport of the words as

importing a contingent interest only, that it must be declared that the children of the testator's daughters took a vested interest whether they attained twenty-one or not.

In *Eccles v. Birkett*, 4 De G. & S. 105, where testator gave his real and personal estate upon trust to pay to each of his children who should be living at the time of his decease, except his sons Adam and Henry, "as and when they shall respectively attain the age of twenty-five years, the sum of £3,000 absolutely;" further declaring it to be lawful for the trustees "to apply all or any part of the income of each respective share of my children under my said will for his or her maintenance or education, or otherwise for his or her benefit, till he or she shall attain his or her age of twenty-five years, as aforesaid,"—it was held that the legacies vested at the death of the testator.

In *Perrott v. Davies*, 38 L. T. N. S. 52, where testator devised his property upon trust for his daughter for life, and after her death upon trust to sell and invest and pay the income, "during the minorities of" her children, "towards their respective maintenance," and directed that as and when his said grandchildren should severally attain twenty-one years, or if daughters when and as they should severally attain that age or marry, his said trustees should pay, assign, and transfer unto such grandchild so attaining twenty-one or marrying as aforesaid an equal share, *per stirpes* and according to the number of grandchildren living or dead leaving issue there might then be or might have been at the decease of his said daughter, of said trust funds,—it was held that as the words used were large enough to give the children *en masse* according to their respective shares the benefit and enjoyment of the whole income to be applied for their maintenance, although the manner in which it was to be applied was left to the discretion of the trustees, the fact that the gift was in the form of a direction to pay to them when they should attain twenty-one or marriage did not deprive it of the character of a vested interest in each of the children.

In *Pearman v. Pearman*, 33 Beav. 394, testator bequeathed the residue of his personal estate to trustees upon trust to enable them to carry on his farm "in order to enable them to bring up, clothe, educate, and maintain all his children," and directed his trustees to pay and divide the whole of the said residue of his said personal estate unto all his children in equal shares as and when he, she, or they should respectively attain the age of twenty-one. In case any of his children should happen to die under age leaving issue, he directed that such issue should take the share of its deceased parent when and so soon as they should severally and respectively attain the age of twenty-one years, and that the trustees should pay and apply the income therefrom in the meantime toward their respective maintenance and education. If he should have no such children or child living to

attain the said age of twenty-one years, or such, if any, dying without leaving any lawful issue, then the property was given to others. It was held that as the subject of the gift was residue, in which case the court strongly inclines to make the gift vested in order to avoid intestacy; as the words "as and when" are ambiguous, and not equivalent to a gift to such of the children as should attain the age of twenty-one years; as there was a gift over in case there should be no child who should attain the age of twenty-one; and as there was a direction that any part of the residue might be applied if necessary in order to enable the trustees to bring up, clothe, educate, and maintain testator's children,—the will, taken as a whole, manifested an intention that a surviving child should take a vested interest, subject to be divested by death under twenty-one without issue.

In *Fox v. Fox*, L. R. 19 Eq. 286, testator directed his trustees to raise a sum of money, and, after the determination of certain prior life interests given therein, to divide and transfer an equal one-fifth part thereof to and among the children of a son equally, ~~as and~~ when they should respectively attain the age of twenty-five years, but if he should have but one child, then to transfer the whole of the said one-fifth part to such only child, applying from time to time the income of the presumptive share of each child, or so much thereof as they should think proper, to and for his and her maintenance and education until such share should become payable; but if the son should leave no child, or if he should and they should all die before attaining the age of twenty-five years, then over. It was held that the gift, though in the form of a direction to pay, was vested by the gift of the intermediate income for maintenance and education.

In *Doe ex dem. Wheedon v. Lea*, 3 T. R. 41, where testator devised realty in trust to hold until a great nephew should attain the age of twenty-four years, and devised unto such great nephew and to his heirs and assigns forever, when and so soon as he should attain his age of twenty-four years, the premises in question, and directed the trustees to surrender the premises accordingly, it was held that the words "when and so soon as he should attain his age of twenty-four years" did not create a condition precedent, but denoted only the time when the beneficial interest was to accrue, upon the authority of *Boraston's Case*, 3 Coke, 19a (set out in VIII. i, supra), *Manfield v. Dugard*, 1 Eq. Cas. Abr. 195, Gilb. Eq. Rep. 36 (set out in VIII. i, supra), and *Goodtitle ex dem. Hayward v. Whitby*, 1 Burr. 228, 1 Ld. Kenyon, 506 (set out supra). And *Groze, J.*, said that this construction was consonant to the testator's intention, for otherwise, had the great nephew left any issue they would not have taken anything under the will, but it was undoubtedly the testator's intention that the great nephew and his children should take the whole.

In *Seotney v. Lomer*, L. R. 31 Ch. Div. 380 (affirming L. R. 29 Ch. Div. 535), where testatrix, having a power of appointment over a fund, appointed two fifths of it upon trust to pay the income thereof to her son "until he shall attain the age of forty years, and when and as soon as he shall attain that age, then I direct that the said trust moneys, stocks, funds, and securities shall be held by my said trustees, or the trustees or trustee for the time being of my will, in trust for my said son W. H. Sowdon, his executors and administrators;" with a proviso that it should not be lawful for such son to sell, assign, or encumber (except by will) his said share or any part thereof, and revoking the appointment to him should he attempt to do so,—it was held, upon the authority of *Re Hart*, 3 De G. & J. 195 (set out in VIII. 1, *supra*) that as the whole of the income of the two fifths which were appointed to the son was to be applied in the discretion of her trustees for his maintenance till he attained the age of forty years, and then the fund was to be held in trust for him, the beneficial interest in the two fifths vested absolutely in the son and passed by his will, although he died before attaining the age of forty, and notwithstanding the gift over if he should attempt to dispose of it.

In *Ackers v. Phipps*, 3 Clark & F. 691 (affirming 5 Sim. 44, 1 L. J. Ch. N. S. 96, 57 Revised Rep. 27), testator gave all his real and personal estates to trustees, and as to certain lands directed that the trustees "shall stand seised and be possessed thereof in trust, and to the intent and purposes to assign, convey, and assure the same unto my godson George Holland Ackers, eldest son of my nephew George Ackers, when and so soon as he, my said godson, shall attain his age of twenty-one years; and also do and shall pay unto my said godson George H. Ackers, the sum of £7,000 at and upon his attaining the said age of twenty-one years. But in case my said godson George H. Ackers shall depart this life before he attains the said age of twenty-one years without leaving issue of his body lawfully to be begotten, then and in such case" the realty and legacy given to him were to sink into and become part of the residue of testator's real and personal estate, and go according to the disposition thereof by him made. The question having arisen as to who was entitled to the rents and profits of the realty during the minority of the devisee, the court below decided that the heir at law was not entitled thereto. When the question was first brought before the House of Lords (3 Clark & F. 691) it was suggested by Lord Brougham that the decree against the heir at law, if sustainable, must be rested on the ground that the interest given to the devisee was an immediate vested interest, and not a contingent interest; but further consideration of the appeal was postponed, and the question reargued before the common-law judges, to whom the question was put as to what estate a devisee would take under

a devise to him when and so soon as he should attain his age of twenty-one years, but in case he should die under the age of twenty-one then the property devised to him to sink into and form part of testator's real estate. The judges were of the opinion that in such case the subsequent gift over in the event of the devisee dying under twenty-one sufficiently shows the meaning of the testator to have been that the first devisee should take whatever interest the party claiming under the devise over is not entitled to, and accordingly that the devisee would take a vested estate on the decease of the testator, subject to be divested in the event of his dying under twenty-one and without issue. In this opinion the lords concurred, and further proceeded to hold that no different construction should be put on the will before them, which conveyed an equitable estate, from that which the judges had put upon the will as applied to a legal estate,—in other words that the fact of the direction to convey made no difference with respect to the disposition of the property; and that the devisee therefore took an equitable vested estate, subject to be divested upon his dying under the age of twenty-one without leaving lawful issue.

In *Re Peek*, L. R. 16 Eq. 221, testator gave a sum of money upon trust to pay the income thereof to and for the maintenance and education of his nephew "until he shall attain the age of twenty-four years. And when and so soon as my nephew shall attain his said age of twenty-four years, I direct that the said principal sum of £5,000 or the stock, funds or securities wherein the same may be then invested shall be paid, assigned and transferred to my said nephew: provided always, and I declare my will to be, that in case my said nephew shall die under the age of twenty-four years, then I direct that my trustees" shall stand possessed of the trust fund for other persons. It was held that the gift being of a legacy payable at a particular age, and the whole income being given in the meantime, the legacy was vested liable to be divested by death under the age of twenty-four.

Instances in which the gift has been held contingent.

In *Kidman v. Kidman*, 40 L. J. Ch. N. S. 359, where testator bequeathed to his executors a sum of money upon trust to invest and pay the dividends to a certain person for life, and from and after her decease "unto and equally among all and every the child and children of [such person] when and as they shall respectively attain the age of twenty-one years. But if the said [person] shall depart this life without lawful issue, then" to others, it was held (following *Re Wrangham*, 1 Drew. & S. 358, 30 L. J. Ch. N. S. 258, 7 Jur. N. S. 15, 3 L. T. N. S. 722, 9 Week. Rep. 156 [set out in VIII. g, *supra*] and disapproving *Bree v. Perfect*, 1 Colly. Ch. Cas. 128, 8 Jur. 282 [set out in VIII. j,

supra]) that the gift over did not show an intention to vest the legacy; that though there was no doubt some inconsistency in the gift, it not going over if the life tenant died leaving any issue, and the issue not taking unless they attained the prescribed age, yet if it should be held that they take vested interests at their birth, the intention would be defeated by giving to them all instead of to those who attained the prescribed age or qualification.

In *Gardiner v. Slater*, 25 Beav. 509, where testator bequeathed his personal estate upon trust to pay one moiety of the income to a daughter for life, and after her decease in trust "to pay, assign, and transfer the capital or principal of such moiety of his said personal estate unto and between or amongst all the children of his said daughter, whether then born or thereafter to be born, in equal shares, when and as they should respectively attain the age of twenty-one years or be married with the lawful consent of parents or guardian, which event should first happen," and to pay and apply the interest and income of each child's portion in the meantime in and for his or her maintenance and education at their discretion,—it was held that there being no direct gift to the children other than a direction to "pay, assign, and transfer the capital" on the death of the tenant for life, a legatee who failed to attain twenty-one, and who had been married without consent, was not entitled.

In *Shum v. Hobbs*, 3 Drew. 93, testatrix gave a fourth part of her residuary estate upon trust to pay the annual income arising therefrom to a son for life, and after his decease "then upon trust to transfer and pay the capital of the said trust funds unto and amongst the child, if only one, or both or all the children if more than one, of my said son [name] in manner hereinafter mentioned." She further directed "that the share of each child who shall be a male shall be payable to him respectively when and as he shall respectively attain his age of twenty-one years, and the share of each of the same children respectively who shall be a female shall be payable to her respectively when and as she respectively shall attain the age of twenty-one years or day of marriage." It was held that as the clause of gift was not complete, it being upon trust to pay "in the manner hereinafter mentioned," so that it was necessary to look to the clause last above quoted to complete the meaning, the case was one where there was no gift other than in the direction to pay at twenty-one, and as this literal construction of the language used was supported by the context of the will, in which provisions for the offspring of other children were clearly expressed to be contingent, the gift in question was also contingent.

In *Re Mervin* [1891] 3 Ch. 197, where testator gave his real and residuary personal estate upon trust for sale, conversion, and investment, directing the trustees to hold the investments and income thereof

upon trust to pay and divide the same equally between the children of his son, naming them, "and any other children who may hereafter be born, as and when they shall respectively attain the age of twenty-five years," giving to the trustees power "in the meantime to pay and apply the whole or any part of the remainder of the income [after paying certain annuities] of the investments for the maintenance and education of such grandchildren during their minority," and also with full power for my trustees in their absolute discretion to advance, pay, or apply to or for the benefit and advancement in the world of my "said grandchildren, or any of them, any part not exceeding one half of the capital to which they or he may be entitled expectant on their, his or her attaining the age of twenty-five years,"—it was held that the trust to pay and divide the property among the children as and when they should respectively attain the age of twenty-five, if it stood alone, would confer contingent interests only on the children, and that the power to the trustees in the meantime to pay and apply the whole or any part of the remainder of the income for the maintenance of the grandchildren during their minority was insufficient to vest the shares of children who did not live to attain twenty-one, the income to be applied for the benefit of each not being of the share which each was to take, the income of the whole fund being applicable for the maintenance of all the children.

In *Sullivan v. Edgell*, 23 Week. Rep. 722, where testator bequeathed the residue of his personality to trustees in trust to permit his wife to carry on his business until his son should attain twenty-one, the wife maintaining all his children in the interim, and when and so soon as his son should attain that age, then upon trust to pay the wife a sum of money, and as to all the other personality upon trust for his said son to and for his own use and benefit, it was held that notwithstanding the inordination of the court was always in favor of making a gift of residue not contingent, the intention of the testator must be followed, which was that attaining twenty-one was a condition precedent to vesting anything in the son.

m. Gifts "whenever" a certain age shall be attained.

In *Tucker v. Bishop*, 16 N. Y. 402, where testator bequeathed to his executors all the residue of his personal property in trust for the benefit of his great-grandchildren, directing them to apply the income thereof annually for the benefit of such great-grandchildren, and whenever any of them should come of age to pay over to such one his or her proportion of the principal, "and so till the whole principal and interest is paid out and expended," the language of the will was held, in view of the absolute gift of the interest accruing until the time for the payment of the principal should ar-

rive, plainly to indicate an intention on the part of the testator to make a present bequest to the great-grandchildren.

n. Gift to trustee or third person "until" legatee attains a certain age, and "then" to him.

Instances in which the gift has been held vested.

In *Saunders v. Vautier*, Craig & Ph. 240, 10 L. J. Ch. N. S. 354, testator gave and bequeathed to his executors and trustees his East India stock upon trust to accumulate the interest and dividends which should accrue due thereon until a great nephew should attain his age of twenty-five years, and then to pay or transfer the principal of such East India stock, together with such accumulated interest and dividends, unto the said great nephew, his executors, administrators, or assigns absolutely. It was held that as there was not only a gift of the intermediate interest, which is regarded as indicative of an intention to make an immediate gift, but also a positive direction to separate the legacy from the estate and to hold it in trust until he should attain twenty-five, and as the transfer was to be made as well to the great nephew, his executors, administrators, or assigns, it was to be inferred that the fund was intended wholly for the benefit of the legatee, although the testator intended that the enjoyment of it should be postponed till he should attain his age of twenty-five.

In *Doe ex dem. Morris v. Underdown*, Willes, 293, where testator devised realty to certain persons, to hold to them for so long a time and until their three children should come to and attain their several and respective ages of one and twenty years, adding: "Then I give, devise, and bequeath the same unto the said [three children, naming them] and to their heirs and assigns respectively, equally to be divided between them as tenants in common, and not as joint tenants, and to take and hold their respective parts and shares of and in the same as they shall severally arrive at their said ages of twenty-one years, and not before" unless their parents should before that time depart this life,—it was held that the word "then" did not denote the time when the interest of the children was to commence, but only the time when they were to come into possession.

In *Re Budd*, 166 Cal. 286, 135 Pac. 1131, testatrix, who wrote her own will, directed that half the net income from certain realty should "be deposited in a bank in the city of Stockton, to there remain until my nephew James Budd Dixon shall have arrived at the age of twenty-one years, and it shall then become and be his property." It was held that while the language of the will was in the future, yet as it appeared that the nephew was the especial object of the bounty of testatrix, and as she had made no specific disposition or bequest over

in the event of his death, her intent to make a present gift was easily and clearly deducible.

In *Thomas v. Wootton*, 4 Harr. & McH. 428, where testator provided: "My will and desire is that all my plantation . . . be in the possession of Elizabeth Herd for the use and maintenance of her and her daughter Mary Herd until the said Mary Herd . . . arrives to the years of sixteen, then the said land to belong to the said Mary Herd and to her heirs and assigns forever," it was held that Mary Herd took an immediate vested estate.

In *Lemonnier v. Godfroid*, 6 Harr. & J. 472, where testator directed his executor to reserve from his estate a certain sum "as a legacy to be paid to" testator's son, directing its investment in such a way as to produce an income for the support and maintenance of the said son, "until he should be of age, and then to pay him the capital or part remaining in case the interest should not be sufficient for his maintenance during his youth,"—it was held that as the testator gave no direction as to the amount of interest to be appropriated to the son's maintenance, the effect in legal operation was the same as if the interest itself were given, and therefore that the effect was to vest the legacy.

In *Hancock v. Titus*, 39 Miss. 224, where testator directed all his property to be kept together "for the purpose of raising my children . . . until they become of age, or marry, and in that case the one so becoming of age or marrying to have an equal share according to valuation of my estate so left," it was held that the interests of the children were vested legacies taking effect in interest at the testator's death.

In *Clancy v. Dickey*, 9 N. C. (2 Hawks.) 498, where testator expressly desired that his negroes should be kept together until his children "arrive to full age or marry, and then to be divided between my beloved wife and children, share and share alike, equally," it was held that, taking the whole will together, and considering that the only legatees in it were his wife and children, who were also residuary legatees, it admitted of the same construction as if he had left the negroes to be kept together by his wife for the benefit of the family until one of his children should arrive at age or be married, when it was to be divided between them and his wife, thereby dis severing the time of division from the substance of the legacy.

In *Hooker v. Bryan*, 140 N. C. 402, 53 S. E. 130, where testatrix "lent" to her sister certain personal property in trust for a nephew "until he becomes twenty-one years old," and then proceeded to make a direct gift of such property to the nephew, it was held that as the case was one where the intermediate use was given to a trustee for the legatee's benefit, his interest was vested.

In *Shepherd's Estate*, 8 Pa. Co. Ct. 520, where testator declared that at the death of his wife his grandson should "receive the

entire interest of my estate until he attains the age of thirty years, then he is to receive the estate absolutely," it was held that the son took a vested estate which was not rendered contingent by a codicil which provided that in case the grandson should die without lawful issue the estate should be divided after the wife's death among certain charitable institutions.

In *Roberts v. Herron*, 78 S. C. 115, 58 S. E. 968, where testator gave and devised to his wife certain real estate, "to have and to hold the same until my two children Mary and William shall become of age, and then to be divided in equal shares between my wife and my two children named above, and to share and share alike," it was held that as there was nothing in the will to show that the right of the children to the estate was uncertain, but the uncertainty related to the time the widow was allowed to hold possession of all the land before the division could take place, the children took vested remainders in fee.

In *Williams v. Vancleave*, 7 T. B. Mon. 388, where testator gave to his wife and daughter-in-law the use of a certain tract of land during the natural life of the wife, adding: "And after my wife's decease, if my said daughter-in-law shall not have again married, but still lives in her state of widowhood, my desire is that she have the use of the land aforesaid until her two children, Elijah and Elvira, shall arrive to the age of twenty-one years, and then the said Elijah Vancleave and his sister Elvira to have the entire and absolute property thereof;" with a limitation over to the survivor should either of the said grandchildren die without issue; and a further limitation in case both of them should die without issue,—it was held that in view of the evident objects of the testator, the remainder devised to the grandchildren vested immediately upon his death.

In *Dusenberry v. Johnson*, 59 N. J. Eq. 336, 45 Atl. 103, where a testator directed his executors to invest \$2,000 immediately upon his decease, and to pay the income thereof at convenient intervals to the guardian or guardians of his two grandchildren "until they respectively become of the age of twenty-one years, to be divided between said children in equal shares, or if one shall die before reaching that age, to the guardian or survivor of them and when they respectively attain that age to pay each of said children \$1,000 of said principal sum; if one only shall live to attain that age, then that one to receive the entire sum of \$2,000; and if both shall die before attaining said age, I direct that said sum shall be held and disposed of as is hereinafter provided,"—it was held that the giving of the interest to the grandchildren during their minority showed that the testator attached the contingency to the time of payment, and not to the substance of the gift, and therefore that the legacy vested immediately, subject to be divested in case both grandchildren died before attaining twenty-one years.

L.R.A.1915C.

In *Smith v. Spencer*, 6 De G. M. & G. 631, 3 Jur. N. S. 193, 5 Week. Rep. 136, where testatrix devised her real estate upon trust, after applying such part of the income as the trustees should think fit towards the maintenance, education, or other benefit of a great nephew, to accumulate the residue of such rents from the decease of testatrix until the great nephew should attain his full age of twenty-one years, and then to pay such accumulations to him, and when he should have attained his age of twenty-one years, then to stand seised of the premises upon trust to him, his heirs and assigns forever, it was held that the gift was not contingent, but absolute, vesting in the great nephew on the death of the testatrix.

In *Stanley v. Stanley*, 16 Ves. Jr. 491, it was held that under a devise of realty upon trust to receive the rents and profits until A should attain the age of twenty-one years, and immediately thereafter to convey and assign the trust property to the use of A and his assigns for and during the term of his natural life, and from and after the determination of that estate to trustees upon trust to support certain contingent uses and estates thereafter limited, A took a vested remainder for life after an estate in the trustees for so many years as his minority might last.

In *Newberry v. Hinman*, 49 Conn. 130, where testator gave in trust for his son a sum of money, "the interest to be used for his benefit until of lawful age, then the principal to be his or his heirs and assigns forever," it was held that the gift of intermediate interest showed that the gift vested on testator's death.

In *Daniels v. Eldredge*, 125 Mass. 356, where testator gave his estate in trust to pay an annuity to his mother during her life, and, subject to this provision, to apply such portion of the income as the trustees should see fit to the education and maintenance of his son until he should reach the age of twenty-five years, and then to convey the estate, with all appreciations thereof, to him in fee; provided that they may in their discretion convey all or part to him at any time after his arriving at the age of twenty-one years; with alternative limitations over in event of his death before reaching the age of twenty-five years leaving or without leaving a widow and children,—it was held that the estate of the son was a vested remainder immediately upon the death of the testator, though subject to be defeated by death before arriving at the age of twenty-five.

In *Potts v. Atherton*, 28 L. J. Ch. N. S. 486, 7 Week. Rep. 331, testator bequeathed all his moneys, securities, and debts owing to him, to trustees upon trust to pay an annuity to his sister-in-law for life, and to pay and apply the residue of the net income in or towards the maintenance, education, and bringing up of a certain person until he should attain his age of twenty-one years, and when and so soon as he should attain that age, upon trust to pay, assign, and

transfer the capital or principal of the said trust moneys and all securities for the same, subject nevertheless to and charged and chargeable with the payment of the said annuity to the said legatee for his own absolute use and benefit. But in case the said legatee should die before attaining the age of twenty-one years, and during the life of the annuitant, the testator made another disposition of the property. It was held that the interest of the legatee was not contingent upon his attaining twenty-one, the gift being of a portion of the property separated from the general assets of the testator, and there being a trust to apply the income for his maintenance and education until twenty-one, subject to the annuity.

In *Parker v. Golding*, 13 Sim. 418, where testator directed the trustees and executors of his will to fund the sum of £2,500, and pay the interest thereof to a daughter for life, "and from and after her decease to and for the education, maintenance, and support of all her children until they shall attain the age of twenty-one years, and then the principal to be equally divided amongst her said children," and if the daughter should die without leaving any child or children, then over, the Vice Chancellor was at first inclined to hold that the legacy was contingent on the children attaining twenty-one, on the ground that though the gift of the interest of a legacy had the effect of vesting the principal where there was a gift of the principal independent of the direction to pay it, yet it had not that effect where, as in the case before him, there was no gift of the principal except in the direction to divide it; but he ultimately held that according to the truth and construction of the will, the interest and the principal of the legacy in question must be taken to be given together, and that the daughter's children accordingly took a vested interest.

In *Re Radford*, 37 Misc. 241, 75 N. Y. Supp. 255, where testatrix devised property to her executors in trust to hold until her son should attain the age of twenty-one years, "then the property to be sold and the proceeds of such sale to be divided among the surviving children or their heirs, share and share alike," it was held that as a general rule bequests to a class mean the persons in existence at the time of the death of the testatrix, that the addition in this will of the words "or their heirs" plainly showed that the testatrix contemplated the contingency of some of the children dying between her death and the period of distribution, and was a provision that in such event their heirs should take, showing a plain intention to make the estate vest immediately upon the death of testatrix.

Instances in which the gift has been held contingent.

In *Laxton v. Eedle*, 19 Beav. 321, where L.R.A.1915C.

testator bequeathed leaseholds to trustees to pay the rents to his wife, until his son attained twenty-one, and then to assign them to his son, it was held that as there was no gift except in the direction to pay when the son should attain his age of twenty-one, and no trust or direction to support him during his minority, and no intimation that any benefit was to be derived by him during that period, he took no vested interest unless and until he should attain the age of twenty-one.

In *Re Ridgeway*, 4 Redf. 226, where testatrix gave to her trustees the residue of her estate to be divided into two equal parts for each of her grandchildren, the income to be paid to them respectively until they should become thirty years of age, when one half of the principal was to be paid to them respectively, and the income of the balance until they should arrive at the age of thirty-five respectively, when the balance of the principal was to become payable; further directing that in the event of their deaths without issue before such payment, then the amount unpaid, including income, should go to others,—it was held that there was nothing in the will to show any intention on the part of the testatrix to vest any portion of the corpus of the residuary estate in the grandchildren in the event of their dying without issue before attaining the age of thirty years.

In *Taylor v. Bacon*, 8 Sim. 100, where testator directed a sum of money to be invested in the public funds, and held in trust to pay the dividends to a daughter-in-law for the benefit of herself and family, "and then at her decease to be divided equally among all her children by my son George, if they shall have attained the age of twenty-one years; but should any of them still be minors, the share of such child or children to be held in trust for them till twenty-one years of age, when the principal shall be paid to them, the dividends on their shares being applied by the trustees to their maintenance while minors,"—it was held that according to the true construction of the language employed, there was no gift to any of the children except those who should attain twenty-one.

In *Breneman v. Herdman*, 35 App. D. C. 27, where testator devised property to be held in trust for the benefit of a daughter during her lifetime, and upon her death "in trust for any child or children she may have at the time of her decease surviving her, until such child or children respectively attain the age of twenty-one years, when the same shall be conveyed by my said executors, or the survivor of them, to such child or to such children, in equal proportions or shares, and his or their heirs," with limitation over in default of grandchildren or in event of their death under twenty-one without issue, it was held that when the grandchildren arrived at the age of twenty-one years their interest vested.

o. Where property is given in trust until a certain age is attained, without a further gift or direction to pay upon attaining that age.

Instances in which the gift has been held vested.

In *Withers v. Sims*, 80 Va. 651, testator gave to his executors in trust for his grandchildren, subject to a life estate previously given to his wife, certain real and personal property, "to be held by my executors aforesaid in trust for my said grandchildren until they shall respectively attain the age of twenty-one or marry. Should either of my said grandchildren die without lawful issue, then I wish the whole of the property named in this clause held by my executors hereinafter named in like manner for the survivor of said grandchildren, until such survivor arrives at twenty-one years of age; or if he shall be twenty-one years of age at the time of such death, then I wish the whole of the property named in this clause to go to him; but should both of my said grandchildren die without lawful issue, then I wish the whole of the property named or referred to in this clause to revert to my estate and be divided among by heirs and distributees according to the laws of Virginia." It was held that the grandchildren took each a vested equitable estate in fee in the property devised and bequeathed to them, subject to be divested only on the death of each under twenty-one years of age without lawful issue.

In *Hayes v. Robeson*, 29 R. I. 216, 69 Atl. 686, testatrix directed that her executor should pay over the sum of \$10,000 to a son, "in trust nevertheless to be applied, with the interest or income therefrom that may accrue, and expended at his discretion for the education, training, and advancement of my two grandsons, . . . and in case of death of either of the said two grandsons before reaching the age of twenty-one years, the whole of said trust fund or whatever may remain thereof shall be applied to the completion of the education, outfit, and advancement of the other for or in his profession or business as the case may be. And further, it is my will that in case of the death of both of my said grandsons [naming them] before they severally reach the age of twenty-one years, this trust fund for them provided hereinbefore shall become the property of" others. It was held that as the gift to a granddaughter in another clause gave her what was clearly a vested interest, and as all the circumstances of the case, together with the tenor of the whole will, indicated that the testatrix intended to treat the three grandchildren substantially alike, the grandsons took a vested interest in the fund, liable to be divested by death under twenty-one years of age.

In *Love v. L'Estrange*, 5 Bro. P. C. 59, where testator bequeathed the residue of his personal estate in trust "until Walter L.R.A.1915C.

Nash . . . shall attain the age of twenty-four years, . . . and from the age of twenty-one years of the said Walter Nash out of the said residue to pay him an annuity of £10 yearly until the age of twenty-four years, and from thenceforth in trust for him the said Walter Nash his executors, administrators, and assigns," it was held that the trust being declared for Walter Nash in the manner mentioned in the will, the equitable right to the bequest vested in him immediately, the age of twenty-four being mentioned not to prevent the right from vesting in him before that age, but to direct the trustees as to the time of paying it to him.

Instances in which the gift has been held contingent.

In *Armstrong v. Armstrong*, 54 Minn. 248, 55 N. W. 971, where testator devised his estate in trust to pay to his wife during her life the net income thereof for the support of herself and children, any surplus to be reinvested for the benefit of legatees, and after the widow's death in trust for the benefit of their children or the survivors of them until said children should become of lawful age, the interests of the children were held contingent upon their attaining majority.

In *Thornton v. Zea*, 22 Tex. Civ. App. 509, 55 S. W. 798, testator gave, devised, and bequeathed all the remainder of his estate to his son and daughters as trustees, "which, together with its accumulation, is to be held by them in trust for the children born and to be born" of said son and daughters "until said children respectively become of legal age; provided that if any of my children should die without issue living, then the share held in trust for his or her children shall be divided among the children of the survivors in the same proportion as if the same had descended by law to my above-named children." It was held that as three of the testator's children had no children at the time of his death, and it not being certain that children would be born to them, and it being provided by the clause under consideration that should any of the testator's children die without issue living, the share held in trust for his or her children should be divided among the children of the survivors, the gift did not vest at the testator's death. The same will coming again before the court in *Walker v. Thornton*, — Tex. Civ. App. —, 124 S. W. 166, it was held that the interest of the children of any one of the testator's children became vested when the first child entitled to receive a share became of age, and was not contingent upon the attainment of age by the other legatees themselves.

p. Where there is a direction to divide when the eldest of a class attains a certain age.

In *Smith's Estate*, 226 Pa. 304, 75 Atl. 425, testator gave a share in a certain business and a one-sixth interest in his

residuary estate in trust to pay the income therefrom to the extent of \$3,000 per annum to a son for life, and to invest any surplus and all the income accruing after the death of the said son, and "allow the same to accumulate until the oldest child of my said son Edward, living at the time of my death, shall become twenty-one years of age, when said accumulated income shall be divided into as many shares as there are children of my said son Edward living at the time of my death (the children of any deceased child of Edward to represent their parent and be counted as representing one share); of these shares those of my said son Edward's children who are twenty-one years of age are to receive one share each of said accumulations of income, and thereafter receive a similar proportion of the surplus income of \$3,000; the shares of those who are minors at the time of my death to continue to accumulate until they respectively become twenty-one years old, when they are to receive the same with a corresponding share of the surplus income thereafter; and in the event of the death of my son Edward either before or after my death, all the income from said interest in said firm, and the income from the one-sixth interest in my residuary estate, shall be divided, share and share alike, among his children him surviving (the issue of deceased children taking their parents' share) until the youngest of said son Edward's children become twenty-one years of age, when said interest in said firm shall be sold, and the proceeds and the one-sixth interest in the residuary estate shall be divided among said children of my son Edward, share and share alike." Should the son die leaving no child or issue or any deceased child surviving him, the trust property was given to others. It was held that in view of the fact that the gift was to children living at the time of testator's death, the reference to the "shares" of those who were minors at the time of his death in the direction that such shares were to continue to accumulate until the minors respectively became twenty-one years old, the provision that the children of any deceased child of Edward were to represent their parent and be counted as representing one share, the will manifested an intention that the gifts to the son's children should take effect at testator's death.

In *Kessler v. Friede*, 29 Misc. 187, 60 N. Y. Supp. 891, testator devised to his executrix certain lands in trust to manage until the oldest child of a deceased son should have arrived at the age of thirty years. After providing for the payment out of the income of the expenses of administering the trust, the testator directed the trustee to apply so much of the balance to the care, maintenance, and education of such of the children of said son as may be minors, but during their minority only, as should seem necessary, and then to divide any balance then remaining into as many shares or parts as said son had children living at

the time of testator's decease, allowing also one share for the son's widow, and to pay one share to said widow and also one share to each of the son's children. He further directed that as soon as the oldest child of such son should arrive at the age of thirty years the executrix should sell and convey the said trust property, and divide the proceeds of sale into as many shares or parts as the son should have children living at the time of testator's decease, and to pay one of said shares to each child who may have arrived at the age of thirty years, and to invest the remaining shares, one for each child under the age of thirty years, at interest, and keep the same so invested until each child should arrive at the age of thirty years, when the share so invested, together with any accumulations of interest, was directed to be paid over. The executrix was also given discretionary power to apply the interest accruing on such investments for the benefit of the respective *cestuis que trusts* during their minority, and to pay such interest to them after attaining majority. Testator further provided that in case any of such children should die leaving issue surviving, then such issue should be entitled to and become vested with the parent's share. It was held that though the interest of the legatees was derivable only under a direction to pay their shares to them upon attaining the age of thirty years, yet the direction that the proceeds of sale of the trust property should be divided into as many shares or parts as his son should have children living at the time of testator's death, the absence of substitutionary provisions for the benefit of others should any of such children die after the testator, the severance of the gift from the corpus of the estate, and the steadfast intention on the part of the testator that in any event the son's children were to be the objects of his bounty, evinced an intention that the shares which the children were to take should be vested interests upon the death of the testator.

In *Butler v. Butler*, 3 Barb. Ch. 304, where testator gave a share of his estate in trust to invest and pay over to a granddaughter the income of the same semi-annually "until her eldest child shall arrive at the age of twenty-one years, and at that period to divide the same as it may exist into as many shares as there may then exist children of the said [granddaughter], and to pay over to each child his or her share on arriving at the lawful age of twenty-one years," the remainder to the children was held contingent.

q. Where there is a direction to divide when the youngest, or all, of a class shall attain a certain age.

Instances in which the gift has been held vested.

In *Milroy v. Milroy*, 14 Sim. 48, where testator gave his real and residuary personal estate in trust for his daughter for

life, "and from and immediately after the decease of my said daughter in trust to pay the interest of such residue, and rents and profits, for and towards the maintenance and education of all and every such child or children as she shall or may leave at her decease, during his, her, or their minority; and when and as soon as the youngest of the child or children shall have attained the age of twenty-five years, upon trust to pay, assign, and transfer the dividends and interest of all such residue and rents, together with the principal money, . . . the same to be divided equally between them, share and share alike;" further providing that in case any of the daughter's children should die leaving a child or children who should live to attain the age of twenty-one, the share of such child should be paid and assigned to his or their offspring, and in case the daughter should leave no child or children, or they should die under age and unmarried, then upon trust to divide among testator's next of kin,—it was held that as it was apparent upon a reading of the instrument that the testator did not mean that anything should go over to the ultimate takers unless his daughter should leave no child or children, or they should die under age and unmarried, the daughter's children upon their mother's death took absolute vested interests.

In *Parkin v. Knight*, 15 Sim. 83, where testator gave all the residue and remainder of his property, which consisted of realty as well as personalty, in trust to his brother Ephraim to assist him to bring up; educate, and provide for the children of the testator's late brother James, adding: "When my youngest nephew attains his age of twenty-one years, it is my will that all my property be equally divided amongst my nephews, or their lawful issue, share and share alike; the division, however, is not to take place, although my youngest nephew may have attained the age of twenty-one years, until the decease of" testator's wife, sisters, and brother Ephraim,—it was held that there was no substantial distinction between this and *Boraston's Case*, 3 Coke, 19 (set forth in VIII. 1, supra), and that the nephews therefore took vested interests subject to the trust during their minority.

In *Re Smith*, 20 Beav. 197, where testator gave a legacy to trustees for the maintenance of his two children during their minority, "and when and so soon as the youngest of my said two children shall have been born twenty-one years, I direct my said trustees or the survivor of them . . . to pay and divide the whole of the said principal of £3,000 equally between them my said two children, share and share alike, if they shall then both be living; but if either of them shall be then dead I then give and bequeath the moiety of such deceased child" to other persons,—it was held that the gift of maintenance had the effect to vest the legacy, which, however, was liable to be divested in case either child

died before becoming entitled to payment.

In *Maddison v. Chapman*, 4 Kay & J. 709, where the testator directed that when the younger of his two daughters had attained twenty-one, his real and personal estate and effects should be divided into three equal parts, one part to be for his wife, and one for each daughter; at his wife's decease her share to be equally divided between his two daughters; and that if either of them should die before a division of the property should have been made, and having no issue, then the part of the deceased should be given to her surviving sister,—the Vice Chancellor, although deeming it unnecessary to decide the question, expressed the opinion that the interests were vested in the daughters. And the will again coming before him in *1 Johns. & H. 470*, he said that the more he had considered it the more he was confirmed in the opinion that the daughters took vested interests, subject to be divested by the survivorship clause.

In *Leeming v. Sherratt*, 2 Hare, 14, testator bequeathed and devised to his executors his freehold property and also all the residue of his personal estate upon trust to sell and dispose of the freehold, and to collect and get in the personalty, "and to pay and divide the money arising therefrom, so soon as my youngest child shall attain the age of twenty-one, unto and equally amongst my children, share and share alike; . . . and in case of the death of any of my children leaving lawful issue, I direct and give to such issue the part or share the parent so dying would have been entitled to have." It was held by Sir James Wigram, V. C., that the interests taken by the children were not contingent upon their surviving until the youngest should attain twenty-one. It was said: "The persons to whom the residue is given are all the testator's children as tenants in common; and the clause which afterwards substitutes the issue of a deceased child for the parent dying leaving lawful issue, shows, or strongly tends to show, that the persons to whom, in the first instance, the residue was given, meant all the testator's children who should survive him, and not all those only who should be living when the youngest should attain twenty-one. Then the residue is given to trustees. For whom are they trustees? Obviously for all the children of the testator who should survive him, except so far as he should otherwise direct. Of what are they trustees? The income of the property between the death of the testator and the time of dividing the residue would accumulate for the benefit of those to whom the residue in terms is eventually given. The trustees, therefore, are trustees of the residue, and of the interim profits thereof, for all the testator's children (except so far as he has afterwards substituted others for those children) upon the happening of an event which in fact has happened, namely, the youngest child attaining twenty-one."

Again, the testator directs that, in case any of his children dies leaving lawful issue, that issue shall take 'the part or share the parent so dying would have been entitled to have.' The words 'would have been entitled to have' were relied upon in argument as showing that the testator himself supposed the parent spoken of to have lost his share in the residue in the event he provides for. But I do not think those words are so full of meaning as that argument supposes. I think the clause is nothing more than the common clause of substitution of one legatee for another in the event spoken of. The substitution is not general. It is confined to the case of a child of the testator dying leaving lawful issue, and does not extend to the case which has happened, of the child of the testator dying not leaving lawful issue. If the will had not contained the clause of substitution, and one or more of the testator's children had died leaving lawful issue before the youngest attained twenty-one, the argument in favor of the legacy being transmissible would have been irresistible; and, if the bequest of the residue would, in the absence of the clause of substitution, have given to John an interest transmissible to his representatives, I do not understand why the clause of substitution can alter the construction of the will in a case to which that clause will not apply. The circumstances which, in cases of residuary gifts, the court has relied upon for preventing an intestacy, as in *Booth v. Booth*, 4 Ves. Jr. 399, 4 Revised Rep. 235, and in *Love v. L'Estrange*, 5 Bro. P. C. 59, were certainly not stronger than occur in this case. . . . There is nothing of improbability in the supposition that the testator intended his children to take absolute interests in the residue, except in the event of their dying leaving issue before the period of division. If there is any case which decides, as an abstract proposition, that a gift of a residue to a testator's children, upon an event which afterwards happens, does not confer upon those children an interest transmissible to their representatives, merely because they die before the event happens, I am satisfied that case must be at variance with other authorities.

In *Murphy v. Murphy*, 20 Grant, Ch. (U. C.) 575, testator devised his estate to trustees for the payment of debts and legacies, and after payment thereof to invest the residue, and therefrom to pay to his wife certain specified sums for the maintenance of each child, and to invest any residue of income and accumulate it and stand possessed thereof, with power to give to each child on attaining twenty-one a sum of \$1,000. When the youngest child should attain the age of twenty-one years, the trustees were to retain a sufficient sum of money to yield a specified income to be paid to his wife for life, adding: "And all the rest and residue of my real and personal estate which shall remain after retaining the last-mentioned sum shall be divided equally among all my children, share and share

alike; and also that the said sum above directed to be invested for the benefit of my wife shall, after her death, be likewise equally divided among my children." He also substituted the issue of any child dying before the said distribution. It was held, following *Leeming v. Sherratt*, 2 Hare, 14, 11 L. J. Ch. N. S. 423, 6 Jur. 683, that the attainment of twenty-one was a condition precedent to vesting. The same will coming again before the court in *Murphy v. Mason*, 22 Grant, Ch. (U. C.) 405, the decision that the children took vested interests on attaining twenty-one was concurred in, but it was further held that these were subject to be divested on dying leaving a family before the youngest should attain twenty-one.

In *Butler v. Butler*, 29 N. S. 145, where testator directed his residuary estate to be held and invested by his executors and trustees until his youngest surviving child should attain the full age of twenty-one years, "and thereupon to divide such residue and its accumulations and unapplied income, if any, share and share alike, between and amongst those of my children next hereinafter named [names] and the issue of any one or more of my said children last above named who my have died before such division or distribution is actually made by my executors and trustees, such issue to take the place of their deceased parents respectively, and to take equally amongst them the share such respective parent, if living, would have taken hereunder,"—it was held that the interests of the children vested immediately, subject to be divested by death leaving issue before the time of distribution.

In *McLeod v. McDonnell*, 6 Ala. 236, where a testator leaving a wife and five minor children directed that all his property should be kept together "till my youngest child may have arrived at lawful age, at which time all the above property, with its increase from now on to the time of my youngest child arriving at lawful age, to be equally divided among all my lawful heirs," it was held that although no express provision was made for the support of his wife or children, the inference was plain that the property was to be kept together for such purpose, and that the distributees took an immediate vested interest.

In *High v. Worley*, 32 Ala. 709, where testator directed certain property to be held by his executor for the use and support of his wife and children until his daughter should arrive at the age of sixteen years, then to be sold and the proceeds equally divided between his wife and children, it was held that as there was nothing in the will to show that time was made the substance of the gift, and none of the words are found therein which are usually understood as expressing contingency, the legacies were vested.

In *Foster v. Holland*, 56 Ala. 474, testator directed his executor to carry on his farms until his grandchildren should mar-

ry or come to the age of twenty-one years, "when an equal division of all my estate shall then be made between them or the survivors." He further directed that the income from the farms should be used for their support and education, and the sum so expended charged to each distributee on final division between them. It was held that an expression in the will of a purpose to make all his grandchildren equal in respect to advancements to their parents, the appropriation of the income to the use of the beneficiary during minority, and the fact that the will contained no residuary clause and no bequest over, although it purported to dispose of his entire estate, showed a purpose that the legacies should vest at the death of testator, enjoyment only having been postponed.

In *McArthur v. Scott*, 113 U. S. 340, 28 L. ed. 1015, 5 Sup. Ct. Rep. 652, where testator devised lands and personal property to his executors in trust, and directed that the income, until his youngest grandchild who might live to be twenty-one years of age should arrive at that age, should be divided equally among the testator's children or the issue of any child dying, and among the grandchildren also as they successively came of age; that "after the decease of all my children and when and soon as the youngest grandchild shall arrive at the age of twenty-one years," the lands should be "inherited and equally divided between my grandchildren *per capita*" in fee, and that in like manner the personal property should be similarly divided, the children of any deceased grandchild to receive *per stirpes* the share which their parent would have been entitled to if living,—it was held that in view of the scheme of the will and the terms in which it was expressed, the grandchildren took vested remainders, opening to let in those born after the testator's death, and subject to be divested only as to any grandchild who died before the expiration of the particular estate, leaving issue, by an executory devise over to such issue.

In *Earnshaw v. Daly*, 1 App. D. C. 218, it was held that under a will by which the testator's widow took a life estate subject to termination by marriage or by the arrival at lawful age of the youngest child, and which contained a direction that after the lawful age of the youngest child testator's property should be sold and the proceeds thereof divided equally between his children, the children took a vested interest upon the death of the testator, full enjoyment of which was postponed until the majority of the youngest.

In *Everett v. Mount*, 22 Ga. 323, testator, after providing for his wife, directed that the balance of his property should remain together until his youngest child should come of age, "each one to be clothed and educated out of my estate equal with my other children, and my estate to pay them \$1,000 as they come of age, and when my youngest child comes of age I wish an equal division of the balance of my property." It L.R.A.1916C.

was held that there was nothing in the whole plan of the will which manifested an intention that the property should not vest, and that it would be inconsistent with principle to hold that the property did not vest in those for whose exclusive use it was to be kept together, and for which reason alone the division was postponed until the youngest child became of age. The court further relied on the circumstance that the intermediate interest was directed to be applied to the clothing and education of those of the testator's children who had not attained the age of twenty-one years.

In *Hempstead v. Dickson*, 20 Ill. 193, 71 Am. Dec. 280, it was held that under a devise of land to trustees to have and to hold until the youngest child of testator should attain a certain age, in trust for all testator's surviving children, their heirs and assigns, as tenants in common, such children took vested remainders.

In *Shafer v. Tereso*, 133 Iowa, 342, 110 N. W. 846, where testator gave to his wife for her support and maintenance during the minority of their youngest child his entire residuary estate, and further provided that at the time the youngest child should attain majority the wife should have a third thereof during the remainder of her life, and that the remaining two thirds "shall be divided between my five sons and six daughters," it was held that if the will were that the remaindermen should not take until the youngest child became of age, there might be ground for contending that the devise was a contingent one, but as there was no uncertainty as to the persons who were to take, or the event upon which they should take, the remainder was a vested one.

In *Hoeker v. Gentry*, 3 Met. (Ky.) 463, testator devised to the children of a deceased son a certain farm, which he directed to be kept, used, and cultivated for the maintenance and support of said children "until the youngest attains the age of twenty-one years; then said land is to be sold and the proceeds equally divided among said children." He likewise devised to them certain slaves, to be hired out until the youngest of said children should attain the age of twenty-one, when the executor was to sell said slaves and divide the proceeds equally among the children. It was held that as testator gave the children the intermediate use of the land, and, by implication, the benefit of the hire of the slaves, until the youngest should attain the age of twenty-one, they took vested interests.

In *Dickison v. Ogden*, 89 Ky. 162, 12 S. W. 191, where testator gave his residuary estate in trust for the benefit of his daughter and her children, the daughter to be permitted to have possession and enjoy the property during her natural life, and on the arrival at age or marriage of the youngest of the daughter's children, then to divide the estate into as many shares as there should be children of the daughter then living and children deceased leaving de-

scendants then alive, and to convey one share to each, the children of a deceased child taking what their parent would have taken, it was held that the plain intention was to vest the daughter with an estate for life, remainder to her children, subject to be devested by their death before the happening of the event designated for the division of the property.

In *Meyer v. Eisler*, 29 Md. 28, where testator gave his residuary estate in trust to pay a share of the net income thereof to his wife, and to reinvest the balance from year to year until the end of twenty years from and after his death, or until his youngest child should arrive at the age of twenty years, when the whole should be divided among his wife, if living, and his children, the issue of any deceased child to receive the share or proportion to which their parent would have been entitled, it was held that there was nothing on the face of the will to indicate the intention of the testator to postpone the vesting of the estate until the happening of the event named.

In *Plaenker v. Smith*, 95 Md. 389, 52 Atl. 606, testator gave his residuary estate in trust annually to pay out of the income thereof a specified sum, or so much thereof as might be necessary to the widow, to be applied by her, as guardian, to the support and maintenance of their children until the youngest should have attained the age of twenty-one years; from and after which time the widow was given an annuity, the trustee being directed to set aside sufficient property for that purpose; and as to the remainder of the residuary estate, including any unexpended balance left over from the sums of money set apart for the maintenance, support, and education of the children, testator directed that it should be equally divided among the children "who may be living at the time of my death, their heirs and assigns, share and share alike," the issue of any child dying during testator's lifetime being substituted for the parent. It was held that the will manifested an intention that the children should take vested interests in their respective shares of residue at the death of the testator, notwithstanding the fact that the legal estate therein was held by the trustee for their benefit during their minority.

In *Collier's Will*, 40 Mo. 287, testator gave his residuary estate in trust to manage and control, directing his trustees to educate and care for his children, the expense to be treated as part of the expenses of the estate, and further empowering the trustees in their discretion to make advancements to any child upon becoming of age or marrying, adding: "And when my said son Dwight shall attain the age of twenty-one years I wish and require my said executors and trustees immediately to settle up my estate, and divide the same out among my said children as hereinafter mentioned, as far as it may be practicable." He expressed the wish that each child should receive an equal share, but gave the

trustees power to discriminate between them in case of "providential visitation or unseen casualties or their own bad conduct." It was held that as a fair and natural construction of the will showed that the children took by virtue of the will, and not by appointment under the power conferred upon the trustees, the gift to whom was regarded as being for the benefit of the children only; and as the postponement of the division seemed more for the benefit and convenience of the estate than for any considerations personal to the heirs and devisees; and as there was no devise over of the respective interests showing any purpose in the testator that the devisees should not receive their shares at all events, so that if any of the devisees died before Dwight attained the age of twenty-one, leaving children, those children would be wholly unprovided for,—the interests of the children vested at the testator's death.

In *Post v. Herbert*, 27 N. J. Eq. 540 (affirming 26 N. J. Eq. 278), testator devised to his executors in trust for the use of the husband of a deceased daughter a certain farm, he to have and enjoy the possession and the rents, issues, and profits thereof until the youngest child of such daughter should attain the age of twenty-one. Accompanying this trust was a power in the trustees, dependent on the written assent of the *cestuis que trusts*, to sell the land, putting the proceeds to the same use during the same interval. Testator further provided "after the said youngest child attains the age of twenty-one years, I order and direct my executors to sell the said tract of land at public sale (if the same is not already sold as above directed), and the net proceeds of said sale or the said principal sum invested as aforesaid as the case may be, to be by them divided between the children of my said daughter [name], share and share alike." It was held that though the only gift to the children was embodied in the order that it be divided among them upon the future event of the youngest child reaching twenty-one, which disposition standing by itself would leave the legacy contingent, yet as the eldest of the children was over twenty-one when the testator died, so that the coming of age of the youngest was, as to the class, a disconnected event which would not confer a personal qualification upon them as individual legatees, and as the purpose of the testator in deferring the payment to the children of these legacies until the youngest should come of age was to keep the family together and provide a home for all the children until the period of distribution, the case was one of a postponement of payment in order to vest an intermediate interest, the legal consequence of which was to convert the direction to divide at a future time into an immediate gift that vested at the death of the testator.

In *Parker v. Glover*, 42 N. J. Eq. 559, 9 Atl. 217, where testator directed his residuary estate to be converted into

money, and a share thereof held in trust to pay over the income to a daughter for life, and after her decease to pay over such income to her children or for their use and benefit, at the discretion of the trustee, until the youngest should come of age, when the principal was to be divided among them, share and share alike, it was held that the gift in remainder vested at the same time as the life interest, at the death of the testator.

In *Dawson v. Schaefer*, 52 N. J. Eq. 341, 30 Atl. 91, it was held that under a will by which testator gave all his property to his six children by name, share and share alike, expressing his devise to be subject to these provisions: "It is my will, and I order and direct, that no part of my real property shall be sold until my youngest child . . . shall arrive at the age of twenty-one years. . . . And when my youngest child living shall have arrived at the age of twenty-one years, then they shall have absolute control of said property to do with and dispose of as best to them seems fit and proper. If any of my children shall die leaving heir or heirs, then such heir or heirs shall receive the same proportion as the parent of such heirs or heirs would have received; that is the parent's undivided part,"—the estate given by the testator to his children vested in them at his death, the postponement being merely of enjoyment for a purpose beneficial to his family, subject, however, to be devested by death before the youngest living child of the testator should become of age leaving a child or children.

In *Torrey v. Shaw*, 3 Edw. Ch. 356, testator devised his residuary estate to his executors in trust for the use of his daughter during her natural life, and upon further trust after the decease of his said daughter for all her children equally and their heirs, executors, and administrators forever, when the youngest of the said children should come of age; while the rents, income, and profits thereof until that period were to be applied at the discretion of the executors to the education and maintenance of the said children. He further provided that if any of his said daughter's children should die before her, leaving issue, the latter should take its parent's share; and that the executors might, before the youngest of said children came of age, advance to any of them any part of their respective shares of the estate if it should be thought necessary for their advancement in life. It was held that in view of the peculiar phraseology of the will and the general design and plan of it, time was not annexed to the substance of the gift, but to its enjoyment, so that the children took vested interests at the death of the testator, liable to be devested by the happening of either of the events provided for in the will.

In *Goebel v. Wolf*, 113 N. Y. 405, 10 Am. St. Rep. 464, 21 N. E. 388, testator gave his residuary estate in trust to pay over one half of the net rents and income of

the real estate to testator's wife for the support and maintenance of herself and minor children; and upon the further trust to apply the remaining one half to the extinguishment of mortgages upon the real estate, and after the payment of all mortgages to invest the said one half for the benefit of testator's children; and upon the further trust to carry on testator's business until his youngest child should arrive at the age of twenty-one years, with discretionary power to sell and discontinue the business at any time, and to invest the net profits and income for the benefit of testator's children; and upon the further trust to convert other personalty into money and invest for the benefit of testator's children; and upon the further trust to pay and advance to each of such children "as they respectively arrive at the age of twenty-one years, or as they respectively marry," the sum of \$3,000; and upon the further trust immediately upon the arrival of the youngest child at the age of twenty-one years, in case testator's wife should not be then living, to divide the entire estate among the children, share and share alike, after deducting all advances made as above provided, but should testator's wife be living at that time, then to defer the division until after her death. It was held that although there was in the will no gift in terms to the testator's children, except in the clause providing for a division of his estate among them on the termination of the trust, yet in view of the fact that there was nothing on the face of the will to indicate that the testator contemplated the death of any of his children during minority, or that any of them might not take the equal one-fourth share of his estate on the final division, and that there was good reason for postponing enjoyment in order to accomplish testator's purpose to provide an income for the support and maintenance of the widow and minor children and to pay off the mortgages; and in view of the provision for advancements to be deducted from the child's share on final division, the will manifested an intention to vest his estate at his death in his then living children, subject to the trust estate in his executors. The court was also influenced by the consideration that this construction would prevent the disinheritance of issue of any child who might marry and die before the expiration of the trust period.

In *Williams v. Conrad*, 30 Barb. 524, where testator, who had directed that his property be kept together for the exclusive use and maintenance of his wife and children, further provided: "After my children are of full age, and after the death of my wife, it is my will and desire that all my property shall be sold and the proceeds divided among my children as the law directs,"—it was held that the real estate of which the testator died seised vested on his death in all his surviving children, subject to his devise thereof to his wife for the use of herself and of the children under age

and unmarried, and subject to the implied power of sale given to the executor.

In *Wright v. Mercein*, 34 Misc. 414, 89 N. Y. Supp. 936, where testator, after giving a son the use of all his property for life, went on to provide that should such son leave lawful issue at the time of his death the property should be divided equally between such issue, share and share alike, "when the youngest child shall have reached the age of thirty years, and the income of said property is to be equally divided between such issue and used for their support until such age shall be reached;" and further provided for the event of the son's dying without leaving lawful issue,—it was held that the interests of the son's children vested at the time of his death, with the time of enjoyment of the principal postponed until the youngest should have arrived at the age of thirty years.

In *Seitz v. Faversham*, 141 App. Div. 903, 126 N. Y. Supp. 801 (judgment modified on other grounds in 205 N. Y. 197), where testatrix gave and devised to the issue of a niece certain real estate, "to have and to hold the same in equal shares as joint tenants, and not as tenants in common, when the youngest of such issue attains the age of twenty-one years, the net income . . . to be applied to their use in equal shares in the meantime," adding: "In the event of the death of any such issue before the youngest survivor shall attain the age of twenty-one years, then I give the share of the one so dying to the survivors of such issue,"—it was held that the devise to each child was vested as it was in being or as it came into being.

In *Rauchfuss v. Rauchfuss*, 2 Dem. 271, where testator directed that upon the coming of age of his youngest child all his real estate should be sold and the proceeds thereof divided equally between all his children, further providing for the division among his children of the rents of the real property during the youngest child's minority, it was held that the rights of the children vested at the time of testator's death.

In *Re Meikle*, 2 Connolly, 97, 20 N. Y. Supp. 88, testator gave the residue of his estate to his executors in trust to pay over to his wife a third of the net income, to pay out of the remaining income a mortgage, and to pay over, distribute, and divide the rest of the income to and among his children, share and share alike; and in case of the death of any of them leaving issue, he directed that the issue should take and receive the share the parent would have received if living. He further provided that on his youngest child attaining the age of twenty-five years, if his wife should not then be living, and in case she should be living at that time, then upon her death, the executors should convert the estate into money and distribute and divide the proceeds to and among his children, share and share alike, the issue of any deceased child to take the share the parent would have taken if living. He also provided that should the son desire to go into business be-

fore attaining twenty-five years of age, the executors might in their discretion make an advancement to him upon his share. It was held that the provision for the advancement to the son, together with the gift of the intermediate income to the children, showed that it was testator's intention to give his children immediate vested interests.

In *Perry v. Rhodes*, 6 N. C. (2 Murph.) 140, where testator gave all his personalty, excepting negroes, to his wife "till such time as my youngest daughter comes to be of the age of twenty-one years, and then to be divided equally among" his wife and daughters; and further directed that his executors hire out all his negroes yearly till such time as his youngest daughter should come of the age of twenty-one years, giving the money arising from such hire to his wife, and that "at such time as my youngest daughter comes of the age of twenty-one years all my said negroes and their increase be equally divided among" his wife and daughters, "to them, their heirs and assigns forever,"—it was held that as the division of the property amongst the wife and children was not annexed to the substance of the legacy, but to the period of the youngest daughter attaining the age of twenty-one years, and as the intermediate interest was given to the wife, doubtless with a view to the benefit of the children as well as herself, the rights of the legatees vested immediately upon the testator's death, enjoyment only being postponed. The court was also influenced by the consideration that the consequence of a different construction would be that if any of the daughters died leaving children before the youngest daughter came of age, those children would be wholly unprovided for.

In *Smith v. Wiseman*, 41 N. C. (6 Ired. Eq.) 540, a legacy, to a daughter-in-law, of a negro to work for her and her four children's support until the youngest one should arrive at the age of seventeen, then to be sold and the money to be equally divided amongst them all, share and share alike, was held vested, so that the share of a child dying under seventeen passed to her personal representative.

In *Sims v. Smith*, 59 N. C. (6 Jones, Eq.) 347, where a testatrix gave certain negroes to her son's five children, naming them, "when the youngest arrives to lawful age . . . to be equally divided between them and their heirs forever," the implication of contingency from the use of the word "when" was held to be overcome by the phrase "equally to be divided between them."

In *Sutton v. West*, 77 N. C. 429, testator by the third clause of his will gave to each of his eight youngest children, "when the youngest shall arrive at the age of twelve years, \$500 in money." By the fifth clause he provided: "I lend to my wife Teresa and my seven youngest children [naming them] all my real and personal estate with the understanding that they are to enjoy so much of the rents . . . as

may be necessary for their support in common until the youngest child shall arrive at the age of twelve years; and after the youngest child shall have arrived at said age, it is then my will and desire that all of the estate above named shall be sold and the proceeds divided equally between my wife, if she should then be living, and all of my children or their legal representatives." It was held that although if the clause giving the \$500 legacies stood alone, the legacy of each child would probably be considered as contingent on such child's being alive when the youngest became twelve years of age, yet as the same persons were also residuary legatees, and as such took vested interests, and as the language of the fifth clause amounted to a direction that the legacies were "to be paid when the youngest child should attain twelve years," such legacies were vested.

In *Linton v. Laycock*, 33 Ohio St. 128, where testator, after giving to his wife a farm during the time till their youngest child should be twenty-one years of age, went on to provide: "When the youngest child is twenty-one years of age, the real estate aforesaid and such part of the said personal property or the proceeds thereof as may then remain unconsumed and unexpended to be equally divided amongst all my children then living, or their heirs,"—it was held that in accordance with well-settled principles of construction the words of futurity related to the time of possession, and that the inference drawn from the phraseology of the will was strengthened by the fact that the postponement of possession was to let in an intermediate estate for a term of years to the testator's wife.

In *Tatem v. Tatem*, 1 Miles (Pa.) 309, where testator gave his estate to his wife during widowhood, "the estate to be and remain undivided until my youngest child should become to the age of twenty-one years," further providing: "It is my will that all my children shall have an equal share of the whole of my estate that I now possess or may possess at my death, both real and personal, at the time before mentioned for division, and should any of my children die without heir lawfully begotten, it is then my will that their share shall be equally divided amongst the surviving children,"—it was held that the freehold in testator's realty vested immediately on the death of the testator.

In *Letchworth's Appeal*, 30 Pa. 175, where testator directed: "At and after the decease of my said wife, and in case she should marry, and when my youngest child shall arrive at the age of twenty-one years, then it is my will that all my estate shall be distributed by my executors, agreeably to the intestate laws of this commonwealth; provided always, nevertheless, that in case all my said children shall die, without leaving lawful issue, during the lifetime of my said wife, then, and in such case, I gave, devise, and bequeath to my said wife all my estate,"—it was held that as the general scheme of the will was that the widow

should be constituted the head of the family during her life, taking the income of the estate for her support and for the maintenance and education of the children, and being allowed, if necessary, to encroach on the principal for this purpose: the will finally directing that on her death, and when testator's youngest child should be of age, all his estate should be distributed agreeably to the intestate laws,—the testator was not thinking of devising away the estate from his children and heirs, but only of directing how it should be administered for the benefit of the family so long as it had or stood in need of a head, and therefore that the children took vested interests on his death, the enjoyment only being postponed until the time appointed by him.

In *Smith v. Myers*, 212 Pa. 51, 61 Atl. 573, where testator devised to a trustee a farm to be held in trust until his grandson should arrive at the age of twenty-one years, "the said trustee to assume charge of said farm and divide proceeds equally between the children of my deceased son William, and at the time my said grandson shall arrive at the age of twenty-one years or shall depart this life, in that case the trust aforesaid shall be discharged, and said farm become the property of the remaining children of my said son jointly and equally,"—it was held that each of the three children of his deceased son took a present vested interest in common in one fourth of the farm, with a remainder in one third of a fourth, contingent on the grandson dying before the age of twenty-one.

In *Arthurs's Estate*, 24 Pittsb. L. J. N. S. 28, where testatrix devised realty to her executor in trust to hold, use, and sell or dispose of the same for the use and benefit in his discretion of a son "and his children now born, and when the youngest of said children shall arrive at full age then to distribute the net proceeds of the said property" to the said son and his said children, share and share alike, the beneficiaries were held to take a vested beneficial interest.

In *Verner v. Cooper*, 2 Am. L. J. 188 (as reported in 49 Century Dig. title "Wills," § 1169), testatrix gave all her estate to be equally divided among her four children, share and share alike, when the youngest should arrive at the age of twenty-one years, and in case one or more of the children should die before division should be made, the share of the deceased child should be equally divided among survivors of the minor children. The eldest daughter after arriving at the age of twenty-one years, but during the minority of the youngest daughter, died before division of the property, leaving issue. Held, that the share of the deceased daughter descended to her heirs at law.

In *Kelly v. Dike*, 8 R. I. 436, testator gave his residuary estate in trust to manage and to reinvest the net income, and to pay out of and from said trust fund to his wife the sum of \$1,200 a year until his youngest child should have arrived at

the age of twenty-one years, for the support of the wife and children. He directed that after his youngest child should have arrived at such age, his wife should be paid a certain annuity out of the trust fund; and further authorized and empowered the trustees, whenever his sons should respectively arrive at the age of twenty-five and be desirous of entering into business, to pay over and advance out of said trust fund the sum of \$5,000 to each, and similarly to advance to his daughters the sum of \$1,000 each upon marriage, the sums of money so advanced to be charged against and deducted from the respective shares of the sons and daughters. He further directed that "when my youngest child shall arrive at the age of twenty-one years, said trust fund shall be divided among my children, share and share alike, first deducting from his or her share all advances made by the said trustees to him or her—and be held in trust by the said trustees, and be invested in the stock of some good bank or banks in Providence in their respective names—for and during the terms of the natural lives of each of my said children," the dividends, income, and profits thereof to be paid over to said children during their natural lives. It was held that the gift of a portion of the income of the trust fund for the benefit of the children, the provision for their advancement, and the direction that these advancements "shall be charged against them respectively and be deducted . . . from the respective shares of my sons and daughters receiving said advances," and the absence of a devise over upon the failure of a child to attain the age of twenty-one, showed the testator's intention to be that the children should take an equitable vested estate upon his decease; the court also remarking that the phrase, "when my youngest child shall arrive at the age of twenty-one years, said trust fund shall be divided between my children," seemed, when viewed in connection with the whole structure and plan of the will, rather to indicate the time of division or payment than to indicate a condition precedent as to any of his children having a vested interest in the estate.

In *Sammis v. Sammis*, 14 R. I. 123, testator gave and devised to his wife the income arising from one undivided quarter part of all his estate, and to his three sons the income arising from the remaining three-quarter parts "until my youngest son then living shall have attained the age of forty years. At the expiration of said time it is my will that all my property, real, personal, and mixed, shall then be divided into four equal quarter parts, and that my said sons [naming them] shall each respectively receive one equal quarter part of said property to them, their heirs and assigns forever." It was held that the three quarters being given to the three sons in two parts, the one part being a mere chattel interest or terms of years, and the other part the entire residue, so that the whole estate was exhausted, and the direction be-

ing that at the expiration of the particular estate the property shall be divided into quarters and each son have a quarter, no particular quarter given to any particular son, there was nothing to prevent a merger of the chattel interest in the reversion, which would give the sons vested interests, but that even if there was an implied trust, the sons nevertheless would take a vested interest subject to the trust estate.

In *Underwood v. Dismukes*, Meigs, 299, testator directed certain of his property to be laid out in the purchase of a tract of land, "and a deed taken for the same to all my children and their heirs," directing that his wife should enjoy the land so purchased during her natural life. He further directed that his executors should "reserve a sufficiency from my estate to support and raise my family until a division of my estate shall take place as is hereinafter directed. I also desire that my sons be put to some trade by my executors, that they may become useful to themselves and society, and that my younger children may get some sort of an education, and that my executors lay out the profit arising from my estate, after supporting my family and educating my children, at their discretion, for the benefit of my estate. And after the whole of my children shall arrive to manhood, or so soon as my two youngest children arrive to the age of eighteen years or marriage, then I direct a division of my estate to be made amongst all my children and their heirs." He also provided that "a loan may be made by my executors of such property as they may think proper to such of them as may marry, which shall be brought together if living at said division and divided as above directed, always taking care to keep a sufficiency for raising the younger children." It was held that as the children were exclusively the objects of testator's bounty, and equally the objects of his bounty, as there was no limitation over, as the entire corpus of the estate and all the intermediate profits were to belong to and be enjoyed by his children and his wife, the interest of the latter determining with her life, as the children were clearly given a vested interest in the land directed to be purchased, and no reason existed why they should take a contingent interest in the other property, and as provision was made for their support and advancement, and the bequest being of a residue,—these circumstances showed the intention of the testator to be that the children should take vested interests.

In *Battle v. House*, 4 Lea, 202, where testator, after directing that all the balance of his property should be kept together by his executors, and managed in the same way after his death as before until his youngest child should arrive at the age of twenty-one years, went on to provide: "It is my will and desire when my youngest child shall arrive at the age of twenty-one years that my property, both real and personal, shall be equally distributed between my children and the descendants of my chil-

dren. If any of my children shall be dead and leave any children surviving them, the children of such dead children taking the interest of his or her parents would have taken if he or she had lived,"—it was held that the children took vested interests, subject to be divested by dying before the time of distribution.

In *Sellers v. Reed*, 88 Va. 377, 13 S. E. 754, where testator gave to his wife all his property until the youngest of their children should arrive at the age of seventeen years, she to board, clothe, and educate all the children until that time, adding: "When the younger child becomes seventeen years of age I will and bequeath to my wife [name] the one third of my estate, both real and personal, the remainder to my children equally,"—it was held that as testator's purpose evidently was to provide a home and support for the family until such time as in his judgment a division of the estate would be expedient, and as there was nothing in the will to show that he intended to give anything contingently, as all the children were put upon a footing of exact equality, and there was nothing to indicate an intention to disinherit the offspring of any of them in any event,—their interests would be considered as vesting at testator's death.

Instances in which the gift has been held contingent.

In *Ford v. Rawlins*, 1 Sim. & Stu. 328, where a will contained the following clause, "I further leave to the use of my said dear wife my furniture, plate, jewels, books, and pictures, which I desire may be distributed amongst our children on the youngest attaining twenty-one years, at her and my executors' discretion; such part being nevertheless reserved for her use as may be thought convenient; and at her death to be distributed as above directed,"—it was held that there being no direct gift to the children, but only a power to the widow and executors to distribute amongst the children at their discretion certain specific articles when the youngest should attain twenty-one, children who died under twenty-one did not take vested interests, and that it made no difference that the widow was to have the interim use of the property, or the use of part of it, for her life after the youngest child should attain twenty-one, if she should happen to be then living.

In *Bastin v. Watts*, 3 Beav. 97, 7 Jur. 791, the testator devised his real and personal estate upon trust to pay the rents and profits to his wife until his youngest child should attain the age of twenty-one years, "and when and as soon as that event should happen" he directed that his trustees "should divide his said real and personal estate into five equal shares," and to stand possessed of certain of these shares in trust for divers of his children for life, remainder to their children. It was held that nothing vested in the children until the youngest attained twenty-one. L.R.A.1915C.

In *Sansbury v. Read*, 12 Ves. Jr. 75, testator directed that the surplus income of his estate "be put into the 3 per cent consolidated bank annuities, there to remain till the youngest child of my nephew Thomas Sansbury, that is born of his present wife, attain the age of eighteen years if a daughter; but if a son, then when he attains the age of twenty-one years, then to be divided among them in equal portions." It was held that as there was no substantive gift to the children, but the only way in which they could claim was under the direction to the executor to divide, the time of division was annexed to the very substance of the gift.

In *Re Hunter*, L. R. 1 Eq. 295, where testator devised real estate in trust to receive the rents and profits until his youngest daughter should attain the age of twenty-one years, to be applied towards the maintenance and education of his daughters until the youngest should attain that age, when the property was to be sold and the proceeds equally divided among his daughters, "and if any of his said daughters should die before his youngest daughter arrived at twenty-one years, her or their share or shares to be divided amongst his surviving daughters, share and share alike; but if any of his said daughters should marry and die before the said youngest daughter attained the age of twenty-one, and leave a child or children, he ordered that it or they should receive their mother's share equally among them,"—it was held that there was no gift until the time of distribution.

In *McLellan v. McGgatt*, 7 U. C. Q. B. 558, testator disposed of the use of some, but not all, of his lands until his youngest son should come of full age, at which time he directed "that the whole of my lands be divided into four equal parts, one part of which I do give and bequeath to my two daughters [naming them], the other three parts to be divided amongst my three sons." It was held that as there was nothing but a direction that at a future day the lands were to be divided and a separate portion granted to each child, the case was not one in which the enjoyment of the estate only is deferred, but one in which time is of the essence of the gift.

In *Re Douglas*, 22 Ont. Rep. 553, where testator directed his executors to sell his farm and invest the proceeds for the benefit of his wife and children until all the children came of age, "when my son John Douglas will get one third of the money, and the balance (two thirds) of the money will be equally divided with my wife and the remaining children," it was held that the interest of each child was contingent upon attaining the age of twenty-one, though not upon surviving to the period of distribution, the postponement of enjoyment being only in order to provide for the maintenance of the family.

In *Cogburn v. Ogleby*, 18 Ga. 56, testator, after directing that the estate be kept together under the management and control

of his executors for the support and education of his family, and making specific provision for the wife of any child dying without issue, went on to provide: "It is my will that as my children should marry or become of age my executor shall give off such child such portion of my estate as he may think for the best, for the purpose of managing, controlling, and deriving the profits or increase to himself. But the title to such property shall not be devested from my executor, nor such child acquire any title to the same. But said property shall belong to my estate until the youngest child shall marry or become of age, and then shall be brought into the general fund, to be divided among all my children equally, share and share alike." It was held that in view of the whole structure of the will, no estate vested in any child until the youngest should come of age or marry, or that if any interest did so vest, it was subject to be devested upon the contingency of the child dying before the time specified.

In *Kingman v. Harmon*, 131 Ill. 171, 23 N. E. 430, it is held that the language used in a will by a testator directing that all his real estate "be reserved for my children, and be divided equally among them when the youngest attains the age of twenty-one years, subject to my wife's dower, and that the proceeds of said property until that time be placed at the disposal of the executors to be used by them for the support of my wife and the support and education of my children, any surplus arising from the above to be used for the benefit of the heirs,"—clearly annexed time to the substance of the gift, so that the title to the lands described did not vest in the children until that period arrived.

In *McClain v. Capper*, 98 Iowa, 145, 67 N. W. 102, testator gave to his wife during the minority of his children the entire use and benefit of his real estate for the purpose of supporting and educating the children, further providing: "And when my youngest child arrives at full age, I desire that the real estate (after my wife's dower interest is set off to her therein) be equally divided between my children [naming them], their heirs or survivors of them." It was held that as the gift was in the direction to divide, and as the division was directed to be made between the children or the "survivors of them," the interests of the children did not vest until the youngest arrived at full age.

In *Dohn v. Dohn*, 110 Ky. 884, 62 S. W. 1033, 64 S. W. 352, where testator directed the residue of his estate to be held in trust to pay his wife a certain sum per month during her lifetime, and to pay to each of his children a certain monthly sum until the youngest should be twenty-five years of age; further directing that after the death of his wife, and when the youngest child should be twenty-five years of age, the entire estate should be divided in equal parts among his children or their heirs, the issue of a child or children dying to "inherit" the share of its parents; and empowering

the trustee to advance to each of the children after his wife's death a sum not exceeding \$1,500, "to be charged to their share in the final settlement to be made when my youngest child is twenty-five years of age,"—it was held that, notwithstanding the language which provides that "the issue of the child or children dying shall inherit the share of its parents," and the argument that the postponement of the distribution and possession was not with reference to any needs of the devisees or to their capacity for the enjoyment of the estate, but solely for the convenience of the estate, to enable the trustee to make the monthly payments, yet as the gift was only in the direction to divide, and as no contrary intention could be collected from the words or context, the interests of the children were conditional on their surviving the period of distribution.

In *Ross v. Ware*, 131 Ky. 828, 116 S. W. 241, where testator gave his wife the use of all his personal and real estate until all his children should become twenty-one years of age, the children to be cared for by the wife; further providing that when all the children should become twenty-one years of age his property should be converted into money and divided, one third to his wife, "and the balance to be equally divided between my children or their descendants, the descendants getting the portion the parent would have gotten,"—it was held that, viewing the will as a whole, and giving to each of its provisions such meaning as its language seems to warrant, it clearly manifested an intention on the part of the testator that the title to the children's share should not vest in them until the youngest should become twenty-one years of age.

In *Webber v. Jones*, 94 Me. 429, 47 Atl. 905, it was held that under a testamentary direction that testator's grandchildren should have a good education, to be paid for out of his residuary estate, "the remaining amount, if any, to be kept on interest until said children are twenty years of age, then what the amount is to be divided between said grandchildren," a grandchild dying before the time fixed for division was not entitled to share.

In *Streib v. Streib*, — N. J. Eq. —, 39 Atl. 723, where testator devised his property to grandchildren, to be kept for them in safe-keeping by their father until all should become of age; further providing that "during said time said [father] shall receive all income and interests from my property for his and the children's support. And when the youngest child shall become of age the whole property shall be equally divided among the said three children, . . . and if one of the same shall die, then his share shall go to the remainder children; and in case all three shall die, then" to others,—it was held that it could not be said that the postponement of the possession was solely for the purpose of having the father receive the income for his and his children's support, so that upon

his death before all had become of age, their interests would become vested.

In *Drake v. Pell*, 3 Edw. Ch. 251, testator devised the residue of his estate in trust to pay the rents to his wife until his youngest child came of age. In case the youngest child came of age during the wife's life the executors were to sell, and, after reserving an annuity for the wife, to divide the residue equally among his nine children, or else to make a similar division by partition. In case the youngest child came of age after the wife's death, then a sale and division was to be made equally among the nine, or else a partition and similar division. He further provided: "And in case any of my children shall die after me and after having attained the age of twenty-one years, then the share, portion, or interest of the child so dying shall go to the heirs, devisees, or legal representatives of the child so dying." It was held that the time appointed for division was of the substance of the gift, and therefore that the rights and interests of the children did not vest and become absolute until the youngest child attained the age of twenty-one years.

In *Smith v. Edwards*, 88 N. Y. 92, testator provided: "I have \$30,000 invested in United States registered bonds, which I order and direct to have kept invested until my youngest grandchild, now born, or that may hereafter be born before final distribution of my estate, shall be of full and lawful age; and that my executors, out of the interest and net increase thereof," shall keep in order a cemetery lot, make up any deficiency in funds to pay legacies, and from time to time make division and distribution of any surplus that may be then in their hands, and, in their discretion, \$10,000 of the principal, between testator's children and grandchildren; after which he continued: "And when my youngest grandchild born, and that may within twenty years be born, shall arrive at full age, or, if a granddaughter, shall sooner be lawfully married, my executors shall divide the remaining \$20,000 (now in such bonds), and such increase as they may then have, into two equal parts, and shall divide" in manner specified among the children and grandchildren, and if any child or grandchild should die before such division and distribution, then his or her share to his or her children, but if without issue, then to his or her brothers or sisters. It was held that as there was no present gift to the named legatees, and no language or provision from which such immediate gift could be properly inferred, the bequest to them lying wholly in the direction for future division and distribution, and no language was used which would take the gift out of the operation of the general rule that such a bequest will be considered contingent, and as only a part and not the whole of the income was given in the interim for the benefit of the legatees, and as the clause of substitution would have been unnecessary if the vesting was intended. L.R.A.1915C.

ed to be immediate, there was not enough to take the bequests out of the operation of the general rule.

In *Greenland v. Waddell*, 116 N. Y. 234, 15 Am. St. Rep. 400, 22 N. E. 367, testatrix gave her entire estate to her executors in trust to convert into money, and to invest one third part thereof and pay the income therefrom to a sister for and during the joint lives of her and her husband; and in case she should die before her husband, leaving lawful issue surviving her, then to pay such income or portion thereof, as may be necessary, toward the support, maintenance, and education of the child or children of said sister "until the youngest child shall arrive at the age of twenty-one years; and on said youngest child arriving at such age my said executors shall pay and transfer to the child or children that shall then be living the whole of said remaining one third, with its accumulations." On the death of all said children before arriving at such age, or on the death of the sister without leaving lawful issue her surviving, the principal was given to others. It was held that as the will did not in terms give the fund to the sister's children, but directed the executors in the events mentioned to pay it to them, the absolute ownership would not vest in such children until they should reach the age of twenty-one years.

In *Schlereth v. Schlereth*, 173 N. Y. 444, 93 Am. St. Rep. 616, 66 N. E. 130, where testator gave his residuary estate to his executors and trustees in trust to convert into money and to pay the income thereof to his daughter during her life, and after her death leaving issue to pay over said income to such issue in equal shares until the youngest of such issue should have attained the age of twenty-one years, and then to divide and distribute the whole of said trust fund so held among such issue, in equal shares each, share and share alike, with a gift over in case the daughter should die without leaving issue, or in case of the failure of such issue to reach the age of twenty-one years,—it was held that as there were no words of gift to the daughter's children except by the direction to the trustees to pay or divide at a future time, it was obvious that the testator intended to make a future and not a present gift.

In *Whitefield v. Crissman*, 123 App. Div. 233, 108 N. Y. Supp. 110, where testator gave all his property in trust for the benefit of his four children, "the income and such portion of the principal as may be necessary for their maintenance to be used until all shall have reached their majority, when after deducting the percentage legally allowed to my wife [name] the residue or balance is to be divided, share and share alike, among the aforementioned children [naming them]; in the event of the death of any of said children without issue, said share to be divided *pro rata* among those remaining"—it was said that there could be no question but that the ultimate vesting of the title of the testator's prop-

erty was postponed until his four children should arrive at the age of twenty-one.

In *Anderson v. Felton*, 36 N. C. (1 Ired. Eq.) 55, testator directed that all his perishable estate be sold, and his lands and negroes rented out until his youngest daughter should become fifteen years old; that his children who had not been educated should be educated and boarded out of the estate; and apportioned his real estate among his daughters and son. He further provided "that at the time my youngest daughter, Sarah Thatch, arrives to the age of fifteen years, that all my negroes and perishable estate shall be divided between all my children, and money likewise to be divided. In case that any of my children should be married before Sarah arrives at fifteen years of age, then my will is that his or her board shall be stopped, and no further charge be paid for him or her until Sarah arrives to fifteen, when he or she shall receive his or her proportionable part." It was held that as there were no words of gift of the personality except by inference from the direction to divide, and as to the period of division (and consequently of gift) the will used terms of strict condition, the legacies were contingent; and that neither the provision for maintenance out of the estate, nor the circumstance that the issue of any child dying before distribution would take nothing, was sufficient to take the case out of the general rule.

In *Kountz's Estate*, 213 Pa. 390, 3 L.R.A. (N.S.) 639, 62 Atl. 1103, 5 Ann. Cas. 427, testatrix gave her residuary estate to her husband in trust for her children and grandchildren, the net income therefrom to be divided as follows: "1. While all my said children continue to live, each shall have one sixth of the aggregate net income, unless in the discretion of my said executor any one should receive either more or less than the one sixth. 2. Should any of my said children die leaving children but no husband or wife, as the case may be, that parent's share of the income shall go to his or her children, in equal parts. 3. Should any one leave a husband or a wife, but no child, such husband or wife shall have his or her spouse's share of the income for life, provided that he or she 'has always had and maintained a good character and does not marry again;' in case of marriage 'or proof of bad character' his or her right shall immediately cease. 4. Should any one leave a husband, or a wife, and children, the deceased parent's share of the income shall be given to the surviving parent for the use of the survivor and children. 5. Should any one die without leaving a spouse or a child, that one's interest in the income and principal shall go to the surviving coheirs, the children of any deceased heir to take such heir's portion. 6. After the decease of the last of my immediate children, and the lapse of ten years from the date when my youngest grandchild shall have become of age, the principal of

the whole estate shall be equally divided among my grandchildren." It was held that the gift to the husband in trust could not be regarded as in itself a distinct and substantive gift to the grandchildren as a class, but that it operated merely to vest the estate in the trustee for the purposes of the trust; that therefore there was no gift to the grandchildren other than that implied from the direction to divide at the future period mentioned, and therefore that the vesting in interest as well as in possession was deferred until that time; and that the gift was not sooner vested by the provision that the grandchildren should take their deceased parent's share of the income, as the gift of the income was to them *per stirpes*, and the gift of the principal to them *per capita*.

r. Where there is a direction to divide when a third person shall attain a certain age.

In *Titus v. Weeks*, 37 Barb. 136, where testatrix directed her executors to convert her estate into money, to be put and kept at interest during the minority of a grandnephew, and the interest thereon accruing to be paid during such minority to her four nephews, going on to provide that when said grandnephew should have arrived at full age an account should be taken of the interest paid and belonging to the said four nephews, and be added to the principal of her estate, and "that such part of the principal of my estate shall then be paid to my said four nephews as shall with the interest they shall have before received equal the one half of such gross sum,"—it was held that the four nephews took an absolute interest in the legacies given them respectively, and not contingently upon their surviving the majority of the grandnephew.

In *Chapman v. Nichols*, 61 How. Pr. 275, testatrix gave real estate to her executors in trust to divide the net rents and profits between her two sons and her grandson until the latter should come of age, and then upon the further trust, on the grandson's coming of age, to divide the real estate into three equal parts, and to grant and convey one equal one-third part to each of her two sons in fee, and the remaining one-third part to the grandson in fee, provided that in case he should die before such division and conveyance, without leaving issue him surviving, then the whole of the estate was to be divided and conveyed to the two sons. It was held that the sons took vested interests each in one third of the estate devised, notwithstanding the legal title was given to the executors as trustees, and that the title was to remain in them until the division was made, and although there were no words of immediate gift of distinct shares, except as indicated by the directions to divide and convey.

In *Robinson's Estate*, 13 Phila. 209, where testator gave the use and income of

his residuary estate, both real and personal, to his wife until his daughter should attain the age of twenty-one years, if the wife should so long remain his widow, for the support of herself and the said daughter; further providing that in the event of her marriage she should have one third of the said income, the remainder to be applied for the support, maintenance, and education of the daughter; adding: "And when she, my said daughter, shall have reached the age of twenty-one years, I will and direct my estate, property, and effects to be distributed as follows: "One third thereof to my said wife absolutely, and the rest and residue thereof to my said daughter; . . . and should my said daughter die before reaching the age of twenty-one years, and without lawful issue, then it is my will that her share of my estate shall go to" others,—it was held that as the widow was to receive part or all of the income of the whole fund until the majority of the daughter, as one third of the estate was to be paid to her absolutely when the daughter should attain full age, and as there was no limitation over in the case of her death, her interest was not contingent upon her living until the daughter attained the age of twenty-one; the court also being influenced by the consideration that a different construction would produce an intestacy as to such one third.

s. Miscellaneous.

In *Den. ex dem. Satterthwaite v. Satterthwaite*, 1 W. Bl. 519, where testator devised land to a father for the use of his son for his maintenance and education till he should attain the age of twenty-one, after which he devised the same to the son and his heirs, it was held that as the father was only in the nature of a guardian to his son, the estate vested instantly in the son.

In *Stretch v. Watkins*, 1 Madd. Ch. 253, where testator gave and bequeathed to a daughter "£120 per annum (that is to say) the interest of £4,000 of my 3 per cent consolidated annuities," adding: "It is my wish and will that the interest as it becomes due be added to the principal till she attains the age of twenty-one years, except £20 per annum to find her clothes, etc.,"—it was held that the direction for accumulation till twenty-one, except as to the £20, did not prevent the daughter from taking a vested interest.

In *Lowe v. Barnett*, 38 Miss. 329, where testator directed that all his property should be kept in the hands of his executors until all his children should come of age, "at the same time allowing to each one as he or she becomes of age to withdraw his or her portion;" further directing that the surplus income after paying for the clothing and education of his children should be applied to the purchase of negroes and other property, and that when his youngest child should become of age or marry an equal division of the estate should L.R.A.1915C.

take place,—it was held that in view of the language of the will, which denoted an intention to confer a present interest, though to be enjoyed upon the happening of the contingency, and as the provision for the children's support and education showed that they took a present interest at the testator's death, the distributees all took vested interests.

In *Burton v. Conigland*, 82 N. C. 99, where testator devised to a nephew a tract of land, and further directed that another should have the use and benefit of such land until the nephew should arrive to the years of twenty-one, it was held that the effect of such disposition was clearly to vest the estate in the devisee at once, deferring, however, his enjoyment of its profits until he should become twenty-one.

In *Watkins v. Quarles*, 23 Ark. 179, testator gave the bulk of his estate to his wife for life, and directed that certain slaves which he had loaned to a married daughter should remain in the possession of the said daughter and her husband until there should be a general division of his estate. He further provided: "The balance of my slaves shall remain upon the plantation upon which I now reside during the lifetime of my wife [name], or, in the event of her death, then to remain upon said plantation until my son John M. Walker shall arrive at the age of twenty-one years, at which period they, with the balance of my estate, to descend in equal shares to the said John M. Walker and to my daughter Mary Walker and her bodily heirs; and in the event of the death of the said John M. Walker without bodily heirs, his entire interest in my said estate to descend to the said Mary Walker and her bodily heirs." It was held that the intermediate interest being carved out for the benefit of testator's wife and of the married daughter, the legacy to John M. and Mary Walker vested at the death of the testator, with a postponement of the possession only until the time fixed by the will for a division of the property between them, in order to let in the intermediate interest carved out, and also to effectuate the express direction and purpose of the testator that a part of the slaves should remain together upon the plantation—a provision for the convenience of the estate and the interest of those who were to get it—until the time when such division was to be made. The court was also influenced by the consideration that if the legacy in question should be held not to vest until the legatees should attain the age of twenty-one, the effect would be to produce an intestacy, notwithstanding testator's evident intention to dispose of the entire estate, in case the son should die under twenty-one.

In *Dodson v. Hay*, 3 Bro. Ch. 404, where testator gave and bequeathed "unto the children of my said sister the whole of all the real and personal estate I may die possessed of after paying the above-intended legacy and those hereinafter mentioned,

and it is my particular will and desire that the children, all of them, be educated with the yearly interest of whatever portion of my estate that may fall to each respective child's lot or share, and such portion not to be otherwise claimed or inherited, directly or indirectly, until the said children arrive at the age of twenty-two years, whether married or single,"—it was held that the words in the first part of the bequest being absolute, and the interest of the fund being given, and the implication of contingency being vague, the legacies were vested. The court was also influenced by the consideration that a different construction would exclude the issue of a child dying before attaining the age of twenty-two.

In *Re Murphy*, 144 N. Y. 557, 39 N. E. 691, where testator directed his executors to divide his residuary estate equally between his wife and children, share and share alike, "the principal of each child, however, not to be paid until they respectively arrive at the age of thirty years, the interest arising therefrom to accumulate during the minority, and on their attaining the age of twenty-one years the interest arising therefrom, that is, from said principal and accumulation, to be paid to said children until they respectively arrive at the age of thirty years,"—it was held that as it was quite apparent that this provision of the will was intended solely for the benefit of the testator's children, and that the postponement of the payment was intended for their benefit, and not for the estate, the gift vested immediately, payment only being postponed as to the children.

In *Myers v. Williams*, 58 N. C. (5 Jones, Eq.) 362, where testator gave his negroes to his brother Nicholas in trust for the use of his children "now born or to be hereafter born of the body of his present wife, . . . but he, the said Nicholas, is not to be accountable to his children for the proceeds of the labor of said negroes until the said children are twenty-one years of age, my object being that the said Nicholas should use the proceeds of the labor of the said negroes to enable him the better to educate his children as well as to support the said negroes,"—it was held that as the terms of the bequest to the brother's children imported a present gift, and as in the meantime the profits were to be applied toward their education, the provision in favor of the father that he was not to be accountable to his children during their minority did not have the effect of preventing the legacy from being vested.

In *Bennett v. Bennett*, 217 Ill. 434, 4 L.R.A.(N.S.) 470, 75 N. E. 339, testator bequeathed to a trustee a sum of money in trust to invest and to pay the income semi-annually to testator's son "until he attains the age of forty years, and if my said wife is still living to pay to my said son [name] at such time the said sum of \$3,000, which shall then become his absolutely," but if testator's wife should not be living at such L.R.A.1915C.

time, then to retain such sum for ten years thereafter, at the end of which time it should become his absolutely. "In case of his death before the time or times herein fixed for the payment of the \$3,000 to him, it shall go to his heirs." It was held that as there was no present gift to the son, vesting was postponed until the time of payment; and that the fact that the fund was segregated at once from the estate and devoted to the particular trust would not defeat the clearly expressed purpose of the testator. The court seems, however, to have been somewhat influenced in this case by the fact that the son was a spendthrift.

E. S. O.

FLORIDA SUPREME COURT.

H. S. WALKER, Plff. in Err.,
v.

STATE OF FLORIDA.

(— Fla. —, 67 So. 94.)

False pretense — representation of quantity in tract.

1. Where the defendant obtains from the prosecutor an automobile in exchange for \$150 in cash and a deed to a lot of land that he represented to contain 10 acres, after having shown the land to the prosecutor and pointed out to him its true boundaries, and the prosecutor, about six months after receiving his deed, has the land surveyed, and then discovered that it contains only 5 acres, and there is no evidence of any effort or intention on the defendant's part to wilfully deceive the prosecutor or to defraud him in the transaction, except the bare expression of his opinion that there were 10 acres in the tract, or that there were 5 acres cleared and 5 acres in wood-

Headnotes by TAYLOR, J.

Note.—For the offense of obtaining money by false pretenses as affected by the absurdity or improbability of representations, or by the prosecutor's failure to investigate the same, see note to *State v. Keyes*, 6 L.R.A.(N.S.) 369. The question whether the offense of false pretenses may be predicated of misrepresentations of the quality, condition, or status of the subject of a sale or trade, is discussed in the note to *State v. Stone*, 49 L.R.A.(N.S.) 574. The question whether fraudulent representations by the vendor as to area within boundaries correctly pointed out are civilly actionable is considered in the note to *Mabardy v. McHugh*, 23 L.R.A.(N.S.) 487; and a similar question with respect to fraudulent representations as to the extent or proportion of land of a particular kind included within tract, in the note to *Best v. Offield*, 30 L.R.A.(N.S.) 55.

Generally, for expression of opinion as fraud, see note to *Hedin v. Minneapolis Medical & S. Institute*, 35 L.R.A. 417.

land, which assertion, if it was false, must have been perfectly apparent to the prosecutor when he had the boundaries truly pointed out to him, and walked all over it with the defendant,—this does not constitute such a false pretense for which the defendant can in law be held criminally liable.

Same — false opinion.

2. It is well settled that an expression of a false opinion or judgment is not within the statute.

Same — absurd representation.

3. Where the pretense relied upon to support the crime is absurd or irrational, or such as the party injured had at hand at the very time the means of detecting, it does not constitute a criminal offense.

(November 17, 1914.)

ERROR to the Criminal Court of Record for Volusia County, to review a judgment convicting defendant of obtaining property by false pretenses. Reversed.

The facts are stated in the opinion.

Messrs. Stewart & Stewart and J. E. Alexander for plaintiff in error.

Messrs. T. F. West, Attorney General, and C. O. Andrews, Assistant Attorney General, for the State.

Taylor, J., delivered the opinion of the court:

The plaintiff in error, hereinafter referred to as the defendant, was by information charged with the crime of obtaining an automobile of the alleged value of \$600, by false pretenses, in the criminal court of record of Volusia county, and was tried, convicted, and sentenced for said offense, and seeks a review of such judgment by writ of error.

Thirty-nine errors are assigned, but, from the conclusions we have reached upon the facts and law of the case, we will discuss but one of them, since that one disposes of the entire case, and that is the denial of the defendant's motion for new trial, made upon the ground that the verdict is contrary to law and the evidence in the case. A brief summary of the evidence for the state in support of the charge makes out the following case: The prosecutor, who is alleged to have been imposed upon by the alleged false pretense, himself sought the defendant, saying to him that he had an automobile that he valued at \$600 that he desired to dispose of. The defendant then told him that he had a 10-acre lot of hammock land out in the country that he would give him, together with \$100 in cash, in exchange for the automobile. Thereupon the prosecuting witness went out with the defendant and walked all over the lot of land, the defendant pointing out to him the

boundaries, and again saying that there were 5 acres cleared and 5 acres in woodland; there being a fence around three sides of it. After inspecting the land, the defendant and the prosecutor went back to town, and on the following Monday morning the prosecutor again approached the defendant and told him he would exchange his automobile for the land they had inspected the previous Saturday, and \$150. The defendant accepted this proposition, and executed with his wife a warranty deed to the lot in question, stating in said deed that it contained 10 acres, more or less, and paid the \$150 in money, upon which the prosecutor delivered the automobile. The deed by which the defendant acquired his title to the land in question also asserted that it contained 10 acres, though there was some proof that the defendant knew that in reality it contained only 5 acres. The prosecutor, some six months after his trade with the defendant, had the land surveyed by a surveyor, and then discovered that there were only 5 acres, instead of 10, and he testified that, if he had known there were only 5 acres, he would not have parted with his automobile, but that he relied on the assertion of the defendant that there were 10 acres in the tract. The prosecutor also testified that he was a stock raiser and farmer, and was fairly familiar with land, land values, acreage, etc. The foregoing facts fairly state the case as made by the proofs on the part of the state. It will be observed that there was no assertion by the defendant that he had ever had the land surveyed, or that he positively knew that it contained fully 10 acres. There was no hurrying of the prosecutor into the trade. No effort on defendant's part to deter him from examination of the public maps and records as to the quantity of land contained in the lot; but, on the contrary, he goes out with the prosecutor to the land, points out to him its true boundaries, and they walked all over it together. There is no hint in the record of any effort or intention on the part of the defendant to wilfully deceive the prosecutor, or to defraud him in the transaction between them, except the bare expression of his opinion that there were 10 acres in the tract, or that there were 5 acres cleared and 5 acres in woodland, which assertion, if it was false, must have been perfectly apparent to the prosecutor when he had the boundaries pointed out to him and walked all over it with the defendant. Especially is this true in the prosecutor's case, since he testified that he was fairly familiar with the acreage of lands. It is well settled that an expression of a false opinion or judgment is not within the statute. 19

Cyc. 398; *Gordon v. Parmelee*, 2 Allen, 212; *State v. Webb*, 26 Iowa, 262. In the case of *Mooney v. Miller*, 102 Mass. 217, it is held that "if the representations relate to the quality and productiveness of the soil, or the number of acres within boundaries which are pointed out, they are not actionable, for they are to be regarded as the usual and ordinary means adopted by sellers to obtain a high price, and are always understood as affording to buyers no ground for omitting to make inquiries." *Bishop v. Small*, 63 Me. 12; *State v. Young*, 76 N. C. 258.

In the case of *State v. Cameron*, 117 Mo. 641, 23 S. W. 767, it is held that "where the pretense relied on to support the crime is absurd or irrational, or such as the party injured had at hand at the very time the means of detecting, it does not constitute a criminal offense." *Buckalew v. State*, 11 Tex. App. 352; *State v. Paul*, 69 Me. 215; *Com. v. Norton*, 11 Allen, 266.

Under the facts in proof in this case, we do not think that the defendant has been shown to be guilty of any criminal offense; and, inasmuch as another trial could result in law only in an acquittal of the defendant, and in useless costs to the county, the judgment of the court below in said case is hereby reversed at the cost of Volusia county, and the plaintiff in error is ordered to be discharged without day.

Shackleford, Ch. J., and Cockrell, Hocker, and Whitfield, JJ., concur.

NEBRASKA SUPREME COURT.

FULLER SHELLENBERGER, Plff. in Err.,
v.

STATE OF NEBRASKA.

(— Neb. —, 150 N. W. 643.)

Evidence — confession — to secure care.

1. The accused, while in a precarious condition from being overheated, was cared for by the sheriff at Burlington, Kansas. Upon his making inquiry as to the relatives of the accused, so that they might be notified in order to care for him, Shellenberger

Headnotes by LETTON, J.

Note. — SHELLENBERGER v. STATE seems to be a case of first impression as to the admissibility of a prior and concededly false confession of crime to determine the weight to be given to a subsequent confession by the same party of another crime, committed at a later date, or to show the abnormal condition of the confessor's mind. The extent of the decision is that such a confession L.R.A.1915C.

requested that the officers at Nebraska City be informed, giving as a reason that he had been implicated in a murder near that place. The sheriff wrote to Nebraska City, but the officers referred to took no action. Upon being so informed, accused requested that the sheriff of Nemaha county, Nebraska, be notified, and told that he had been implicated in a murder committed in that county some thirteen or fourteen years before. He gave the details of the murder at length, which he repeated to the sheriff of Nemaha county when he arrived. Held, that the confession, being voluntarily made before arrest, and before accusation had been made, was properly received in evidence.

Same — characteristics and prior acts.

2. The father of the accused was for years afflicted with St. Vitus's dance. His mother was a woman of violent temper and an epileptic. In his boyhood the accused was also afflicted with St. Vitus's dance. He is below the average in intelligence. The evidence, unaided by the confession, is not sufficient to sustain a conviction. Under these circumstances every fact tending to throw any light upon the truth or falsity of the confession should be submitted to the jury, and since mental tendencies, peculiarities, and predispositions may extend over a lifetime, the fact that he had made a false confession in 1890 that he was guilty of another murder was not too remote to be admissible in evidence.

Appeal — evidence — exclusion of prior untrue confession.

3. A double murder was committed near the city of Omaha in 1890. The guilty person was apprehended, tried, convicted, and executed. Soon after the murder, defendant was arrested, charged with complicity in that crime, to which he made a confession. It was afterward shown that the confession was untrue, and the prosecution was dismissed. At this trial, in order to aid the jury to determine the weight to be given to the confession made by the accused as to the murder of Bahaud, and to show the abnormal condition of the defendant's mind, it was sought to prove that he had made such previous false confession. This evidence was excluded upon objection by the state. Held, that this ruling was prejudicially erroneous.

Trial — instructions — caution as to testimony.

4. A cautionary instruction as to the evidence of police officers is only proper to be given when the officer is a witness for the state in the endeavor to convict the accused.

is admissible where the subject of investigation is the mental condition and peculiarities of the party, and so probably would be of little weight as authority in a case where such question is eliminated, and it is sought to admit it for the sole purpose that it tends to show the probable untruthfulness of the subsequent confession. As to when confession is voluntary, see 50 L.R.A.(N.S.) 1077.

Witness — nonexpert — opinion.

5. A nonexpert witness may, after detailing the facts and circumstances upon which he bases his opinion, give his opinion upon the question of sanity, but he is not permitted to express his opinion without disclosing the facts upon which it is based.

Appeal — evidence — proved to be irrelevant.

6. Error cannot be predicated upon the admission of testimony which at the time seems relevant. If by reason of further facts it appears to be irrelevant and prejudicial, defendant should move to strike it from the consideration of the jury; otherwise he cannot complain.

Trial — instruction — propriety.

7. An instruction which stated in direct terms that "the confession of defendant, if he made such confession, is competent evidence to prove his connection with such crime," without further instruction sufficiently qualifying the direct statement under the facts in this case, should not have been given.

Same — criticism.

8. Instructions given upon the subject of reasonable doubt criticized.

(Fawcett, J., dissents in part.)

(January 2, 1915.)

ERROR to the District Court for Nemaha County to review a judgment convicting defendant of murder in the first degree. Reversed.

The facts are stated in the opinion.

Messrs. John C. Watson and Max M. Cohn, for plaintiff in error:

Confessions of parties charged with crime should be acted upon by the courts and juries with great caution.

1 Greenl. Ev. § 200; Best, Ev. p. 537; Heddendorf v. State, 85 Neb. 747, 124 N. W. 150.

An accused in a criminal prosecution is entitled to a trial upon competent, relevant evidence, which at least tends to establish his guilt or innocence; and evidence which has no such tendency, but which, if effective at all, could only serve to excite the minds and inflame the passions of the jury, should not be admitted.

McKay v. State, 90 Neb. 64, 39 L.R.A. (N.S.) 714, 132 N. W. 741, Ann. Cas. 1913B, 1034.

Upon the question whether a confession is voluntary, the mental condition and situation of the accused at the time it was made are important considerations.

Beckham v. State, 100 Ala. 15, 14 So. 859; Owsley v. Com. 125 Ky. 384, 101 S. W. 366; Porter v. State, 55 Ala. 95; Cady v. State, 44 Miss. 332; State v. Squires, 48 N. H. 364; Ammons v. State, 80 Miss. L.R.A.1915C.

592, 18 L.R.A. (N.S.) 768, 92 Am. St. Rep. 607, 32 So. 9, 12 Am. Crim. Rep. 82.

A confession receivable in evidence only after proof that it was made voluntarily is restricted to an acknowledgment of the defendant's guilt; and the word does not apply to a statement made by the defendant of facts which tend to establish his guilt.

Taylor v. State, 37 Neb. 788, 56 N. W. 623; May v. State, 38 Neb. 211, 56 N. W. 804.

The burden of sanity when there is the slightest evidence as to the mental incapacity of the defendant is shifted from the defendant to the prosecution.

Wright v. People, 4 Neb. 407.

Opinions of nonexpert witnesses are admissible as bearing upon the question of his sanity.

Pflueger v. State, 46 Neb. 493, 64 N. W. 1094; Re Wilson, 78 Neb. 765, 111 N. W. 788; Bothwell v. State, 71 Neb. 747, 99 N. W. 669; Lamb v. Lynch, 56 Neb. 135, 76 N. W. 428.

Messrs. Grant G. Martin, Attorney General, Frank E. Edgerton, Assistant Attorney General, and Fred G. Hawxby, for the State:

The evidence was sufficient to sustain the conviction.

Sullivan v. State, 58 Neb. 796, 79 N. W. 721.

Defendant's confession was properly admitted in evidence.

Snider v. State, 56 Neb. 309, 76 N. W. 574; Davis v. State, 51 Neb. 301, 70 N. W. 984; Basye v. State, 45 Neb. 261, 63 N. W. 811.

One who was present, aiding and abetting in the commission of such a felony as this, was a principal in the crime itself.

Williams v. State, 91 Neb. 605, 136 N. W. 1011; Hill v. State, 42 Neb. 503, 60 N. W. 916; Dixon v. State, 46 Neb. 298, 64 N. W. 961; Jahnke v. State, 68 Neb. 154, 94 N. W. 158, 104 N. W. 154; Joyce v. State, 88 Neb. 599, 130 N. W. 291.

Letton, J., delivered the opinion of the court:

Plaintiff in error, hereinafter termed the defendant, was indicted on November 14, 1913, upon the charge that upon the 16th day of June, 1899, he murdered one Julian Bahuaud, in the attempt to perpetrate a robbery, by striking him on the head with a blunt instrument. He pleaded not guilty, was tried, and was convicted of murder in the first degree. The jury fixed the penalty at imprisonment for life, to which term he was sentenced. He brings the case here by proceedings in error.

The proof that a murder was committed is positive and undisputed. Bahuaud was

an old man, something of a recluse, who lived alone on a farm a short distance from the village of Julian. On the afternoon of Sunday, June 18, 1899, some neighbors found his body lying on the bed in his house. Decomposition had set in, and it was apparent that he had been dead from twenty-four to forty-eight hours, according to the medical testimony. His skull was crushed, apparently by a blow from some blunt instrument. His house had been ransacked, drawers were opened, and a tin box, which apparently had contained papers, was found upstairs with the lid cut open. A print of bloody fingers was on the stairway wall. A chair was displaced and a bench overturned in the kitchen. Some empty dishes and a candle were standing on the table. An inquest was held at once. No clue to the perpetrators of the crime was found.

On June 28, 1913, Sheriff Grubb of Coffey county, Kansas, was called into the country near by by a telephone message that there was a sick man on the public highway. He went out and found the defendant lying by the roadside overcome by heat. He took him to Burlington, put him in the jail, and called the county physician. The doctor examined him and told the sheriff that he was suffering from heat, had a fever, and that he could not tell what might happen. The sheriff told the defendant that the doctor said he was in a bad condition, and if he had any people, probably he had better communicate with them so that they could come and get him, or take care of him. Defendant told the sheriff to notify the officers at Nebraska City to come and get him; that he was implicated in a murder which took place there in a big cut near the wagon bridge down by the river. The officers at Nebraska City were notified, but none came. The sheriff testified that when the officers did not come from Nebraska City, defendant told him about the murder of Julian Bahuaud. He said that he and two other men met in the back part of a barber shop in Julian; that they afterwards met at a street corner and walked upon the railroad to Bahuaud's home; that as they went up they looked in at the window and saw the old man eating his supper, his back towards the door; it was about dusk; that one of them hit him on the head with a stone tied in a handkerchief; that it was not their intention to kill him, but to commit a robbery; that after they found he was dead they carried him and laid him on the bed. He said that he went outside to watch, and the others went upstairs and found a tin box in which they found some money; that they went back up the railroad to town, and he went back

to where he was working in the country. The witness asked him about the blood on the wall of the stairway, and he said one of them cut his hand in opening the tin box and coming downstairs left blood on the wall or the banister.

W. H. Jones, sheriff of Nemaha county, Nebraska, testified that he went to Burlington, saw the defendant in jail at that place, and had three conversations with him. The statements made by defendant, in substance, were the same as those made to Sheriff Grubb, but in addition defendant said that it was about 8 or half past in the evening, and that the lamp was lighted; that Gibbs slipped in and hit Bahuaud; that the others got about \$800 or \$1,000 from the tin box, and that he got \$200 in money. In the third talk he added that he was working at the time for Henry Levigne, and that he stopped work about the middle of the afternoon that day and went to Julian. After repeated questioning, he finally told him that one of the men was Frank Gibbs, and that the other was a little fellow called Joe, but he could not remember his last name. On the witness's asking if it was Joe Kopf, he said, "Yes; it was." He also told that he remained in the neighborhood of Julian for about a year, when one Sunday he heard a Mr. Cook say, "Let's hang Shellenberger for killing old man Julian;" that he then thought they knew about it, and went away. He afterwards said to the witness he did not see Gibbs strike the deceased. The witness said that he suggested the name of Joe Kopf to defendant because a number of people were suspicious that he was one of the parties who committed the murder.

Mr. Levigne testified that defendant worked for him in June, 1899, and, by referring to his account book, that on the 16th of June, he worked three-quarters of the day, being off duty the latter part of the day, and that he did not see him again until the next morning. On cross-examination he testified that he did not remember whether defendant was at home for supper that evening, he could not be positive. He also said it was not unusual for defendant to take a half or three-quarters of a day off, and go to town, and that defendant continued to work for him until the 4th of August.

The witness Cook testified to making a joking remark about a year after the event, proposing to hang Shellenberger for Bahuaud's murder. He described the surroundings of the house, and said that the window in Bahuaud's kitchen was a half window, and so high that a man could not look into it from the ground outside, the top of it

going close to the ceiling. The house stood about 2 feet above the ground, and while one could see out from the inside, he could not see in from the outside. The state also showed by this witness that defendant, a year or two before the murder, worked on an adjoining farm to that of deceased, and lived one winter in a cabin about 30 rods from Bahuaud's house. The foregoing is a much condensed statement of the essential facts proved by the state.

For the defense, one group of witnesses was called to prove that defendant was weak-minded, or defective mentally, and that he had a mania or predisposition to make false confessions that he was implicated in serious crimes. Another group, among whom was Kopf himself, was called to prove an alibi for Kopf. Defendant also took the stand. He admitted that he made nearly all the statements testified to by Jones and Grubb, but declared them to be false, and said he could not tell why he made them. He also testified that he remained in the neighborhood of Julian and Nebraska City for four or five years after the remark made by Cook, to which allusion had been made, which he said was made in a joking manner, and to which he paid no attention. A doctor testified that, with other physicians, he made a physical examination of defendant, and found scars caused by syphilitic lesions, and that syphilis is apt to affect the mental soundness of those afflicted with it, and cause degeneracy, loss of mind or mental capacity.

In rebuttal, two other physicians were called who had participated in the examination of defendant. These testified they found no evidence of syphilis, and that defendant was not weak-minded, but was mentally dull. Several witnesses testified that soon after the murder, Kopf's hand was wrapped up.

Over 100 assignments of error are made in the petition in error. We cannot consider them all with due regard to the rights of other litigants.

It is strenuously insisted that the confessions made to Sheriff Grubb and Sheriff Jones were not voluntarily made, and are for that reason inadmissible. At the time these were made defendant was suffering from a heat stroke, and had been taken to the county jail, not because he was accused of any crime, but in order to give him proper care. The statements made by him to Sheriff Grubb, both as to a murder at Nebraska City and the Bahuaud murder, seem to have been entirely voluntary on his part. He was apparently unrestrained except by his own physical condition. No compulsion is shown as to the statement to Sheriff Jones. We have no doubt that the L.R.A.1915C.

statements made were proper to be received in evidence in connection with all the testimony as to the circumstances under which they were made, and it was for the jury, and not for the court, to say what, if any, weight should be given to them.

Error is assigned upon the exclusion of the testimony of several witnesses as to a confession made by defendant, years before, that he was guilty of another murder.

The testimony of T. J. Mahoney of Omaha was taken out of the hearing of the jury in order to accommodate the witness, and it was afterwards offered on the part of defendant as a deposition by consent of counsel. The gist of Mr. Mahoney's testimony was that in 1890 a Mr. and Mrs. Jones were murdered in Douglas county; that at that time Mr. Mahoney was prosecuting attorney for that county; that one Neal was arrested and charged with the crime; that Neal made a statement which implicated the defendant; that defendant was arrested and taken to Douglas county, and while in custody confessed that he went with Neal to the farm where Mr. and Mrs. Jones lived, to steal horses and cattle; that he saw Neal shoot them, and that Neal gave him the revolver, which he threw into a stream near by. Mr. Mahoney then questioned him as to the locality of the crime and the situation of the buildings upon the farm. He did not reply, and seemed unable to do so, but when leading questions which suggested answers were put he brightened up and answered, "Yes;" that most of these questions suggested things contrary to the fact, but that defendant readily answered, "Yes" to any of them. A complaint and information was filed against him by the witness, but upon further investigation the prosecution was dropped and Shellenberger discharged. Questions as to the defendant's mental condition at that time were excluded upon objections by the state. Nearly all of this testimony was excluded as too remote and immaterial, and was not read to the jury.

The testimony of H. P. Hayes was taken in the same manner, and much of it excluded as too remote. He testified that he was chief detective of the Omaha police force at the time of the Jones murder; that after Shellenberger was arrested for that crime he talked with him several times with regard to it; that Shellenberger stated, in substance, that he was associated with Neal in the murder, giving details; that upon inquiry it was found that he could not describe anything about the farm, which led to an investigation at Nebraska City, and that following this investigation the defendant was discharged.

George W. Leidigh testified that he had

lived in the state of Nebraska for forty-three years, had been a warden of the state penitentiary, and had been a member of the legislature for several terms; that in February, 1890, defendant worked for him at Nebraska City for a week or ten days, putting up ice, and including the 4th of February, which was the date of the Jones murder. He produced a check dated the 4th of February, and stated that he delivered that check to Shellenberger between the hours of 8 and 10 o'clock at night on that day; that he always paid his men in the evening after they were through work; that in the course of business this check was returned to him, and that he afterwards took it to Omaha and delivered it to Mr. Mahoney, who afterwards returned it to him. Both Hayes and this witness positively identified the defendant as being the Joseph Shellenberger who was charged with the Jones murder and who made the confession. The witness was then asked with respect to conversations which he had with defendant at that time, with reference to the confession and other talks and acts of defendant, with the object of laying a foundation for his opinion as to sanity. This was objected to and excluded and an offer to prove denied.

Mr. Chapman, who served as mayor of Nebraska City, and who had lived in Nebraska City for thirty years, testified that the defendant was commonly known by the name of Joe Shellenberger; that his parents lived upon a small farm which the witness owned, and that he was on quite intimate terms with the defendant and his family; that defendant's mother was a woman of high temper, would have tantrums, would go about the house talking to herself, and at times would fight with any member of the family; that she suffered from epileptic fits, would fall down and froth at the mouth; that defendant's father was afflicted with St. Vitus's dance for many years, and finally died from that affliction; that the defendant, when he was a boy on the farm, was afflicted with St. Vitus's dance and was a very nervous boy.

It was also shown that the defendant is without education, unable to read or write, and below the average in intelligence; he had been a wanderer from place to place both before and after 1890, changing his name from time to time, sometimes working as a farm hand or laborer, sometimes apparently engaged in petty crimes. With such progenitors, with such testimony in relation to defendant's character and life, and under the peculiar conditions of this case, where the truth of the confession is the most material matter in the controversy, it seems to us essential to a fair trial

that every fact which would throw any light upon its truth or falsity should be submitted to the jury. The state insists that the testimony with reference to the defendant's confession or implication in the murder of Mr. and Mrs. Jones is too remote in point of time to be of any weight, but it must be remembered that the subject of investigation is the mental condition and peculiarities of defendant, that the motive for the confession is material, and that a peculiar mental bias, weakness, or tendency may extend for a lifetime. There is often a persistency in both mental and physical habits that is remarkable, and a defective mind may continue at the childhood stage. The defendant stood charged with a crime punishable by the extreme penalty of the law. If he is a degenerate or defective, there is the more reason for care and caution that every provision which the law offers for the protection of those accused of crime should be allowed. There are numerous cases upon record where men have voluntarily confessed themselves to be guilty of atrocious crimes, where investigation has proved their innocence, and the confession could only be attributed to a defective or abnormal mentality. This is said, not as indicating or expressing any opinion as to the guilt or innocence of the defendant, but merely to emphasize the necessity of extreme care to allow the accused a full opportunity to make his defense.

After a careful consideration of all the testimony in the record, we are satisfied that without the confession there is not sufficient evidence to sustain the conviction. The most important inquiry therefore—the vital question in the case—is, what weight and value should be given to the confession as evidence? To determine this, all the testimony bearing upon defendant's physical and mental condition, both at the time of the confession and before, the tendencies which he may have inherited, his manner of life, and the fact that he confessed to other homicides of which he could not have been guilty, should all be taken into consideration. We are of opinion that evidence as to any fact occurring during the life of this defendant which is in any way calculated to throw light upon the credibility of his confession is material to the issues, should have been submitted to the jury, and that it was prejudicial to his rights to exclude it.

The court gave the following instructions: "A certain police officer has testified in this case, and you are instructed that under the laws of this state, in weighing his testimony, a greater care should be used, because of the natural and unavoid-

able tendency of such persons in procuring and stating evidence against the accused."

The witness Hayes is the only police officer who was sworn. His testimony was for defendant. Instructions of this nature are countenanced by the courts in behalf of a defendant, in order to call attention of the jury to the fact that the hunting instinct still exists, and that men whose duty it is to prosecute criminals sometimes allow their zeal, perhaps unconsciously, to color or bias their testimony in the endeavor to procure conviction. This is the only reason why such instructions are permitted. If this instruction had any effect, it could only be to disparage the testimony of Hayes.

It is said that the court erred in refusing to permit the defendant to show, by several witnesses called by him, that in the opinion of each of them the defendant was insane on the subject of confessions implicating himself in crimes. We think that in the main the court was justified in excluding this evidence. The settled rule is that a nonexpert may, after detailing to the jury at length the facts and circumstances upon which he bases his opinion, give his opinion upon the question of sanity. Not being an expert, after he has given the facts upon which he bases his opinion, the jury are as well fitted to decide the question as the witness, and he is therefore not permitted to express his opinion without disclosing the facts upon which he bases it. This rule of the law of evidence is so elementary as to require no authorities to support it.

Complaint is made with respect to the admission of the testimony of Cook as to the remark that was made by him to Shellenberger which has been alluded to. Since the defendant told this to the sheriff at Burlington, it was proper to allow the witness Cook to testify to it also, as corroboration of the confession, and as showing a motive for flight. Its effect as evidence, however, practically disappeared when it was shown that though Cook had not seen the defendant afterwards until the trial, Shellenberger remained in the vicinity for at least four or five years afterwards. If it was desired to exclude the testimony, defendant should have moved the court to remove its consideration from the jury, since it was only proper to receive it to show a motive for flight on account of fear that his guilt was suspected, and in connection with evidence that he actually fled or went in hiding.

Error is assigned on account of instruction No. 20, which is as follows: "The court instructs the jury that if the prosecution in this case has proved, independent L.R.A.1915C.

of the confession of the defendant, beyond a reasonable doubt, that Julian Bahaud was killed on the 16th day of June, 1899, as alleged in the indictment in this case, then the confession of the defendant, if he made such confession, is competent evidence to prove his connection with said crime, and may, with slight corroboration, be sufficient to convict."

The complaint is that there was no proof outside of the confession to show defendant's connection with the crime, and that it was erroneous to say "that the confession of the defendant, if he made such confession, is competent evidence to prove his connection with said crime." We think there was no error in the preliminary statement as to the fact of the murder, but we agree with the defendant that the latter part of the instruction, which tells the jury that "the confession of the defendant, if he made such confession, is competent evidence to prove his connection with said crime," is too broad a statement. It is true the confession may be competent evidence, but this can only be so if the jury are satisfied that the defendant made it voluntarily and understandingly, and not by reason of mental weakness or obliquity. In other words, the instruction seems to determine as a matter of law that the confession "is competent evidence," while it was for the jury to determine its competency and weight as evidence.

Complaint is made as to the giving of instructions Nos. 12 and 13, defining reasonable doubt. In *Blue v. State*, 86 Neb. 189, 125 N. W. 136, in the opinion by Sedgwick, J., some of the language of this instruction is considered at some length and condemned. It is then suggested that the instruction upon reasonable doubt given by Chief Justice Shaw in the trial of Professor Webster for the murder of Parkman (*Com. v. Webster*, 5 Cush. 295, 320, 52 Am. Dec. 711), which was expressly approved in this state in *Carr v. State*, 23 Neb. 749, 37 N. W. 630, is a model which may well be followed by our trial courts. It was said in *Flége v. State*, 90 Neb. 390, 401, 133 N. W. 431, by a minority of the court, and in *Bartels v. State*, 91 Neb. 575, 136 N. W. 717, by a divided court, that an instruction similar to No. 12 was erroneous and was prejudicially erroneous in those cases.

The case is a difficult one. On the one hand, the story told by Shellenberger seems to be corroborated by the physical facts surrounding the tragedy; on the other hand, an abnormal and defective individual, with a vivid imagination uncontrolled by sound reason, living at the time in the neighborhood of the crime, at the house of a man who had attended the inquest,

where all the circumstances and details were matters of common discussion and general knowledge, might, years afterwards, relate these incidents and by an exaggerated egotism, if his mental peculiarities ran in that direction, accuse himself of the crime. Such instances have not been uncommon in the history of criminal law in England and in this country. Even in this state in recent years unfounded confessions of murder have been made, and the confessing party acquitted when all the facts were disclosed. The defendant may be guilty, but the orderly and impartial administration of justice and the dignity and welfare of the commonwealth demand he be afforded the opportunity to produce before the jury all of the material and competent evidence upon which he relies.

The judgment of the District Court is reversed.

Rose, J., not sitting.

Fawcett, J.

I concur in the views of the majority as general legal propositions, but, under the evidence in the record, taken as a whole, I do not think they justify a reversal.

NORTH DAKOTA SUPREME COURT.

RE APPLICATION OF MARTHA A. HART.

(29 N. D. 38, 149 N. W. 568.)

Pardon — power to grant.

1. The exclusive power to grant commutations and pardons is vested by article 3

Headnotes by BRUCE, J.

Note. — Power of court to suspend sentence or stay execution of sentence.

This note is supplementary to the notes to State v. Abbott, 33 L.R.A. (N.S.) 112, and Fuller v. State, 39 L.R.A. (N.S.) 242, where the early cases upon this question are gathered.

As to power to commit after expiration of term of sentence, see note to Ex parte Clendenning, 19 L.R.A. (N.S.) 1041.

As indicated in the note in 33 L.R.A. (N.S.) 112, it is generally conceded that courts may suspend sentence temporarily for the purpose of considering motions for new trials and the like, but, as shown in that note, there is a conflict as to the power of courts to suspend sentence indefinitely.

Power to suspend sentence temporarily.

Supplementing notes in 33 L.R.A. (N.S.) 113, and 39 L.R.A. (N.S.) 242. L.R.A.1915C.

of the amendments to the Constitution of North Dakota in the board of pardons.

Same — suspension of sentence — legality.

2. A trial court may, without encroaching upon the prerogatives of the pardoning power, suspend the execution of sentence so as to allow an opportunity for an appeal to executive clemency.

Sentence — suspension — revocation.

3. Where the court suspends a jail sentence for an indefinite period under the provisions of chapter 136 of the Laws of 1913, such suspension may be revoked and the defendant imprisoned even after the period of the sentence has expired.

(Spalding, Ch. J., dissents.)

(November 21, 1914.)

APPPLICATION for a writ of habeas corpus to secure release from custody to which applicant had been committed upon revocation of a suspension of sentence for conducting a bawdyhouse. Writ quashed.

Statement by Bruce, J.:

This is a proceeding upon a writ of habeas corpus, the writ having been issued by this court. On the 20th day of October, 1913, the petitioner was arrested at the city of Fargo and brought before Hon. A. G. Hanson, judge of the county court of Cass county, on the charge of keeping and maintaining a bawdyhouse. She entered a plea of guilty and the court imposed a fine of \$300 and a jail sentence of six months, and also required the defendant to pay the costs of the action. On the same day the following order suspending the jail sentence was entered:

Said defendant and her attorney, Seth W. Richardson, Esq., appeared in court, and

A court having jurisdiction in a criminal case has power to suspend judgment on conviction for determinate periods and for a reasonable length of time. State v. Tripp, — N. C. —, 83 S. E. 630.

And a court has power to suspend sentence for a definite time with the consent of the defendant upon a condition which he impliedly promises to perform. State v. Everitt, 164 N. C. 399, 47 L.R.A. (N.S.) 848, 79 S. E. 274.

And it is held that sentence may be pronounced on a plea of guilty at a term subsequent to that at which the plea was entered. Cox v. State, — Ark. —, 169 S. W. 789; Spencer v. State, — Ark. —, 169 S. W. 790.

And in Ex parte Sparks, 9 Okla. Crim. Rep. 665, 132 Pac. 1118, it was held that where conditions arise which render it impossible to render judgment at the term at which the defendant is convicted, judgment may be entered at a subsequent term, not-

the state's attorney, A. W. Fowler, was also present; the defendant then in person and in open court withdrew her plea of not guilty to the charge of keeping and maintaining a bawdyhouse, and entered a plea of guilty to said charge. By consent of counsel judgment was then entered and said defendant was sentenced to be confined in the county jail of Cass county, North Dakota, for a period of six months and pay a fine of \$300 and costs of this action, taxed at \$3.70, and in default of the payment of the fine and costs that she stand committed to the said county jail for the further period of ninety days. Thereupon said defendant, by her counsel, paid into court said fine of

\$300 and \$3.70 costs, and, it appearing to the satisfaction of the judge of this court that said defendant has not heretofore been imprisoned for crime, and it further appearing to the satisfaction of the judge of this court that said defendant is about to leave this state, and it further appearing to the satisfaction of the judge of this court that the public welfare does not demand or require that the defendant shall suffer the full penalty of the judgment imposed by said sentence, now therefore, on motion of said state's attorney, it is hereby ordered and directed, that said jail sentence of six months imposed upon said defendant as aforesaid be, and the same hereby is, sus-

withstanding §§ 5942, 5943, and 5953, Rev. Laws 1910.

In *Re Hemstreet*, 18 Cal. App. 639, 123 Pac. 984, a judgment rendered after the lapse of the two days allowed for pronouncing sentence was held not an excess of jurisdiction, but merely an error in procedure which the defendant was entitled to have reviewed on appeal, and a new trial granted on account of such error.

Although the record does not show that the delay in pronouncing judgment, which was for a period longer than allowed, except in case of motions for new trials, was for the purpose of hearing such a motion, but such a motion was had and denied, it will be presumed, in the absence of a showing to the contrary, that the court acted regularly, and that the continuance was allowed for the purpose of hearing a motion for a new trial. *People v. Rhodes*, 17 Cal. App. 789, 121 Pac. 935; *People v. Scott*, 13 Cal. App. 301, 109 Pac. 498.

And where it is provided by statute that "the court must appoint a time for pronouncing judgment which must not be less than two, nor more than five days after the verdict or plea of guilty, provided, however, that the court may extend the time not more than ten days for the purpose of hearing or determining any motion for a new trial or in arrest of judgment," a sentence pronounced fifteen days after the rendition of the verdict is valid, although the date originally fixed for pronouncing sentence was only four days after the rendition of the verdict; especially where both dates were appointed at the request of the defendant, since the maximum limit is fifteen days, and it does not matter whether it is divided into two periods of five and ten days, or two periods of four and eleven days, respectively. *People v. Flavin*, 21 Cal. App. 244, 131 Pac. 321.

The fact that a motion for a new trial was made before the defendant was formally arraigned for sentence does not rob it of the force and effect of a motion for a new trial so as to preclude the court from continuing the hearing as allowed by the Code, especially where the continuance is at the request of the defendant. *People v. Bernard*, 21 Cal. App. 50, 130 Pac. 1063. L.R.A.1915C.

—indefinitely.

Supplementing notes in 33 L.R.A.(N.S.) 114 and 39 L.R.A.(N.S.) 242.

A court for many purposes, as on a pending motion for a new trial, appeal, or other review of the judgment or other proceedings supplemental to it, has inherent power to suspend or stay execution of judgment; but it has no power to indefinitely stay or suspend execution for or during the good behavior of the defendant. *Reese v. Olsen*, 44 Utah, 318, 139 Pac. 941.

And it has been held that a trial judge has no more authority to indefinitely suspend the imposition of the punishment prescribed by law upon one found guilty of a crime, or who has entered a plea of guilty, than it has to indefinitely suspend the execution of a sentence after its imposition. *Hancock v. Rogers*, 140 Ga. 688, 79 S. E. 558.

So it has been held that whenever a verdict or plea of guilty has become final, the court is under an absolute duty to pronounce sentence, and has no discretion, as a disciplinary measure, to suspend it. *State ex rel. Dawson v. Sapp*, 87 Kan. 740, 42 L.R.A.(N.S.) 249, 125 Pac. 78.

And in *Ex parte Holdaway*, 105 Ark. 1, 150 S. W. 123, it was held that the court had not power to suspend judgment on condition.

But it was held that the fact that the judgment recited that the payment of the fine and costs assessed was postponed to a future day did not make the payment of the judgment conditional. *Ibid*.

In *Snodgrass v. State*, — Tex. Crim. Rep. —, 41 L.R.A.(N.S.) 1144, 150 S. W. 162, it was held that the fact that the Constitution placed in the governor power to grant reprieves and pardons "after conviction" did not limit his authority to cases in which the court had pronounced judgment, so as to authorize conferring upon the court jurisdiction to remit punishment by a suspension of sentence prior to that time.

—statutes regulating suspension.

Supplementing notes in 33 L.R.A.(N.S.) 116 and 39 L.R.A.(N.S.) 243.

pended, and said defendant having paid into court the fine and costs as required by said judgment and sentence, the said defendant is hereby ordered discharged and released from custody forthwith.

Dated at Fargo, North Dakota, this 28th day of October, 1913.

By the court: A. G. Hanson, Judge.

After the entering of this order the petitioner seems to have resided outside of the state for the period of six months. About a year after, and on the 2d day of October, 1914, however, she was again charged with keeping a bawdyhouse in the city of Fargo, and although a plea of not guilty seems to

have been entered in the action and no trial seems to have been yet had thereon, the following order was entered by the court:

Order Vacating Order Suspending Jail Part of Sentence.

The above-entitled action came on this day to be heard upon the application of Arthur W. Fowler, state's attorney, for an order vacating that certain order made in this court on October 28, 1913, in the above-entitled case, suspending the jail part of the sentence which had been on that day imposed upon the above-named defendant, and the state's attorney having submitted evi-

The power to suspend the execution of a sentence in a felony case is conferred upon the district courts by § 1, chap. 32, Comp. Laws 1909. *Ex parte Lujan*, — N. M. —, 137 Pac. 587.

It has been held that the legislature has power to enact a statute providing that a criminal court, upon hearing after the adjournment of the term, may adjourn a case or suspend sentence and commit the defendant to the custody of a probation officer for a time not exceeding one year, since such an act merely gives the courts control over their judgments for the period of one year, and does not conflict with the pardoning power. *Belden v. Hugo*, — Conn. —, 91 Atl. 369.

And it has been held that a suspended sentence act providing that in certain cases, if the person on trial requests it before the trial is begun, the court shall submit the question whether the defendant has been before convicted of a felony, and authorizing the court, upon the jury's finding that he has not, and their recommendation of suspension of sentence, to suspend sentence, is not unconstitutional as an interference with the pardoning power conferred upon the governor, but that such act is within the scope of the legislative power to fix the punishment of any and all penal offenses. *Baker v. State*, — Tex. Crim. Rep. —, 158 S. W. 998; *Cook v. State*, — Tex. Crim. Rep. —, 165 S. W. 573; *King v. State*, — Tex. Crim. Rep. —, 162 S. W. 890.

And in view of such act the court cannot suspend sentence unless the jury so recommend in their verdict. *Potter v. State*, — Tex. Crim. Rep. —, 159 S. W. 846; *Johnson v. State*, — Tex. Crim. Rep. —, 169 S. W. 1151; *Roberts v. State*, — Tex. Crim. Rep. —, 158 S. W. 1003; *Cook v. State*, — Tex. Crim. Rep. —, 165 S. W. 573.

And it has been held that a finding that the defendant has never before been convicted of a felony in this state or any other state is insufficient to warrant the court suspending sentence. *Johnson v. State*, — Tex. Crim. Rep. —, 169 S. W. 1151; *Roberts v. State*, — Tex. Crim. Rep. —, 158 S. W. 1003; *Bowen v. State*, — Tex. Crim. Rep. —, 162 S. W. 1146.

Nor can it suspend where the jury merely

find accused's previous good character, and that he has not been previously convicted of a felony. *King v. State*, — Tex. Crim. Rep. —, 162 S. W. 890.

And under the provision of this act that before a sentence can be suspended application therefor must be made in writing before the trial is begun, a jury is not authorized to recommend a suspension of sentence when no application was filed until after verdict, since, in the absence of such application being filed before the trial begins, neither the court nor jury has authority to suspend sentence. *Barnett v. State*, — Tex. Crim. Rep. —, 170 S. W. 143.

And under such act an application for suspended sentence, filed after a motion for a continuance has been overruled and the jury has been selected, is filed too late. *Muldrew v. State*, — Tex. Crim. Rep. —, 166 S. W. 156.

It has been held under the act under consideration that a defendant who has entered a plea of guilty to two felonies on the same day is not entitled to a suspension of either sentence under the suspended sentence act. *Weatherford v. State*, — Tex. Crim. Rep. —, 166 S. W. 149.

And this act does not apply to cases of burglary, and it is proper in such a case to refuse to submit the question of suspension of sentence to the jury. *Black v. State*, — Tex. Crim. Rep. —, 165 S. W. 571.

The fact that a defendant has been previously convicted of a felony bars him from the right to a suspension of sentence under the act in question, but the fact that he has not before been convicted of a felony does not, in and of itself, entitle one to a suspension of sentence, although it authorizes him to enter the plea, and if his reputation is shown to be such that the best interests and welfare of the state will not suffer by suspending the sentence, and is such that hope can be entertained of his reformation by extending the clemency, it may be done; but if this reputation is such that there is but little hope of reformation without his being compelled to undergo punishment, the punishment should not be suspended. *Williamson v. State*, — Tex. Crim. Rep. —, 167 S. W. 360.

dence proving that the above-named defendant had, on the 2d day of October, 1914, violated the laws of this state by conducting a bawdyhouse at No. 217 Second Avenue North, in the city of Fargo, North Dakota, and the court having duly considered the matter and being fully advised in the premises, and believing that the said order suspending said sentence should be revoked and set aside, now, therefore, it is hereby ordered that the said order dated October 28, 1913, suspending the jail part of the sentence, be and the same is hereby revoked and set aside.

Dated at Fargo, North Dakota, this 2d day of October, A. D. 1914.

By the court: A. G. Hanson, Judge.

A bench warrant was duly issued on this

The "general reputation" of defendant contemplated by the suspended sentence act is such reputation for a peaceable, law-abiding man. *Campbell v. State*, — Tex. Crim. Rep. —, 164 S. W. 850.

Power to sentence after suspension.

Supplementing note in 33 L.R.A.(N.S.) 117.

It has been held that where the court, after receiving a plea of guilty and noting it upon the record, caused an order to be entered that the cause be continued, that the defendant pay all costs at once, and that the fine be imposed at the pleasure of the court, it might enter judgment for a fine over five years later, and that such judgment was not invalid on the ground that it was rendered by piecemeal. *Barwick v. State*, 107 Ark. 115, 153 S. W. 1106.

And under such circumstances the case was held not abandoned, or the court's power to render judgment after the lapse of several terms barred. *Ibid*.

And where it did not appear in this case that the court had ever struck the case from its docket, or that the defendant had ever asked for final judgment, or asked to be discharged because no judgment had been rendered, it was held that he waived the delay, and could not complain because the court delayed entering judgment. *Ibid*.

In *Young v. People*, 53 Colo. 251, 125 Pac. 117, where, after a plea of *nolo contendere*, the court ordered that the case be retired from the docket upon the payment of costs, but reserved the right to arrest the defendant at any time and reinstate the case for further proceedings, it was held that the court had the power at a later date of the same term, while the costs were unpaid, to reinstate the case and pronounce sentence, it being held that the order did not amount to an indefinite postponement of sentence.

And in *State v. Everitt*, 164 N. C. 399, 47 L.R.A.(N.S.) 848, 79 S. E. 274, it was held that suspension of sentence upon payment of costs did not render such payment a satisfaction of the judgment, so that the L.R.A.1915C.

order of suspension, and the petitioner was arrested. A petition was then made to the district court of Cass county for a writ of habeas corpus, which was issued, but quashed on the hearing. Petitioner and defendant then applied to this court for a writ, which was issued and a return made; the sheriff justifying under the order of revocation and the bench warrant of the county court.

Mr. Harry Lashkowitz for petitioner.
Messrs. Arthur W. Fowler and William C. Green, for the State:

Every court has inherent power to enforce obedience to its mandates, and has inherent power to do all things that are reasonably necessary for the administration

court could not afterwards proceed with the sentence.

And it was further held that imposing a sentence, which was suspended during good behavior, upon violation of law by the accused, was not void as a punishment for something occurring after the original conviction. *Ibid*.

And it was held that one at liberty under a suspended sentence is not entitled to a jury trial of the question whether or not he has violated the conditions of the suspension, so as to be subject to punishment under the verdict against him. *Ibid*.

The judge of a city court was held, in *Hancock v. Rogers*, 140 Ga. 688, 79 S. E. 558, not to be without jurisdiction to subsequently impose sentence by reason of the entering of an order, "sentence suspended and defendant allowed to go on his own recognizance provided he move from Pulaski county," it appearing that the defendant was brought before the court several months later upon another charge.

It has been held under a statute giving the court power in certain cases to place a defendant on probation under the charge of a probation officer, under such terms as it might require, and giving it discretion to revoke the probation and immediately pronounce judgment, that the court's authority to pronounce sentence is not exhausted because a defendant, during the term of probation, was taken into custody by the probation officer, and kept in jail for a few days by order of the court, and then released, but the court was held to have jurisdiction to subsequently imprison him because of another violation of the terms of his probation. *People v. Dudley*, 173 Mich. 389, 138 N. W. 1044.

And this statute was held not unconstitutional because, in the termination of the probation proceedings, no provision was made for benefit of counsel, for the right to be confronted with witnesses, the right of trial by jury, or on the ground that it deprived the defendant of his liberty without due process of law, or that by its terms he was more than once placed in jeopardy for the same offense. *Ibid*.

of justice, within the scope of its jurisdiction.

8 Am. & Eng. Enc. Law, 28.

Every court has inherent power to suspend the execution of sentence, as well as to suspend the passing of sentence.

State ex rel. Buckley v. Drew, 75 N. H. 402, 74 Atl. 875; Re Collins, 8 Cal. App. 367, 97 Pac. 188; Weber v. State, 58 Ohio St. 616, 41 L.R.A. 472, 51 N. E. 116; State v. Vaughan, 71 Conn. 457, 42 Atl. 640; Re Hinson, 156 N. C. 250, 36 L.R.A. (N.S.) 352, 72 S. E. 310; Fufts v. State, 2 Sneed, 232.

Suspension of execution of sentence by the courts is not an unlawful interference with executive prerogatives, to wit, the power of granting pardons, reprieves, and

In *People v. Heise*, 257 Ill. 443, 100 N. E. 1000, it was held that although the court could not lawfully impose sentence after it had been indefinitely suspended and a long period had elapsed, yet that the legislature had power to give the court authority, in an act punishing the abandonment of wives, to suspend sentence upon the defendant upon his entering into a recognizance, and to thereafter impose sentence and enforce its execution.

In *People v. Polich*, — Cal. App. —, 143 Pac. 1065, where the Code provided that the court might extend the time for entering judgment not more than twenty days when the question of probation was considered, it was held, upon its appearing from the minutes of the court that an application for probation was entered by the defendant four days after verdict, and that the court continued the matter for three days, that it had power to enter judgment at the expiration of that time, although it did not affirmatively appear that the court referred the matter of probation to the probation officer for a report, the court remarking that if such report was necessary, it would be presumed that the court proceeded regularly in the matter.

And it was held that even if the defendant was entitled to a new trial because of the delay in the entry of judgment, yet, in the absence of a motion or demand for a new trial on the ground of such delay, the court might lawfully enter judgment. *Ibid*.

In *State ex rel. Dawson v. Sapp*, 87 Kan. 740, 42 L.R.A. (N.S.) 249, 125 Pac. 78, it was held that where, after a plea of guilty, the defendant was permitted to go at large under an arrangement that he should escape punishment unless the court should in the future determine to impose a sentence, the jurisdiction of the case was lost with the expiration of the term, and that no sentence could thereafter be pronounced.

And this was held to be true although the sentence purported to be suspended until a certain date, for the purpose of retaining control of the defendant, who was ordered to appear at that time and show L.R.A.1915C.

commutations of sentence, under constitutional provisions.

Carnal v. People, 1 Park. Crim. Rep. 263; *State v. Finch*, 54 Or. 482, 103 Pac. 505; *Parker v. State*, 135 Ind. 534, 23 L.R.A. 859, 35 N. E. 179; *Miller's Case*, 9 Cow. 730; *State v. Abbott*, 33 L.R.A. (N.S.) 120, note; *People v. Brown*, 54 Mich. 15, 19 N. W. 571; *People v. Stickle*, 156 Mich. 557, 121 N. W. 497; *Snodgrass v. State*, — Tex. Crim. Rep. —, 41 L.R.A. (N.S.) 1144, 150 S. W. 162.

Bruce, J., delivered the opinion of the court:

The question to be resolved in this case is whether, after an order suspending a jail sentence on which no commitment has been

that he had not violated the law in the interval. *Ibid*.

Power to stay execution of sentence.

Supplementing notes in 33 L.R.A. (N.S.) 119 and 39 L.R.A. (N.S.) 244.

There is a conflict upon the power of courts to suspend the execution of sentence after it has been pronounced, many decisions taking the view that such action by the court is an interference with the executive's right of pardon.

In *State v. Sturgis*, 110 Me. 96, 43 L.R.A. (N.S.) 443, 85 Atl. 474, it was held that after sentence has been imposed, the court has no power to suspend the execution of the sentence, except in order that the defendant may exercise his legal rights to obtain a reversal or modification of the judgment against him.

And in *Norman v. Rehberg*, 12 Ga. App. 698, 78 S. E. 256, it was held that a judgment suspending the execution of a sentence during the good behavior of the defendant was beyond the power of the court, and void.

So, in *Hancock v. Rogers*, 140 Ga. 688, 79 S. E. 558, a judge of a superior or of a city court was held to have no authority to suspend the execution of a sentence imposed by him in a criminal case, except as incidental to a review of the judgment under which the sentence was imposed.

And in *State v. Sturgis*, supra, it was held that a recognizance given in accordance with a sentence of fine and imprisonment for wrongfully selling intoxicating liquor, but providing that the imprisonment part should be canceled on payment of the fine if accused gave a recognizance not to make further sales, was void, since the court was held to have no power to grant the relief. And to the same effect is *State v. Talberth*, 109 Me. 575, 85 Atl. 296.

And where judgment has been entered, and the defendant committed in execution of the judgment, the court is without jurisdiction, after subsequently denying a motion for a new trial, to suspend the further execution of the sentence, such act being

issued, and six months after the period of that sentence has expired, the court which imposed the sentence and suspended the same may revoke the order and order the commitment of the defendant, and require her to serve out the original jail sentence. The statute under which the sentence was suspended is chapter 136 of the Laws of 1913, and reads as follows: "Section 1. Court may suspend or modify sentence, when.—In all prosecution for misdemeanors where the defendant has been found guilty, and where the court or magistrate has power to sentence such defendant to the county jail, and it appears that the defendant has never before been imprisoned for crime, either in this state or elsewhere (but detention in an institution for juvenile de-

linquents shall not be considered imprisonment), and where it shall appear to the satisfaction of the court or magistrate that the character of the defendant and circumstances of the case are such that such defendant is not likely again to engage in an offensive course of conduct, and where it appears that the public welfare does not demand or require that the defendant shall suffer the penalty imposed by law, said court or magistrate may suspend the execution of the sentence, or may modify or alter the sentence imposed, in such manner as to the court or magistrate, in view of all the circumstances, seems just and right."

We are of the opinion that the court had jurisdiction to revoke this order. There can be no doubt that the power "to remit

executive in its nature, and it cannot subsequently set aside such order and order the defendant's reincarceration, although the order suspending the execution of sentence provided that it was suspended until a further order of the court, and on condition that the defendant should not violate the law, and that if he should do so, the court reserved the right to order him reincarcerated. *Brabant v. Com.* 157 Ky. 130, 162 S. W. 786.

It has been held that under a Constitution conferring upon the governor power to grant reprieves and pardons, the legislature cannot confer upon the court power to remit the punishment upon a verdict finding one guilty of crime and imposing imprisonment upon him by suspending its execution during good behavior, and finally annulling the conviction. *Snodgrass v. State*, — Tex. Crim. Rep. —, 41 L.R.A.(N.S.) 1144, 150 S. W. 162.

And it was held that an act attempting to confer such power on courts would also be void by reason of the constitutional provision requiring the legislature to pass laws depriving persons convicted of crimes of the right to hold office, sit on juries, etc. *Ibid.*

In *People v. Goodrich*, 149 N. Y. Supp. 406, it was held that the supreme court has power under the common law to suspend the execution of a sentence already passed.

And this power was also held to exist under a provision of the Code empowering the courts, in their discretion, to "suspend sentence" during good behavior, the words "suspend sentence" being held as applicable to the suspension of the execution of a sentence as to the passing of the same. *Ibid.*

And the same conclusion was held to be led to by a provision of the Code that in certain cases where the court has suspended sentence, or, after imposing sentence, has suspended the execution thereof, the defendant shall be placed in the hands of a probation officer, and another provision that upon suspending sentence, the court may place the defendant on probation, and if L.R.A.1915C.

the judgment is to pay a fine, the court, on imposing sentence, may direct that the execution of the sentence of imprisonment be suspended and the defendant be placed on probation, and an amendment giving the court power at any time to revoke and terminate the probation, and if sentence has been suspended, pronounce judgment, or, if judgment has been pronounced and execution suspended, to revoke such suspension. *Ibid.*

And the court in such a case is not required to try the issue of fact whether the defendant had violated the conditions of her discharge. *Ibid.*

In *State v. Fjolander*, 125 Minn. 529, 147 N. W. 273, under §§ 496, 7813 and 7832, Gen. Stat. 1913 (the provisions of which do not appear), the court, after sentencing a defendant to pay a fine or be imprisoned for a specified time, was held authorized to enter an order immediately following the sentence, suspending execution of sentence for a designated period covering about six months.

Power to enforce after stay of execution.

Supplementing notes in 33 L.R.A.(N.S.) 121 and 39 L.R.A.(N.S.) 244.

In *People v. Goodrich*, supra, where, after a plea of guilty, the defendant was sentenced to pay a fine and also to a term of imprisonment, but the sentence as to imprisonment was suspended during good behavior, the court was held to have power, several months later, upon the defendant's again being indicted on another charge, to revoke the suspension of sentence of imprisonment and direct that it be executed.

In *State v. Clifford*, 84 N. J. L. 595, 87 Atl. 97, where a defendant was sentenced to pay a fine and serve a term in prison, the prison term to stand suspended during good behavior, and he paid the fine, it was held that the court could not, after he was subsequently convicted of another offense, revoke the suspension of the prison sentence, and impose it to run concurrently with the sentence in the second case.

J. T. W.

fines and forfeitures, to grant commutations and pardons after convictions, for all offenses except treason and cases of impeachment" was by § 76 (amendments, art. 3) of the Constitution vested solely and exclusively in the governor; that § 76, that is to say, article 3 of the amendments, took this exclusive power from the governor and vested it in the board of pardons, of which the governor is a member, and that the sole and exclusive power in such matters now rests in that board. *Re Webb*, 89 Wis. 354, 27 L.R.A. 358, 46 Am. St. Rep. 846, 62 N. W. 177, 9 Am. Crim. Rep. 702; *Snodgrass v. State*, — Tex. Crim. Rep. —, 41 L.R.A. (N.S.) 1144, 150 S. W. 162. We realize, of course, that there are some authorities which seem to hold that, prior to the American Revolution, the English courts exercised a co-ordinate power in such matters, and which seem to argue for a like power in the American courts. If the premise were true, it can, on the ground of analogy, have no application in America, as prior to the English Revolution and the establishment of the so-called parliamentary idea, the theory, though occasionally combatted, was consistently adhered to that the power which was possessed by the courts flowed from the King; that all agencies of government derived their power from him, and that these powers were exercised in accordance with his wish and will, and that when the exercise of power or authority was sanctioned by him, it was deemed to have the approval of the sovereign power. Even after the English Revolution, and the establishment of the parliamentary idea, it has been "the King in Parliament" who has governed trials. There are not in England, in fact, and never have been, three distinct agencies of government, wholly independent of each other with their powers and duties defined by the written law of the land, as is the case in America. See *Snodgrass v. State*, *supra*; *Jenks*, *Short History of English Law*, page 187. The act of the judge, therefore, was to a large extent that of the sovereign. Even if this were not the case, however, the premise is itself entirely false from a historical standpoint. Prior to the American Revolution the English courts never, as a matter of fact, exercised or presumed to exercise, the powers which are sought to be conferred by the statute in question, and at the time of the English Revolution in 1688, and long prior to the American Revolution and to the adoption of the American Constitutions, both state and national, had ceased to exercise the powers on the analogy of which the premise and the argument is based. To quote from the opinion in the case of *Snodgrass v. State*, *supra*: "In the early days of

England a person upon trial as to his guilt or innocence was not permitted to introduce any witnesses to prove himself innocent of an offense charged against him, nor in mitigation of the punishment. The Crown introduced its evidence to prove his guilt, and, if that testimony showed his guilt to the satisfaction of the jury, they so found. If the court had a doubt of his guilt from the testimony, it could not grant a new trial on that ground, and no appeal was then permitted on this ground. Under this condition the plea of 'benefit of clergy' arose. It was first claimed by officials of the church alone, who claimed the right to be tried in the ecclesiastical court. This plea was then permitted to all persons eligible to clerk or other position in the church,—that is, all men who could write,—and finally broadened to apply to all persons charged with crime. Not being permitted to offer testimony showing his innocence on the trial, nor offer testimony in mitigation of the punishment, after being found guilty by verdict, when granted the 'benefit of clergy,' persons adjudged guilty of crime were first permitted in the ecclesiastical court to expurgate themselves, or prove their innocence and offer evidence in mitigation. Later the courts that tried the cases, after verdict but before assessment of the punishment by sentence, would permit a defendant to introduce testimony in mitigation of the punishment to be assessed by the sentence or judgment of the court, and under this system there grew up the custom of suspending the sentence until the evidence was heard under this plea, so that the court might have the benefit of it in arriving at the punishment he would assess. Upon hearing this testimony the court frequently refused to inflict the death penalty, which was virtually the penalty for all felonies, and would only assess a penalty of burning in the hand to mark the man; later, burning in the face, and still later, sentencing the person adjudged guilty to transportation to America or some other point beyond the seas, and other penalties. From this power of the courts of England, claimed and exercised in an early day, must we look to any inherent power in a court to ameliorate or relieve any person of punishment adjudged guilty of an offense. In *Chitty's Crim. Law*, vol. 1, p. 624, the rule at that time is said to have been: 'By the common law . . . the prisoner was not even permitted to call witnesses, . . . but the jury were to decide on his guilt or innocence according to their judgment upon the evidence offered in support of the prosecution. And, though . . . this latter practice of rejecting evidence for the prisoner was abolished about the time of Queen

Mary, yet the witnesses could not be sworn on behalf of the prisoner, but were merely examined without any particular obligation, and therefore obtained but little credit with the jury.' In his work he recites that Queen Mary, in appointing Sir Richard Morgan chief justice of the common pleas, enjoined him 'that notwithstanding the old error [of the law] which did not admit any witness to speak, or any other matter to be heard, in favor of the adversary, her Majesty being party, her Highness's pleasure was that whosoever could be brought in favor of the subject should be heard.' Mr. Blackstone in his Commentaries says that, shortly after the Revolution of 1688, among the chief alterations of the law was the 'regulation of trials by jury, and the admitting of witnesses for prisoners under oath.' Other learned commentators and writers of that period could be cited as showing that the 'plea of benefit of clergy,' or suspending sentence, was the outgrowth of that condition, when during the trial not only was his mouth closed, but the mouths of all persons who would testify in his favor were also closed, and this plea or suspension of sentence, or reprieve, as it was called in that day and time, was but a way of permitting those who would testify in his favor to be heard in mitigation of the punishment to be assessed, although in the common pleas court on this hearing they were not allowed to dispute the verdict of guilt which had been found by the jury, but the testimony was received alone to aid the judge in passing sentence after the verdict of guilt, and in mitigation of the punishment. But in the beginning and for a long time this plea was not allowed in cases except where the penalty was death, and was never applied to petit theft or misdemeanors. This can have no application to our jurisprudence, for the jury in their verdict fix the punishment as well as pass on the guilt or innocence of an accused person. After it became the law in England that witnesses were permitted to testify on oath in behalf of a defendant on trial of his guilt or innocence, this plea and custom rapidly waned, and by statute it was provided it could not be pleaded in many cases, and finally in 1827 it was wholly abolished, and has not been the rule in that country since that date. Bishop, *Crim. Law*, § 937. Yet we find some trying to work out a theory whereby our courts would inherit that power from the jurisprudence of England, although it was taken away from the courts of England nearly a century ago, and arose under conditions wholly at variance with our system of jurisprudence."

See also *State v. Voss*, 80 Iowa, 467, 8 L.R.A. 767, 45 N. W. 898.

That the order of the trial court suspending sentence in the case at bar would, if construed as petitioner desires it, constitute an invasion of the province of the board of pardons, there can, indeed, be but little question. Ex parte Clendenning, 22 Okla. 108, 1 Okla. Crim. Rep. 227, 19 L.R.A.(N.S.) 1041, 132 Am. St. Rep. 628, 97 Pac. 650; *Snodgrass v. State*, — Tex. Crim. Rep. —, 41 L.R.A.(N.S.) 1144, 150 S. W. 162; *Re Webb*, 89 Wis. 354, 27 L.R.A. 356, 46 Am. St. Rep. 846, 62 N. W. 177, 9 Am. Crim. Rep. 702; *State v. Abbott*, 87 S. C. 466, 33 L.R.A.(N.S.) 112, 70 S. E. 6, Ann. Cas. 1912B, 1189. It is to be remembered that the Constitution vests in the board the power both to commute and to pardon. We have no doubt that, following the analogy of the English courts, and as a power which is inherent in the court itself, and certainly under the sanction of the statute, the trial judge can suspend the enforcement of a sentence for a reasonable time in order to allow an appeal to the executive clemency. Beyond this, however, the courts cannot go. The case at bar, in fact, is none other than one in which the court has, under the sanction of the statute, allowed the defendant that opportunity, and although the time that has elapsed between the rendition of the judgment and the rearrest has been longer than the original sentence, the defendant cannot complain, as the original order was legal, and the failure to sooner seek for the clemency of the board of pardons is due to the delay, not of the court, but of the defendant herself. *Miller v. Evans*, 115 Iowa, 101, 56 L.R.A. 101, 91 Am. St. Rep. 143, 88 N. W. 198; *Re Schantz*, 26 N. D. 380, 144 N. W. 445; *Fuller v. State*, — Miss. —, 39 L.R.A.(N.S.) 242, 57 So. 6.

We are not unmindful of the case of *Re Markuson*, 5 N. D. 180, 64 N. W. 939, and that in it we said: "We know of no authority which will permit a trial court to postpone from time to time the date at which imprisonment shall go into effect after a valid judgment has been entered, declaring that the imprisonment shall begin at a definite date, which is stated in the judgment. The time at which a sentence of imprisonment begins and ends is a matter of the greatest importance, and is so considered by all the authorities. . . . Under § 21, supra, the judgment may be withheld for thirty days upon the terms stated in the statute; and to facilitate a review in the supreme court, but we find no authority anywhere under which the time of taking effect of a judgment of imprisonment as originally pronounced may, by orders of the trial court, be postponed from time to time for any purpose or under any circumstances.

That case, however, was handed down in

1895, and long prior to the enactment of the statute which is now before us, which authorizes the suspension of sentences, and which must, if possible, be upheld and be given a construction which will be in accordance with the provisions of the Constitution.

To construe the statute as granting the power to the trial court to commute a sentence or to pardon the offense would render the statute unconstitutional. To hold that the suspension is indefinite and only for a reasonable time, and for the purpose of affording the prisoner, if he desires, an opportunity to apply for executive clemency, would render it valid. We so construe it. We hold, indeed, that the statute justifies just such a procedure as was suggested in the Texas court of criminal appeals in *Snodgrass v. State*, 41 L.R.A.(N.S.) 1144, 150 S. W. 162. In that case, the court, though holding a statute to be unconstitutional which sought to confer upon the courts the power "to suspend judgment on conviction during the good behavior, and ultimately to annul the judgment," expressly said: "A law can be drawn so that if on the trial it appears that it is the first offense, and the evidence convinces the judge that the best interests of society, of the individual, and of the state, would be served if the hand of the law was stayed, and the person adjudged guilty be given a chance to reform, he may recommend to the governor a conditional pardon; and we are sure that in every deserving case the recommendation would be complied with by the governor. The people had the confidence in the governor to place this power in his hands, and we, too, have the same confidence. The law could require that he have the court stenographer make a copy of the testimony heard, and require the judge to forward it to the governor, with his recommendation, and provide that the prisoner be not conveyed to the penitentiary until the governor had acted on the recommendation. Thus the end sought may be reached in a way not violative of our Constitution, and all the good features in the law be retained."

The suspension in the case at bar is, in effect, nothing more or less than a recommendation to the board of pardons and the giving to the defendant an opportunity to obtain clemency from that board. The order was made under the authority of the statute, and therefore does not come within the condemnation of the case of *Re Markuson*, supra. If the defendant has neglected to take advantage of the opportunity offered, she has herself only to blame, and cannot complain if the order is afterwards revoked.

The writ will be quashed.
L.R.A.1915C.

Spalding, Ch. J., dissenting:

I cannot concur in the conclusion reached by my associates in this case. The result seems to come by reason of a belief that no different conclusion can be reached and avoid a decision that the statute in question is invalid. To save so holding it seems to me the court has put an exceedingly strained construction on the meaning and the reasons for the law. I shall not at length review the authorities cited, but on this question simply refer to the case of *Snodgrass v. State*, — Tex. Crim. Rep. —, 41 L.R.A.(N.S.) 1144, 150 S. W. 162, on which so much reliance seems to be placed. I am unable to discover that it has any application to either the law or the facts before us.

In effect the Texas law wiped out the effect of the conviction as well as the fact of conviction, and restored the party to practically the same position in society that he had occupied before the conviction, or would have occupied had he never been convicted. This is why the Texas statute was construed as working a pardon, if valid. Our statute does not contain any such provisions, but, on the contrary, when strictly construed, if the defendant's conduct is exemplary, it leaves a sentence hanging over him during the remainder of his life. The better his conduct the more certain it is that his future must be blighted by a judgment of conviction in a criminal case still suspended over him. It thus becomes a punishment for good conduct rather than for infractions of law, and this only in case of the commission of a minor offense. The court may, at any time, either with or without cause, revoke its order of suspension and inflict the punishment prescribed. The defendant may not have sought a suspension of the execution of the judgment. He may not have desired it. The court may, nevertheless, inflict upon him a punishment far in excess of anything usual or theretofore known in the annals of jurisprudence for the offense committed. To say the least, for a misdemeanor it becomes an unusual punishment. In the case at bar the record discloses that the application for a suspension of execution was made by the state, and not by the defendant. But the Texas case is not authority on the further point to which it is cited.

The Texas court in its opinion suggested that a law might be drawn to cover first offenses, providing for a recommendation by the judge to the governor, that is, a recommendation for a conditional pardon, supported by a copy of the testimony taken on the trial, and a provision that in such case the prisoner should not be conveyed to the penitentiary until action had been had on

the recommendation of the judge. This suggestion of the Texas court that a law might be enacted which, by its terms, specified that it was for the purpose of enabling the judge to recommend clemency, and staying execution long enough to enable the governor to act, is made a basis of the holding that our statute, which contains none of these provisions, was enacted for the purpose only of giving an opportunity to seek executive clemency. Its very terms refute any such assumption. It specifies the reasons for the stay or suspension of execution of the judgment. They are: If it appears that it is the first offense, that the character of the defendant and the circumstances are such that the offense is not likely to be repeated, and finally, that the public welfare does not require the imposition of the penalty. It does not authorize the suspension of the execution of the sentence for any reason except those enumerated. Furthermore, if any such intention existed, why should the suspension be permitted for a longer period than necessary to enable the party to apply for clemency, the court to make the recommendation, and the pardon board to act? In no case would a suspension of more than six months be necessary to permit these things to be done. In the case at bar the conviction was had in October; the next meeting of the board of pardons was fixed by law for the 2d day of December following. No application was made for clemency, and none has been made at any of the subsequent meetings of the board. Still further, the record discloses that the execution of the sentence was in fact suspended for an entirely different reason. It was suspended because the defendant was willing to take her departure from the state. It remained suspended for more than a year, and until she returned to the state.

For these reasons I cannot concur in the reasoning of the conclusions of my learned brethren on this subject. Neither can I concur in their intimation that, except for imagining that the law was enacted solely with a view to permitting the defendant to apply for executive clemency, it would be unconstitutional. There is a wide difference between the suspension of the execution of sentence, as provided in this statute, and the granting of a pardon or conditional pardon. A pardon is a remission of guilt, and a conditional pardon is one which does not become operative until the grantee has performed some specific act, or which becomes void when some specified event transpires. 1 Bishop, Crim. Law, § 914. A remission of guilt reinstates the offender as nearly as possible in the same condition as he would

have occupied had he never been charged with committing the offense. A pardon releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as though he had never committed the offense. It makes him, as it were, a new man and gives him a new credit and capacity. *People ex rel. Forsyth v. Court of Sessions*, 141 N. Y. 288, 23 L.R.A. 856, 36 N. E. 386, 15 Am. Crim. Rep. 675. This is not true of the suspension of execution of a judgment. In such case the court, in effect, says: This is your first conviction. Your record heretofore has been good. The offense is only a misdemeanor. The circumstances surrounding it and your relations to society have been such as to indicate that you are not naturally criminal and that you are not likely to become a confirmed criminal. From these facts it appears that the welfare of society does not demand that at this time the sentence be executed. The policy of the law is to give every person the greatest opportunity for development that due protection to society will permit him to have. Hence you are put on probation. The court will see whether you are disposed to become a criminal and whether in fact you are entitled to its consideration, and society still be protected. We will therefore not execute the sentence until we have an opportunity to note your conduct and learn more of your disposition. Should you be guilty of further infraction of law, and not deport yourself as a good citizen at all times within the period for which the sentence was pronounced, the suspension will be revoked, and you will be required to pay the penalty of the offense which you committed and of which you were convicted.

This does not constitute a pardon, either full or conditional. It does not absolve him from guilt. It is not a remission. It does not restore to him his rights as a citizen, or wipe out the record of his conviction; the defendant enjoys his liberty outside the walls of the jail, yet he remains under the sentence to which he has been condemned, and may be imprisoned at any time. *George v. Lillard*, 106 Ky. 820, 51 S. W. 793, 1011.

In my judgment, so long as the statute is construed to not extend the power of suspension beyond the maximum limit of the time for which the defendant was sentenced, by express terms, and does not permit a revocation thereof except within such period, it is valid, and not subject to attack as an invasion of the pardoning power. All that is necessary is to read and construe the statute as applying only to the time during which the sentence would have been running,

had there been no suspension. It is then made to harmonize with the modern policy of dealing with criminals for the first time guilty of minor offenses. It gives them an opportunity to prove their worth, and that society will not suffer if the full penalty is not executed, and it minimizes the punishment rather than increases it, as is done by the construction given the statute by my brethren.

Courts do not try criminals and pronounce sentence with reference to what the board of pardons may do in the future. They are guided by the law. The board of pardons is governed by no law. It exercises its functions whenever, in its judgment, the ends of justice have been met in a given case. When an offender has served long enough to punish him adequately for the offense committed and to serve as a warning to others, and thereby protect society, and when at the same time he gives adequate evidence of reformation, the board of pardons may feel justified in acting favorably. But none of these considerations apply to a court. Its action within certain limits is controlled by the law. I am aware that numerous authorities hold that some statutes, somewhat similar to the one in question, provide for an invasion of the pardoning power, but I think that in each instance the statute was a palpable invasion of that power, or the court failed to distinguish between a pardon and the suspension of execution of judgment, and did not recognize that there is a marked difference.

The pardoning power in this country is not parallel to that in monarchical countries where the King rules by divine right, and a history of this power in such countries properly sheds but little light upon the subject. For a clear, comprehensive consideration of the subject of the pardoning power in America, see *State v. Nichols*, 26 Ark. 74, 7 Am. Rep. 600. Because the order suspending the execution of the judgment in this case was not entered until long after the expiration of the six months for which the defendant was sentenced, I am of the opinion that the writ should be granted. *Re Markuson*, 5 N. D. 180, 64 N. W. 939, is a direct authority on this subject.

Furthermore, it is not necessary to strain the construction to protect the offender. Everything that is attempted to be accomplished by this statute can be done by suspending sentence, which the court has the inherent power to do, as held by nearly all authorities. See *People ex rel. Forsyth v. Court of Sessions*, supra. L.R.A.1915C.

WASHINGTON SUPREME COURT.
(Department No. 2.)

ANDREA RASMUSSEN, Admr., etc., of
J. K. Rasmussen, Deceased, Resp.,
v.

NORTH COAST FIRE INSURANCE COMPANY, Appt.

SAME, Resp.,
v.

DUBUQUE FIRE & MARINE INSURANCE COMPANY, Appt.

(— Wash. —, 145 Pac. 610.)

Evidence — weight — attempt to defraud insurer — overestimate of loss.

1. The fact that the proof of loss upon a stock of goods, supported by the testimony of the insured's adjuster, places a value upon the property lost much higher than that fixed by the insurer's adjuster and that adopted by the jury, does not show an attempt to defraud the insurer so as to overthrow the verdict of the jury rejecting that conclusion.

Witness — value of insured property — insurance agent.

2. Under a statute providing that everyone who makes insurance on property is presumed to know its value, and is subject to fine if the amount is in excess of the insurable value of the property, an insurance agent who places insurance on property is competent to testify as to its value at the time in an action upon the policy.

Evidence — reputation of insured.

3. Evidence as to the reputation of insured for truth, veracity, honesty, and integrity is admissible after his death, in an action to recover insurance upon his property, in which the defense is fraudulent overvaluation of the property in the proofs of loss.

(January 16, 1915.)

APPEALS by defendants from judgments of the Superior Court for Spokane County denying motions for judgments notwithstanding the verdict for plaintiff in consolidated actions brought to recover the amount alleged to be due on separate fire insurance policies. Affirmed.

The facts are stated in the opinion.

Messrs. Zent, Powell, & Redfield and McBurney & O'Connor, for appellants:

False swearing which voids the insurance must be done wilfully and knowingly, and with intent to defraud the company; but knowledge and intent may be inferred from the circumstances, and assured cannot

Note.—The relevancy of evidence as to character or reputation on the issue of fraud or dishonesty in a civil case is treated in the note to *Great Western L. Ins. Co. v. Sparks*, 49 L.R.A.(N.S.) 724.

escape the consequences of fraud by adopting and swearing to a detailed fraudulent statement without examination.

Clement, Fire Ins. p. 275; 19 Cyc. 856.

The finding of the jury as to values amounts to a finding of fraud, and fraud is shown by the undisputed evidence; and it is the duty of the court, as a matter of law, to enter judgment for the defendants on the admitted facts.

Rovinsky v. Northern Assur. Co. 100 Me. 112, 60 Atl. 1025; Pottle v. Liverpool & L. & G. Ins. Co. 108 Me. 401, 81 Atl. 481; Dolloff v. Phoenix Ins. Co. 82 Me. 266, 17 Am. St. Rep. 482, 19 Atl. 396; F. Dohmen Co. v. Niagara F. Ins. Co. 96 Wis. 38, 71 N. W. 69; Catron v. Tennessee Ins. Co. 6 Humph. 176; Sleeper v. New Hampshire F. Ins. Co. 56 N. H. 401.

Testimony as an expert by a person not qualified constitutes reversible error.

Cook v. Stimson Mill Co. 41 Wash. 314, 83 Pac. 419, 19 Am. Neg. Rep. 596; Waldron v. Waldron, 156 U. S. 380, 39 L. ed. 458, 15 Sup. Ct. Rep. 383.

Evidence of the reputation of insured for truth, veracity, honesty, and integrity is inadmissible.

Carter v. Seattle, 19 Wash. 597, 53 Pac. 1102, 4 Am. Neg. Rep. 465; Poler v. Poler, 32 Wash. 400, 73 Pac. 372; 1 Wigmore, Ev. § 64, p. 135; Gebhart v. Burkett, 57 Ind. 379, 26 Am. Rep. 61; Stone v. Hawkeye Ins. Co. 68 Iowa, 737, 56 Am. Rep. 870, 28 N. W. 47; Ruan v. Perry, 3 Caines, 120; Munkers v. Farmers' & M. Ins. Co. 30 Or. 211, 46 Pac. 850; American F. Ins. Co. v. Hazen, 110 Pa. 530, 1 Atl. 605; Continental Ins. Co. v. Jaehnichen, 110 Ind. 59, 59 Am. Rep. 194, 10 N. E. 636; Black v. Epstein, 221 Mo. 286, 120 S. W. 754; Vansickle v. Shenk, 150 Ind. 413, 50 N. E. 381; Milan Bank v. Richmond, 235 Mo. 532, 139 S. W. 352; Pierce v. Cole, 110 Me. 134, 85 Atl. 567; Powers v. Armstrong, 62 Ark. 267, 35 S. W. 228; Simpson v. Westenberger, 28 Kan. 756, 42 Am. Rep. 195; Adams v. Elseffer, 132 Mich. 100, 92 N. W. 772; Ward v. Herndon, 5 Port. (Ala.) 382; Ellwood v. Walter, 103 Ill. App. 219; Fowler v. Aetna F. Ins. Co. 6 Cow. 673; 16 Am. Dec. 460; Gough v. St. John, 16 Wend. 646; Martin v. Good, 14 Md. 398, 74 Am. Dec. 545; Atwood v. Dearborn, 1 Allen, 483, 79 Am. Dec. 755; Leinkauf v. Brinker, 62 Miss. 255, 52 Am. Rep. 183; Boardman v. Woodman, 47 N. H. 120.

Mr. O. C. Moore, for respondent:

The ruling of the trial court in denying the motion for judgment *non obstante veredicto* is supported by the law and the facts.

Wagner v. Northern L. Ins. Co. 75 Wash. 106, 134 Pac. 685, 70 Wash. 210, 44 L.R.A. (N.S.) 338, 126 Pac. 434; 23 Cyc. 779; L.R.A.1915C.

Slocum v. New York L. Ins. Co. 238 U. S. 384, 57 L. ed. 879, 33 Sup. Ct. Rep. 523, Ann. Cas. 1914D, 1029; Spokane Grain Co. v. Great Northern Exp. Co. 55 Wash. 545, 104 Pac. 794; Roe v. Standard Furniture Co. 41 Wash. 550, 83 Pac. 1109.

Having chosen to make insured's son their witness, and to examine him on cross-examination concerning matters respecting which he was not interrogated in chief, and there being no evidence in the record to the contrary, defendants are now estopped from contradicting or questioning the correctness of his statements on cross-examination.

State v. Carpenter, 32 Wash. 254, 73 Pac. 357; Bailey v. Seattle & R. R. Co. 32 Wash. 640, 73 Pac. 679; Anderson v. Union Terminal R. Co. 161 Mo. 411, 61 S. W. 874; Jones, Ev. 2d ed. § 824; Graves v. Merchants' & B. Ins. Co. 82 Iowa, 637, 31 Am. St. Rep. 507, 49 N. W. 67.

There being competent evidence to sustain the verdicts without regard to the testimony of the agents Tilsley and Junken, the court will not, in any event, grant appellants' motion for judgment, nor otherwise disturb the verdicts of the jury.

Elster v. Seattle, 18 Wash. 304, 51 Pac. 394; Swadling v. Barneson, 21 Wash. 699, 59 Pac. 506; Keating v. Pacific Steam Whaling Co. 21 Wash. 415, 58 Pac. 224; Stanley v. Stanley, 27 Wash. 570, 68 Pac. 187; Schwede v. Hemrich, 29 Wash. 124, 69 Pac. 643; Bell v. Spokane, 30 Wash. 508, 71 Pac. 31; Morrison v. Northern P. R. Co. 34 Wash. 70, 74 Pac. 1064; Knust v. Bullock, 59 Wash. 141, 109 Pac. 329.

Evidence of the good reputation of the deceased for truth, integrity, and honesty was admissible and proper.

Greenl. Ev. 15th ed. § 54; Mosley v. Vermont Mut. F. Ins. Co. 55 Vt. 142; Fire Asso. of Philadelphia v. Jones, — Tex. Civ. App. —, 40 S. W. 44; Allison v. McClun, 40 Kan. 525, 20 Pac. 125; McNabb v. Lockhart, 18 Ga. 495, 1 Am. Neg. Cas. 754; Houston Electric Co. v. Faroux, — Tex. Civ. App. —, 125 S. W. 922; Cudlipp v. C. R. Cummings Export Co. — Tex. Civ. App. —, 149 S. W. 444; Hilker v. Hilker, 153 Ind. 425, 55 N. E. 81.

Crow, Ch. J., delivered the opinion of the court:

These two actions, which have been consolidated, were commenced by J. K. Rasmusson on two separate policies of fire insurance for \$1,000 and \$2,000 respectively, executed and delivered to him by the defendant North Coast Fire Insurance Company, a corporation, and the Dubuque Fire & Marine Insurance Company, a corporation, on a stock of merchandise in the city

of Spokane. After the commencement of the actions and before trial, the death of J. K. Rasmusson was suggested, and Andrea Rasmusson, administratrix of his estate, was substituted as plaintiff. From verdicts and judgments in plaintiff's favor, the defendants have appealed.

For many years J. K. Rasmusson was engaged in the retail grocery business in Spokane and carried fire insurance on his stock of goods. On December 27, 1911, the appellant North Coast Fire Insurance Company executed and delivered policy No. 24,550 to Rasmusson, insuring a stock of groceries and certain fixtures against loss by fire in the sum of \$1,000. On August 9, 1911, the appellant Dubuque Fire & Marine Insurance Company executed and delivered policy No. 741,357 to Rasmusson, insuring the same stock and fixtures against loss by fire in the sum of \$2,000. On January 26, 1912, while both policies were in full force and effect, the groceries and fixtures were damaged by fire. Mr. Rasmusson in due season prepared and delivered proofs to appellants, claiming the loss sustained by him exceeded the face value of the two policies. These proofs were rejected by appellants, who, in their answers, contend that his losses did not exceed \$1,200. The policies each contained a stipulation which provided that "this entire policy shall be void . . . in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after the loss."

Basing their defenses on this provision, the appellants in substance alleged that Mr. Rasmusson made and delivered to each of them a false and fraudulent statement of his alleged loss, in that he stated that the same amounted to \$3,040.13, whereas it did not exceed \$1,200 in all; that he made such false statements with the fraudulent intent and design of inducing appellants to pay him the full amount of the policies; that he fraudulently represented that, within two years preceding the fire, he had purchased goods to the value of \$29,756.26, whereas his purchases during that period did not exceed \$23,797.11. Mr. Rasmusson in his reply admitted that he made such statements in his proof of loss and in response to interrogatories, but alleged that he then believed and still believes the same to be correct and true. The principal issues submitted to the jury were the extent and value of the stock of groceries and fixtures owned by the assured at the date of the fire, the extent of loss sustained, and whether the assured had with fraudulent intent misrepresented the value of his stock and fixtures, and the ex-

tent of his loss, with the design and for the purpose of defrauding appellants. The jury returned a general verdict, which included interest, in the sum of \$720.16, against the North Coast Fire Insurance Company, and in the sum of \$1,467.84 against the Dubuque Fire & Marine Insurance Company. The jury also answered special interrogatories as follows: (1) What was the value of the goods, wares, and merchandise (not including fixtures) at the store of Mr. Rasmusson at the time of the fire? Answer: \$2,100. (2) What was the value of the goods, wares, and merchandise (not including fixtures) at the store of Mr. Rasmusson immediately after the fire? Answer: \$162. (3) What was the amount of damage to the fixtures covered by the policies of insurance in this case occasioned by the fire? Answer: \$250.

Appellants' principal contention is that the trial court erred in denying their motions for judgment notwithstanding the verdict, their position being that the undisputed evidence shows that the loss sustained by the assured did not exceed \$1,200; that he misrepresented the value of his stock of goods, the purchases made by him, and the extent of his loss; that he did so knowingly and wilfully, with the intention and purpose of defrauding appellants; and that under the provision above quoted the policies were avoided by such fraudulent acts.

In their brief appellants say: "The Rasmusson proof of loss listed the value of the stock prior to the fire at \$2,750.67; the jury found it to have been \$2,100. The proof of loss claimed damages to stock of \$2,618.48; the jury placed it at \$1,938. The proof of loss claimed damage to fixtures as \$421.65; the jury found this item \$250. This is a reduction of a fraction over 25 per cent on the claimed loss of stock, and 40 per cent on fixtures."

They argue that the finding of the jury as to values amounts to a finding of fraud; that fraud is also shown by the undisputed evidence; and that it was the duty of the trial court to enter judgment in their favor. We have carefully examined the record and conclude that appellants' contention in this regard cannot be sustained. The estimates made by appellants' adjusters showing losses sustained, to a considerable extent, constitute evidence which they claim to be undisputed. Without these estimates and appellants' deductions therefrom, they would have no basis for their contention. These adjusters were appellants' representatives, who were looking after their interests and seeking to protect them. There is no more reason for accepting their estimates as undisputed than there would be for accepting

the estimate prepared by respondent's representative, an experienced adjuster, as undisputed. The fact is that these estimates dispute each other, and the record shows that the evidence is otherwise conflicting. Appellants admit that to sustain their defense it is not sufficient for them to show that Mr. Rasmusson made false statements, and that he padded his proofs of loss, but that it must also be shown that he did so knowingly and intentionally for the purpose of defrauding them. The evidence is too voluminous to be set forth or analyzed in an opinion of moderate length. It appears that, at or about the time of the fire, the assured was in very bad health; that he died prior to the trial of these actions; that a dispute arose between him and the adjusters representing the appellants; that, when they advised him of their conclusions, he left them saying he would have nothing to do with their estimate, as his stock and losses were several times the values and losses fixed by them; that he procured the services of an experienced adjuster to prepare an estimate upon which to base proofs of loss; and that this adjuster and Mr. Rasmusson's son, a young man about twenty-one years of age, who had worked in the store for some time and had made purchases to replenish the stock, prepared an estimate. Their estimate and that of appellants' adjusters differed widely. The findings of the jury as nearly approximate that of the assured as those of the appellant's adjusters. There was no showing that the assured had recently increased his insurance, or that he was carrying overinsurance for fraudulent purposes. The policies were renewals of previous policies for the same amounts. No contention is made that the assured was in any way responsible for the fire. In fact, the evidence is clearly to the contrary. The agents who wrote the policies on behalf of the appellants, and who saw the stock of goods, gave it as their opinion that the assured had a stock ranging in value from \$3,000 to \$3,500. There is no suggestion that they acted fraudulently or conspired with the insured for the purpose of writing excessive insurance. Nor is there any showing of any facts indicating a design on the part of the assured to overinsure or defraud the appellants at any time prior to the making of the proofs of loss. At that time a sharp difference of opinion arose between him and appellants' adjusters. We cannot say as a matter of law that he then made any untruthful statements knowingly or with an intention of defrauding appellants. The trial court, by careful instructions which correctly stated the law, submitted the issues of false statements and

L.R.A.1915C.

fraudulent intention to the jury. To these instructions no exceptions have been taken. The jury have found against appellants, and our conclusion is that their verdict cannot be disturbed.

The plaintiff called as witnesses one J. H. Tilsley and one W. A. Junkin, the agents of appellants, who wrote and issued the policies of insurance. These witnesses testified to the value of the stock of goods and fixtures at the time the policies were written and also at or about the time of the fire. Appellants objected to this testimony on the ground that the competency of the witnesses was not shown. It appeared that Tilsley was in the grocery business for about nine years prior to 1900, and that Junkin had kept books in a grocery for about one year. The trial court, however, permitted them to testify by reason of § 105 of chapter 49, Session Laws 1911, page 243, which reads as follows: "Every insurer who makes insurance upon any building or property or interest therein against loss or damage by fire, and every agent who issues a fire insurance policy covering on any building or property or interest therein, and every insured who procures a policy of fire insurance upon any building or property or interest therein owned by him is presumed to know the insurable value of such building or property or interest therein at the time such insurance is effected. Any insurer who knowingly makes insurance on any building or property or interest therein against loss or damage by fire in excess of the insurable value thereof, shall be fined in a sum not less than \$50 nor more than \$100. Any agent who knowingly effects insurance on a building or property or interest therein in excess of the insurable value thereof shall be fined in a sum not less than \$15 nor more than \$25. Any person or party who knowingly procures insurance against loss or damage by fire on any building or property or interest therein owned by him in excess of its insurable value shall be fined in a sum not less than \$25 nor more than \$100."

The evident purpose of this section is to prevent overinsurance. It certainly contemplates that an agent, before placing a policy, will, by proper investigation, advise himself of the value of the property to be protected, and the presumption is that he has done so. In view of this statute we can find no error in admitting the evidence of which appellants now complain. Other evidence tending to show value was also introduced by the respondent.

Mr. Rasmusson, the assured, died before the trial and his evidence could not be secured. Appellants by their evidence

sought to show that, when he prepared and by his oath verified the proofs of loss, he fraudulently and intentionally overstated values and losses for the purpose of defrauding them. On rebuttal respondent called a number of prominent business men of Spokane who had known Mr. Rasmussen during his lifetime. These witnesses, over appellants' objection, were permitted to testify that the reputation of Mr. Rasmussen for truth, veracity, honesty, and integrity was good. Appellants now insist that error was committed in admitting this evidence. They argue that in civil actions evidence of good character is not admissible except where character is directly in issue. In support of this position they cite *Carter v. Seattle*, 19 Wash. 597, 53 Pac. 1102, 4 Am. Neg. Rep. 465, and *Poler v. Poler*, 32 Wash. 400, 73 Pac. 372, from this court, and additional authorities from other jurisdictions. The case of *Carter v. Seattle* was one to recover damages for personal injuries. Contributory negligence was pleaded and evidence was introduced by the defendant tending to show plaintiff's intoxication at the time of the injury. Thereupon plaintiff testified that he had not been drinking on the evening of the accident, and also introduced witnesses to testify to his reputation for sobriety. It was held that the admission of this evidence was erroneous. The character of the plaintiff for integrity was not in issue. Moreover, the plaintiff himself was present in court and testified. Assigning reasons for the ruling made, this court said: "The general and well-settled rule in negligence cases is that it is not proper for a plaintiff, in order to rebut evidence of particular acts of negligence, to show that he is generally careful, cautious, and prudent; nor can it be shown that a party is habitually careless to support a claim of negligence upon a particular occasion. The principle underlying these cases and the case at bar is that such evidence raises a collateral issue not affecting the question to be determined."

This is not a case where the issue of negligence is involved. Here the assured, who was dead at the time of the trial, and could not be called to testify, was positively charged with fraudulent acts and false swearing in his proof of loss for the purpose of securing a much larger recovery than that to which he was entitled. An examination of the case of *Poler v. Poler* will show that it has no bearing on the question now before us. It was there held that the defendant in an action for divorce could not introduce witnesses to show his general reputation as a law-abiding and moral man, that not being an issue in the case. While the general rule seems to be L.R.A.1915C.

that character evidence is ordinarily inadmissible in a civil action, there is some conflict of authority, and certain exceptions are recognized. We think an exception should be recognized in this case, where the assured died prior to the trial and his evidence could not be procured. The jury did not have an opportunity to pass upon his credibility by observing his appearance upon the witness stand. As above stated, it was charged by appellants that he had perpetrated a fraud, and that in doing so he had sworn to false statements set forth in his proofs of loss. This amounted to a substantial charge of perjury. His denial of this charge could not be obtained. It seems to us that, under these circumstances, there was no error in permitting the plaintiff to show his reputation for honesty and integrity. There are courts that hold that in civil actions, when the character of a plaintiff is assailed by the defense interposed, evidence of his good character is admissible. *Mosley v. Vermont Mut. F. Ins. Co.* 55 Vt. 142, 152; *Fire Asso. of Philadelphia v. Jones*, — Tex. Civ. App. —, 40 S. W. 44; *Allison v. McClun*, 40 Kan. 525, 20 Pac. 125; *Houston Electric Co. v. Faroux*, — Tex. Civ. App. —, 125 S. W. 922; *Cudlipp v. C. R. Cummings Export Co.* — Tex. Civ. App. —, 140 S. W. 444.

We do not feel that we would be justified in holding the admission of the character evidence was prejudicial.

The judgment is affirmed.

Morris, Mount, Parker, and Fullerton, JJ., concur.

WEST VIRGINIA SUPREME COURT OF APPEALS.

LULA MOSS, Admr., etc., of William Moss, Deceased,

v.

CAMPBELLS CREEK RAILROAD COMPANY, Plff. in Err.

(— W. Va. —, 83 S. E. 721.)

Master and servant — police officer — liability for acts.

1. A special police officer appointed by the

Headnotes by ROBINSON, J.

Note. — Liability of private person or corporation for acts of special police officer appointed by public authorities.

For the earlier cases on this question,

governor at the instance of a railway company, though prima facie a public officer, is, when specially employed by the company to enforce its rules and to protect the passengers on its trains, in that regard, a servant of the company, and if, while on a train as such servant, he inflicts injury on a passenger, not acting in his capacity as a public officer for the vindication of the law, or not justified by the law of self-defense, the company is liable, notwithstanding the injurious act is prompted by motives purely personal to the servant.

New trial — separable question.

2. As a general rule a new trial when granted is awarded for the entire case; but when manifest justice demands, and it is clear that the course can be pursued without confusion, inconvenience, or prejudice to the rights of any party, a new trial may be limited to a particular, separable question.

see notes to *McKain v. Baltimore & O. R. Co.* 23 L.R.A.(N.S.) 289; *Pennsylvania R. Co. v. Kelly*, 30 L.R.A.(N.S.) 481; *Taylor v. New York & L. B. R. Co.* 39 L.R.A.(N.S.) 122; and *New York, C. & St. L. R. Co. v. Fieback*, 43 L.R.A.(N.S.) 1164.

These notes do not include cases involving the liability of a master for the arrest or false imprisonment by a servant employed as a detective, policeman, or watchman who is not also a public officer, such cases being compiled in notes to *Milton v. Missouri P. R. Co.* 4 L.R.A.(N.S.) 282, and *Conchin v. El Paso & S. W. R. Co.* 28 L.R.A.(N.S.) 88.

The general rule upon which the cases involving the question under discussion are decided is that a private person or corporation will not be liable for the acts of a special officer appointed by public authority, but employed and paid by the private person or corporation, when the acts complained of are performed in carrying out his duty as a public officer; but that such person or corporation may become liable for the acts of such an officer in performing the duties for which he is employed by such private party.

Thus, in *Pounds v. Central of Georgia R. Co.* — (Ga. —, 83 S. E. 96, it was held that a railway company was not liable in damages for the wrongful killing by a police officer of plaintiff's husband, even if such officer was paid by the corporation, where it did not appear that at the time of the homicide the officer was performing any service for or by direction of the corporation, but was merely in the discharge of such duties as are performed by the police officers in municipalities.

In *Houston v. Minneapolis, St. P. & S. Ste. M. R. Co.* 25 N. D. 469, 46 L.R.A.(N.S.) 589, 141 N. W. 994, it was held that defendant was not liable for the arrest of plaintiff by or upon the orders of defendant's conductor for the statutory offense of publicly drinking or offering another intoxicating beverage upon a train carrying passengers in the state, pursuant to a statute which confers police powers upon L.R.A.1915C.

Same — omitted averment in pleading.

3. Where there is no error as to the trial on the merits of the action, but there is technical error in the overruling of a demurrer to the declaration, in that the appointment and qualification of the plaintiff as administratrix is not averred, which point was not expressly raised or deemed of consequence in the court below, a new trial will be limited to the issue made on the omitted averment when supplied.

(October 6, 1914.)

ERROR to the Circuit Court for Kanawha County to review a judgment in plaintiff's favor in an action brought to recover damages for the alleged wrongful killing of plaintiff's intestate. Reversed.

The facts are stated in the opinion.

every passenger conductor, and makes it his duty, while thus engaged, to arrest any person who shall in his presence or to his knowledge violate the provisions of the act, and to deliver such person to any policeman, constable, or other peace officer to be by him informed against and prosecuted, as it cannot be said that the conductor, while acting in obedience to the statute, is acting for the railway company at all, as it has no control over him whatsoever while he is in the discharge of the duty thus imposed upon him by the sovereign power of the state. The court said it was immaterial whether at the time of the arrest the status of plaintiff as a passenger had ceased or not.

In *Ruffner v. Jamison Coal & Coke Co.* 247 Pa. 34, 92 Atl. 1075, it was held that, as defendant did not appoint the policemen whose acts were complained of, could not determine the period of their service, could not prescribe their duties, and could not discharge them, the fact that it paid their salaries, presumably by reason of the order of the court which appointed them, did not convert such policemen into its private servants, so as to render it liable for an assault committed by them, not upon its private property, but in the public highway and in pursuance of what they conceived to be their official duties.

In *Norfolk & W. R. Co. v. Perdue*, — Va. —, 83 S. E. 1058, which was an action for damages for the arrest of plaintiff by a special police officer at defendant's depot, the trial court instructed the jury that, although the officer was appointed upon the request of the railroad company, he was as much an officer of the state as any other officer authorized by law to make arrests, and that if the arrest was made in this capacity the railroad company was in no way responsible for his act. The appellate court did not pass upon the correctness of this instruction, inasmuch as after it was given plaintiff amended his declaration so as to allege that a gatekeeper of defendant assisted the special police officer in making the arrest, and defendant was held liable because of the act of the gatekeeper.

Messrs. Adam B. Littlepage and Brown, Jackson, & Knight for plaintiff in error.

Messrs. A. M. Belcher and E. S. Bock, for defendant in error:

Plaintiff's intestate was a passenger on defendant's train.

Gillingham v. Ohio River R. Co. 35 W. Va. 588, 14 L.R.A. 798, 29 Am. St. Rep. 827, 14 S. E. 243; 6 Cyc. 536, 537; Chicago & E. I. R. Co. v. Jennings, 89 Ill. App. 335; Illinois C. R. Co. v. Treat, 75 Ill. App. 327; Jeffersonville, M. & I. R. Co. v. Riley, 39 Ind. 568; Barth v. Kansas City Elev. R. Co. 142 Mo. 535, 44 S. W. 778, 3 Am. Neg. Rep. 682; Choate v. Missouri P. R. Co. 67 Mo. App. 105; Exton v. Central R. Co. 63 N. J. L. 368, 16 L.R.A. 508, 46 Atl. 1099; Warner v. Baltimore & O. R. Co. 168 U. S. 339, 42 L. ed. 491, 18 Sup. Ct. Rep. 68; Western

& A. R. Co. v. Voils, 98 Ga. 446, 35 L.R.A. 655, 26 S. E. 483; Chattanooga, R. & C. R. Co. v. Huggins, 89 Ga. 494, 15 S. E. 848; West Chicago Street R. Co. v. Manning, 170 Ill. 417, 48 N. E. 958; Holt v. Hannibal & St. J. R. Co. 87 Mo. App. 203; St. Louis & S. F. R. Co. v. Kilpatrick, 67 Ark. 47, 54 S. W. 971; Gardner v. New Haven & N. Co. 51 Conn. 143, 50 Am. Rep. 12; Ohio & M. R. Co. v. Muhling, 30 Ill. 9, 81 Am. Dec. 336; Frank v. Schrover, 18 Ill. 416; Russ v. The War Eagle, 14 Iowa, 363; McKimble v. Boston & M. R. Co. 139 Mass. 542, 2 N. E. 97, 3 Am. Neg. Cas. 823; Alabama & V. R. Co. v. Beardsley, 79 Miss. 417, 89 Am. St. Rep. 660, 30 So. 660; Hurt v. Southern R. Co. 40 Miss. 391; Cleveland v. New Jersey S. B. Co. 68 N. Y. 306; Morris v. New York, O. & W. R. Co. 73 Hun, 560, 56

In Wilhelm v. Parkersburg, M. & I. R. Co. — W. Va. —, 82 S. E. 1089, it is held that the fact that a statute conferred upon the officers of common carriers all the powers of conservators of the peace did not relieve the carrier from liability for the wrongful acts of its authorized agents while engaged in the proper performance of their official functions, so that such a statute would not relieve defendant carrier from liability if its conductor committed an unnecessary assault upon plaintiff in order to facilitate the removal from the train of her husband, who was intoxicated and disorderly.

In Scibor v. Oregon-Washington R. & Nav. Co. — Or. —, 140 Pac. 629, the court sustained a verdict in favor of plaintiff for damages received at the hands of a watchman who was employed and paid by defendant railway company, who had him appointed as a deputy sheriff that he might make arrests if anyone criminally interfered with defendant's property, for which services he was to be paid by the defendant, although the arrest was not made on defendant's property, but at a house to which stolen property had been traced. The court said that his employment was not simply that of a watchman, but included also the duties of a deputy sheriff as to anything necessary to be done in his employment as watchman, even though they took him away from the cars in his charge. The appointment by the sheriff expressly limited his powers to the particular purpose named in the appointment, and expressly exempted the sheriff from liability for his compensation. It was also held that evidence that the officer's appointment had been canceled by the sheriff a day or two previously to the assault complained of was immaterial, as the court's instructions practically informed the jury that a private citizen's right to make an arrest for a felony without a warrant is the same as that of an officer.

In Armstrong v. Stair, 217 Mass. 534, 105 N. E. 442, the proprietors of a theater were held responsible for an assault upon and L.R.A.1915C.

the arrest of a patron, by a special officer who had been appointed upon their request by the police commission, pursuant to a statute which expressly provided that a person or corporation applying for the appointment shall be liable for the official misconduct of the appointee, as for the torts of a servant or agent, it appearing that an usher had summoned the officer under general instructions by the defendant that, when any person without a seat coupon was occupying a seat and refused to vacate, the usher should go to the officer and have the person removed.

In Clish v. Boston, R. B. & L. R. Co. 219 Mass. 341, 106 N. E. 854, a judgment was sustained in favor of plaintiff, who was injured while at defendant's station as a passenger, during a scuffle between a special officer in the defendant's employ and an intoxicated man whom he had arrested and was conveying to a patrol wagon, under circumstances from which the jury could find that he failed to exercise reasonable care in handling the prisoner so as not to injure plaintiff.

Generally, as to liability for injury to a passenger resulting from attempted ejection by carrier or fellow passenger, see note in 44 L.R.A.(N.S.) 1125.

In Redgate v. Southern P. Co. 24 Cal. App. 573, 141 Pac. 1191, where a statute providing for the appointment of police officers to be designated and paid by railroad companies contained a provision that "the company designating such person or persons shall be responsible civilly for any abuse of his or their authority," the court said that defendant railway company would not be liable for the arrest of one of its employees by such an officer, unless in making the arrest he abused his authority in that he did not have reasonable cause for believing that the accused had committed the crime for which he was arrested, and inasmuch as the facts shown upon which the officer acted were sufficient to justify him in believing that accused was guilty, defendant was not liable.

R. L. S.

N. Y. S. R. 231, 26 N. Y. Supp. 342, 6 Am. Neg. Cas. 35; *Bartlett v. New York & S. B. Ferry & Steam Transp. Co.* 25 Jones & S. 348, 8 N. Y. Supp. 309; *Ham v. Delaware & H. Canal Co.* 142 Pa. 617, 21 Atl. 1012; *Iseman v. South Carolina & G. R. Co.* 52 S. C. 566, 30 S. E. 488; *Martin v. Southern R. Co.* 51 S. C. 150, 28 S. E. 303, 3 Am. Neg. Rep. 501; *Norfolk & W. R. Co. v. Groseclose*, 88 Va. 267, 29 Am. St. Rep. 718, 13 S. E. 454, 7 Am. Neg. Cas. 51; *The Wasco*, 53 Fed. 546; 4 Elliott, Contr. § 3308; Elliott, Railroads, 2d ed. §§ 1578, 1579; *Rogers v. Kennebec S. B. Co.* 86 Me. 261, 25 L.R.A. 491, 29 Atl. 1069, 3 Am. Neg. Cas. 590; *Smith v. St. Paul City R. Co.* 32 Minn. 1, 50 Am. Rep. 550, 18 N. W. 827, 4 Am. Neg. Cas. 220; *Louisville, N. A. & C. R. Co. v. Thompson*, 107 Ind. 442, 57 Am. Rep. 120, 8 N. E. 18, 9 N. E. 357; *Pennsylvania R. Co. v. Price*, 96 Pa. 256; *Bricker v. Philadelphia & R. R. Co.* 132 Pa. 1, 19 Am. St. Rep. 585, 18 Atl. 983, 10 Am. Neg. Cas. 207; *Chattanooga Rapid Transit Co. v. Venable*, 105 Tenn. 460, 51 L.R.A. 886, 58 S. W. 861; *Berry v. Missouri P. R. Co.* 124 Mo. 223, 25 S. W. 229; *Shearm. & Redf. Neg.* 5th ed. § 488, p. 879; *Hutchinson, Carr.* 3d ed. §§ 1021, 1022; *Russell v. Pittsburgh, C. C. & St. L. R. Co.* 157 Ind. 305, 55 L.R.A. 253, 87 Am. St. Rep. 214, 61 N. E. 678; *Indianapolis Traction & Terminal Co. v. Klentschy*, 167 Ind. 598, 79 N. E. 908, 10 Ann. Cas. 869; *McNeill v. Durham & C. R. Co.* 135 N. C. 682, 67 L.R.A. 230, 47 S. E. 765; *Bradburn v. Whatcom County R. & Light Co.* 45 Wash. 582, 14 L.R.A.(N.S.) 526, 88 Pac. 1020; *Carroll v. Staten Island R. Co.* 58 N. Y. 126, 17 Am. Rep. 221; *Hutchinson, Carr.* § 503.

Whether or not Nichols was acting in self-defense at the time he shot and killed Moss was a question to be determined by the jury.

Teel v. Coal & Coke R. Co. 66 W. Va. 315, 66 S. E. 470; *State v. Cain*, 20 W. Va. 680; *Re Morrison*, 147 U. S. 18, 37 L. ed. 62, 13 Sup. Ct. Rep. 246.

Nichols, at the time he shot Moss, was a servant of the railroad company, and it is liable to plaintiff.

Layne v. Chesapeake & O. R. Co. 66 W. Va. 608, 67 S. E. 1103; *Teel v. Coal & Coke R. Co.* 66 W. Va. 315, 66 S. E. 470; *Gillingham v. Ohio River R. Co.* 35 W. Va. 588, 14 L.R.A. 798, 29 Am. St. Rep. 827, 14 S. E. 243; *Birmingham R. & Electric Co. v. Baird*, 130 Ala. 334, 54 L.R.A. 752, 89 Am. St. Rep. 43, 30 So. 456; *Chicago & N. W. R. Co. v. Peacock*, 48 Ill. 253; *St. Louis, A. & C. R. Co. v. Dalby*, 19 Ill. 353; *Hanson v. Urbana & C. Electric Street R. Co.* 75 Ill. App. 474; *Louisville, N. A. & C. R. Co. v. Wood*, 113 Ind. 544, 14 N. E. 572, L.R.A.1915C.

16 N. E. 197, 3 Am. Neg. Cas. 197; *Louisville & N. R. Co. v. Kelly*, 92 Ind. 371, 47 Am. Rep. 149, 8 Am. Neg. Cas. 213; *Sherley v. Billings*, 8 Bush, 147, 8 Am. Rep. 451; *Chesapeake & O. Canal Co. v. Allegany County*, 57 Md. 202, 40 Am. Rep. 430; *Baltimore & O. R. Co. v. Barger*, 80 Md. 23, 26 L.R.A. 220, 45 Am. St. Rep. 319, 30 Atl. 560, 8 Am. Neg. Cas. 360; *Eads v. Metropolitan R. Co.* 43 Mo. App. 536; *Tidey v. Erie R. Co.* 66 N. J. L. 382, 49 Atl. 427; *Dwinelle v. New York C. & H. R. R. Co.* 120 N. Y. 117, 8 L.R.A. 224, 17 Am. St. Rep. 611, 24 N. E. 319; *McLeod v. New York, C. & St. L. R. Co.* 72 App. Div. 116, 76 N. Y. Supp. 347; *Williams v. Gill*, 122 N. C. 967, 29 S. E. 879; *Daniel v. Petersburg R. Co.* 117 N. C. 592, 4 L.R.A.(N.S.) 485, 23 S. E. 327; *Knoxville Traction Co. v. Lane*, 103 Tenn. 376, 46 L.R.A. 549, 53 S. W. 557; *The L. P. Dayton*, 120 U. S. 337, 30 L. ed. 669, 7 Sup. Ct. Rep. 568; 6 Cyc. 600.

It was not necessary to aver the appointment and qualification of plaintiff as administratrix.

Gunn v. Ohio River R. Co. 37 W. Va. 421, 16 S. E. 628; *Bowler v. Lane*, 3 Met. (Ky.) 311; *Pope v. Stacy*, 28 Vt. 96; *Durham v. Hudson*, 4 Ind. 501; *Duncan v. Duncan*, 19 Mo. 368; *Kelley v. Love*, 35 Ind. 106; *Beers v. Shannon*, 73 N. Y. 297; *Scrantom v. Farmers' & M. Bank*, 33 Barb. 527; *Melton v. Chesapeake & O. R. Co.* 71 W. Va. 701, 78 S. E. 309; *Telfair v. Stead*, 2 Cranch, 407, 2 L. ed. 320; *Childress v. Emory*, 8 Wheat. 642, 5 L. ed. 705; *M'Kimm v. Riddle*, 2 Dall. 100, 1 L. ed. 306; 6 Enc. U. S. Sup. Ct. Rep. 179.

Robinson, J., delivered the opinion of the court:

By this action the plaintiff administratrix seeks damages for the death of her intestate, who, it is alleged, while a passenger on a train of the defendant railway company, was wrongfully killed by a servant of the company. Through the verdict of a jury, plaintiff has recovered a judgment against defendant for \$5,000 and the latter prosecutes error.

Plaintiff's intestate was shot by a special police officer appointed at the instance of the defendant company pursuant to Code 1913, chap. 145, § 31. Defendant insists that it is not liable for the act. *Prima facie* such special officer is a public officer, and the railway company is not responsible for his acts. But such officer, when specially employed by a common carrier to perform certain duties and services for it, is a servant of the carrier, while acting in the scope of his employment, for whose wrongful acts the carrier is liable. It is liable for such

servant's infliction of injury upon a passenger on a train whereon it is his employment to afford protection to passengers, although the injurious act was wilful and malicious and was prompted by motives personal to the servant. *Layne v. Chesapeake & O. R. Co.* 66 W. Va. 607, 67 S. E. 1103.

It conclusively appears from the evidence that at the time Nichols, the special officer, killed Moss, plaintiff's intestate, the former was not acting as a public officer for the vindication of the law. He was not engaged in making an arrest or in doing any other thing in the line of an officer of the law. It furthermore conclusively appears that he was acting as the servant of the defendant carrier. There is no other proof in this particular but that he was on the train as the servant of the railway company to enforce its rules and protect the passengers. This is his own testimony as to his duties on the train. Whether Moss was a passenger, and whether the killing was justified under the law of self-defense, were issues in the case. The verdict involves a finding that he was a passenger, and that Nichols did not kill him in self-defense. Then the railway company is liable for the action of Nichols in causing the death, though the killing grew out of a purely personal matter between the two men, as defendant insists it did. Nichols being on the train in the line of his employment for the protection of the passengers, the carrier is liable for his act in breach of the protection he was employed to afford. His act was one within the scope of his employment in the broader sense in which the law recognizes scope of employment in such instances. 4 Elliott, Railroads, § 1638; 2 Hutchinson, Carr. § 1093.

The trial court instructed the jury in accordance with the principles we have iterated above. It did not err in refusing the instructions asked which were inconsistent therewith. One of the instructions given for plaintiff as to the liability of the carrier for the act of Nichols did not embrace the question whether Nichols was acting as a public officer or as a servant of the carrier, but the conclusive state of the evidence in this regard, as well as the fact that the question was embraced in another instruction, made it not essential to do so.

A review of the instructions as to the question whether Moss was a passenger at the time he was killed discloses no error of the court in its action on them. What Moss's intention was as to payment of fare was properly submitted.

There is no error in the record except in the overruling of defendant's demurrer to the declaration. That pleading is sufficient in all particulars but one. It does L.R.A.1915C.

not aver the appointment and qualification of the plaintiff as administratrix. Because of the omission to plead his issuable matter, the demurrer should have been sustained. *Austin v. Calloway*, — W. Va. —, 80 S. E. 361; *Perry v. New River & P. Consol. Coal Co.* — W. Va. —, 81 S. E. 844.

At the time this action was instituted, as well as at the time the demurrer was entered, considered, and overruled, it was generally deemed unnecessary to aver that a plaintiff administrator had been duly appointed and qualified. Our decision in *Austin v. Calloway* came later and brought the neglected point to the attention of the profession. That point was never expressly raised herein until the case reached the appellate court,—until the decision in *Austin v. Calloway* raised it. True, the demurrer to the declaration embraced the point and technically raised it, but in the proceedings below it was quite naturally never deemed of consequence, and was not brought to the attention of the court. Just as full and fair a trial on the merits of the action was had on the declaration without the averment as would have been had with it. Defendant was entitled to the averment, because it is a traversable one; but if it had been in the declaration, in all probability it never would have been traversed. Moreover, were we wholly to reverse for want of the averment and to send the case back for the averment to be put in and a new trial to be had, in all probability the averment would not be traversed, or if it were, the due appointment and qualification of the administratrix would promptly be proved by production of the county records. If there had been any doubt as to the appointment and qualification of the plaintiff as administratrix, would not defendant have raised the issue, even on the declaration as it was? The omission in the declaration clearly had no bearing on the trial of the merits of the alleged wrong. By all the omitted matter was rather conceded to be unnecessary when the case was tried. If we wholly reverse, it will likely avail nothing but to put plaintiff to the costs, delay, and inconvenience of another trial, and give defendant another chance on simply that which has been already fairly determined.

Now, for such error alone, shall we order another trial as a whole? To do so, under the circumstances of this case, would seem manifest injustice. Many a similar action has gone through this court and the judgment has been sustained here with the same averment lacking. Simply because we have recently discovered its materiality, and in a sense have taken litigants by surprise, shall we begin to overthrow trials for the omission of the averment, when there is a sensi-

ble way to supply it and to try separately any issue raised on it? Without a retrial of the merits already tried with no error, there is a way to determine safely whether the verdict that has been found should fall and the suit abate. The one fact to be determined to support the verdict is separable from the merits already tried. If plaintiff duly alleges that she has been appointed and qualified and no issue is taken on that, or if taken is determined in her favor, why in reason and justice, under the peculiar circumstances in relation to the point and its omission, should there not be judgment on the verdict? If the averment had been duly made at the proper stage and the plea of *ne unques* filed thereto, the issue so made would have been tried by the record separately from the issues on the merits of the action, in advance of the same. Why not, since under the circumstances justice seems to require it, try last as well as first this separable issue as to whether plaintiff has been appointed and qualified? There is a demand for straight, speedy, and sensible justice. Here is an opportunity for it, and that without harmful violation of established legal order. Pity it is, that we have no statute which would enable us to disregard wholly such a matter as is relied on for reversal herein.

What the court said in *Woodward v. Horst*, 10 Iowa, 120, is pertinent here: "It may be admitted that as a general rule a new trial when granted is awarded for the entire case, and that ordinarily courts will not dispose of a cause by piecemeal. And yet when not attended with too much confusion or inconvenience, or where it can be done without prejudice to the rights of parties, there is no substantial or valid objection to departing from the general rule. In this case there need be no confusion, and certainly there is no prejudice."

This doctrine is by no means new. It is generally accepted where it safely and certainly meets the ends of justice. In the case before us the omitted point has no bearing on the ascertainment of that which has already been ascertained, whether a servant of defendant in the course of his employment wrongfully killed plaintiff's intestate. How has defendant been prejudiced if it is a fact that plaintiff has been duly appointed and qualified? Why in meeting proper ends of justice should not the verdict on the merits stand if the fact is yet averred, and not denied, or, if denied, is established in favor of plaintiff? Say it is out of the usual course. Does it prejudice the interests of anyone? Ought not the usual course to be departed from when to follow it will only give to the party demanding that it be followed the benefit of

a mere unsubstantial technicality to the likely injury of the other party? If, as is most probable, plaintiff has been duly appointed and qualified, it would be inequitable to plaintiff for us to declare the trial abortive, under the peculiar circumstances which, at so late an hour, have caused advantage to be taken of the point. It is bad enough that, in obedience to existing principles, we must even reverse the judgment, without our going so far as to overthrow all that has been done.

In a recent work it is stated: "Probably from a desire to eliminate unnecessary litigation, and in the exercise of the discretion with which the appellate court is invested with respect to the granting of new trials, it is undoubtedly the present general rule, in remanding a cause for a new trial, either by the court or a jury, when error exists only as to one or more issues and the judgment in other respects is free from error, to limit the new trial to the issues affected by the error." 2 R. C. L. 287.

The same subject is adverted to in 14 Enc. Pl. & Pr. 937, in this language: "Where the material issues were correctly found upon the first trial, and the error does not touch the merits, a partial new trial to correct that error may be granted."

Nor is the doctrine unknown in Virginia jurisprudence. The supreme court of Virginia has held: "New trials being addressed to the discretion and authority of the court, it may impose such terms upon the successful party as will meet the ends of substantial justice. The new trial may be limited to a single point, to a single issue, or a particular question, or even to a part of the demand sued for, without reopening the whole case." *Fry v. Stowers*, 98 Va. 417, 36 S. E. 482.

Mr. Minor well understood it: "The application for a new trial being addressed to the equitable discretion and authority of the court, in order to prevent a material and manifest injustice, the court, as the alternative of a new trial, may impose terms upon the party, requiring him to consent to such modification of the verdict as will meet the substantial justice of the case (*e. g.*, to reduce the recovery, etc.); the new trial to be granted, if he does not consent. So the new trial may be limited to a single point, as to a single issue in the case, or a particular question, without reopening the whole case." 4 Minor, Inst. 3d ed. 930.

A concrete application of the doctrine, as applied to omitted averment of similar substance as that omitted in the case before us, is found in *Grand Trunk Western R. Co. v. Reddick*, 88 C. C. A. 80, 160 Fed.

898, wherein it is held: "Where a cause has been properly tried on the merits in a circuit court, and a judgment rendered for plaintiff, on a reversal because of the failure of the declaration to allege the requisite diversity of citizenship between the parties to give the court jurisdiction, it is competent for the appellate court to remand with leave to permit an amendment, and to try the question of jurisdiction alone, if issue is taken thereon, according to the practice with respect to pleas in abatement."

In the course of the opinion the United States circuit court of appeals said: "If plaintiff had averred that he was a citizen of Illinois and defendant a corporation organized and existing under the laws of Michigan, and if defendant could honestly have challenged those allegations, or either of them, the issue could have been determined in advance of a trial on the merits. We see no just reason why, after a trial on the merits, the logically separable matter of jurisdiction should not be determined."

In *Atchison, T. & S. F. R. Co. v. Gilliland*, 113 C. C. A. 476, 193 Fed. 608, we again observe the application of the principle in relation to the omission of an averment of the plaintiff's right to sue because of diversity of citizenship, the court saying: "We are therefore of the opinion that the court below should be directed that the plaintiff be allowed to amend her complaint in accordance with the facts, and that the defendant be given an opportunity to meet the new issue thus raised, and have it determined according to law. If, upon such determination, it be found that there is diverse citizenship between the parties, a judgment will be re-entered upon the verdict accordingly."

The decisions along the same line are numerous. In 7 Ann. Cas. 116, they will be found collected in a case note to *Smith v. Whittlesey*, 79 Conn. 189, 63 Atl. 1085. In that reported case, the Connecticut court says the principle should be applied when its application is necessary to do justice.

We deem it well, however, to impress that which another court has tersely stated: "It should clearly appear that the matter involved is entirely distinct and separable from the matters involved in the other issues, and that the new trial can be had without danger of complications with other matters." *Benton v. Collins*, 125 N. C. 83, 47 L.R.A. 33, 34 S. E. 242.

In the light of the foregoing we are of opinion to reverse the judgment and remand the case with the following directions: Let the averment be supplied; if defendant takes issue thereon, let that issue be tried; if no issue is taken, or if taken is found in favor of plaintiff, let judgment be again

entered on the verdict; if the averment is not supplied, or if supplied and issue taken on it is found for defendant, let the verdict be set aside and the action be dismissed.

It may be said that in *Austin v. Calloway* and in *Perry v. New River & P. Consol. Coal Co.* we did not pursue this course. In the first mentioned of these cases, it should have been pursued, but was not brought to our attention. In the last-mentioned case, the verdict had already been set aside by the court below, and a new trial awarded. There were reasons warranting us in affirming that order.

Petition for rehearing denied December 22, 1914.

UNITED STATES SUPREME COURT.

GERMAN ALLIANCE INSURANCE COMPANY, Appt.,
v.

IKE LEWIS, as Superintendent of Insurance of the State of Kansas.

(233 U. S. 389, 58 L. ed. 1011, 34 Sup. Ct. Rep. 612.)

Constitutional law — police power — regulating prices — business affected with public interest.

1. A business may be so far affected with a public interest as to permit legislative regulation of its rates and charges, although no public trust is imposed upon the property, and although the public may not have a legal right to demand and receive service.

Same — regulating fire insurance rates.

2. The business of fire insurance is so far affected with a public interest as to justify legislative regulation of its rates.

Same — equal protection of the laws — classification — regulating foreign insurance rates.

3. Exempting farmers' mutual insurance

Note. — Fire insurance as a business affected with a public interest.

This note supplements the one accompanying *State ex rel. McCarter v. Firemen's Ins. Co.* 29 L.R.A. (N.S.) 1195, where the earlier cases are considered.

As suggested by the title, these notes are concerned only with the preliminary question whether or not fire insurance is a business affected with a public interest so as to subject it to public regulation, and are not concerned with the ultimate question as to the validity of the regulations, assuming the premise.

As to power of legislature to regulate life insurance rates, see note to *People v. Hartford L. Ins. Co.* 37 L.R.A. (N.S.) 778.

As to kinds of business affected with a public interest and control in respect to rates or prices generally, see note to *Rat-*

companies organized and doing business under the laws of the state, and insuring only farm property, from the legislative scheme for regulation or fire insurance rates, does not render such legislation invalid as to other insurance companies, as denying the equal protection of the laws.

(Mr. Chief Justice White, Mr. Justice Lamar and Mr. Justice Van Devanter, dissent.)

(April 20, 1914.)

APPEAL by complainant from a judgment of the Circuit Court of the United States for the District of Kansas, sustaining a demurrer to and dismissing a bill filed to restrain the enforcement of a state statute regulating fire insurance rates. Affirmed.

Statement by Mr. Justice McKenna:

Bill in equity to restrain the enforcement of the provisions of an act of the state of Kansas entitled, "An Act Relating to Fire Insurance, and to Provide for the Regula-

tion and Control of Rates of Premium Thereon, and to Prevent Discriminations Therein," chap. 152 of the Session Laws of 1909.

tion and Control of Rates of Premium Thereon, and to Prevent Discriminations Therein," chap. 152 of the Session Laws of 1909.

The grounds of the bill are that the act offends the Constitution of the state and of the United States.

A summary of the requirements of the act is as follows:

Sec. 1. Every fire insurance company shall file with the superintendent of insurance general basis schedules showing the rates on all risks insurable by such company in the state, and all the conditions which affect the rates or the value of the insurance to the assured.

Sec. 2. No change shall be made in the schedules except after ten days' notice to the superintendent, which notice shall state the changes proposed and the time when they shall go into effect. The superintendent may allow changes upon less notice.

Sec. 3. When the superintendent shall determine any rate is excessive or unreasonably high, or not adequate to the safety or soundness of the company, he is author-

cliff v. Wichita Union Stockyards Co. 6 L.R.A.(N.S.) 834.

It will be noticed that it was held in *GERMAN ALLIANCE INS. CO. v. LEWIS*, that a business may be so far affected with a public interest as to permit legislative regulation of its rates and charges, although no public trust is imposed upon the property, and although the public may not have a legal right to demand and receive service, and further that the business of fire insurance is a business so far affected with a public interest as to justify legislative regulation of its rates.

In *German Alliance Ins. Co. v. Hale*, 219 U. S. 307, 55 L. ed. 229, 31 Sup. Ct. Rep. 246, in holding that due process of law was not denied to an insurance company connected with a tariff association which fixed rates, by a statute giving the insured or beneficiary in a policy issued by such company a right to recover, in addition to the actual loss, 25 per cent of the actual loss or damage, any stipulation in the contract notwithstanding, the court said: "The business of fire insurance is, as everyone knows, of an extensive and peculiar character, and its management concerns a very large number of people, particularly those who own property and desire to protect themselves by insurance. We can well understand that fire insurance companies, acting together, may have owners of property practically at their mercy in the matter of rates, and may have it in their power to deprive the public generally of the advantages flowing from competition between rival organizations engaged in the business of fire insurance. In order to meet the evils of such combinations or associations, the state is competent to adopt appropriate regulations that will tend to substitute

competition in the place of combination or monopoly. . . . Regulations having a real, substantial relation to that end, and which are not essentially arbitrary, cannot properly be characterized as a deprivation of property without due process of law."

This language was quoted with approval in *Bell v. Louisville Fire Underwriters*, 146 Ky. 841, 143 S. W. 388, where the right of the state insurance commissioner to examine the books of a fire insurance association was upheld.

And in *People v. Aachen & M. F. Ins. Co.* 126 Ill. App. 636, where it was sought to enjoin fire insurance companies from combining to restrain competition, the decision in *North American Ins. Co. v. Yates*, which is set out in the earlier note, was relied upon, and it was held that the insurance business is a public necessity and is stamped with a public interest.

In *Citizens' Ins. Co. v. Clay*, 197 Fed. 435, where a foreign insurance company licensed to do business in Kentucky sought an injunction against the enforcement of a statute requiring insurance companies to file with the state insurance board specific data regarding insurance rates, and making it unlawful to use any other rate than one obtained by the application of schedules furnished by the board, on the ground that the statute was invalid because in violation of the due process of law and equal protection of law provisions of the Constitution, where no schedules had been filed or rates fixed by the board, the injunction was denied, it being held that the statute did not impair the company's license. The court in the course of its discussion said: "Fire insurance is a commercial necessity, and its character tends to monopoly. To engage in the business calls for large capital. Prac-

ized to direct the company to publish and file a higher or lower rate, which shall be commensurate with the character of the risk; but in every case the rate shall be reasonable.

Sec. 4. No company shall engage or participate in insurance on property located in the state until the schedules of rates be filed, nor write insurance at a different rate than the rate named in the schedules, or refund or remit in any manner or by any device any portion of the rates; or extend to any insured or other person any privileges, inducements, or concessions except as specified in the schedules.

Sec. 5. Any company making insurance where no rate has been filed shall, within thirty days after entering into such contract, file with the superintendent a schedule of such property, showing the rate and such information as he may require. The schedule shall conform to the general basis of schedules, and shall constitute the permanent rate of the company.

Sec. 6. The schedules shall be open to the inspection of the public, and each local

agent shall have and exhibit to the public copies thereof relative to all risks upon which he is authorized to write insurance.

Sec. 7. No company shall, directly or indirectly, by any special rate or by any device, charge or receive from any person a different rate of compensation for insurance that it charges or receives from any other person for like insurance or risks of a like kind and hazard under similar circumstances and conditions in the state. Any company violating this provision shall be deemed guilty of unjust discrimination, which is declared unlawful.

Sec. 8. The superintendent may, if he finds that any company, or any officer, agent, or representative thereof, has violated any of the provisions of the act, revoke the license of such offending company, officer, or agent, but such revocation shall not affect liability for the violation of any other section of the act; and provided that any action, decision, or determination of the superintendent under the provisions of the act shall be subject to review by the courts of the state as provided in the act.

tically it is in the hands of a comparatively small number of insurers, who naturally in many things act together or in groups, and who are so situated as to make competition in rates subject to easy control. Actual combinations to restrain competition in rates have been common enough to provoke legislation in many states, including Kentucky. The reports of the court of appeals of that state indicate the prevalence of such restrictive agreements, and the existence of such legislation. *Bell v. Louisville Fire Underwriters*, supra. True, the bill alleges and the demurrer admits that 'the business of fire insurance, as carried on in the state of Kentucky and elsewhere, by your orator and other insurance companies, is not a monopoly, either legally or actually;' but on the oral argument our attention was directed to the Kentucky statute and the decision above cited, and it was agreed by counsel that noncompetitive agreements among agents existed in parts of the state. It is enough to say that in this business a degree of monopoly is probable, unless prevented by appropriate legislation. It seems measurably analogous to the elevator business involved in *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77, and *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468. And see *Carroll v. Greenwich Ins. Co.* 199 U. S. 401, 411, 50 L. ed. 246, 250, 26 Sup. Ct. Rep. 66. The business of fire insurance is not impressed with a public use in the sense that the public can demand service, but it has at least a quasi public, as distinguished from a purely private, character. See discussion in *McCarter v. Firemen's Ins. Co.* 74 N. J. Eq. 381, 29 L.R.A.(N.S.) 1194, 135 Am. St. Rep. 708, 73 Atl. 80, 414, 18 Ann. Cas. 1048. Recognizing such public L.R.A.1915C.

character, the business has been subjected to regulation which would be quite invalid in a purely private business, such regulations, for example, as a valued policy law (*Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281), and an increased recovery penalty (*German Alliance Ins. Co. v. Hale*, supra). So, too, the legislative right seems to be recognized to the extent of limiting the amount of business a company may do in a year, the amount of commissions it may pay its agents, etc. Such regulations are familiar, and, so far as have been brought to our attention, unchallenged; but they are clearly in violation of an unrestricted right of contract."

In *Boston Ice Co. v. Boston & M. R. Co.* 77 N. H. 6, 45 L.R.A.(N.S.) 835, 86 Atl. 356, Ann. Cas. 1914A, 1090, where the validity of a statute giving railroads whose operations destroy neighboring property by fire the right of subrogation to insurance on the property was involved, the court said that the power of the state to regulate and impose conditions upon the business of corporations which it creates or permits to act within it, and especially to regulate the business of insurance, is too well settled to permit of discussion.

And in *General Acci. Fire & Life Assur. Co. v. Walker*, 99 Miss. 404, 55 So. 51, where the validity of a statute prohibiting provisions by insurers limiting the time of notice within which suit might be commenced to less than one year, the court said that right of the state to regulate the business of insurance and provide the kind and character of insurance contracts is beyond controversy, it being one of the most important police powers exercised by the state.

J. T. W.

Sec. 9. The superintendent shall give notice of any order or regulation made by him under the act, and any company, or any person, city, or municipality which shall be interested, shall have the right within thirty days to bring an action against the superintendent in any district court of the state to have the order or regulation vacated. Issues shall be formed and the controversy tried and determined as in other cases of a civil nature, and the court may set aside one or more or any part of any of the regulations or orders which the court shall find to be unreasonable, unjust, excessive, or inadequate to compensate the company writing insurance thereon for the risk assumed by it, without disturbing others. The order of the superintendent shall not be suspended or enjoined, but the court may permit the complaining company to write insurance at the rates which obtained prior to such order upon the condition that the difference in the rates shall be deposited with the superintendent to be paid to the company or to the holders of policies as, on final determination of the suit, the court may deem just and reasonable. During the pendency of the suit no penalties or forfeitures shall attach or accrue on account of the failure of the complainant to comply with the order sought to be vacated or modified until the final determination of the suit. Proceedings in error may be instituted in the supreme court of the state as in other civil cases, and that court shall examine the record, including the evidence, and render such judgment as shall be just and equitable. No action shall be brought in the United States courts until the remedies provided by the act shall have been exhausted. If any company organized under the laws of the state, or authorized to transact business in a state, shall violate the section, the superintendent may cancel the authority of the company to transact business in the state.

Sec. 10. Infractions of the act are declared to be misdemeanors and punishable by a fine not exceeding \$100 for each offense, provided that if the conviction be for an unlawful discrimination, the punishment may be by a fine or by imprisonment in the county jail not exceeding ninety days, or by both fine and imprisonment.

Sec. 11. No person shall be excused from testifying at the trial of any other person on the ground that the testimony may incriminate him, but he shall not be prosecuted on account of any transaction about which he may testify, except for perjury committed in so testifying; "provided, that nothing in this act shall affect farmers' mutual insurance companies, organized and doing business under the laws of this state, and insuring only farm property."

L.R.A.1915C.

The bill alleged that it was brought by the German Alliance Insurance Company in behalf of itself and all other companies and corporations conducting a similar business and similarly situated, and that Charles W. Barnes was the duly elected superintendent of fire insurance of the state of Kansas. It alleged the jurisdictional amount, and that the controversy was one arising under the Constitution of the United States and of the state of Kansas. It alleged, further, the following facts, which we state in narrative form, omitting those which relate to the Constitution of the state, no assignment of error being based upon them. The appellant, to which we shall refer as complainant, was incorporated under the laws of New York as a fire insurance company in 1879, and immediately entered upon such business, and it has for long periods of time conducted the business of fire insurance in Kansas and other states of the United States.

The business of fire insurance as conducted by it consists of making indemnity contracts against direct loss or damage by fire for a consideration paid, known as a premium; that the rate or premium is the amount charged for each \$100 of indemnity. The property which is the subject of insurance is ordinarily known and designated as the risk. Complainant issues indemnity contracts or fire insurance policies covering all kinds and descriptions of improvements upon real estate and the contents thereof and all kinds and descriptions of personal property, and also farm houses, barns, and granaries and their contents. The rate of premium varies with the kind of property covered, its physical characteristics and situation, its exposure, the presence or absence of fire protection, and many other causes.

The establishment of the basis rate for the premium to be charged is a matter of technical and mathematical deduction from the experience of all fire insurance companies, covering a long period of years, and, territorially, the whole civilized world. To make such deduction it is necessary not only to be in possession of the compiled statistics of fire insurance business, but also to be skilled in the mathematical "theory of probabilities" and in the "law of large numbers" so as to be able to apply with technical accuracy such laws and such data, and that no one not specially trained as an insurance statistician is competent to make such deductions.

A theoretically correct basis rate having thus been arrived at is subject to variation according to the risk, whether in town or country, and, if in the former, according to the class of town or city in which it is sit-

uated. The classification of towns and cities depends upon water supply, fire protection, and general physical conditions. In addition to ascertaining the individual risk, if a building the size, material of which, and the manner in which it is constructed, the character of the occupancy, and the character of the occupancy and construction of adjacent buildings, also the character of the contents of the buildings, and the manner in which they are stored, and the precautions used to detect and prevent fires, are necessary to be ascertained.

Complainant and others engaged in the insurance business employ a large number of men skilled as inspectors to report upon individual risks, and it is impossible to fix and adjust a reasonable rate of premium for each and every individual risk without the information so obtained and having the same applied by experts. And such training and information are necessary to determine whether a basic rate or actual rate, as applied to any particular risk, is or is not reasonable, and the respondent is not possessed of the requisite information or special training necessary to qualify for such determination, and any conclusion to which he might come would be a mere guess or arbitrary determination; and the provisions of the act can only be properly administered in any event by the employment by the state of a corps of inspectors and experts specially trained in the business of fixing rates of fire insurance.

The complainant has complied with all of the laws of the state, and has received the regular license or authorization of the state, to transact the business of fire insurance therein.

It conducts its business by means of resident agents, of which it has seventy-two directly employed; it has a large and valuable established business to secure which it has expended a large sum of money, and to be compelled to give up its business would result in irreparable damage and injury to it. A large number of the fire insurance policies issued by complainant are written upon farm buildings and their contents, and in writing such business it comes into direct competition with various farmers' mutual insurance companies organized and doing business under the laws of the state, and insuring only farm property.

The business of fire insurance is purely and exclusively a private business, and may be transacted by private persons in their individual capacity, or by unincorporated or incorporated companies; that the amount of indemnity and the premium is a matter of private negotiation and agreement, and the act of the legislature of the state of Kansas attempts to regulate the business in L.R.A.1915C.

so far as the fixing of the rate of premium is concerned, and in the attempted regulation distinguishes between fire insurance companies and individuals and partnerships, and thereby denies to complainant and other companies the equal protection of the law, contrary to the 14th Amendment to the Constitution of the United States, and is therefore unconstitutional and void.

Under the laws of Kansas, mutual fire insurance companies may be organized, that such companies having a guaranteed fund of \$25,000 may do business on a cash basis and accept premiums in cash, and that such premium measures the total liability of the insured under the policy, either to the company or to its creditors; that by the 11th section of the act under review, it is provided "that nothing in this act shall affect farmers' mutual insurance companies, organized and doing business under the laws of this state, and insuring only farm property." The complainant and many other companies insure farm property and come into direct competition with farmers' mutual companies of the character specified, and the act of the legislature in excepting the latter companies deprives complainant of the equal protection of the laws, and is therefore repugnant to the 14th Amendment of the Constitution of the United States and is unconstitutional and void.

The business of fire insurance is private, with which the state has no right to interfere, and the right to fix by private contract the rate of premium is a property right of value; the business is not a monopoly, either legally or actually; it may not be legally conducted by the national government or by the state of Kansas or other states under their respective Constitutions, and is not a business included within the functions of government. Neither complainant nor others engaged in fire insurance receive or enjoy from the state of Kansas or any government, state or national, any privilege or immunity not in like manner and to like extent received and enjoyed by all other persons, partnerships, and companies, incorporated or unincorporated, respectively, engaged in the conduct of other lines of private business and enterprises. Complainant, therefore, is deprived of one of the incidents of liberty and of its property without due process of law, in violation of the 14th Amendment to the Constitution of the United States.

The act distinguishes between fire insurance companies and other insurance companies, individuals and persons, and distinguishes between insurance and other lines

of business and thereby offends the equality clause of the Constitution of the United States.

Complainant, under protest, filed the general basis schedules of its rates as required by the act, which were arrived at by the process hereinbefore set out. On the 19th of August, 1909, respondent made a reduction of 12 per cent from the rates as filed and from the rates filed by other companies, with the proviso that it should not apply to residence property, churches, school-houses, farm property, or special hazards. The order was to become effective September 1, 1909. And it was further ordered that on and after that date the exception of churches and dwelling houses should be eliminated. Complainant notified the superintendent by letter that it would, under protest, and reserving the rights which it had under the law, comply with the provisions of the order.

The risks included in the order, and not excepted therefrom, comprise all ordinary mercantile risks in the state, and that the reduction of 12 per cent will result in a rate which is much less than the cost of carrying the risks.

Respondent is threatening to make further reductions, and it is proposed to revoke the license of any fire insurance company which may violate the provisions of the act, even though the rates fixed by him may be so low as to be confiscatory, and to inflict upon the officers of the company, including complainant, the penalties prescribed for such violation, and such companies and complainant, unless defendant be restrained by injunction, will be obliged to comply with the requirements of the act to their irreparable damage and injury.

Complainant finally alleges that it is not its purpose to attack the orders of respondent on the ground that they were not made in strict compliance with the provisions of the acts, but to have the act in its entirety declared to be unconstitutional and void for the reasons alleged, and to have respondent restrained and orders made by him under the provisions of the act enjoined. And such an injunction is prayed.

Respondent filed a demurrer stating that he demurred to so much of the bill as charges the act of the state of Kansas to be repugnant to the Constitution of Kansas and the Constitution of the United States. The demurrer was sustained. Subsequently, upon the bill being amended, a general demurrer was filed, which was also sustained by the court, and the bill dismissed. Prior, however, to this action, it having been suggested that the term of office of Charles W. Barnes as superintendent of insurance had expired, and that Ike

Lewis had succeeded to that office and to all of its duties and powers, he was made defendant in the place and stead of Charles W. Barnes.

Messrs. Thomas Bates, John G. Johnson, and Seymour Edgerton, for appellant:

The business of fire insurance is a private business, and the public has no legal right to demand its service.

American Surety Co. v. Shallenberger, 183 Fed. 636; *Hunt v. Simonds*, 19 Mo. 583; *Orr v. Home Mut. Ins. Co.* 12 La. Ann. 255, 68 Am. Dec. 770; *Queen Ins. Co. v. State*, 86 Tex. 250, 22 L.R.A. 483, 24 S. W. 397.

The state has not the power to fix the rates charged to the public either by corporations or individuals engaged in a private business, and the test as to whether a use is public or not is whether a public trust is imposed upon the property, and whether the public has a legal right to the use which cannot be denied.

Allen v. Jay, 60 Me. 124, 11 Am. Rep. 185; *American Live Stock Commission Co. v. Chicago Live Stock Exch.* 143 Ill. 210, 18 L.R.A. 190, 36 Am. St. Rep. 385, 32 N. E. 274; *Arnsperger v. Crawford*, 101 Md. 247, 70 L.R.A. 497, 61 Atl. 413; *Avery v. Vermont Electric Co.* 75 Vt. 235, 59 L.R.A. 817, 98 Am. St. Rep. 818, 54 Atl. 179; *Brown v. Gerald*, 100 Me. 351, 70 L.R.A. 472, 109 Am. St. Rep. 526, 61 Atl. 785; *Burlington Twp. v. Beasley*, 94 U. S. 310, 24 L. ed. 161; *Chesapeake & P. Teleph. Co. v. Manning*, 186 U. S. 238, 46 L. ed. 1144, 22 Sup. Ct. Rep. 881; *Citizens' Sav. & L. Asso. v. Topeka*, 20 Wall. 655, 22 L. ed. 455; *Colliester v. Hayman*, 183 N. Y. 250, 1 L.R.A.(N.S.) 1188, 111 Am. St. Rep. 740, 70 N. E. 20, 5 Ann. Cas. 344; *Dutton v. Strong*, 1 Black, 23, 17 L. ed. 29; *Ex parte Quarg*, 149 Cal. 79, 5 L.R.A.(N.S.) 183, 117 Am. St. Rep. 115, 84 Pac. 766, 9 Ann. Cas. 747; *Fallsburg Power & Mfg. Co. v. Alexander*, 101 Va. 98, 61 L.R.A. 129, 99 Am. St. Rep. 855, 43 S. E. 194; *Farmers' Market Co. v. Philadelphia & R. Terminal R. Co.* 142 Pa. 580, 21 Atl. 902, 989; *Gaylord v. Sanitary Dist.* 204 Ill. 576, 63 L.R.A. 582, 98 Am. St. Rep. 235, 68 N. E. 522; *Howard Mills Co. v. Schwartz Lumber & Coal Co.* 77 Kan. 599, 18 L.R.A.(N.S.) 356, 95 Pac. 559; *Horney v. Nixon*, 213 Pa. 20, 1 L.R.A.(N.S.) 1184, 110 Am. St. Rep. 520, 61 Atl. 1088, 5 Ann. Cas. 349, 19 Am. Neg. Rep. 496; *Hurley v. Eddingfield*, 156 Ind. 416, 53 L.R.A. 135, 83 Am. St. Rep. 198, 59 N. E. 1058; *Jacobs v. Clearview Water Supply Co.* 220 Pa. 388, 21 L.R.A.(N.S.) 410, 69 Atl. 870; *Louisville & N. R. Co. v. West Coast Naval*

Stores Co. 198 U. S. 483, 49 L. ed. 1135, 25 Sup. Ct. Rep. 745; Ladd v. Southern Cotton Press & Mfg. Co. 53 Tex. 172; Pearce v. Spalding, 12 Mo. App. 141; People v. Steele, 231 Ill. 340, 14 L.R.A.(N.S.) 361, 121 Am. St. Rep. 321, 83 N. E. 236; Purcell v. Daly, 19 Abb. N. C. 301; Queen Ins. Co. v. State, 86 Tex. 250, 22 L.R.A. 483, 24 S. W. 397; Ryan v. Louisville & N. Terminal Co. 102 Tenn. 111, 45 L.R.A. 303, 50 S. W. 744; Shasta Power Co. v. Walker, 149 Fed. 568; Sholl v. German Coal Co. 118 Ill. 427, 59 Am. Rep. 379, 10 N. E. 199; New York & C. Grain & Stock Exch. v. Board of Trade, 127 Ill. 153, 2 L.R.A. 411, 19 N. E. 855; State ex rel. Star Pub. Co. v. Associated Press, 159 Mo. 410, 51 L.R.A. 151, 81 Am. St. Rep. 368, 60 S. W. 91; Tyler v. Beacher, 44 Vt. 648, 8 Am. Rep. 398; Ulmer v. Lime Rock R. Co. 98 Me. 579, 66 L.R.A. 387, 57 Atl. 1001; Weems S. B. Co. v. People's S. B. Co. 214 U. S. 345, 53 L. ed. 1024, 29 Sup. Ct. Rep. 661, 16 Ann. Cas. 1222.

The regulation of rates and charges in a private business is not within the police power of the state.

Adair v. United States, 208 U. S. 175, 52 L. ed. 442, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; Coffeyville Vitrified Brick & Tile Co. v. Perry, 60 Kan. 297, 66 L.R.A. 185, 76 Pac. 848, 1 Ann. Cas. 936; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 40 L. ed. 679, 22 Sup. Ct. Rep. 431; Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18; Ex parte Dickey, 144 Cal. 234, 66 L.R.A. 928, 103 Am. St. Rep. 82, 77 Pac. 924, 1 Ann. Cas. 428; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Hurtado v. California, 110 U. S. 535, 28 L. ed. 238, 4 Sup. Ct. Rep. 111, 292; Ex parte Berger, 193 Mo. 16, 3 L.R.A.(N.S.) 530, 112 Am. St. Rep. 472, 90 S. W. 759, 5 Ann. Cas. 383; Kreibohm v. Yancey, 154 Mo. 67, 55 S. W. 260; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Muller v. Oregon, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; People v. Steele, 231 Ill. 340, 14 L.R.A.(N.S.) 361, 121 Am. St. Rep. 361, 83 N. E. 236; People ex rel. Rodgers v. Coler, 166 N. Y. 1, 52 L.R.A. 814, 82 Am. St. Rep. 605, 59 N. E. 716; State ex rel. Star Pub. Co. v. Associated Press, 159 Mo. 410, 51 L.R.A. 151, 81 Am. St. Rep. 368, 60 S. W. 91; Street v. Varney Electrical Supply Co. 160 Ind. 338, 61 L.R.A. 154, 98 Am. St. Rep. 325, 66 N. E. 895; West L.R.A.1915C.

Branch Lumberman's Exch. v. McCormick, 1 Pa. Dist. R. 542.

Messrs. John S. Dawson, Attorney General of Kansas, S. N. Hawks, F. S. Jackson, and Charles Blood Smith, for appellee:

The act complained of is within the police power of the state.

Noble State Bank v. Haskell, 219 U. S. 112, 575, 55 L. ed. 117, 341, 32 L.R.A.(N.S.) 1062, 1065, 31 Sup. Ct. Rep. 186, 299, Ann. Cas. 1912A, 487, 489; German Alliance Ins. Co. v. Hale, 219 U. S. 307, 55 L. ed. 229, 31 Sup. Ct. Rep. 240; Carroll v. Greenwich Ins. Co. 199 U. S. 401, 411, 50 L. ed. 246, 250, 26 Sup. Ct. Rep. 66; Jacobson v. Massachusetts, 197 U. S. 11, 27, 31, 49 L. ed. 643, 650, 651, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 297, 43 L. ed. 702, 706, 19 Sup. Ct. Rep. 465; Citizens' Ins. Co. v. Clay, 197 Fed. 435; German Alliance Ins. Co. v. Barnes, 189 Fed. 769.

The act is not repugnant to either the due process clause of the 14th Amendment or the equal protection clause.

Orient Ins. Co. v. Daggs, 172 U. S. 561, 43 L. ed. 554, 19 Sup. Ct. Rep. 281; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 208, 209, 32 L. ed. 107, 108, 109, 8 Sup. Ct. Rep. 1161; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Holden v. Hardy, 169 U. S. 366, 389, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383; Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; Paul v. Virginia, 8 Wall. 168, 179, 19 L. ed. 357, 359; Ducat v. Chicago, 10 Wall. 410, 415, 19 L. ed. 972, 973; Liverpool & L. Life & F. Ins. Co. v. Massachusetts (Liverpool & L. Life & F. Ins. Co. v. Oliver) 10 Wall. 566, 573, 19 L. ed. 1029, 1031; Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165; Santa Clara County v. Southern P. R. Co. 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; Bank of Augusta v. Earle, 13 Pet. 519, 10 L. ed. 274; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 28 L. ed. 1137, 5 Sup. Ct. Rep. 739; Fire Asso. of Philadelphia v. New York, 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. Rep. 108; Fritts v. Palmer, 132 U. S. 282, 33 L. ed. 317, 10 Sup. Ct. Rep. 93; Barbier v. Connolly, 113 U. S. 32, 28 L. ed. 925, 5 Sup. Ct. Rep. 357; Soon Hing v. Crowley, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; Kentucky R. Tax

Cases, 115 U. S. 322, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; Home Ins. Co. v. New York, 134 U. S. 606, 33 L. ed. 1031, 10 Sup. Ct. Rep. 593; Pacific Exp. Co. v. Seibert, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; Orient Ins. Co. v. Daggs, 172 U. S. 562, 43 L. ed. 554, 19 Sup. Ct. Rep. 281; New York & N. E. R. Co. v. Bristol, 151 U. S. 571, 38 L. ed. 274, 14 Sup. Ct. Rep. 437.

The classification made by the legislature is not unreasonable.

4 Enc. U. S. Sup. Ct. Rep. 357; Heath & M. Mfg. Co. v. Worst, 207 U. S. 354, 52 L. ed. 243, 28 Sup. Ct. Rep. 114; Ozan Lumber Co. v. Union County Nat. Bank, 207 U. S. 256, 52 L. ed. 197, 28 Sup. Ct. Rep. 89; Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 668, 17 Sup. Ct. Rep. 255; Missouri. K. & T. R. Co. v. May, 194 U. S. 267, 48 L. ed. 971, 24 Sup. Ct. Rep. 638.

The legislature may fix rates.

Note to Winchester & L. Turnp. Road Co. v. Croxton, 33 L.R.A. 177; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47; Hale, De Portibus Maris, 1 Hargraves Law Tracts, 78; Mobile v. Yuille, 3 Ala. 137, 36 Am. Dec. 441; Laurel Fork & S. H. R. Co. v. West Virginia Transp. Co. 25 W. Va. 324; Allnutt v. Inglis, 12 East, 527, 11 Revised Rep. 482; People v. Budd, 117 N. Y. 1, 5 L.R.A. 559, 15 Am. St. Rep. 460, 22 N. E. 670, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; Re Annon, 50 Hun, 415, 2 N. Y. Supp. 275, affirmed in 26 N. Y. S. R. 554; Spring Valley Waterworks v. Schottler, 110 U. S. 347, 38 L. ed. 173, 4 Sup. Ct. Rep. 48; Brass v. North Dakota, 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857, affirming 2 N. D. 482, 52 N. W. 408.

The right to regulate prices, as well as the right to demand service, is each evidence of a public business, but neither is necessary to make a vocation subject to public control.

Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468, 117 N. Y. 1, 5 L.R.A. 559, 15 Am. St. Rep. 460, 22 N. E. 670; Freund, Pol. Power, §§ 304, 378; People v. Formosa, 61 Hun, 272, 16 N. Y. Supp. 753, 131 N. Y. 478, 27 Am. St. Rep. 612, 30 N. E. 402; Roswell v. Security Mut. L. Ins. Co. 193 N. Y. 465, 19 L.R.A.(N.S.) 946, 86 N. E. 532; Winchester & L. Turnp. Road Co. v. Croxton, 98 Ky. 730, 33 L.R.A. 182, 34 S. W. 518; West Branch Lumbermen's Exch. v. Fisher, 150 Pa. 475, 24 Atl. 735; Craig v. Kline, 65 Pa. 399, 3 Am. Rep. 636; Henry L.R.A.1915C.

v. Roberts, 50 Fed. 902; Genesee-Fork Improv. Co. v. Ives, 144 Pa. 114, 13 L.R.A. 427, 22 Atl. 887; Mobile v. Yuille, 3 Ala. 137, 36 Am. Dec. 441; Brass v. North Dakota, 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857; McCarter v. Firemen's Ins. Co. 74 N. J. Eq. 372, 29 L.R.A.(N.S.) 1194, 135 Am. St. Rep. 708, 73 Atl. 80, 414, 18 Ann. Cas. 1048; Civil Rights Cases, 109 U. S. 62, 27 L. ed. 856, 3 Sup. Ct. Rep. 18.

Associations having all the power to fix fire insurance rates have been authorized by the state legislatures, and are valid.

New York Fire Underwriters v. Higgins, 130 App. Div. 78, 114 N. Y. Supp. 506; Firemen's Fund Ins. Co. v. Hellner, 159 Ala. 447, 49 So. 297, 17 Ann. Cas. 793; Continental Ins. Co. v. Parkes, 142 Ala. 650, 39 So. 204; Orient Ins. Co. v. Daggs, 172 U. S. 565, 43 L. ed. 555, 19 Sup. Ct. Rep. 281; Farmers' & M. Ins. Co. v. Dobney, 189 U. S. 301, 47 L. ed. 821, 23 Sup. Ct. Rep. 565; Barbier v. Connolly, 113 U. S. 27, 28, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357.

Mr. Justice McKenna delivered the opinion of the court:

The specific error complained of is the refusal of the district court to hold that the act of the state of Kansas is unconstitutional and void as offending the due process clause of the 14th Amendment of the Constitution of the United States. To support this charge of error, complainant asserts that the business of fire insurance is a private business, and, therefore, there is no constitutional power in a state to fix the rates and charges for services rendered by it. An exercise of such right, it is contended, is a taking of private property for a public use. The contention is made in various ways, and, excluding possible countervailing contentions, it is urged that the act under review cannot be justified as an exercise of the police power or of the power of the state to admit foreign corporations within its borders upon such terms as it may prescribe, or of any other power possessed by the state; that no state has the power to impose unconstitutional burdens either upon private citizens or private corporations engaged in a private business.

The basic contention is that the business of insurance is a natural right, receiving no privilege from the state, is voluntarily entered into, cannot be compelled, nor can any of its exercises be compelled; that it concerns personal contracts of indemnity against certain contingencies merely. Whether such contracts shall be made at all, it is contended, is a matter of private negotiation and agreement, and necessarily there must be freedom in fixing their terms.

And "where the right to demand and receive service does not exist in the public, the correlative right of regulation as to rates and charges does not exist." Many elements, it is urged, determine the extending or rejection of insurance; the hazards are relative and depend upon many circumstances upon which there may be different judgments, and there are personal considerations as well,—“moral hazards,” as they are called.

It is not clear to what extent some of these circumstances are urged as affecting the power of regulation in the state. It would seem to be urged that each risk is individual, and no rule of rates can be formed or applied. The bill asserts the contrary. It in effect admits that there can be standards and classification of risks, determined by the law of averages. Indeed, it is a matter of common knowledge that rates are fixed and accommodated to those standards and classifications in pre-arranged schedules, and, granted the rates may be varied in particular instances, they are sufficiently definite and applicable as a general and practically constant rule. They are the product, it is true, of skill and experience, but such skill and experience a regulating body may have as well as the creating body. Indeed, an allegation in the original bill that the superintendent of insurance could not have the requisite technical and mathematical training to determine whether a basic rate or an actual rate as applied to any particular risk was or was not reasonable, and that his conclusion, therefore, “would be a mere guess or arbitrary determination,” was omitted by an amendment. It would indeed be a strained contention that the government could not avail itself, in the exercise of power it might deem wise to exert, of the skill and knowledge possessed by the world. We may put aside, therefore, all merely adventitious considerations and come to the bare and essential one, whether a contract of fire insurance is private, and as such has constitutional immunity from regulation. Or, to state it differently and to express an anti-theoretical proposition, (is the business of insurance so far affected with a public interest as to justify legislative regulation of its rates?) And we mean a broad and definite public interest. In some degree the public interest is concerned in every transaction between men, the sum of the transactions constituting the activities of life. But there is something more special than this, something of more definite consequence, which makes the public interest that justifies regulatory legislation. We can best explain by examples. The transportation of property—business of common carriers—is obviously

of public concern, and its regulation is an accepted governmental power. The transmission of intelligence is of cognate character. There are other utilities which are denominated public, such as the furnishing of water and light, including in the latter gas and electricity. We do not hesitate at their regulation nor of the fixing of the prices which may be charged for their service. The basis of the ready concession of the power of regulation is the public interest. This is not denied, but its application to insurance is so far denied as not to extend to the fixing of rates. It is said, the state has no power to fix the rates charged to the public by either corporations or individuals engaged in a private business, and the “test of whether the use is public or not is whether a public trust is imposed upon the property, and whether the public has a legal right to the use which cannot be denied;” or, as we have said, quoting counsel, “Where the right to demand and receive service does not exist in the public, the correlative right of regulation as to rates and charges does not exist.” Cases are cited which, it must be admitted, support the contention. The distinction is artificial. It is, indeed, but the assertion that the cited examples embrace all cases of public interest. The complainant explicitly so contends, urging that the test it applies excludes the idea that there can be a public interest which gives the power of regulation as distinct from a public use, which, necessarily, it is contended, can only apply to property, not to personal contracts. The distinction, we think, has no basis in principle (*Noble State Bank v. Haskell*, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487), nor has the other contention that the service which cannot be demanded cannot be regulated.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77, is an instructive example of legislative power exerted in the public interest. The Constitution of Illinois declared all elevators or storehouses, where grain or other property was stored for a compensation, to be public warehouses, and a law was subsequently enacted fixing rates of storage. In other words, that which had been private property had from its uses become, it was declared, of public concern, and the compensation to be charged for its use prescribed. The law was sustained against the contention that it deprived the owners of the warehouses of their property without due process of law. We can only cite the case and state its principle, not review it at any length. The principle was expressed to be, quoting Lord Chief Justice Hale, “that when private property is ‘af-

fectured with a public interest, it ceases to be *juris privati* only" and it becomes "clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large;" and, so using it, the owner "grants to the public an interest in that use, and must submit to be controlled by the public for the common good." And it was said that the application of the principle could not be denied because no precedent could be found for a statute precisely like the one reviewed. It presented a case, the court further said, "for the application of a long-known and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress." The principle was expressed as to property, and the instance of its application was to property, but it is manifestly broader than that instance. It is the business that is the fundamental thing; property is but its instrument, the means of rendering the service which has become of public interest.

That the case had broader application than the use of property is manifest from the grounds expressed in the dissenting opinion. The basis of the opinion was that the business regulated was private and had "no special privilege connected with it, nor did the law ever extend to it any greater protection than it extended to all other private business." The argument encountered opposing examples, among others, the regulation of the rate of interest on money. The regulation was accounted for on the ground that the act of Parliament permitting the charging of some interest was a relaxation of a prohibition of the common law against charging any interest; but this explanation overlooked the fact that both the common law and the act of Parliament were exercises of government regulation of a strictly private business in the interest of public policy,—a policy which still endures and still dictates regulating laws. Against that conservatism of the mind which puts to question every new act of regulating legislation, and regards the legislation invalid or dangerous until it has become familiar, government—state and national—has pressed on in the general welfare; and our reports are full of cases where in instance after instance the exercise of regulation was resisted and yet sustained against attacks asserted to be justified by the Constitution of the United States. The dread of the moment having passed, no one is now heard to say that rights were restrained or their constitutional guaranties impaired.

Munn v. Illinois was approved in many state decisions, but it was brought to the review of this court in *Budd v. New York*, L.R.A.1915C.

143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468, and its doctrine, after elaborate consideration, reaffirmed, and against the same arguments which are now urged against the Kansas statute. Nowhere have these arguments been, or could be, advanced with greater strength and felicity of expression than in the dissenting opinion of Mr. Justice Brewer. Every consideration was adduced, based on the private character of the business regulated, and, for that reason, its constitutional immunity from regulation, with all the power of argument and illustration of which that great judge was a master. The considerations urged did not prevail. Against them the court opposed the ever-existing police power in government and its necessary exercise for the public good, and declared its entire accommodation to the limitations of the Constitution. The court was not deterred by the charge (repeated in the case at bar) that its decision had the sweeping and dangerous comprehension of subjecting to legislative regulation all of the businesses and affairs of life and the prices of all commodities. Whether we may apprehend such result by extending the principle of the cases to fire insurance we shall presently consider.

In *Brass v. North Dakota*, 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857; *Munn v. Illinois* and *Budd v. New York* were affirmed. A law of the state of North Dakota was sustained which made all buildings, elevators, and warehouses used for the handling of grain for a profit public warehouses, and fixed a storage rate. The case is important. It extended the principle of the other two cases and denuded it of the limiting element which was supposed to beset it,—that to justify regulation of a business the business must have a monopolistic character. That distinction was pressed and answered. It was argued, the court said, "that the statutes of Illinois and New York [passed on in the *Munn* and *Budd* Cases] are intended to operate in great trade centers, where, on account of the business being localized in the hands of a few persons in close proximity to each other, great opportunities for combinations to raise and control elevating and storage charges are afforded, while the wide extent of the state of North Dakota and the small population of its country towns and villages are said to present no such opportunities." And it was also urged that the method of carrying on business in North Dakota and the Eastern cities was different, that the elevators in the latter were essentially means of transporting grain from the lakes to the railroads, and those who owned them could, if

uncontrolled by law, extort such charges as they pleased, and stress was laid upon the expression in the other cases which represented the business as a practical monopoly. A contrast was made between those conditions and those which existed in an agricultural state where land was cheap and limitless in quantity. It was replied that this difference in conditions was "for those who make, not for those who interpret, the laws." And considering the expressions in the other cases which, it was said, went rather to the expediency of the laws than to their validity, yet, it was further said, the expressions had their value because the "obvious aim of the reasoning that prevailed was to show that the subject-matter of these enactments fell within the legitimate sphere of legislative power, and that so far as the laws and Constitution of the United States were concerned, the legislation in question deprived no person of his property without due process of law."

The cases need no explanatory or fortifying comment. They demonstrate that a business, by circumstances and its nature, may rise from private to be of public concern, and be subject, in consequence, to governmental regulation. And they demonstrate, to apply the language of Judge Andrews in the *Budd Case* (117 N. Y. 27, 5 L.R.A. 559, 15 Am. St. Rep. 460, 22 N. E. 670), that the attempts made to place the right of public regulation in the cases in which it has been exerted, and of which we have given examples, upon the ground of special privilege conferred by the public on those affected, cannot be supported. "The underlying principle is that business of certain kinds hold such a peculiar relation to the public interest that there is superinduced upon it the right of public regulation." Is the business of insurance within the principle? It would be a bold thing to say that the principle is fixed, inelastic, in the precedents of the past, and cannot be applied though modern economic conditions may make necessary or beneficial its application. In other words, to say that government possessed at one time a greater power to recognize the public interest in a business and its regulation to promote the general welfare than government possesses to-day. We proceed, then, to consider whether the business of insurance is within the principle.

A contract for fire insurance is one for indemnity against loss, and is personal. The admission, however, does not take us far in the solution of the question presented. Its personal character certainly does not of itself preclude regulation, for there are many examples of government regu-

lation of personal contracts, and in the statutes of every state in the Union superintendence and control over the business of insurance are exercised, varying in details and extent. We need not particularize in detail. We need only say that there was quite early (in Massachusetts, 1837, New York, 1853) state provision for what is known as the unearned premium fund or reserve; then came the limitation of dividends, the publishing of accounts, valued policies, standards of policies, prescribing investment, requiring deposits in money or bonds, confining the business to corporations, preventing discrimination in rates, limitation of risks, and other regulations equally restrictive. In other words, the state has stepped in and imposed conditions upon the companies, restraining the absolute liberty which businesses strictly private are permitted to exercise.

Those regulations exhibit it to be the conception of the lawmaking bodies of the country without exception that the business of insurance so far affects the public welfare as to invoke and require governmental regulation. A conception so general cannot be without cause. The universal sense of a people cannot be accidental; its persistence saves it from the charge of unconsidered impulse, and its estimate of insurance certainly has substantial basis. Accidental fires are inevitable and the extent of loss very great. The effect of insurance—indeed, it has been said to be its fundamental object—is to distribute the loss over as wide an area as possible. In other words, the loss is spread over the country, the disaster to an individual is shared by many, the disaster to a community shared by other communities; great catastrophes are thereby lessened, and, it may be, repaired. In assimilation of insurance to a tax, the companies have been said to be the mere machinery by which the inevitable losses by fire are distributed so as to fall as lightly as possible on the public at large, the body of the insured, not the companies, paying the tax. Their efficiency, therefore, and solvency, are of great concern. The other objects, direct and indirect, of insurance, we need not mention. Indeed, it may be enough to say, without stating other effects of insurance, that a large part of the country's wealth, subject to uncertainty of loss through fire, is protected by insurance. This demonstrates the interest of the public in it, and we need not dispute with the economists that this is the result of the "substitution of certain for uncertain loss," or the diffusion of positive loss over a large group of persons, as we have already said to be certainly one of its effects. We can see, therefore, how it has come to be con-

sidered a matter of public concern to regulate it, and governmental insurance has its advocates and even examples. Contracts of insurance, therefore, have greater public consequence than contracts between individuals to do or not to do a particular thing whose effect stops with the individuals. We may say in passing that when the effect goes beyond that, there are many examples of regulation. *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Griffith v. Connecticut*, 218 U. S. 503, 54 L. ed. 1151, 31 Sup. Ct. Rep. 132; *Muller v. Oregon*, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957; *Mutual Loan Co. v. Martell*, 222 U. S. 225, 56 L. ed. 175, 32 Sup. Ct. Rep. 74, Ann. Cas. 1913B, 529; *Schmidinger v. Chicago*, 228 U. S. 578, 57 L. ed. 364, 33 Sup. Ct. Rep. 182; *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259; *Noble State Bank v. Haskell*, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A. (N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487.

Complainant feels the necessity of accounting for the regulatory state legislation and refers it to the exertion of the police power; but, while expressing the power in the broad language of the cases, seeks to restrict its application. Counsel states that this power may be exerted to "pass laws whose purpose is the health, safety, morals, and the general welfare of the people." The admission is very comprehensive. What makes for the general welfare is necessarily in the first instance a matter of legislative judgment, and a judicial review of such judgment is limited. "The scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative considerations in dealing with the matter of *policy*. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance." *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 540, 569, 55 L. ed. 328, 339, 31 Sup. Ct. Rep. 259.

The restrictions upon the legislative power which complainant urges we have discussed, or rather, the considerations which take, it is contended, the business of insurance outside of the sphere of the power. To the contention that the business is private we have opposed the conception of the public interest. We have shown that the business

of insurance has very definite characteristics, with a reach of influence and consequence beyond and different from that of the ordinary businesses of the commercial world, to pursue which a greater liberty may be asserted. The transactions of the latter are independent and individual, terminating in their effect with the instances. The contracts of insurance may be said to be interdependent. They cannot be regarded singly, or isolatedly, and the effect of their relation is to create a fund of assurance and credit, the companies becoming the depositories of the money of the insured, possessing great power thereby, and charged with great responsibility. How necessary their solvency is, is manifest. On the other hand, to the insured, insurance is an asset, a basis of credit. It is practically a necessity to business activity and enterprise. It is, therefore, essentially different from ordinary commercial transactions, and, as we have seen, according to the sense of the world from the earliest times,—certainly the sense of the modern world,—is of the greatest public concern. It is therefore within the principle we have announced.

But it is said that the reasoning of the opinion has the broad reach of subjecting to regulation every act of human endeavor and the price of every article of human use. We might, without much concern, leave our discussion to take care of itself against such misunderstanding or deductions. The principle we apply is definite and old, and has, as we have pointed out, illustrating examples. And both by the expression of the principle and the citation of the examples we have tried to confine our decision to the regulation of the business of insurance, it having become "clothed with a public interest," and therefore subject "to be controlled by the public for the common good."

If there may be controversy as to the business having such character, there can be no controversy as to what follows from such character if it be established. It is idle, therefore, to debate whether the liberty of contract guaranteed by the Constitution of the United States is more intimately involved in price regulation than in the other forms of regulation as to the validity of which there is no dispute. The order of their enactment certainly cannot be considered an element in their legality. It would be very rudimentary to say that measures of government are determined by circumstances, by the presence or imminence of conditions, and of the legislative judgment of the means or the policy of removing or preventing them. The power to regulate interstate commerce existed for a century before the interstate commerce act was passed, and the Commission constituted

by it was not given authority to fix rates until some years afterwards. Of the agencies which those measures were enacted to regulate at the time of the creation of the power, there was no prophesy or conception. Nor was regulation immediate upon their existence. It was exerted only when the size, number, and influence of those agencies had so increased and developed as to seem to make it imperative. Other illustrations readily occur which repel the intimation that the inactivity of a power, however prolonged, militates against its legality when it is exercised. *United States ex rel. Atty. Gen. v. Delaware & H. Co.* 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527. It is oftener the existence of necessity rather than the prescience of it which dictates legislation. And so with the regulations of the business of insurance. They have proceeded step by step, differing in different jurisdictions. If we are brought to a comparison of them in relation to the power of government, how can it be said that fixing the price of insurance is beyond that power and the other instances of regulation are not? How can it be said that the right to engage in the business is a natural one when it can be denied to individuals and permitted to corporations? How can it be said to have the privilege of a private business when its dividends are restricted, its investments controlled, the form and extent of its contracts prescribed, discriminations in its rates denied, and a limitation on its risks imposed? Are not such regulations restraints upon the exercise of the personal right—asserted to be fundamental—of dealing with property freely, or engaging in what contracts one may choose, and with whom and upon what terms one may choose?

We may venture to observe that the price of insurance is not fixed over the counters of the companies by what Adam Smith calls the higgling of the market, but formed in the councils of the underwriters, promulgated in schedules of practically controlling constancy which the applicant for insurance is powerless to oppose, and which, therefore, has led to the assertion that the business of insurance is of monopolistic character and that "it is illusory to speak of a liberty of contract." It is in the alternative presented of accepting the rates of the companies or refraining from insurance, business necessity impelling if not compelling it, that we may discover the inducement of the Kansas statute; and the problem presented is whether the legislature could regard it of as much moment to the public that they who seek insurance should no more be constrained by arbitrary terms than they who seek transportation by railroads, L.R.A.1916C.

steam, or street, or by coaches whose itinerary may be only a few city blocks, or who seek the use of grain elevators, or to be secured in a night's accommodation at a wayside inn, or in the weight of a 5 cent loaf of bread. We do not say this to belittle such rights or to exaggerate the effect of insurance, but to exhibit the principle which exists in all and brings all under the same governmental power.

We have summarized the provisions of the Kansas statute, and it will be observed from them that they attempt to systematize the control of insurance. The statute seeks to secure rates which shall be reasonable both to the insurer and the insured, and as a means to this end it prescribes equality of charges, forbids initial discrimination or subsequently by the refund of a portion of the rates, or the extension to the insured of any privilege; to this end it requires publicity in the basic schedules and of all of the conditions which affect the rates or the value of the insurance to the insured, and also adherence to the rates as published. Whether the requirements are necessary to the purpose, or—to confine ourselves to that which is under review—whether rate regulation is necessary to the purpose, is a matter for legislative judgment, not judicial. Our function is only to determine the existence of power.

The bill attacks the statute of Kansas as discriminating against complainant because the statute excludes from its provisions farmers' mutual insurance companies, organized and doing business under the laws of the state and insuring only farm property. The charge is not discussed in the elaborate brief of counsel, nor does it seem to have been pressed in the lower court, it is, however, covered by the assignments of error.

The provision of the statute is, "That nothing in this act shall affect farmers' mutual insurance companies, organized and doing business under the laws of this state, and insuring only farm property." The distinction is therefore between co-operative insurance companies insuring a special kind of property and all other insurance companies. It is only with that distinction that we are now concerned. There are special provisions in the statutes of Kansas for the organization of co-operative companies, and if the statute under review discriminates between them the German Alliance Company cannot avail itself of the discrimination. A citation of cases is not necessary, nor for the general principle that a discrimination is valid if not arbitrary, and arbitrary in the legislative sense, that is, outside of that wide discretion which a legislature may exercise. A legislative

classification may rest on narrow distinctions. Legislation is addressed to evils as they may appear, and even degrees of evil may determine its exercise. *Ozan Lumber Co. v. Union County Nat. Bank*, 202 U. S. 623, 50 L. ed. 1176, 26 Sup. Ct. Rep. 768. There are certainly differences between stock companies, such as complainant is, and the mutual companies described in the bill, and a recognition of the differences we cannot say is outside of the constitutional power of the legislature. *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281.

Decree affirmed.

Mr. Justice Lamar, dissenting:

I dissent from the decision and the reasoning upon which it is based. The case does not deal with a statute affecting the safety or morals of the public. It presents no question of monopoly in a prime necessity of life, but relates solely to the power of the state to fix the price of a strictly personal contract. The court holds that fire insurance, though personal, is affected with a public interest, and therefore that the business may not only be regulated, but that the premium or price to be paid to the insurer for entering into that personal contract can be fixed by law.

The fixing of the price for the use of private property is as much a taking as though the fee itself had been condemned for a lump sum; that taking, whether by fixing rates for the use or by paying a lump sum for the fee, has always heretofore been thought to be permissible only when it was for a public use. But the court in this case holds that there is no distinction between the power to take for public use and the power to regulate the exercise of private rights for the public good. That is the fundamental proposition on which the case must stand, and the decision must therefore be considered in the light of that ruling and of the results which must necessarily flow from the future application of that principle. For if the power to regulate, in the interest of the public, comprehends what is intended in the power to take property for public use, it must inevitably follow that the price to be paid for any service or the use of any property can be regulated by the general assembly. This is so because the power of regulation is all-pervading, as witness the statute of frauds, the recording acts, weight and measure laws, pure food laws, hours of service laws, and innumerable other enactments of that class. And if this power be as extensive as is now, for the first time, decided, then the citizen holds his property and his individual right of contract and of

labor under legislative favor rather than under constitutional guaranty. The principle is applied here to the case of insurance; but the nature of that business and the intangible character of its contracts are such as to indicate the far-reaching effect of the principle announced, and warrants a statement of some of the grounds of dissent.

Insurance is not production; nor manufacture; nor transportation; nor merchandise. And this court in *New York L. Ins. Co. v. Deer Lodge Co.* at the present term [231 U. S. 495, 58 L. ed. 332, 34 Sup. Ct. Rep. 167] reaffirmed its previous rulings that "insurance is not commerce," "not an instrumentality of commerce," "not a transaction of commerce," "but simply contracts of indemnity against loss by fire." Such a contract is personal, and in the state whose statute is under consideration, insurance companies are classed among those "strictly private." *Leavenworth County v. Miller*, 7 Kan. 520, 12 Am. Rep. 425. The fact that insurance is a strictly private and a personal contract of indemnity puts it on the extreme outside limit, and removes it as far as any business can be from those that are in their nature public. So that if the price of a private and personal contract of indemnity can be regulated,—if the price of a chose in action can be fixed,—then the price of everything within the circle of business transactions can be regulated. Considering, therefore, the nature of the subject treated and the reasoning on which the court's opinion is based, it is evident that the decision is not a mere entering wedge, but reaches the end from the beginning, and announces a principle which points inevitably to the conclusion that the price of every article sold and the price of every service offered can be regulated by statute.

And such laws are not without English precedent. For while no statute ever before attempted to fix the price of a contract of indemnity,† yet under a Parliament that sat as a perpetual constitutional convention, with power to pass bills of attainder to take property for private purposes, and to take it without due process of law, many statutes approaching that now under review were adopted and enforced. Acts were passed by Parliament fixing the price of many commodities that were convenient or useful. These laws did not stop at fixing the price of property, but, like the present act, they fixed the price of private contracts, and by statute prescribed the rate of wages, and made it unlawful for the em-

†The statute fixing the premium rates on surety bonds was held to be void in *American Surety Co. v. Shallenberger*, 183 Fed. 636.

ployee to receive or for the employer to give more than the wage fixed by law. It is needless to say that these laws were felt to be an infringement upon the rights of men; that they were bitterly resisted by buyer and seller, by employer and employee, and were a source of perpetual irritation often leading to violence. But the fact that the English Parliament had the arbitrary power to pass such statutes made them valid in law, though they were in violation of the inherent rights of individual. In time, the great injustice in this was so far recognized that these laws, fixing the price of strictly private contracts, seem to have been repealed, and Lord Ellenborough, while enforcing, as proper, a rate for public wharves, was able to say, in *Allnutt v. Inglis*, 12 East, 535, "that the general principle is favored that every man may fix whatever price he pleases for his own property or for the use of it." But what was a favor in England, that might at any time be withdrawn, was in this country made a constitutional right that could not be withdrawn. For although the practice of fixing prices may have prevailed in some of the colonies "up to the time of independence," yet, as Judge Cooley says, since independence "it has been commonly supposed that a general power in the state to regulate prices was inconsistent with constitutional liberty." Cooley, *Const. Lim.* 7th ed. 807; *Stickney, State Control of Trade*, p. 3, and the abstract of English price-fixing statutes, pp. 9 et seq. That common supposition is rightly founded on the fact that the Constitution recognizes the liberty to contract and right of private property. They include not only the right to make contracts with which to acquire property, but the right to fix the price of its use while it is held, and the further right to fix the price if it is to be sold. To deprive any person of either is to take property, since there can be no liberty of contract and true private ownership if the price of its use or its sale is fixed by law. That right is an attribute of ownership. *State Freight Tax Case*, 15 Wall. 278, top, 21 L. ed. 162.

But it may be said that, though insurance is a contract of indemnity, and personal, its personal character has not been thought to preclude the many regulatory measures adopted and sustained during the past hundred years.

This is most freely conceded. But it is equally true that the failure for more than one hundred years to attempt to fix the rates of insurance is indubitable evidence of the general public and legislative conception that the business of insurance did not belong to the class whose rates could be fixed. That settled usage is not L.R.A.1915C.

an accident. For rate-making is no new thing, and neither is insurance. Its use in protecting the owner of property against loss; its value as collateral in securing loans; its method of averages and distributing the risk between many persons widely separated, and all contributing small premiums in return for the promise of a large indemnity, has been known for centuries. All these considerations were recently pressed upon the court in an effort to secure a ruling that insurance was commerce. In refusing to accede to the sufficiency of the argument, the court, in the *Deer Lodge Case*, pointed out that the size of the business of insurance did not change the inherent nature of the business itself, saying that "the number of transactions do not give the business any other character than magnitude."

The character of insurance, therefore, as a private and personal contract of indemnity, has, not been changed by its magnitude or by the fact that more policies and for greater amounts are now written than in the centuries during which no effort has ever before been made to fix their rates. It is, however, undoubtedly true that during all of that period *regulatory statutes* were, from time to time, adopted to protect the public against conditions and practices which were subject to regulation. The public had no means of knowing whether these corporations were solvent or not, and statutes were passed to require a publication of the financial condition. The policies were long and complicated, with exceptions and qualifications and provisos. They were often unread by the policy holder and sometimes not understood when read. Statutes were accordingly passed providing for a standard form of policy in order to protect the assured against his inexperience, to prevent hard bargains, and to avoid vexatious litigations; and as similar evils appear they may be dealt with by regulatory or prohibitory legislation just as statutes were passed, and can still be passed to punish combinations, pooling arrangements, and all those practices which amount to unfair competition.

But these and those referred to in *McCarter v. Firemen's Ins. Co.* 74 N. J. Eq. 372, 29 L.R.A.(N.S.) 1194, 135 Am. St. Rep. 708, 73 Atl. 80, 414, 18 Ann. Cas. 1048, furnish instances of the exercise of this power to regulate which can be exerted against any person, trade, or business, no matter great or small. This power to regulate is so much oftener exerted against the large business, because the evils are then more apparent, that the size of the business and the number of persons interested is sometimes referred to as indicating that

the business is affected with a public interest. But there is no such limitation. For the power to regulate is the essential power of government which can be exerted against the whole body of the public or the smallest business. And if, as seems to be implied, the fact that a business may be regulated is to be the test of the power to fix rates, it would follow, since all can be regulated, the price charged by all can be regulated. Or if great size is the test, if the number of customers is the test, if the scope of the business throughout the nation is the test, if the contributions of the many to the value of the business is the test,—or if it takes a combination of all to meet the condition,—then every business with great capital and many customers distributed throughout the country, and making a large business possible, must be treated as affected with a public interest, and the price of the goods on its shelves can be fixed by law. Then could the price of newspapers, magazines, and the like be fixed, because certainly nothing is more affected with a public interest, nothing is so dependent on the public, nothing reaches so many persons, and so profoundly affects public thought and public business. Such a business is, indeed, affected with a public interest,—justifying regulation (Lewis Pub. Co. v. Morgan, 229 U. S. 288, 57 L. ed. 1190, 33 Sup. Ct. Rep. 867), but not the fixing of the price of the paper or periodical or the rates of advertising. For great and pervasive as is the power to regulate, it cannot override the constitutional principle that private property cannot be taken for private purposes. Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130. That limitation on the power of government over the individual and his property cannot be avoided by calling an unlawful taking a reasonable regulation. Indeed, the protection of property is an incident of the more fundamental and important right of liberty guaranteed by the Constitution, and which entitled the citizen freely to engage in any honest calling, and to make contracts as buyer or seller, as employer or employee, in order to support himself and family.

It said, however, that the validity of rate statutes has often been recognized, notably in the Munn Case (94 U. S. 126, 24 L. ed. 84), where a statute was sustained which regulated the price to be charged for storing grain in elevators.

The Munn Case is a landmark in the law. It is accepted as an authoritative and accurate statement of the principle on which the right to fix rates is based. But the statute there under review did not undertake to fix the price of a personal contract,

but to fix the price for the use of property, once private, but then public. The reasoning of the court clearly shows that in order to regulate rates, two things must concur—(1) the business must be affected with a public interest; and (2) the property employed in such business must be devoted to a public use. The basic principle of the decision was the oft-quoted saying of Lord Hale that “when private property is ‘affected with a public interest, it ceases to be *juris privati* only.’” The decision in the Munn Case was but an application of that terse statement, and was applied in a case where the elevators had been devoted to a public use. This will distinctly appear from the statement by the court of the question involved and decided. For after reviewing and applying Lord Hale’s pithy saying, and reviewing the other authorities, the court said (italics ours):

“Enough has already been said to show that when private property is devoted to a public use it is subject to public regulation. It remains only to ascertain whether the warehouses of these plaintiffs in error and the business which is carried on there come within the operation of this principle.”

Not only does the Munn Case show that the right to fix prices depends on the concurrence of public interest and the employment of property devoted to a public use, but, with the exception of the Louisiana Bread Case, *Guillotte v. New Orleans*, 12 La. Ann. 432, it is believed that every American rate statute since the requirement that property should not be taken without due process of law related to a business which was public in its character and employed visible and tangible property which had been devoted to a public use.

The list of rate-regulated occupations is not too long to be here given. It includes canals, waterways, and booms; bridges and ferries; wharves, docks, elevators, and stock-yards; telegraph, telephone, electric, gas, and oil lines; turnpikes, railroads, and the various forms of common carriers, including express and cabs. To this should be added the case of the innkeeper (as to which no American case has been found where the constitutional question as to the right to fix his rates has been considered), the confessedly close case of the irrigation ditches for distributing water (193 U. S. 379), and the toll mill acts. This, of course, does not include the case of condemnation for governmental purposes or for roads and ways where no question of rates is involved. There may be other instances not found, but it is believed that the foregoing enumeration exhausts the list of what has heretofore been treated as a public business justifying

the exercise of the price-fixing power against persons or corporations.

It is to be noted that in each instance the power to regulate rates is exercised against a business which in every case used tangible property devoted to a public use. Some of them had a monopoly (*Spring Valley Waterworks v. Schottler*, 110 U. S. 354, 28 L. ed. 176, 4 Sup. Ct. Rep. 48). Some of them had franchises. Most of them used public ways or employed property which they had acquired by virtue of the power of eminent domain. They were therefore subject to the correlative obligation to have the use, of what had been thus taken by law fixed by law. And as further pointing out the characteristics of the public use justifying the fixing of prices, it will be noted that, with the exception of toll mills (which, however, to employ property devoted to a public use), they all have direct relation to the business or facilities of transportation or distribution,—to transportation by carriers of passengers, goods, or intelligence by vehicle or wire; to distribution of water, gas, or electricity through ditch, pipe, or wire; to wharfage, storage, or accommodation of property before the journey begins, when it ends, or along the way.

When thus enumerated, they appear to be grouped around the common carrier as the typical public business, and all employing in some way property devoted to a public use.

It will be seen, too, that the size of the business is unimportant, for the fares of a cabman, employing a broken-down horse and a dilapidated vehicle, can be fixed by law as well as the rates of a railroad with millions of capital and thousands of cars transporting persons and property across the continent.

The fact that rate statutes, enacted and sustained since the adoption of constitutional government in this country, all had some reference to transportation or distribution, is a practical illustration of the accepted meaning of "public use" when that phrase was first employed in American Constitutions, and when turnpikes and carriers, wharfingers and ferrymen, had rates, tolls, and fares fixed by law. No change was made in the meaning of the words or in the principle involved when it opened to take in new forms and facilities of transportation, whether by vehicle, pipe, or wire, and new forms of storage, whether on the wharf or in the grain elevator.

But it is said that business is the fundamental thing, with the property but an instrument, and that there is no basis for the distinction between a public interest and a public use. But there is a distinction

between a public interest—justifying regulation—and a public use—justifying price fixing. "Public interest and public use are not synonymous." *Re Niagara Falls & W. R. Co.* 108 N. Y. 385, 15 N. E. 429. And since the case here involves the validity of a Kansas statute, it is well to note that the supreme court of that state in *Howard Mills Co. v. Schwartz Lumber & Coal Co.* 7 Kan. 599, 18 L.R.A.(N.S.) 356, 95 Pac. 559, recognizes that there is a difference, and adjudges accordingly. It there cited numerous decisions from other states, and in defining a public use made the following quotation from the opinion of the supreme court of Maine:

"Property is devoted to a public use when, and only when, . . . all the public has a right to demand and share in' [it] . . . In a broad sense it is the right in the public to an actual use, and not to an incidental benefit."

The effect of the difference between public use and public interest appears from the application; for the supreme court of Kansas, on the authority of this and numerous other cases, held that a steam flour mill was not such a public use as would authorize its owners to exercise the power of eminent domain, though it was a useful and important business instrumentality which contributed to the growth and development of the locality where the [mills] are situated. This may also be said, however, of every legitimate business. To a limited extent every honest industry adds to the general sum of prosperity and promotes the public welfare.

Nothing more can be said of insurance—nor can the power to take the private property of insurers by fixing rates be enlarged by a legislative declaration that the business is affected with a broad and definite public interest. For since the contract of insurance is private and personal, it is almost a contradiction in terms to say that the private contract is public, or that a business which consists in making such private contracts is public in the constitutional sense. The fundamental idea of a public business, as well declared by the supreme court of Kansas (77 Kan. 608), is that "all of the public have a right to demand and share in it." That means that each member of the public, on demand and upon equal terms, without written contract, without haggling as to terms, may demand the public service, and secure the use of the facility devoted to public use. If the company can make distinctions and serve one and refuse to serve another, the business *ex ci termini* is not public. The common carrier has no right to refuse to haul a passenger even if he has been convicted of

arson. But if an insurance company is indeed public, it is bound to insure the property of the man who is suspected of having set fire to his own house, or whose statements of value it is unwilling to take. This is manifestly inconsistent with the contract of insurance, which requires the utmost good faith, not only in making truthful answers to questions asked, but in not concealing anything material to the risk. If the company has the discretion to insure or the right to refuse to insure, then, by the very definition of the terms, it is not a public business. If, on the other hand, the company is obliged to insure bad risks or the property of men of bad character, of doubtful veracity, or known to be careless in their handling of property, the law would be an arbitrary exertion of power in compelling men to enter into contract with persons with whom they did not choose to deal where confidence is the very foundation of a contract of indemnity. Indeed, it seems to be conceded that a person owning property is not entitled to demand insurance as a matter of right. If not, the business is not public, and not within the provision of the Constitution which only authorizes the taking of property for public purposes—whether the taking be of the fee, for a lump sum assessed in condemnation proceedings, or whether the use be taken by rate regulation, which is but another method of exercising the same power.

The suggestion that the public interest is found in the characteristics of the business of insurance justifies a brief examination of those characteristics and a statement of the results that logically must follow from such a test. For if the power is to develop out of the characteristics, it must necessarily follow that other occupations, having similar characteristics, must be subject to the same rate regulating power.

The elements which are said to show that insurance is affected with a public interest do not arise out of the size of any one company, but out of the volume of the aggregate business of all the companies doing business within the state and beyond its borders. If that test be applied, and if the sum of the units is to determine whether or not a business is affected with a public interest (which is said to be the equivalent of a public use), then if the principle of the decision be applied to the business of forming, all can see to what end it leads. In view of the amount of property employed and the aggregate number of persons engaged in agriculture, and the public's absolute dependence upon that pursuit, it would follow that, farming being affected with a broad and definite public interest, the price of wheat and corn; cotton and

wools; beef, pork, mutton, and poultry; fruit and vegetables,—could be fixed. Or if we take the aggregate of those who labor, and consider the public's absolute dependence upon labor, it would inevitably follow that it, too, was affected with a broad and definite public interest, and that wages in the United States of America in this 20th century could be fixed by law, just as in England between the 14th and 18th centuries. And inasmuch as the prices of agricultural products are dependent on the price of land and labor, and as the price of labor is closely related to the cost of rent and food and clothes and the comforts of life, there would be the power to take the further step and regulate the cost of everything which enters into the cost of living. Of course, it goes without saying that if the rates for fire insurance can be fixed, then the rates for life and marine insurance can be fixed. By a parity of reasoning, the rates of accident, guaranty, and fidelity insurance could also be regulated. There seems no escape from the conclusion that the asserted power to fix the price to be paid by one private person to another private person or private corporation for a private contract of indemnity, or for his product, or his labor, or for his private contracts of any sort, will become the center of a circle of price-making legislation that, in its application, will destroy the right of private property, and break down the barriers which the Constitution has thrown around the citizen to protect him in his right of property,—which includes his right of contract to make property,—his right to fix the price at which his property shall be used by another. By virtue of the liberty which is guaranteed by the Constitution, he also has the right to name the wage for his labor and to fix the terms of contracts of indemnity,—whether they be contracts of indorsement or suretyship, or contracts of indemnity against loss by fire, flood, or accident.

In view of what Judge Cooley calls the general supposition that "the right to fix prices was inconsistent with constitutional liberty," it is not surprising that little is to be found in the books relating to a statute like this. It is, however, somewhat curious that among the few expressions to be found on the subject is the intimation by Lord Ellenborough in *Allnutt v. Inglis*, 12 East, 535, that insurance rates were not on the same basis as a public business using property devoted to a public use. For in answering the argument that if the rates of a public wharf could be fixed, insurance rates could also be fixed, he clearly intimates that this could not be done, since the wharf was a monopoly, and "the busi-

ness of insurance and of counting-houses may be carried on elsewhere."

In the following cases the statutes fixing prices have been held to be void: *Ex parte Dickey*, 144 Cal. 234, 66 L.R.A. 928, 103 Am. St. Rep. 82, 77 Pac. 924, 1 Ann. Cas. 428, fixing the price to be charged by an employment bureau; *Ex parte Quarg*, 149 Cal. 79, 5 L.R.A.(N.S.) 183, 117 Am. St. Rep. 115, 84 Pac. 766, 9 Ann. Cas. 747; *People v. Steele*, 231 Ill. 340, 14 L.R.A.(N.S.) 361, 121 Am. St. Rep. 321, 83 N. E. 236, prohibiting the sale of theater tickets at a price higher than that charged by the theater; *State v. Fire Creek Coal & Coke Co.* 33 W. Va. 188, 6 L.R.A. 359, 25 Am. St. Rep. 891, 10 S. E. 288, limiting the profits on sales to employees. See also *State v. McCool*, 83 Kan. 430, 111 Pac. 477, where, in sustaining a statute regulating the weight of bread, the court called attention to the fact that the statute did not attempt to fix the price. To these could be added a multitude of decisions showing that the power to regulate is limited by the constitutional prohibition against the taking of private property. *Guillotte v. New Orleans*, 12 La. Ann. 432, is the only American case found which sustains the right to fix prices for other than a commodity or service furnished by a public utility company of the kind already pointed out. In that case the court said that the city could fix the price of bread, and that if the baker did not desire to do business within the limits of such city, he could go elsewhere. That reasoning would support any statute, for every citizen at least has the right to go out of business. But it has been repeatedly held by this court that such an answer cannot sustain an invalid statute, the Constitution being intended to secure the citizen against being driven out of business by an unconstitutional statute or regulation.

There is, in the opinion, an allusion to usury laws as instances of fixing rates for other than public service corporations. We do not understand that the opinion is founded on that proposition, for even the usury laws do not fix a flat rate, but only a maximum rate, and do not require lenders to make loans to all borrowers, similarly situated, at the same rate of interest. Moreover, interest laws were in their inception not a restriction upon the right of contract, but an enlargement, permitting what theretofore had been regarded both as an ecclesiastical and civil offense. This fact may have been coupled with the idea that as the sovereign had the prerogative to coin money L.R.A.1915C.

and make legal tender for all claims, he could fix the price that should be charged for the use of that money.

At any rate, interest laws had been long recognized before the Constitution, and have been prevalent ever since. They therefore fall within the rule that contemporary practice, if subsequently continued and universally acquiesced in, amounts to an interpretation of the Constitution. But the same character of long-continued acquiescence and settled usage that sustains a usury law also sustains the right of the contracting parties to agree upon the charge for insurance. For centuries before the Constitution, and continuously ever since, they have themselves fixed this charge, and this makes most strongly in favor of their right to continue to agree upon the price of a private contract of indemnity against loss by fire.

The act now under review not only takes property without due process of law, but it unequally and arbitrarily selects those from which such property shall be taken by price fixing. Although including all other fire insurance companies, it excepts certain mutual insurance companies. *Persons* engaged in doing an insurance business are not within its terms. In Kansas, the right to do a fire insurance business is not limited to corporations, but may be conducted by persons, individuals, partners, companies, and associations, whether incorporated or not. Gen. Stat. (Kan.) (1909) §§ 4086, 4091, 4122. And if it could be true that the legislature could fix the price of insurance, it would seem to be doubly necessary that all doing an insurance business should be treated alike. There is no difference in principle and none by statute in the character of the contract, whether it is made by one man, or the Lloyds, or a corporation. There is no difference in the character of the contract made by a stock company and a mutual company. In each instance the contract is one of indemnity against loss or a fixed premium. If the policy holder is a stockholder in an ordinary corporation, he may get back some of his premium by way of dividends; if he is a member of a mutual company, he pays his premium and gets back his share of the earnings. But to say that the state may fix the price to be charged for insurance by a stock company, and that it will not fix the price to be charged by mutual companies or by the Lloyds, who do an enormous business of exactly the same nature, on exactly the same sort of property, and on exactly the same terms, is to make a dis-

crimination which amounts to a denial of the equal protection of the law.

Mr. Chief Justice White and Mr. Justice Van Devanter concur in this dissent.

Mr. Justice Lurton was not present when this case was argued, and took no part in its decision.

KENTUCKY COURT OF APPEALS.

R. H. EDELEN, Appt.,

v.

DORA HERMAN, by Next Friend.

(102 Ky. 500, 172 S. W. 936.)

Evidence — of customary rate of wages — dispute as to contract rate.

In case of a conflict between the parties as to the wages to be paid under a contract

Note. — Evidence of value of services or of customary compensation on question as to amount agreed upon.

I. Introductory, 1208.

II. Evidence of custom, 1209.

III. Evidence of value.

a. In general.

1. The general rule, 1213.

2. Contrary doctrine, 1217.

b. Evidence that a certain price meant profit or loss, 1217.

c. Evidence as to cost or expense, 1218.

d. Employee's value to other employers, 1219.

IV. Miscellaneous, 1219.

I. Introductory.

The parties agree that there is a contract for services fixing the compensation, but they differ as to what that compensation is, the employee claiming it is a certain amount, the employer that it is a certain less amount; may either or both of them show the customary compensation for similar services, or the value of such or similar services, not as responsive to the issue, but as bearing upon the probabilities of the evidence given on the one side or the other? By the weight of authority, evidence of value is admissible under such circumstances, but the tendency seems to be to exclude evidence of custom.

Of course, those cases where the evidence was admitted simply as relevant to a possible recovery on a *quantum meruit* are of no value on the question, but cases where the evidence was admitted not only as relevant to a possible recovery on a *quantum meruit*, but also as bearing on the probability of the various compensations alleged by the two parties, are included in this note. Cases are excluded where the evi-

for domestic service, evidence of the customary rate for such service is admissible to aid the jury in determining what the rate fixed actually was.

(February 3, 1915.)

APPEAL by defendant from judgment of Common Pleas Branch, Fourth Division, of the Circuit Court for Jefferson County, in plaintiff's favor in an action brought to recover a balance alleged to be due under the terms of a parol contract for domestic services rendered by plaintiff. Reversed.

The facts are stated in the opinion.

The authorities relied upon by Messrs. Shield, Campbell, & McAtee, for appellant, are as follows:

Anderson v. Arpin Hardwood Lumber Co., 131 Wis. 34, 110 N. W. 788; Cox v. Polk, 139 Mo. App. 264, 123 S. W. 102; Leasuf v. Boie, 142 Iowa, 284, 120 N. W. 643; Richardson v. McGoldrick, 43 Mich. 476, 5

dence offered related to the rate of compensation paid the employee under a former employment by the same employer, or by an employer whose business had been acquired by the defendant.

This note does not include cases of re-forming contracts on account of a mistake, wherein evidence of customary price was offered to show that a mistake was made in the written contract. See Mercer v. Hickman-Ebbert Co. 32 Ky. L. Rep. 230, 105 S. W. 441.

It has been suggested in at least one case that if any evidence is admissible upon the question of value, it should relate to the value contemplated at the time of the contract, and not to the value of the services actually rendered. Thus, in Shakespeare v. Baughman, 113 Mich. 551, 71 N. W. 874, where a lawyer declared upon an express contract to pay him a certain sum to obtain the appointment of a guardian for an incompetent, it was held that there was no error in excluding evidence to show that the plaintiff was a lawyer of limited practice and experience, and that the labor performed was light in comparison to the alleged contract price. The court apparently considered that if the evidence was admissible at all it would not be to show the value of the services rendered, but the value of the services contemplated by the contract.

Allegation that the services are worth the agreed price.

While it is not intended in this note to include cases where evidence of custom or value is admitted as relevant to a recovery on *quantum meruit*, it may be noticed that such evidence has been held admissible where the complaint, besides setting up a contract for services at a fixed price, alleges that the services were worth such price. Sturgis v. Hendricks, 51 N. Y. 635

N. W. 672; 9 Cyc. 769, and 3 Enc. Ev. 519, and cases cited in the opinion.

Messrs. E. C. Wurtele and Samuel J. Levy for appellee.

Turner, J., delivered the opinion of the court:

Dora Herman, by her next friend, A. Herman, instituted this action against appellant for a balance claimed under the terms of an express parol contract for domestic services rendered by her in appellant's home for forty-nine weeks at the contract price of \$10 per week.

Appellant answered, not denying the rendition of the services, but claiming they were rendered under another and different contract, by the terms of which he was to pay appellee \$8 per month and her board and lodging for such services, and that same had been fully paid.

Appellee is a German girl who, at the time of the contract, had been in this coun-

try only a short time, was only sixteen years of age, and spoke very little English. Her father came to this country with her from Germany, and he likewise spoke English very indifferently. The father claimed to be a distiller, and, hearing that appellant was the owner or the manager of two distilleries, sought him upon several occasions with a view of procuring employment for himself. Upon one of these occasions it developed that he had this daughter, for whom he desired to procure employment as a domestic in a home where she would be protected from the temptations of the city.

It is the theory of the plaintiff that, at the time of the employment of the daughter by appellant, he also agreed that he would at some future time give her father employment as a distiller at \$75 per month, and that, when such employment of the father should begin, the daughter's wages should be reduced to \$6 per week; but that,

(customary price); *Cornish v. Graff*, 36 Hun, 160 (value of the services).

In *Edward v. Enterprise Bank*, 87 S. C. 84, 68 S. E. 961, architects suing for their fees set up a special contract and alleged that their services were reasonably worth the sum specified therein, and the answer denied that there was any special sum agreed upon and alleged that the plaintiffs promised to make the price satisfactory to the defendant, but that they did their work in a careless and dilatory manner, etc. It was held that it was competent for the plaintiffs to introduce evidence as to what their services were reasonably worth under the pleadings and the allegation of value, and also under the general rule as to probabilities, *infra*, III. a, 1 (citing *Tarrant v. Gittelson*, *infra*, III. a, 1), and that the evidence was also admissible on account of the contention of the defendant that under the contract the price for the services was to be made satisfactory to it.

II. Evidence of custom.

The cases on evidence of custom are perplexing. It will be seen in subdivision III. a, 1, *infra*, that evidence of value is generally considered admissible. In the few cases on evidence of custom the tendency seems to be to the contrary, but most of these cases do not discuss the subject of this note, and they are probably too few in number to afford any comprehensive view of the question. Further, most of the cases excluding evidence of custom relate not directly to the contract price, but to some custom bearing upon it indirectly. It is also often a matter of doubt, when a court in admitting the evidence refers to evidence of custom or of customary compensation, whether it means anything more than the market value of the services, and probably this is all that is meant in *EDELEN v. HER-* L.R.A.1915C.

MAN. Evidence that a broker's customary commission in a locality is a certain per cent may very well refer to a custom which would be controlling in the absence of a fixed compensation, but evidence as to what it was customary to pay for hauling is not far from evidence of the market value of hauling. Under these circumstances the meaning of the cases is not to be extended beyond the circumstances involved.

As above intimated, the courts which exclude evidence of custom do not in general discuss the relation between evidence of the value of services and evidence of the custom as to the compensation for services; but in *Peyser v. Western Dry Goods Co.* 53 Wash. 633, 102 Pac. 750, the court in excluding evidence of custom, said: "This court has uniformly distinguished between cases where the terms of the contract have been agreed upon and those where the terms of the contract have not been agreed upon. It has also distinguished, in cases where the terms have been agreed upon, between custom as evidence of value and other evidence tending to show the value of the subject-matter of the contract. Stated in another form, it has held that, when there is a contract, but a dispute as to the contract price, evidence of the value of the subject-matter of the controversy is admissible as a circumstance tending to prove or disprove the matter in dispute, whilst evidence of custom cannot be admitted for such purpose. It is conceded in this case that the commission was agreed upon, but there is a controversy as to what the agreement was. The writer is not convinced of the soundness of this distinction. If it were an original question in this court, he would be inclined to regard proof of a general custom as a circumstance tending to corroborate the appellant's version of the contract. However, being largely a rule of procedure, we will adhere to the

as the father was never given such employment under the terms of the contract, the daughter was entitled to \$10 per week for the whole term of service.

It is the theory of the defendant that the father approached him, told him he was anxious to get his daughter in a home where she might be protected, and that appellant told him to bring the daughter to his home and he would let his housekeeper see whether or not she could employ her; that the father and daughter did come to his home and were told that the housekeeper would give her employment, and she would be paid such wages as the housekeeper might think she was worth, after a trial; and that thereafter her wages were fixed by the housekeeper at \$8 per month,

and this fact was communicated to her father, and that the prospective employment of the father as a distiller had no connection whatever with the employment of the daughter.

Appellee and her father testified to the contract as set out in her pleadings, and appellant and his housekeeper testified to the contract as set out in his answer. The jury found a verdict for the full amount claimed by the plaintiff, and, from a judgment on that verdict, this appeal is prosecuted.

Appellee, as stated, was only sixteen years of age at the time, and was a skilled domestic in no particular. On the trial the defendant offered to prove the real value of the services rendered by the plaintiff, and

rule we have heretofore announced." See also *Oliver v. Morawetz*, *infra*.

It will be seen *infra* that the Illinois, Iowa, and Washington courts admit evidence of value, but that the Wisconsin court has not done so, although not fully committed on the subject.

In some jurisdictions evidence of customary compensation is not receivable where there is an alleged special contract and the compensation is in dispute. *Lonergan v. Courtney*, 75 Ill. 580; *Stansbury v. Kephart*, 54 Iowa, 647, 7 N. W. 110; *Swadling v. Barneson*, 21 Wash. 699, 59 Pac. 506; *Peyser v. Western Dry Goods Co.* 53 Wash. 633, 102 Pac. 750; *Oliver v. Morawetz*, 95 Wis. 1, 69 N. W. 977; *Kosloski v. Kelly*, 122 Wis. 665, 100 N. W. 1037.

Thus, where there was evidence that the contract was that the plaintiff should receive for building certain houses 10 per cent on their cost, and the defendant claimed that the compensation was to be 10 per cent on the labor, it was held proper to refuse to permit the defendant to show "what was the general commission for building such houses," for, "there being evidence tending to prove a contract to pay 10 per cent as such commissions, it was wholly immaterial what the general custom may have been." *Lonergan v. Courtney*, 75 Ill. 580, *supra*.

So, where the plaintiff claimed upon a special contract for services as drug clerk and medical student to a deceased physician, it was held that the defendant was properly prevented from showing the terms upon which medical students are customarily taken into medical offices. *Stansbury v. Kephart*, 54 Iowa, 647, 7 N. W. 110, *supra*, (judgment reversed on other grounds).

Similarly, where the dispute was whether a commission for procuring a contract was payable in case such contract was not carried out, it was held that there was no error in excluding the defendant's question to the plaintiff as to whether he knew the local custom, as the question was immaterial whatever it was. *Swadling v. Barneson*, 21 Wash. 699, 59 Pac. 506, *supra*. L.R.A.1915C.

So, where the controversy was whether the plaintiff, a traveling salesman, was to be paid a commission on all sales in his territory, whether made by him or by other salesmen, it was held proper to exclude evidence offered by the defendant as to the general custom among business houses as to commissions in cases of this character. *Peyser v. Western Dry Goods Co.* 53 Wash. 633, 102 Pac. 150, *supra*.

In *Oliver v. Morawetz*, 95 Wis. 1, 69 N. W. 977, *supra*, where the plaintiff alleged a special agreed compensation for selling land in a certain city, and the defendant entered a general denial, it was held that it was error to permit the plaintiff to show what the customary commission was in the said city. The court stated that the question whether, in case of conflict and evenly balanced testimony as to a contract price for services, evidence of the value of the services or cost of performance is admissible, had been left undecided in *Kyamen v. Meridean Mill Co.* 58 Wis. 399, 17 N. W. 22, *infra*, III. a, 1, and also cited in *Brunnell v. Hudson Saw Mill Co.* 86 Wis. 587, 57 N. W. 364, *infra*, subdiv. "Employee showing what another employee has received."

In *Kosloski v. Kelly*, 122 Wis. 665, 100 N. W. 1037, *supra*, it was held that it was proper to refuse to permit the defendant to show whether it was not the usual custom in the Wisconsin woods to make contracts of the kind alleged by the defendant, where the plaintiff sued for a certain compensation for his services, and the defendant answered that the amount claimed by the plaintiff was to be reduced in case the plaintiff did not remain until the completion of certain work, and that he had not so remained. The court said: "The idea here was to show that a certain kind of contract was usually made, and to argue from that fact that the defendant's version of the contract was more likely to be true than the plaintiff's version, because it agreed with the contracts usually made. This is not a legitimate use of proof of custom. It is not the supplying of incidents or explanation of terms, but the

offered to prove by her former employer that she had been employed by him as a domestic just before she went to defendant's home, and that he paid her \$2 per week for her services; that she was unable to speak English, except with difficulty, and was an unskilled domestic, and was worth only the wages which he had paid her. Treating that as an offer to prove the customary price of services similar to those rendered by the plaintiff at the time and place of performance, the question arises: Under the state of the pleadings in this case, was such evidence competent as tending to show the real contract between the parties? Manifestly it was not competent to vary the terms of the contract between the parties; but where only the rate of

payment for services under the contract was in issue, and there was such wide divergence between the parties as to the contract price, was it not competent as bearing upon which claim was probably correct?

By way of illustration, if a farm laborer should institute an action against his employer and set up an express parol contract by which he was to be paid \$20 per day for his labor on the farm, and the employer should answer, admitting the contract except as to the rate of payment, and alleging that under its terms the rate was \$2 a day, and not \$20, can it be doubted that the defendant might show the unreasonableness of the contract asserted by the plaintiff by showing that the customary price

bolstering up of one story as against another by evidence of purely collateral facts which merely tend to make the one story seem more likely than the other."

As heretofore stated, in *EDELLEN v. HERMAN*, the court apparently means to hold no more than that evidence of the customary rate is practically the same thing as evidence of the market value, and so admissible.

New York and Colorado.

In New York and Colorado, where evidence of customary compensation is admissible when there is a dispute as to the amount fixed by special contract, it is to be remembered that the courts in those jurisdictions are inclined to allow recoveries on *quantum meruit*, while this reason is not always given for admitting the evidence. In the *Flagg* and *Standish* Cases, *infra*, the decision is put upon the ground of the bearing of the evidence upon the probabilities, as in the case of evidence of value. The *Connell* Case, on the contrary, excludes the evidence. The *Colorado* case, *infra*, is not strictly within the scope of the note as it holds that the evidence may be admitted as justifying a recovery upon a *quantum meruit*. The *Kavanagh* and *Rubino* Cases are not very helpful on the question.

In an action to recover the balance of commissions of a life insurance agent, where there was a direct conflict as to the amount of the commissions, it was held that it was error to exclude the defendant's offer to show what the usual commission was to persons employed as was the plaintiff (the court quoting *Barney v. Fuller*, 133 N. Y. 605, 30 N. E. 1007). *Flagg v. Reilly*, 23 App. Div. 57, 48 N. Y. Supp. 544.

Similarly, where the plaintiff alleged and proved a special agreement by the defendant engaging her services as an actress for the season from September 2, 1891, to April 5, 1895, or thereabouts, at \$30 per week, and the defendant in his answer and at the trial denied any such agreement, especially the duration, it was L.R.A.1915C.

held to be error to refuse the defendant's offer to prove a uniform custom in the profession, when an actress is engaged for an inferior character, such as the plaintiff, and the engagement is for the season, to have a contract in writing, with a clause reserving the right to either party to terminate the contract on two weeks' notice,—as bearing upon the probability of the agreement. *Standish v. Brady*, 18 Misc. 371, 41 N. Y. Supp. 651.

But in *Connell v. Averill*, 8 App. Div. 524, 40 N. Y. Supp. 855, where the plaintiff claimed he was hired as hotel porter for a year, and the defendant that he was hired only from month to month, it was held that the defendant could not show that the custom of hiring hotel porters was from month to month, as "the contract, as stated by each of the parties, was clear and explicit as to the term of service," and the defendant "could not change the terms of an unambiguous contract by showing that the custom was contrary to the clearly expressed intention of the contracting parties."

In *Buckingham v. Harris*, 10 Colo. 455, 15 Pac. 817, where there was some dispute as to the commission which a real estate broker was to receive for selling land, it was held that there was no error in admitting evidence by the broker and his witness that the customary rate was the rate alleged in the complaint to have been expressly agreed upon. The court said: "It is alleged in the complaint that, by the terms of the employment, appellant agreed to pay 5 per cent. This evidence showed that the customary rate was 5 per cent. The admission of evidence so variant from the allegations of the complaint is urged here as cause for reversal of the judgment. In view of all the evidence, together with the character of the contest, we do not think this evidence was of the character to surprise, prejudice, or mislead appellant." The court referred to the similar case of *Sussdorf v. Schmidt*, 55 N. Y. 320, where it was held that there might be a recovery on a *quantum meruit*, and said: "And § 81 of our Code provides that such

for labor, at the time in that community, was \$2 per day? And this, not for the purpose of varying or changing the contract, but for the sole purpose of enabling the jury to reach a fair conclusion as to what was the real contract.

The precise question involved here has not been passed upon in this state so far as we have been advised, but we are not without ample authority to sustain our view that the evidence was competent.

In 9 Cyc. pp. 767, 768, the rule is thus stated: "Where there is a direct conflict of evidence as to the agreed rate of payment, the actual value of the services rendered, of the property sold, or of materials furnished at the time of making the contract, may be proved, as such evidence tends

to show whose contention is probably correct."

And in the note to that text it is said: "These cases proceed upon the principle that in controversies where a special agreement is alleged on one side and is denied on the other, it is relevant to put in evidence any circumstances which tend to make the proposition at issue either more or less improbable; and this not to change the contract, but as evidence bearing upon the probability that the contention of one party is correct, rather than that of the other."

In volume 3, Enc. of Evidence, p. 517, we find the rule stated in a different form, to wit: "Thus, on an issue as to whether or not a contract was made as claimed, any

error shall be disregarded: 'If the opposite party is by such variance surprised or misled, the court may on terms allow an amendment of the pleading to conform to such proof.' No surprise was even claimed here; so it is apparent that such error is insufficient to warrant a reversal of the judgment."

Where the employer had died and the only witness to the agreement as to the sum which was to be paid for the services had an interest on the plaintiff's side, and there was evidence in the case that the supposed compensation which he testified to was much greater than that customary for such services, it was held to be error to direct a verdict in accordance with the testimony of such witness as to the sum agreed upon, and to decline to submit the question to the jury as to whether there had ever been a promise to pay the sum alleged. *Kavanagh v. Wilson*, 70 N. Y. 177.

In *Rubino v. Scott*, 118 N. Y. 662, 22 N. E. 1103, where the plaintiff alleged that the defendant employed him for an agreed compensation to assist in purchasing bonds, and the trial court found that the defendant did not employ the plaintiff nor agree to pay him anything, it was held that there was no error in permitting the defendant to prove what were the usual rates of commission for buying and selling railroad bonds in the city where the agreement was alleged to have been made.

Employer's custom with his other employees.

The employer may not show his general custom with his employees as to compensation, in a dispute with an employee as to the terms of a special contract.

Thus, he may not show that it is his custom not to pay his employees for the time that they are away on vacation (*Wilson v. Smith*, 111 Ala. 170, 20 So. 134); nor that he hires his clerks by the month, and not by the year (*Jacobus v. Wood*, 84 Ga. 638, 10 S. E. 1099; *Purveyor v. Ould*, 81 S. C. 456, 62 S. E. 863); nor that he

does not pay commissions as well as a salary, and never had done so (*Featherstone Foundry & Mach. Co. v. Criswell*, 36 Ind. App. 681, 75 N. E. 30).

Where there was a conflict as to the terms of a contract for procuring advertisements, the employers could not show that their custom was not to pay canvassers except upon particular contracts for advertising which they brought to the office, and that they dealt with the plaintiff in this manner. *Holmes v. Pettingill*, 60 N. Y. 646.

See also *infra*, III. a, 1, "Evidence of other contracts, bids, etc."

Employee showing what another employee has received.

It may be here noted that it has been held that the employee may not show what another employee has received as bearing upon a dispute as to the amount of compensation fixed by a special contract.

Thus, a teacher could not show that the teacher of the same school two years before had received a salary of the amount claimed by the plaintiff in a dispute with the board of education, which had ended the school year before the usual ten months had expired, and which claimed that the employment was at a certain sum per month, and not at a yearly salary. *Westerman v. Cleland*, 12 Cal. App. 63, 106 Pac. 606.

So, in *Gill v. Staylor*, 97 Md. 665, 55 Atl. 398, it was held that the court should have excluded the evidence where the plaintiff, suing on a special contract of service to the defendant's decedent, showed what such decedent had paid another employee for wages, as this did not tend to show that the decedent agreed to give the plaintiff the same amount, nor did it throw any light on the inquiry as to what his services were worth.

In *Brunnell v. Hudson Saw Mill Co.* 86 Wis. 587, 57 N. W. 364, an action by an employee for certain wages, where the defendant had claimed that the contract was that he should retain a certain amount of

circumstances bearing thereon, or any evidence which tends to render that fact probable or improbable, is relevant, provided, of course, the evidence is not otherwise objectionable."

The case of *Campau v. Moran*, 31 Mich. 280 (Cooley, J.), was where Moran sued Campau on a verbal contract to recover the contract price of work done upon a certain structure. The defense set up a very different contract, calling for a much more substantial structure. The court, in passing upon the admissibility of evidence that the cost of building the structure in the manner contended for by defendant would be much more than the contract price, said:

"When the parties were thus distinctly at issue upon the terms of the contract, evi-

dence that the cost of performance of such a contract as the defendant set up would be greatly in excess of the contract price would certainly afford some reasonable ground for believing that defendant is in error on the facts. We can very well conceive of cases in which such evidence might be very forcible."

The case of *Ellis v. Woodburn*, 89 Cal. 129, 26 Pac. 963, was where a lawyer sued for a contingent fee under the terms of a contract in addition to the retainer which he had already received. The defendant denied the agreement to pay the contingency, and alleged an express contract upon the part of the plaintiff to render the services for the amount of the retainer which had been paid, and no more. The court,

the wages, and that if the plaintiff left his employ before the season was over he should forfeit the amount so retained, it was held that there was no error in refusing to permit the defendant to show that this was the customary contract that the defendant had with the plaintiff's fellow servants, it not appearing that the plaintiff knew anything about the contract with the other servants; the court stated further that even if he had had such knowledge, it would have been doubtful whether the evidence would have been admissible.

III. Evidence of value.

a. In general.

1. The general rule.

By the great weight of authority, where the parties to a special contract for services are in dispute as to the compensation fixed by the contract, evidence of the value of the services is admissible as bearing upon the probabilities of the case, that is to say, as tending to show which statement is more likely to be true. The purpose of the evidence is to corroborate the party offering it as giving probability to his statement in regard to the amount fixed by the contract, and to cast doubt and improbability upon the statement made by the other party.

Evidence on behalf of employees.

Under the foregoing rule there are numerous cases where evidence of the value of an employee's services has been held admissible on his behalf in a dispute as to the amount of compensation fixed by a special contract. *Locke v. Kraut*, 85 Conn. 486, 83 Atl. 626 (value of masonry work shown by experts); *Sullivan v. Herrick*, 161 Iowa, 148, 140 N. W. 359 (value of hauling dirt; judgment for plaintiff reversed on other grounds); *Lexington & C. County Min. Co. v. McNeal*, 11 Ky. L. Rep. 137; *Piffet's Succession*, 37 La. Ann. 871 (services as physician and nurse to a decedent); *Richardson v. McGoldrick*, 43 Mich. 476, 5 N. W. 672 (action for wages, evidence L.R.A.1915C.

of value according to "going wages" at the time); *Saunders v. Gallagher*, 53 Minn. 422, 55 N. W. 600; *Spurek v. Dean*, 49 Neb. 66, 68 N. W. 375 (where there seems to have been no objection made to the evidence); *Cornell v. Markham*, 19 Hun, 275 (services as bookkeeper); *Knallakan v. Beck*, 47 Hun, 117; *H. M. Whitney Co. v. Stevenson*, 17 App. Div. 224, 45 N. Y. Supp. 552; *Rosenberg v. Heidelberg*, 98 App. Div. 17, 90 N. Y. Supp. 684; *Allison v. Horning*, 22 Ohio St. 138 (the court considering that the difference between the value and the amount insisted upon by the defendant was so great as to make the evidence competent); *Rauch v. Scholl*, 68 Pa. 234; *Tarrant v. Gittelson*, 16 S. C. 231. See also *Barnes v. Spencer*, 113 Minn. 101, 129 N. W. 140, *infra*, IV.; also, as recognizing the general rule, *Pettet v. Johnston*, — Wash. —, 145 Pac. 985, *infra*; *Ellis v. Woodburn*, 89 Cal. 129, *infra*, "Proof of contract," quoted from in *EDELEN v. HERMAN*; also the insufficiently reported case of *Bromley v. Standard-Plunger Elevator Co.* 144 Fed. 713, where the court seems to have been of a similar (*obiter*) opinion.

Thus, upon a dispute between a clerk in a store and his employer as to the compensation for his services, it was held that the value of a clerk's services might be given in evidence by the plaintiff as tending to prove or disprove the reasonableness of the testimony as to the compensation agreed upon. *Tarrant v. Gittelson*, 16 S. C. 231, *supra*.

So, upon a dispute between employer and employee as to the contract price for cutting and hauling saw logs, it was proper to permit the employee to show that the services rendered were worth more than claimed by the employer. *Saunders v. Gallagher*, 53 Minn. 422, 55 N. W. 600.

So, upon a controversy as to the contract price of getting out hewn and sawed timber, and putting it up in trestles, it was competent for the plaintiff to prove that it was worth more than the price stated by the defendants, as tending to show that his version of the contract was a more probable and reasonable one. *Lexing-*

in holding that evidence of the value of the services rendered was incompetent, said: "If there had been a dispute as to the amount of a contingent fee to be paid, then such evidence would have been relevant as having a bearing upon the probabilities of the case. Testimony as to value or usual price has been frequently admitted in aid of proof of an express contract, where the only fact in dispute was as to the sum agreed to be paid for services rendered thereunder, or for property sold. The principle upon which the evidence is admitted in such a case is that proof of reasonable value or usual price has some tendency to show the probable price actually agreed on; that being the fact in dispute."

ton & C. County Min. Co. v. McNeal, 11 Ky. L. Rep. 137, *supra*.

So, where the plaintiff sued in two counts, one on an express contract, the other on a *quantum meruit*, and was compelled to elect on which one he would proceed, and he elected the express contract, and there was evidence in the case as to the value of the services, it was held that such evidence was properly allowed to remain in the case as affecting the probability of the respective versions of the parties as to the nature and character of their contract, there being a dispute between them as to the amount of the compensation. *Rosenberg v. Heidelberg*, 98 App. Div. 17, 90 N. Y. Supp. 684, *supra*.

In *Knallakan v. Beck*, 47 Hun, 117, *supra*, upon a controversy as to the amount of wages as carriagemaker, etc., which the plaintiff was to receive, the court held that it was proper for him to show "what was the fair market value for the services of a man who had learned his trade and worked at wagon making there in that shop" at a date which was about the time of the beginning of the services. The court said that *Cornish v. Graff*, 36 Hun, 160, *supra*, I., would be exactly in point if the complaint in this case had averred that the services were worth the agreed price.

Similarly, upon a claim by a sister against the estate of her brother for \$1,000 a year in taking care of their parents for many years, it was held that it was proper for the plaintiff to show that at the time of entering upon the contract she gave up her profession as a music teacher, in which she was making a \$1,000 a year or more, thus showing that the contract was not an improbable one. *Waldron v. Alexander*, 136 Ill. 550, 27 N. E. 41.

In *Piffet's Succession*, 37 La. Ann. 871, *supra*, upon a claim on an express contract for services as physician and nurse rendered to a decedent, the court stated that the testimony, while inadmissible to prove the value of the services, was competent to show the reasonableness of the contract, and said: "Having declared upon a contract, he must first have proved it, which L.R.A.1915C.

The supreme court of New Hampshire in *Swain v. Cheney*, 41 N. H. 234, in discussing a similar question, said: "That there was a contract was admitted, and it would seem that there was no controversy about the terms of it, except as to the agreed price for drawing the lumber between the top of the hill and the depot; and while the plaintiff testified positively, as it would seem, that this agreed price was \$1.50 per thousand, the defendant probably testified just as positively that the agreed price was but \$1 per thousand. Here, then, there was a single point in dispute for the jury to settle; and, as the evidence was conflicting, the jury must find the fact to be either one way or the other, according to the pre-

we think he has done by his own oath and corroborating circumstances, and then evidence that the contract was one likely to be made under the circumstances, and was reasonable in itself, was properly heard."

In *Schwerin v. DeGraff*, 21 Minn. 357, in an action to recover for work done by a subcontractor against a contractor in grading a railroad, where the plaintiff claimed that there was a certain price to be paid him for grading a certain section, and the defendant claimed that the price to be paid was no more than that for an adjoining section, it was held that evidence was properly admitted to show that the work on the section in question was more difficult than that on the adjoining section, on the ground that where there is no written contract and the price is disputed, any evidence tending to show that the testimony of one party is more reasonable than that of the other is admissible.

But the usual price the same season for sawing laths ought not to be shown when the parties are in dispute as to the amount fixed by a contract to saw laths in the defendant's mill, where he provided part of the help and supplies, as the evidence did not relate to the peculiar circumstances of the case. *Kyammen v. Meridean Mill Co.* 58 Wis. 399, 17 N. W. 22, the court distinctly not deciding whether evidence of this character was ever admissible upon a controversy as to the amount of a fixed compensation.

Evidence on behalf of employers.

So, for the same reason, evidence of the value of services has been received on behalf of the employers, when the parties differed on the rate of compensation. *McGawley v. Gannon*, 11 Rob. (La.) 165; *Misner v. Darling*, 44 Mich. 438, 7 N. W. 77 (sawing of lumber); *Lewis v. Goldstein*, 75 N. J. L. 305, 68 Atl. 85; *Barney v. Fuller*, 133 N. Y. 605, 30 N. E. 1007, *infra*, "Two grounds for admitting the evidence." See also *Edelex v. Herman*; see also as recognizing the rule *Whitton v. Sullivan*, 96 Cal. 480, *infra*, IV.

ponderance of the evidence; and if the direct testimony was evenly balanced, then they must consider the probabilities of the case, and weigh them, and thus come to a conclusion. And it seems to us that the evidence offered tended to show what was the common price for conveying that precise kind of lumber over the same road, and at the same time, which would, we think, be competent, as tending to show whether it was more probable that the price agreed to be paid was \$1 or \$1.50 per thousand."

There are many authorities to the same effect, but, without quoting them further, it may be said that the decided weight of authority is that where the question is not whether there is a contract or no contract,

but what was the real rate of compensation agreed upon by the parties, evidence of the value of the services rendered, and of the customary price of similar services at the time and place of the contract, may be introduced, not for the purpose of varying the contract between the parties, but solely for the purpose of aiding the jury in determining what was the real rate of compensation agreed upon by them. In this view of the case, the evidence offered by the defendant should have been admitted.

For the reason given, the judgment is reversed, with directions to grant appellant a new trial, and for further proceedings consistent herewith.

Compare *Anderson v. Arpin Hardwood Lumber Co.* 131 Wis. 34, 110 N. W. 788, *infra*, subdiv. "The question of marked discrepancy," and *Doyle v. Edwards*, 15 S. D. 648, 91 N. W. 322, *infra*, III. a, 2.

In *Lewis v. Goldstein*, 75 N. J. L. 305, 68 Atl. 85, *supra*, upon contracts for work and services and materials in painting certain buildings, where there was a controversy as to the amount of the compensation, it was held to be error not to permit the defendant to show what the work contracted for was reasonably worth and the value thereof at the time of the making of the several contracts. The court said: "The correct rule is that where there is a direct conflict of evidence as to the agreed rate of payment, the actual value of the services rendered or of the materials furnished at the time of the making of the contract may be proved. . . . The ground of this exception to the ordinary rule is that when the evidence is in direct conflict as to the private agreement of the parties touching matters that had at the time a market value or a going rate, proof of such general value or rate is relevant, not because it can be substituted for the agreed rate, but because it tends to show whose contention as to such agreed rate was probably correct."

It was observed in *Stagg v. Barrett*, 78 N. J. L. 588, 76 Atl. 974, *infra*, III. c, that it was not necessary in that case to hold whether *Lewis v. Goldstein* was correctly decided or not.

Upon a denial in pleading of the price for drayage as claimed by the employee, it was held that the employer might show that the usual price was less. *McGawley v. Gannon*, 11 Rob. (La.) 165, where the court's statement as to the pleadings is as follows: "The testimony was clearly admissible under the pleadings, which denied the price claimed by plaintiff as the value of her services."

Evidence of other contracts, bids, etc.

It may be noted that in *Klopp v. Jill*, 4 Kan. 482, where Jill, the plaintiff, sued L.R.A.1915C.

on a *quantum meruit* for plastering, and the defense was a contract price, in holding that the trial court had erred in refusing to admit evidence of a witness to the effect that the defendant had agreed to give the job to the witness at the contract price in question if the plaintiff would not do it at that rate, the appellate court said: "I think Raiser's testimony would have tended very strongly to show what such work was worth at the time, by showing what the defendant could have had it done for. It would also have tended to establish the contract alleged by Klopp to have been made, by corroborating Klopp's testimony." The defendant had already testified that he had told the plaintiff that another man stood ready to do the job at the contract price.

On the other hand, in *Sullivan v. Herrick*, 161 Iowa, 148, 140 N. W. 359, it was held that evidence of the defendant was immaterial which related to the price for which he contracted for other similar work, or to what bids he received for the work done by the plaintiff (the judgment for the plaintiff was reversed on other grounds).

Limits of the doctrine.

It may be doubted whether the reasonable limits of the doctrine upon which evidence of this kind is admitted were not passed by the court in its opinion in *Rauch v. Scholl*, 68 Pa. 234, where the plaintiff had contracted to furnish to a bridge builder stone from his quarry at \$2.15 per cubic yard, and hired the defendants to quarry and haul the stone to the bridge, and alleged that they had undertaken to do the work for \$1.75 per cubic yard, and they alleged that the price was \$2 per cubic yard, and it was held that there was no error in permitting the defendants to offer evidence to show what the value of the stone was in the ground unquarried. The court said: "This evidence was objected to as irrelevant. If it had any bearing upon the matter in controversy it was admissible. Now, surely, if the stone in the quarry was only worth 15 cents, and its value at the bridge

was \$2 more, it went very far to show that the services of the defendants were worth that much to the plaintiff. He argues that he was entitled to the benefit of the contract he had made, and that it would not be just to deprive him of that advantage and transfer it to the defendants, and that this would be the consequence of admitting this evidence. But, surely, it is not an unfair presumption that he was to receive no more than the market value of the stone under his contract at the bridge, and if in point of fact it was more, it was incumbent on him to rebut this evidence by showing it."

Probably no other case goes so far, unless it be *Swain v. Cheney*, 41 N. H. 234, quoted from in *EDELEN v. HERMAN*. See *infra*, III. c.

Two grounds for admitting the evidence.

In some of the cases the evidence was held admissible not only as bearing on the probabilities, but also as being relevant upon a possible recovery on a *quantum meruit* in case the jury found that there was no express contract as to compensation, or none such as claimed by either party.

Thus, in *Richardson v. McGoldrick*, 43 Mich. 476, 5 N. W. 672, in an action for wages upon an express agreement to pay a specified amount, where the defendant claimed that the amount was a certain definite lower amount, it was held that the plaintiff was properly allowed, under objection, to show by his own testimony and by other testimony what the value of his services was according to going wages at that time. The court explained this decision as follows: "Under this direct conflict of evidence the jury might perhaps have thought the parties never came to any actual understanding on the rate of wages, and never therefore agreed upon it. The testimony of what was the value of the services or the current rate of wages would be proper in such a case on a *quantum meruit*. If, as is not unlikely, they thought an agreement was made, we think the testimony had some bearing on the probabilities, and was within the rule approved in *Campau v. Moran*, 31 Mich. 280. In such a conflict of evidence between the only two persons knowing the facts, corroborating circumstances may very fairly be regarded. On either ground the testimony was admissible."

The clause of the opinion in *Campau v. Moran*, *supra*, quoted in *EDELEN v. HERMAN*, is part of a paragraph of great obscurity; for further reference to the *Campau* Case, see *infra*, III. b.

In view of the later Michigan cases, any holding to the contrary, if any, in *Marsh v. Tunis*, 39 Mich. 100, may be disregarded.

In *Barney v. Fuller*, 133 N. Y. 605, 30 N. E. 1007, where it was claimed by attorneys that they were employed by their client to work for a certain agreed compensation, and he on his side claimed that they

were to receive a certain sum per day and their expenses when away from home, it was held that it was proper to permit the client to show what the reasonable value of the services rendered by the attorneys was, and this for two reasons, one, that the jury might find that the contract was neither as claimed by the plaintiff nor by the defendant, and that therefore they had a right in that contingency to consider the value of the services; two, that the defendant was entitled to show the value of the services as bearing upon the probability that the agreement was one way or the other.

In *H. M. Whitney Co. v. Stevenson*, 17 App. Div. 224, 45 N. Y. Supp. 552, where the controversy was not only as to the amount of the compensation, but also as to the nature of the services to be rendered, it was held to be error to exclude evidence offered by the employee of the value of his services, as such evidence was admissible under both the grounds laid down in *Barney v. Fuller*, *supra*.

The question of marked discrepancy between value and price alleged by a party.

In one or two cases the court seems to take the view that a marked discrepancy between the value and the price alleged by a party, is a prerequisite to the admission of the evidence.

Thus, in *Allison v. Horning*, 22 Ohio St. 138, it was held that the employee was properly allowed to give evidence of the value of his services when there was a conflict as to the contract price, the court considering that the difference between the value as proven and the value claimed by the defendant was so great as to make the evidence competent for the purpose of rebutting the evidence of the defendant.

In *Anderson v. Arpin Hardwood Lumber Co.* 131 Wis. 34, 110 N. W. 788, upon a controversy as to whether the contract price for handling and piling lumber was 65 or 70 cents per thousand feet, the defendant was not permitted to show the reasonable value of the work per thousand feet nor the reasonable cost thereof. The court, in holding that there was no error in this, stated: "To render such evidence as that under consideration admissible in a case of this sort, there must be a direct conflict as to the contract price of the thing to which it relates. The difference must be so great that the reasonable value thereof from the standpoint of the parties when the contract was made may reasonably discredit the evidence on the one side, and corroborate that on the other, affording some reasonable ground for believing that the contract was at the price most in harmony with such evidence. No guide is at hand in our decisions as to the difference between the adverse claims requisite to satisfy the call for a large difference, but in no case has it been nearly so small as in the instance in hand."

Proof of contract as to prerequisite to evidence of value of services.

Proof of the value of services cannot be admitted until a contract has been shown. *Bright v. Metairie Cemetery Asso.* 33 La. Ann. 62.

In *Ellis v. Woodburn*, 89 Cal. 129, 26 Pac. 963, quoted from in the opinion in *EDELLEN v. HERMAN*, in reversing a judgment for the plaintiff, who had introduced evidence as to what would be a fair compensation for his services though he claimed a contingent fee, the court observed that there was no controversy as to what would have been a reasonable contingent fee, but whether there was any agreement at all to pay such a fee, and stated that it was manifest that proof of what would be a reasonable contingent fee could have no legitimate tendency to show that there was in fact an express contract for that kind of fee.

So, there was no error in refusing to permit the employee to show the value of his services where there was a dispute as to the existence of the contract, although later in the case a controversy developed which, while admitting a contract as to part of the services, made an issue as to the matter of compensation; for while the evidence would then have been admissible, it was not reoffered. *Dickey v. Greenleaf*, 38 Ohio St. 593.

Compare *Rubino v. Scott*, 118 N. Y. 662, 22 N. E. 1103, *supra*, II.

2. Contrary doctrine.

There seems to be little in direct opposition to the general rule. The *Kelly Case*, *infra*, is so briefly reported as to be of little value. The *Doyle Case*, *infra*, while excluding evidence of the value of services, does not discuss the question as to whether the evidence might have a bearing on the probability of the alleged compensation. The matter is, however, discussed or mentioned in the Wisconsin cases, which, as far as they go, do not sustain the general rule. And while the Wisconsin court is not fully committed against the rule, it held in *Anderson v. Arpin Hardwood Lumber Co.* 131 Wis. 34, 110 N. W. 788 (*supra*, III. a, 1, "The question of marked discrepancy"), that it would not admit the evidence where there was no marked discrepancy between the opposing claims. For other Wisconsin cases, see *Oliver v. Morawetz*, 95 Wis. 1, 69 N. W. 977, *supra*, II.; *Kosloski v. Kelly*, 122 Wis. 665, 100 N. W. 1037, *supra*, II.; *Brunnell v. Hudson Saw Mill Co.* 86 Wis. 587, 57 N. W. 364, *supra*, II.; *Kyammen v. Meridean Mill Co.* 58 Wis. 399, 17 N. W. 22, *supra*, III. a, 1.

In *Doyle v. Edwards*, 15 S. D. 648, 91 N. W. 322, where the plaintiff declared upon a special contract fixing a minimum for his services in performing an operation upon the defendant's decedent, and the amount of the compensation was in dispute, L.R.A.1915C.

the plaintiff recovered the minimum compensation. The court, in affirming the judgment, held that there was no error in excluding evidence offered by the defendant tending to prove the value of the plaintiff's services, on the ground that, the plaintiff having offered no evidence as to the value of his services, the defendant had no right to introduce evidence upon that subject, as the value of the services was not in issue. The court does not discuss the question as to whether the evidence might have a bearing on the probability of the alleged contract price.

In *Kelly v. Malone*, 5 Ga. App. 618, 63 S. E. 639, where the opinion is not reported, it is stated in the headnote that "where both parties to a cause rely upon an express contract, and are in conflict only as [to] its terms, and this is the only issue raised by the pleadings, it is not error to exclude testimony as to the value of services which were the subject-matter of the contract; nor is it error to refuse to allow proof that others had offered to perform such services for a different amount. *Jacobus v. Wood*, 84 Ga. 638 (2, 4), 10 S. E. 1099."

In *Jacobus v. Wood*, cited in the foregoing case, the plaintiff claimed a discharge without just cause, and the controversy was chiefly whether the employment was by the year or by the month. It was held that the defendant was properly not allowed to show the insufficiency of services of the plaintiff, as that had not been pleaded, and also that it was proper to exclude evidence as to the time and terms of the defendant's other clerks, or testimony that he hired them all by the month, and none by the year.

In view of the recognition of the general rule by the California court in *Ellis v. Woodburn*, 89 Cal. 129, 26 Pac. 963 (preceding paragraph), quoted from in *EDELLEN v. HERMAN*, and in *Whitton v. Sullivan*, 96 Cal. 480, 31 Pac. 1115, *infra*, IV., probably nothing to the contrary is intended to be decided in the somewhat obscure case of *Fladung v. Dawson*, 5 Cal. Unrep. 286, 43 Pac. 1107, where there was contradictory evidence before the court as to the amount of the compensation for labor and materials, and it was held to be error to hold that there was no agreement as to the amount of the compensation, and to admit the plaintiff's evidence as to what the value of the labor and materials was, and give judgment accordingly. But the court does not discuss the question of admitting the evidence on the ground of its bearing on the probabilities.

b. Evidence that a certain price meant profit or loss.

The cases are not entirely agreed as to whether it is admissible to show whether the contract prices alleged would have meant a gain or a loss to a party.

In *Locke v. Kraut*, 85 Conn. 486, 83 Atl. 626, it was held in an action to recover the

balance of the contract price for doing masonry work, where there was a direct dispute as to the amount of the compensation, that the plaintiff properly showed by expert evidence the reasonable value of the work, and that the amount contended for by the defendant would have meant that the work was done at a loss by the plaintiff.

Similarly, in *Wheeler v. Buck*, 23 Wash. 679, 63 Pac. 566, where the plaintiff declared on a certain per cent commission for making a sale, and the defendant denied the contract, but admitted that the plaintiff was entitled to a reasonable commission, it was held that it was error to refuse to permit the defendant to show what his profits in the transaction would have been, as showing the improbability of the commission claimed by the plaintiff. Cited in *Dimmick v. Collins*, 24 Wash. 78, 63 Pac. 1101, and in *McCowan v. Northeastern Siberian Co.* 41 Wash. 675, 84 Pac. 614.

On the same principle in *Albertini v. Linden*, 43 Mont. 126, 115 Pac. 31, where there was controversy as to the wages which the plaintiff was to receive for driving an ice wagon, it was held that it was error not to permit the defendant to show what the gross receipts for ice were during a certain month, and also that it was known to both parties at the time of making the contract that the gross receipts during a part of the period would not exceed a certain amount per month, as showing the probability of the defendant's claim as to the amount of compensation, following the general theory of *Barney v. Fuller*, 133 N. Y. 605, 30 N. E. 1007, supra, III. a, 1, "Two grounds for admitting the evidence."

On the other hand, in *Sullivan v. Herick*, 161 Iowa, 148, 140 N. W. 359, it was held that where a witness had testified that the value of the work done by the plaintiff was a certain amount, which was between the price claimed by the defendant and that claimed by the plaintiff, the court properly refused to permit the witness to testify whether the plaintiff could have made money at the price claimed by the defendant, as this was irrelevant and immaterial.

In *Campau v. Moran*, 31 Mich. 280, quoted from in *Edele v. Herman*, it was held to be error to allow the plaintiff to show the value of the timber used by him, and also to show that a building of the nature claimed by the defendant could not have been built for the contract price. As heretofore stated, the clause quoted in *Edele v. Herman* is part of a paragraph of great obscurity.

c. Evidence as to cost or expense.

Strictly speaking, evidence of the cost or expense of doing the work in question is not logically related to the contract price, as it relates to a matter subsequently to the making of the contract; but the courts

are not agreed as to whether it may be received or not.

It was held in *Stagg v. Barrett*, 78 N. J. L. 588, 76 Atl. 974, that it was not proper for the plaintiff, who did certain work, to show what he paid workman under him, where he claimed on a *quantum meruit* for certain work, and the defendant claimed that there was an express contract fixing the rate per day, as such evidence related to a matter subsequently to the making of the bargain between the parties.

So, it was said in *Saunders v. Gallagher*, 53 Minn. 422, 55 N. W. 600, supra, that evidence of the cost of doing the work would not have been admissible, as neither party could know when he made the contract what the cost would be.

So, in *Van Orden v. Fox*, 32 App. Div. 173, 52 N. Y. Supp. 863, where it was agreed that the plaintiff was to receive a certain sum per foot for driving a well, but the controversy was as to whether he was to be allowed any compensation at all in case he did not get a proper supply of water, it was held to be error to permit him to testify as to the price of the casing per foot.

See also *Campau v. Moran*, 31 Mich. 280, preceding subdivision.

Where the contract was for the services of the plaintiff and a helper, and there was a dispute as to the price he was to be paid per day and also as to the number of days which he and his helper worked, it was held that it was error to permit the plaintiff to show by the helper that he had compensated him on the basis of the price and of the number of days claimed by the plaintiff, as the defendant was not a party to the alleged settlement between the plaintiff and his helper, and the helper's testimony as to such settlement was without any probative value as to the terms of the agreement between the plaintiff and the defendant. *Dixon v. Million*, 142 Ill. App. 559.

On the other hand, in *Carpenter v. Lenane*, 166 Mich. 610, 132 N. W. 477, where there was a dispute between a contractor and a subcontractor as to the division of the compensation between them, it was held that it was error to exclude evidence of the cost price of a part of the work on the contract, where there were no other witnesses except the parties, as evidence of the cost price would bear upon the reasonableness of the contract between them.

In *Swain v. Cheney*, 41 N. H. 232, quoted from in *Edele v. Herman*, the plaintiff declared on a contract to draw lumber from a mill to a depot for \$1.50 per thousand, and the defendant claimed that by the contract the plaintiff was to have \$1.50 if he drew from the mill, but only \$1 per thousand if he drew only a certain shorter distance, and it was agreed that he drew only the shorter distance; it was held that it was error to refuse to permit the plaintiff to prove what he paid a third party for drawing a part of the lumber in ques-

tion such shorter distance after the contract had been made.

d. Employee's value to other employers.

The cases on this branch of the subject are hardly to be reconciled. As is shown below, it has been held that the employer was properly prevented from showing that the employee offered to work for another for the price claimed by the employer; that it was error to allow the employee to show what he received from other employers for similar work; that it was proper for the employee to show that about the time of the contract he had an offer in the defendant's hearing from another employer for substantial wages, where the defendant claimed that he was to give only board and lodging for the plaintiff's services; and that it was proper for the employee to show that just before entering the defendant's employ, he voluntarily left an employment much more lucrative than that testified to by the defendant.

In *Roles v. Mintzer*, 27 Minn. 31, 6 N. W. 378, it was held that it was not error in an action for compensation for services on a contract fixing the price, to exclude evidence offered by the defendant that about the time that the plaintiff came to work for him he had offered to work for another man for the compensation which was insisted upon as correct by the defendant, for there is no presumption that a person will work for one man on certain terms from the fact that he is willing to work for some other man on those terms.

In *Shall v. Old Forge Co.* 109 App. Div. 907, 96 N. Y. Supp. 75, on a dispute as to what the compensation was to be, it was held to be error to admit evidence on behalf of the employee of what he received from other employers for similar work.

But in *Blomgren v. Anderson*, 48 Neb. 240, 67 N. W. 186, where the plaintiff claimed that his wages were to be so much per month, and the defendant claimed that the services were to be an equivalent for board and lodging, it was held that there was no error in admitting evidence that before the plaintiff hired himself to the defendant he had had an offer at a satisfactory rate of wages to work for another man, particularly as this offer was alleged to have been made in the presence of the defendant and in his hearing.

In *Rocco v. Parczyk*, 9 Lea, 328, where both parties agreed that there had been a contract, but differed as to the compensation, it was held that there was no error in permitting the plaintiff to prove that just before he went into the defendant's service, he voluntarily left a much more lucrative employment than that testified to by the defendant, and also in permitting the plaintiff to prove that after he entered defendant's service he rejected an offer from another party at a considerably greater compensation than that testified to by the defendant. This case is of doubtful value on the subject of this note for the reason L.R.A.1915C.

that it does not appear whether the recovery was upon special contract or upon a *quantum meruit*, the court finding that there was no error in an instruction that if the jury should find from the testimony that there was no contract as to compensation, they would allow the plaintiff what his services were reasonably worth.

The employer may not show what the employee did after he left the defendant's employ. *Crawford v. Rice & H. Baltimore Co.* 98 S. C. 121, 82 S. E. 273, where the court stated that under some circumstances such evidence might be slightly relevant, but as a general rule it was inadmissible.

In *Rocco v. Parczyk*, *supra*, it was held proper to refuse to permit the defendant to show that the plaintiff received from other parties after he had left the defendant's employ, and three years after the contract in question, much lower compensation than he claimed in the suit.

IV. Miscellaneous.

In *Auer v. Dauffer*, 17 Ky. L. Rep. 26, 30 S. W. 201, the court, in declining to reverse a judgment for the plaintiff where there had been a controversy between the plaintiff and the defendant as to the agreed price for the plaintiff's services, commented on the fact that the defendant did not permit the plaintiff to prove, which he offered to do by several witnesses, that the value of the services that he rendered was equal or greater than the amount he claimed as the contract price, and said: "Where parties differ so widely as to the exact terms of a special contract for services to be rendered, we cannot well avoid an impression that where one of them offers to prove, clearly and conclusively, by a number of witnesses, that the services actually rendered under the special contract were worth the price which he says was agreed to be paid, it is strongly persuasive of the justice of his claim. Doubtless this consideration had its influence with the court below on the trial." The court is probably referring to the refusal of the trial court to set aside the verdict; it does not appear why the evidence was not admitted as was done in *Lexington & C. County Min. Co. v. McNeal*, 11 Ky. L. Rep. 137, *supra*, III. a, 1.

In *Barnes v. Spencer*, 113 Minn. 101, 129 N. W. 140, where the rate of wages claimed by the plaintiff seems to have been denied by the defendant, the court said: "Plaintiff claimed an express contract as to wages. He was permitted to testify as to the character of his work, and perhaps additional work, such as choring. This was not error, as the probability of the contract claimed was an element proper to be considered by the jury."

In *Whitton v. Sullivan*, 96 Cal. 480, 31 Pac. 1115, it was held that evidence of the value of the work was properly excluded where it was offered on the part of the defendant, and the contract had been made between the plaintiff and the defendant's

agent, and there was no controversy between the two of them as to the terms of the contract, but the defendant claimed that his agent had exceeded his powers. The court recognized the principle quoted in the principal case from *Ellis v. Woodburn*, 89 Cal. 129, 26 Pac. 963.

In *Connor v. Hackley*, 2 Met. 613, a contractor, having employed the plaintiff at \$30 a month, assigned the contract to the defendant and the plaintiff continued doing the same work for the defendant that he had formerly done for the original contractor, and afterward sued the defendant for a balance for wages at the rate of \$40 a month, and put in evidence showing that his services were worth that amount. The court charged the jury to the effect that, while there was strong evidence from which they might infer that the plaintiff continued with the defendant at the same rate of wages, at all events it was for them to find what the contract between the parties was, and, the jury having found a verdict for above \$30 a month, it was not disturbed.

In *Pettet v. Johnson*, — Wash. —, 145 Pac. 985, the court stated that ordinarily evidence of the value of the services was competent and admissible where there was a dispute, for the purpose of furnishing circumstantial evidence as to which contention was correct, but where the plaintiff had offered such evidence, and the defendant had objected that it was immaterial, and the question was withdrawn, the defendant could not thereafter object that evidence that he sought to put in of the same nature was excluded.

In *Allison v. Scheeper*, 9 Daly, 365, where an attorney sued his client for 25 per cent of an award on an allegation that there was a special contract by which he was to receive that per cent, or nothing if there was no award, the client seems to have defended on the ground that she never made any contract at all with the plaintiff. The plaintiff recovered, and the court held that it was proper and necessary in fact for the plaintiff as an attorney to show that the amount of the contract was just, fair, and reasonable, and therefore it was proper for him to show that it was the usual contract.

The following Texas cases apparently relate simply to the question of *quantum meruit*:

In *Lohner v. Wilcox*, — Tex. Civ. App. —, 43 S. W. 27, it was held that in an action by an attorney to recover a definite amount on a special contract for his services, it was error to permit him to show the value of his services. The court's decision is apparently upon the ground that in this way he would be permitted to recover upon a *quantum meruit*.

In *Mullinax v. Pyron*, — Tex. Civ. App. —, 123 S. W. 1139, upon an allegation of a special contract, evidence of the reasonable and customary price for the services in the neighborhood was held to be error, as proof of a *quantum meruit* was not admissible under the circumstances.
L.R.A.1915C.

There is no error in excluding evidence as to the value of services long after the contract was made (*Dickey v. Greenleaf*, 38 Ohio St. 593), nor in excluding evidence as to the prevailing rate of wages at a time not limited to the time of the contract, or to a reasonable time prior thereto (*Stagg v. Barrett*, 78 N. J. L. 588, 76 Atl. 974, supra, III. c), where the admissibility of the evidence in any case was not passed upon.

It may be noted that it does not appear that there was any dispute as to the contract price in *Brigham v. Hawley*, 17 Ill. 38, 2 Mor. Min. Rep. 59, nor in *Wilson v. Wilson*, 125 Ill. App. 385. B. B. B.

KENTUCKY COURT OF APPEALS.

ILLINOIS CENTRAL RAILROAD COMPANY, Appt.,
v.

H. C. ROGERS et al., Doing Business as Rogers & Thomas.

(102 Ky. 535, 172 S. W. 948.)

Carrier — improper loading of live stock — liability for injury.

A carrier is not liable for injury to live stock loaded by the shipper into a car furnished for that purpose, because of the improper manner of loading, if it did not in fact discover the fault, although it might have done so, since it may assume that the shipper has loaded the car properly.

(February 4, 1915.)

Note. — Effect of shipper's negligence in loading car, or as to condition of car, upon the carrier's common-law liability.

This note is supplementary to the one appended to *Duncan v. Great Northern R. Co.* 19 L.R.A.(N.S.) 952.

It should be noted that these notes do not include cases where a carrier accepts property which is improperly packed or crated, such cases being covered in the note to *Atlantic Coast Line R. Co. v. Rice*, 29 L.R.A.(N.S.) 1214.

As to the validity of a provision in a carrier's contract imposing the responsibility of inspecting and selecting cars upon the shipper, see note to *Adams v. Colorado & S. R. Co.* 36 L.R.A.(N.S.) 412.

Improper loading—in general.

See also note in 19 L.R.A.(N.S.) 952. In *Crawford v. Southern R. Co.* 56 S. C. 136, 34 S. E. 80, it is held that the duty to see that a car is properly loaded devolves upon the carrier, and therefore it cannot by contract relieve itself from the consequences of an overloading of the cars by the shipper.

In *McCarthy v. Louisville & N. R. Co.*

APP^{EAL} by defendant from a judgment of the Common Pleas Branch, Third Division, of the Circuit Court for Jefferson County, in plaintiffs' favor in an action brought to recover damages for injuries to a shipment of live stock while in defendant's possession for transportation. Reversed.

The facts are stated in the opinion.

Mr. R. V. Fletcher, with Messrs. S. Lyman Barber and Trabue, Doolan, & Cox, for appellant:

The proximate and only cause of the injury and damage was the act of the shippers, and defendant was not liable.

Cincinnati, N. O. & T. P. R. Co. v. Sanders, 118 Ky. 119, 80 S. W. 488; Illinois C. R. Co. v. Holt, 29 Ky. L. Rep. 135, 92 S.

W. 540; Kelly v. Adams Exp. Co. 134 Ky. 208, 119 S. W. 747; Louisville & N. R. Co. v. Cooper, 142 Ky. 533, 134 S. W. 920; Cincinnati, N. O. & T. P. R. Co. v. Rankin, 153 Ky. 730, 45 L.R.A.(N.S.) 529, 156 S. W. 400; Hutchinson, Carr. 3d ed. § 266; 6 Cyc. 376, 378; Fordyce v. McFlynn, 56 Ark. 424, 19 S. W. 961; Pennsylvania Co. v. Kenwood Bridge Co. 170 Ill. 645, 49 N. E. 215; Evans v. Fitchburg R. Co. 111 Mass. 142, 15 Am. Rep. 19; Ficklin v. Wabash R. Co. 115 Mo. App. 633, 92 S. W. 347; Rixford v. Smith, 52 N. H. 355, 13 Am. Rep. 42; Goodman v. Oregon R. & Nav. Co. 22 Or. 14, 28 Pac. 894; Texas & P. R. Co. v. Klepper, — Tex. Civ. App. —, 24 S. W. 567; Ft. Worth & D. C. R. Co. v. Word, — Tex. Civ. App. —, 32 S. W. 14;

102 Ala. 193, 48 Am. St. Rep. 29, 14 So. 370, in which it does not clearly appear whether the injury to the goods was due to improper packing or to improper loading, the court, after pointing out that there could be no contributory negligence treated as a defense to an action against the carrier on its common-law liability, but that negligence of the shipper would be available as a defense only when it was the sole cause of the injury, said: "If the improper loading was apparent, that is, was a fact which addressed itself to the ordinary observation of the carrier's servants, or if it was not apparent, but the carrier was yet guilty of negligence but for which the injury would not have happened, the carrier would be liable notwithstanding the negligence of or imputable to the plaintiffs. If the cars used in this transportation were close cars and came to the defendant with their doors closed, so that without opening the doors the condition of their contents could not be seen, we should say the improper loading, if they were indeed improperly loaded, was not apparent within the meaning of the rule we have stated; in such case there would be we think no duty on the connecting carrier to open the cars and inspect their contents, which were not of a character to require such attention, assuming proper loading in the first instance."

In permitting a shipper to load the cars himself, a carrier does not make the shipper its agent, so that it will become liable for the manner in which the car is loaded on the ground of agency. Pennsylvania Co. v. Kenwood Bridge Co. 170 Ill. 645, 49 N. E. 215.

In Pennsylvania Co. v. Kenwood Bridge Co. supra, which was an action for injury to trusses loaded by a shipper upon defendant's car, because they were too high to go under a bridge, the court said that if permission was given to load them at a height at which they would pass under wires and bridges on the road, and they were loaded at a greater height, so that they could not pass under a certain bridge, it would conflict with the plainest principles L.R.A.1915C.

of justice to permit the plaintiff to recover for injury resulting from its own fault, unless the defendant had knowledge of the fact; and an instruction which would require an inspection at all events, regardless of the question of whether the circumstances were such that defendant had a right to rely upon an understanding that the trusses would be of a certain height, and not to measure them to see whether the understanding had been disregarded, was erroneous.

In Elgin, J. & E. R. Co. v. Bates Mach. Co. 98 Ill. App. 311, affirmed in 200 Ill. 636, 93 Am. St. Rep. 218, 66 N. E. 326, which was an action for damages for injury to a fly wheel which was shipped over defendant's road, liability for which defendant sought to escape on the ground that the injury to the wheel was caused by the negligent manner in which it was loaded, supported, and fastened upon the car by the shipper, the court held that the question of negligence on the part of the shipper was one for the jury, and said that, moreover, if the wheel was not properly prepared for shipment, it was apparent to the carrier, and it should have refused to accept it in that condition or have prepared it itself.

In Galveston, H. & S. A. R. Co. v. Smith, 2 Tex. App. Civ. Cas. (Willson) § 138, it was held that the act of shippers in loading corn into cars while it was wet, because of which it spoiled during transit, was such negligence on the part of the shippers as to relieve the carrier from liability, inasmuch as none of the carrier's officials or employees had anything to do with receiving, handling, or loading the corn into the car for shipment.

In Ross v. Troy & B. R. Co. 49 Vt. 364, 24 Am. Rep. 144, it was held that where the shipper loaded heavy machinery onto a flat car and improperly fastened it thereon, because of which it was thrown off and damaged, the carrier would not be liable, not being an insurer against the negligent acts of shippers.

In Texas & P. R. Co. v. Kelly, — Tex. Civ. App. —, 74 S. W. 343, it was held that

Texas & P. R. Co. v. Edins, 36 Tex. Civ. App. 639, 83 S. W. 253; International & G. N. R. Co. v. Drought, — Tex. Civ. App. —, 100 S. W. 1011; Gulf, W. T. & P. R. Co. v. Wittnebert, 101 Tex. 368, 14 L.R.A. (N.S.) 1227, 130 Am. St. Rep. 858, 108 S. W. 150, 16 Ann. Cas. 1153; Ross v. Troy & B. R. Co. 49 Vt. 364, 24 Am. Rep. 144; Betts v. Farmers' Loan & T. Co. 21 Wis. 81, 91 Am. Dec. 460; Miltimore v. Chicago & N. W. R. Co. 37 Wis. 190.

Mr. Thomas C. Mapother, for appellees:

Defendant was liable for the injury.

Louisville, H. & St. L. R. Co. v. Southern Seating & Cabinet Co. 157 Ky. 772, 164 S. W. 90; Kelly v. Adams Exp. Co. 134 Ky. 208, 119 S. W. 747; Union Exp. Co. v.

Graham, 26 Ohio St. 595; McCarthy v. Louisville & N. R. Co. 102 Ala. 193, 48 Am. St. Rep. 29, 14 So. 370; Atlantic Coast Line R. Co. v. Rice, 169 Ala. 265, 29 L.R.A. (N.S.) 1214, 52 So. 918, Ann. Cas. 1912B, 389; Hannibal & St. J. R. Co. v. Swift, 12 Wall. 262, 20 L. ed. 423.

Hannah, J., delivered the opinion of the court:

On February 4, 1914, in the Jefferson circuit court, Rogers & Thomas obtained a verdict and judgment against the Illinois Central Railroad Company in the sum of \$219.10 for damages to a shipment of live stock which was delivered by them to and accepted by the railroad company at Leitchfield on April 29, 1913, for transportation

the fact that stoves had been improperly loaded on the cars either by the shipper or the initial carrier, together with a showing that the car was properly handled by the final carrier, was sufficient to exempt the latter from liability for injury to the stoves, the car being sealed and the stoves not being exposed to view when received by defendant.

In International & G. N. R. Co. v. Drought, — Tex. Civ. App. —, 100 S. W. 1011, it is held that where a shipper assumes the duty of loading cars for shipment, the carrier is not liable for damages arising from the improper loading of the goods, and the fact that the defendant's conductor knew that the goods were not properly loaded would not relieve the shipper from the effects of his contributory negligence, the only inquiry being, Did the negligence of plaintiff contribute to the injury of his property?

In St. Louis Southwestern R. Co. v. Woldert Grocery Co. — Tex. Civ. App. —, 144 S. W. 1194, there being testimony tending to show that peaches were loaded by the carrier's agent in accordance with instructions given by the shipper, and that they may have been so loaded because of the failure of the carrier to furnish regulation material necessary to properly load them, and that they were loaded in the best manner possible under the circumstances, it could not be said as a matter of law that, in instructing the carrier to load them as they were loaded, the shipper was guilty of such negligence as deprived him of a right to recover against the carrier.

—live stock.

See also note in 19 L.R.A.(N.S.) 952.

As to condition of car, see *infra*, "Negligence as to condition of car."

Generally, as to the liability of a carrier for suffocation of live stock, see note to Kime v. Southern R. Co. 43 L.R.A.(N.S.) 617.

In Ames v. Fargo, 114 App. Div. 666, 99 N. Y. Supp. 994, which was an action for damages against an express company for in-

jury to a horse which it undertook to carry for plaintiff, defendant was held not liable, it appearing that the injury was due to the faulty manner in which the horse was tied in the car, and that the shipper directed how she should be tied, over the objection of one of defendant's agents that she was tied with too long a rope.

In Kinnick Bros. v. Chicago, R. I. & P. R. Co. 69 Iowa, 665, 29 N. W. 772, it was held that where a carrier's agent took a contract for shipment of a carload of hogs, and went to the car after it was loaded and closed and sealed it, the carrier should be held to have assumed all the liabilities of a common carrier with reference to it, though the shipper loaded the hogs in the car without assistance or direction from its agents or employees, and the car was overcrowded.

If a car was overloaded or overcrowded with sheep by the shipper, so that he would be held to have no cause of action because of the overcrowding, by reason of his contributory negligence in that respect, it would not relieve the carrier from liability for its negligence, if any, in keeping the car without unloading for an unreasonable length of time at the feeding station. Moore v. Chicago, R. I. & P. R. Co. 151 Iowa, 353, 131 N. W. 30.

In Colsch v. Chicago, M. & St. P. R. Co. — Iowa, —, 117 N. W. 281, it is held that where a carrier accepts a car with full notice of the number and weight of the cattle loaded into it, and issues its bill of lading showing such facts, it cannot escape responsibility for injury to the stock by showing that the car was overloaded by the shipper.

In a later decision in the same case, reported in 149 Iowa, 176, 34 L.R.A.(N.S.) 1013, 127 N. W. 198, Ann. Cas. 1912C, 915, which is apparently a rehearing and, in effect, overrules the former decision, the court reversed the judgment in favor of the shipper on several grounds, one of which was that the court excluded evidence of admissions by the shipper to the conductor that his agent in loading the car had put too many animals into it, and it was held

to Louisville. It was shown in evidence by the plaintiffs that they loaded a mixed car of live stock at Leitchfield, in three separate compartments; in one end of the car, some calves and sheep; in the other end, eight head of cattle; and, in the middle and separated by partitions at either end, a lot of hogs. It was further shown that, on arrival of the car at Louisville, two hogs were dead, one cow crippled, and three or four others somewhat injured. The duty of doing the loading was assumed by the shippers; they loaded the car themselves without assistance of any of the carrier's agents; and the agent at Leitchfield did not examine the car after it was loaded. It was shown by the crew of the train which handled the car that at Kroft's sta-

tion some 25 miles from Leitchfield, they discovered that there was something wrong in the car, and made an investigation which disclosed that one hog was dead and another badly injured; one cow was down and three or four others injured; that about fifteen hogs were in the same compartment with the cattle; that they must have been loaded that way, as the partition between the cattle and the remainder of the hogs was intact. The trainmen knocked this partition out, thus allowing all the hogs to be in the same compartment with the cattle.

1. The court instructed the jury that it was the duty of the railroad agent at Leitchfield to see that the live stock was properly loaded before receiving it for shipment; and that if they believed from the

that, at most, it was a question for the jury as to whether defendant knew or should have known the manner in which the stock was loaded, and assumed the risks incident thereto.

In *Texas & P. R. Co. v. Klepper*, — Tex. Civ. App. —, 24 S. W. 567, it was held that the carrier should have been allowed to prove that the car was overcrowded by having too many horses placed in it, when the evidence was undisputed that the shipper loaded the car, as, if he placed too many in the car and the injury resulted therefrom, he, and not the carrier, would be at fault, and should bear the loss caused thereby. And it was no answer to say that the shipper called for a 34-foot car, and was told that he could only be furnished with one 33 feet long, as he knew the size of the car and, if he knew he required a longer one, his negligence was the greater in crowding the horses into a shorter one.

In *Missouri, K. & T. R. Co. v. Belcher*, — Tex. Civ. App. —, 41 S. W. 706, the fact that a shipper crowded fifty head of cattle into cars the proper limit of capacity for which was forty-five head was considered an element of contributory negligence upon his part, and the court said that the error committed in finding an absence of contributory negligence was not immaterial.

In *Texas & P. R. Co. v. Edins*, 36 Tex. Civ. App. 639, 83 S. W. 253, where it appeared that there was a contract exempting the carrier from liability for negligence of the shipper in loading the cars, the court said that at all events, it being the fault of the shipper in whole or in part in loading too many horses into one car, he would not be entitled to recover for injuries due to such overloading, contract or no contract.

Negligence as to condition of car.

See also note in 19 L.R.A.(N.S.) 952.

It is incumbent upon a carrier to furnish a car properly equipped to safely transport horses to their destination, and it is not the duty of the shipper to inspect the L.R.A.1915C.

car to see that it is safe. *Chicago, B. & Q. R. Co. v. Morris*, 16 Wyo. 308, 93 Pac. 664.

In *Southern R. Co. v. Williams*, 139 Ga. 357, 77 S. E. 153, it was held that, although plaintiff observed the condition of the car at the time he loaded the fruit into it with reference to insufficient refrigeration, still if he called the attention of the agent of the company at the shipping point to the condition of the car, and the agent of the company directed him to go ahead and load the fruit, assuring him that the railway company would furnish the ice, and plaintiff, relying on that promise, loaded the car and the company failed to furnish the ice, because of which the fruit was damaged, it was liable.

In *Blair v. Wells-Fargo & Co.* 155 Iowa, 190, 135 N. W. 615, which was an action for damage to horses which were being transported by defendant, due to a defective condition of the car which exposed the horses to severe weather, it was held that if apparently mild weather prevailed from the time the horses were loaded by the shippers until after they left an intermediate point, and by reason thereof the unsuitableness of the car to properly protect the horses did not become at once apparent to them, the court could not say that they used the car so furnished at their own peril, or that failure to make complaint at the intermediate point operated as a waiver or estoppel against their right to maintain an action for damages, the court saying: "When a carrier undertakes to furnish a car for a particular service, it is in duty bound to supply one which is free from substantial defects unfitting it for the reasonably safe carriage of the proposed freight, and while the shipper cannot shut his eyes to the clear and manifest unfitness of the car tendered him, he is under no legal obligation to closely inspect it. In other words, he is entitled to assume under all ordinary circumstances that the carrier has performed its legal duty, and that the car is reasonably well adapted to the purpose for which it is ordered."

When a shipper orders a car for a particular purpose, and this purpose is known

evidence that the railroad company accepted the shipment not properly loaded, but in good condition, and that the live stock was injured or damaged or depreciated in value on delivery at destination, they should find for the plaintiff, unless they should further believe from the evidence that such injury or depreciation was caused by the inherent nature or propensities of the animals, or was due to causes beyond defendant's control, in either of which latter events they should find for defendant. Appellant complains of this instruction for the reason that its effect is to impose liability upon the carrier for loss or injury due to improper loading of the car by the shipper.

to the carrier and it agrees to furnish the kind of car ordered, his acceptance of a car other than the one ordered does not generally constitute a waiver of his right to recover damages for injury caused by the defective condition or insufficiency of the car which he accepts. *Louisville & N. R. Co. v. Rash*, 141 Ky. 225, 132 S. W. 553.

In *Missouri, K. & T. R. Co. v. McLean*, 55 Tex. Civ. App. 130, 118 S. W. 161, the court said that if a common carrier undertakes to carry perishable property in cars especially adapted to preserve it, he will become responsible for any defects in the cars resulting in injury to the property; and although a shipper may discover before the loading or departure of the car that it is not suitable for carrying cabbages or other like perishable goods, he will not on that account be deemed guilty of contributory negligence or to assume the risk, where he has no means or opportunity of relieving himself of the situation.

In *Cleveland, C. C. & St. L. R. Co. v. Louisville Tin & Stove Co.* 33 Ky. L. Rep. 924, 17 L.R.A.(N.S.) 1034, 111 S. W. 358, it is held that a railroad company cannot escape liability for injury through rust to metal loaded into one of its cars, because of the fact that the car did not properly protect the metal from the elements, on the ground that the shipper loaded the metal without exercising reasonable care to ascertain whether or not it was in proper condition for the intended use.

But in *Otrich v. St. Louis, I. M. & S. R. Co.* 154 Mo. App. 420, 134 S. W. 665, where it appeared that the defendant's informed the shipper that the car which had been furnished was not suitable for loading live stock, and that if he would wait until the next day a suitable car would be furnished, but that the shipper decided to use the car which had been furnished and repaired and loaded it himself, it was held that, by accepting the car furnished rather than waiting until a better one could be secured, he waived all right to complain of the injuries resulting from the kind of car which was furnished.

In *Allen v. Chicago, B. & Q. R. Co.* 82 Neb. 726, 23 L.R.A.(N.S.) 278, 118 N. W. 655, it was held that if a car furnished for L.R.A.1915C.

Appellees insist that the instruction is proper, and cite in support of their contention the case of *Louisville, H. & St. L. R. Co. v. Southern Seating & Cabinet Co.* 157 Ky. 772, 164 S. W. 90. In that case the court, in illustrating what was meant by the rule that a carrier is not liable as an insurer for loss or injury caused by the act or fault of the shipper, said: "For instance, under the fourth exception, . . . if goods are insufficiently packed, and this fact is not known to the carrier nor discoverable by the exercise of ordinary care, it is not liable for loss or injury due to such insufficient packing, if itself free from negligence."

the transportation of live stock could be made reasonably suitable and safe only by bedding it with sand, cinders, hay, straw, or some like substance, it was the carrier's duty to provide that bedding, and that it could not relieve itself of such liability by suggesting that the plaintiff use some other and insufficient article for that purpose, nor was it relieved of liability by the fact that the plaintiff's agent accepted the car without proper bedding.

But in *Texas C. R. Co. v. O'Laughlin*, — Tex. Civ. App. —, 72 S. W. 610, which was an action for injury to live stock shipped over defendant's road, because of insufficient bedding in the cars, it was held that if plaintiff was present at the time when the cars were bedded by defendant, and expressed his satisfaction with the bedding in the cars, and agreed to accept them as sufficiently bedded, the carrier would not be liable.

In *Texas & N. O. R. Co. v. Davis-Fowler Co.* — Tex. Civ. App. —, 133 S. W. 309, it is held that if a shipper in directing how goods shall be carried has specified in the contract of shipment that the car in which they are shipped shall be ventilated in a certain manner, and the goods are injured by the car being ventilated in accordance with such direction, the carrier is not liable for the damages flowing from its being ventilated in obedience to the shipper's direction. But the fact that the car was received with the ventilators arranged in a certain condition will not relieve the carrier from liability, as no duty rested on the shipper under the contract to see to the arrangement of the ventilating apparatus of the car, nor was such duty cast upon him by the law.

In *Central of Georgia R. Co. v. Chicago Varnish Co.* 169 Ala. 287, 53 So. 832, it was held that while a carrier could not be held responsible for a loss which arose out of the condition of the cars alone, where the shipper had undertaken to furnish the cars, the carrier could not escape responsibility where the cars were furnished by the shipper under an agreement by which the carrier was to keep them in repair at the expense of the shipper. R. L. S.

But in stating the illustration quoted, the court had in mind only those instances where the goods are delivered in crates or packages to the carrier at its warehouse, there to be loaded into cars by the carrier, and not by the shipper. In such cases, the weight of authority is that, if the improper condition is not known to the carrier or discoverable by the exercise of ordinary care, it is not liable for loss or injury due to such insufficient packing, if itself free from negligence. 6 Cyc. 380; 4 R. C. L. Carriers, § 203; 18 Ann. Cas. 234, note; 29 L.R.A.(N.S.) 1214, note. But where the improper condition of the goods is known to the carrier or discoverable in the exercise of reasonable care in the ordinary handling and loading of the goods, and they are accepted by the carrier without qualification or dissent in respect of such condition, the carrier must handle the shipment with reference to such defective condition, and is liable for loss or injury thereto if negligent in respect thereof. *The David & Caroline*, 5 Blatchf. 266, Fed. Cas. No. 3,593; *Union Exp. Co. v. Graham*, 26 Ohio St. 595.

It is well settled by the almost unanimous authorities that where the carrier furnishes a car to the shipper for the purpose of shipping live stock therein, and the latter loads the live stock himself, and in doing so he overcrowds the animals or places in one compartment animals of different kinds, the risk of loss or injury is upon the shipper, being caused by his own act, or by his own act in conjunction with the inherent nature, propensities, and qualities of the animals themselves; the carrier not being liable for loss or injury due to either or both of such causes. *Hutchinson, Carr.* § 333; *Fordyce v. McFlynn*, 56 Ark. 424, 19 S. W. 961; *Ficklin v. Wabash R. Co.* 115 Mo. App. 633, 92 S. W. 347 (overcrowded sheep); *Ft. Worth & D. C. R. Co. v. Word*, — Tex. Civ. App. —, 32 S. W. 14; *Squire v. New York C. R. Co.* 98 Mass. 239, 93 Am. Dec. 162 (hogs); *Texas & P. R. Co. v. Klepper*, — Tex. Civ. App. —, 24 S. W. 567 (overcrowded horses); *Miltimore v. Chicago & N. W. R. Co.* 37 Wis. 190 (wagon not securely loaded on car); *Ross v. Troy & B. R. Co.* 49 Vt. 364, 24 Am. Rep. 144 (machinery insecurely loaded on car); *Pennsylvania Co. v. Kenwood Bridge Co.* 170 Ill. 645, 49 N. E. 215 (bridge material loaded by shipper); *Ohio & M. R. Co. v. Dunbar*, 20 Ill. 623, 71 Am. Dec. 291; *Rixford v. Smith*, 52 N. H. 355, 13 Am. Rep. 42; *Missouri, K. & T. R. Co. v. Belcher*, — Tex. Civ. App. —, 41 S. W. 706; *Texas & P. R. Co. v. Edins*, 36 Tex. Civ. App. 639, 83 S. W. 253. See 6 Cyc. 381; 4 R. C. L. Carriers, § 203. L.R.A.1915C.

There are a few respectable authorities holding the contrary view. In *Kinnick Bros. v. Chicago R. I. & P. R. Co.* 69 Iowa, 665, 29 N. W. 772, a shipper loaded a car of hogs, and they were injured because of being overcrowded in the car. The carrier's agent, however, had closed the door of the car, and the court held that, as there was nothing to prevent his observing the manner in which the hogs were loaded, the carrier was not relieved from the consequences of the shipper's act or fault in overcrowding the animals in the car. In *Duncan v. Great Northern R. Co.* 17 N. D. 610, 19 L.R.A.(N.S.) 952, 118 N. W. 826, a car was loaded by a shipper with flax. The shipper closed the inside doors, and the carrier's agent closed the outside doors. While the car was en route, some of the flax escaped by reason of the inside door becoming unfastened. The court said that the devices for fastening the inside doors were open to the inspection of the carrier's agent when he closed the outside doors, and were where he could not avoid seeing them if he looked at all, or even made the slightest effort to ascertain whether they were properly fastened, and upon that ground held the carrier not relieved by the act of the shipper in neglecting to fasten securely the inside doors of the car. The *Duncan Case* rests upon the *Kinnick Case*, supra, and the case of *McCarthy v. Louisville & N. R. Co.* 102 Ala. 193, 48 Am. St. Rep. 29, 14 So. 370. In the *McCarthy Case*, the court held that, if the improper loading of the cars was apparent,—that is, was a fact which addressed itself to the ordinary observation of the carrier's servants,—the carrier is not relieved upon the ground that the loss or injury was due to the act or fault of the shipper. The *Duncan Case* also cites *Union Exp. Co. v. Graham*, 26 Ohio St. 595; but a fair interpretation of the opinion therein is that, if the carrier receives for shipment property insufficiently packed when he might, in the exercise of reasonable care, have discovered such insufficiency, the carrier is still liable for loss or injury thereto due to his negligence.

In *Gulf, W. T. & P. R. Co. v. Wittnebert*, 101 Tex. 368, 14 L.R.A.(N.S.) 1227, 130 Am. St. Rep. 858, 108 S. W. 150, 16 Ann. Cas. 1153, the court said that it had found no dissent from the rule that, when a consignor loads freight upon a car, the carrier which receives the car as loaded is not liable for damages which arise from a defect in the loading; but, after reviewing a number of cases, the court said: "The authorities cited, and from which we have made the quotations above, establish the proposition that it is not the duty of a railroad company which receives from the

owner or from another railroad a loaded car, to make an inspection of the manner of the loading when the defect cannot be discovered by an external examination"

However, as has been seen from the authorities cited, the great weight of authority supports the proposition that, where the shipper loads the car himself, the carrier is not liable for loss or injury arising from such defective manner of loading, whether the same be discoverable or not, if not actually discovered by the carrier. The carrier has a right to assume that the shipper

L.R.A.1915C.

has loaded the car in proper manner; and it does not lie in the mouth of a shipper whose act or fault in respect to the manner in which he loaded the car has resulted in loss or injury to his property, to say to the carrier that it might have discovered such improper loading by an inspection. The shipper may not thus derive advantage from his own wrong.

For the error in the instruction noted, the appellant is entitled to a new trial, and the judgment of the lower court is therefore reversed.

INDEX TO NOTES.

(The Index to Cases follows this.)

Act of God.		Building contracts.	
Vessel striking submerged object as act of God	423	See CONTRACTS.	
Advertising.		Building line.	
Right of action for use of photograph or name for advertising purposes	839	See BUILDINGS.	
Animals.		Buildings.	
Right to kill dogs	359	Injury by fall of, see NEGLIGENCE.	
Appeal and error.		Power to establish a building line	981
Consumption of liquor by jury as ground for new trial or reversal	302	Carriers.	
Assault and battery.		Damages for failure in duty to passenger, see DAMAGES.	
On passenger, see CARRIERS.		Carrier's liability for assault upon passenger by strikers, mob, or third persons	681
Withdrawal from combat as affecting civil liability for assault	893	Discharging street car passenger on curve	609
Attorneys.		Duty as to notification of passenger of arrival at station	664
Liability of husband on wife's contract for attorneys' fees in divorce proceedings	467	Negligence of passenger in getting on or off moving train	181
Acting with mob as a ground for disbarment, suspension, or other discipline	259	Effort that must be made to collect fares before ejecting passengers for nonpayment of same	148
Automobiles.		Ejection of sick or intoxicated passenger	134
Measure of damages for damage to automobile used for pleasure	819	Effect of shipper's negligence in loading car, or as to condition of car, upon the carrier's common-law liability	1220
Bailment.		Who are common carriers within constitutional or statutory provision directed specifically against suppression of competition between carriers	865
Liability of bailee for articles which accidentally come into his possession with subject of bailment	712	Validity of monopoly or special privilege granted to third persons, of providing facilities to shippers at place of shipment or destination	250
Bankruptcy.		Charities.	
Refusal of discharge because of transfer of assets with a view to distribution of proceeds among creditors	89	Exemption from taxation, see TAXES.	
Banks.		Chattel mortgage.	
Liability of bank for failure to prevent misappropriation of funds by a fiduciary	518	Right of lienor to proceeds where property is sold with his consent under agreement that proceeds shall be applied toward payment of the debt	166
Benevolent societies.		Clubs.	
Taxation of, see TAXES.		Sale of liquor by, see INTOXICATING LIQUORS.	
Bills and notes.		Competition.	
Transfer of title to note by indorsement in form of guaranty	661	Suppression of, see MONOPOLY AND COMBINATIONS.	
Brokers.			
Written authorization of broker or agent to buy or sell land as a memorandum of contract of sale sufficient to satisfy the statute of frauds	400		
L.R.A.1915C.	1227		

Conflict of laws.

Applicability of statute referring question of limitation to the law of the state where contract was to be performed

976

Constitutional law.

Constitutionality of Federal employers' liability act

47

Constitutionality of statute forbidding employer to exact an agreement from employee not to join labor union

960

License or tax as contrary to a constitutional provision prohibiting or restricting traffic in intoxicating liquors

101

Right to reduce rates of public service corporation fixed by franchise or charter

261

Effect of contract with patrons to preclude regulation of rates of public service corporations

282

Right to raise rates of public service corporation fixed by franchise

287

Power of legislature to enact prima facie rule of evidence for criminal

717

Contracts.

Of wife, see HUSBAND AND WIFE.

Of infant, see INFANTS.

Written authorization of broker or agent to buy or sell land as a memorandum of contract of sale sufficient to satisfy the statute of frauds

400

Validity of an agreement by which compensation is dependent on success in procuring a contract with public officer or board

823

Effect of defective or insufficient plans upon rights and liabilities of contractors and subcontractors who do not expressly warrant them

671

Contribution and indemnity.

Right of one liable for damages from defective article to recover over against vendor or manufacturer

336

Contributory negligence.

At railroad crossing see RAILROADS.

Corporations.

Public service corporations, see PUBLIC SERVICE CORPORATIONS.

Taxation of stock, see TAXES.

Liability of, for acts of special police officer appointed by public authorities

1183

Personal liability of officer or director of corporation for personal injuries from torts in connection with its business

874

Situs of corporate stock for purpose of transfer on books of corporation

471

Right of foreign corporation to avail itself of statute of limitations

544

Courts.

Judicial proceedings as privileged communications, see LIBEL AND SLANDER.

Power to suspend sentence or stay execution of sentence

1169

L.R.A.1915C.

Covenants and conditions.

In lease, see LANDLORD AND TENANT.

Criminal law.

Power of legislature to enact prima facie rule of evidence for criminal case

717

Acquittal or conviction upon a charge of burglary or feloniously entering with intent to steal goods of a certain person, as a bar to a subsequent prosecution based on the same entry, but charging intent to steal the property of another person

627

Cruel and unusual punishment

558

Power of court to suspend sentence or stay execution of sentence

1169

Cruel and unusual punishment.

See CRIMINAL LAW.

Custom.

Evidence of, see EVIDENCE.

Damages.

Liability of carrier for punitive or exemplary damages for refusal or failure to transport passengers

477

Measure of damages for damage to automobile used for pleasure

319

Dangerous agencies.

See ELECTRICITY; NEGLIGENCE.

Debtors and creditors.

Right of creditors to set up usury in their debtor's contract with others

634

Descent and distribution.

Homicide as affecting devolution of property

328

Disbarment.

Of attorneys, see ATTORNEYS.

Discharge.

In bankruptcy, see BANKRUPTCY.

Divorce and separation.

Conclusiveness of decree for, see JUDGMENT.

Liability of husband on wife's contract for attorney's fees in divorce proceedings

467

Effect of divorce on tenancy by entireties

896

Dogs.

See ANIMALS.

Drunkenness.

Of passenger, see CARRIERS.

Easements.

Easements created by severance of tract of land with apparent benefit existing

345

Ejection.

Of passenger, see CARRIERS.

Electricity.		Frauds, statute of.	
Duty of electric company with respect to wiring or fixtures installed in private property	570	See CONTRACTS.	
Employers' indemnity policy.		Garbage.	
See INSURANCE.		Throwing garbage on surface as nuisance	747
Employers' liability.		Guaranty.	
See MASTER AND SERVANT.		Transfer of title to note by indorsement in form of guaranty	661
Entireties.		Guardian and ward.	
Estate by, see HUSBAND AND WIFE.		Guardian's consent as affecting infant's contract	362
Equity.		Right of guardian of an infant to appointment as administrator or executor	581
Reimbursement of taxes paid by purchaser, as condition of equitable relief against invalid tax title	492	Homicide.	
Evidence.		As affecting devolution of property	328
Power of legislature to enact prima facie rule of evidence for criminal cases	717	Husband and wife.	
Admissibility of newspaper files to prove the publication or contents of an order of publication	690	As to divorce, see DIVORCE AND SEPARATION.	
Evidence of value of services or of customary compensation on question as to amount agreed upon	1208	Liability of husband on wife's contract for attorneys' fees in divorce proceedings	467
Exclusive privilege.		Validity of conveyance of wife's real property to husband through himself as trustee or through a third person	767
Grant of, by carrier, see CARRIERS.		Effect of divorce on tenancy by entireties	396
Executors and administrators.		Incompetent persons.	
Right of committee of lunatic or guardian of an infant to appointment as administrator or executor	581	Right of committee of lunatic to appointment as administrator or executor	581
Personal liability of, for succession tax	615	Indorsement.	
Situs for taxation, as between different states or countries, of personal property held by executor or administrator	949	Of note, see BILLS AND NOTES.	
Manner of raising question, to charge executor or administrator personally, or collusion in establishing claim against estate	787	Infants.	
Exemplary damages.		Guardian's consent as affecting infant's contract	362
See DAMAGES.		Inheritance tax.	
Exemptions.		See TAXES.	
From taxation, see TAXES.		Insolvency.	
Extension of time.		As to bankruptcy, see BANKRUPTCY.	
Release of surety by, see PRINCIPAL AND SURETY.		Insurance.	
Falling objects.		Fire insurance as a business affected with a public interest	1189
Injury by, see NEGLIGENCE.		Waters covered by description of waters in policy of marine insurance	408
Federal employers' liability act.		Effect of breach of policy of insurance by mortgagor on rights of mortgagee	758
See MASTER AND SERVANT.		Scope and construction of provision for indemnity in case of injury while riding in or on a public conveyance	456
Fire insurance.		Injuries covered by employers' indemnity policy	155
See INSURANCE.		Intoxicating liquors.	
Foreign corporations.		Consumption of liquor by jury as ground for new trial or reversal	302
See CORPORATIONS.		License or tax as contrary to a constitutional provision prohibiting or restricting traffic in intoxicating liquor	101
Former jeopardy.			
See CRIMINAL LAW.			
L.R.A.1915C.			

- What is a village within statutes or ordinances in relation to intoxicating liquor 898
- Loan as sale 648
- Applicability of liquor laws to social club dispensing liquors to members 876
- Jeopardy.**
See CRIMINAL LAW.
- Judgment.**
Conclusiveness as to third persons of decree in suit for divorce or annulment as to the facts adjudicated as distinguished from the status established 870
- Judicial sale.**
Applicability to existing purchasers, of changes in law relating to redemption from judicial sales 414
- Jury.**
Consumption of liquor by jury as ground for new trial or reversal 302
- Labor organizations.**
Constitutionality of statute forbidding employer to exact an agreement from employee not to join labor union 960
- Landlord and tenant.**
Construction of provision in lease as to termination or leasehold in case of sale of premises 234
Transfer of reversion 190
Right of transferee of reversion as to breaches of covenant occurring before transfer 245
Provision in lease of public property as to payment of taxes 698
Provision in lease the purpose of which is to assure lessee an exclusive right to conduct a certain business on premises owned by lessor 854
Landlord's breach of covenant to repair or make improvements as defense to action for rent, or justification for abandonment 649
- Lease.**
See LANDLORD AND TENANT.
- Libel and slander.**
Privilege as to defamatory statements in testimony or affidavits to be used in progress of case 986
- License.**
For sale of intoxicating liquor, see INTOXICATING LIQUORS.
- Liens.**
Right of lienor to proceeds where property is sold with his consent under agreement that proceeds shall be applied toward payment of the debt 166
- Life insurance.**
See INSURANCE.
L.R.A.1915C.
- Life tenants.**
Rights as between life tenant and remainderman to an increase in the value of the estate 846
- Limitation of actions.**
Right of foreign corporation to avail itself of statute of limitations 544
Applicability of statute referring question of limitation to the law of the state where contract was to be performed 976
- Loan.**
Of intoxicating liquor as a sale 648
- Malpractice.**
See PHYSICIANS AND SURGEONS.
- Marine Insurance.**
See INSURANCE.
- Master and servant.**
Insurance against master's liability for injury to employees, see INSURANCE.
Liability of private person or corporation for acts of special police officer appointed by public authorities 1183
Implied power of employee to employ physician to attend injured employee 809
Master's duty to furnish medical aid to servant 789
Evidence of value of services or of customary compensation on question as to amount agreed upon 1208
Constitutionality of statute forbidding employer to exact an agreement from employee not to join labor union 960
Constitutionality, application, and effect of the Federal employers' liability act 47
- Medical attention.**
Master's duty to furnish to servant 789
- Memorandum.**
To satisfy the statute of frauds, see CONTRACTS.
- Mob.**
Assault by, on passenger, see CARRIERS.
- Monopoly.**
Grant of, by carrier, see CARRIERS.
Who are common carriers within constitutional or statutory provision directed specifically against suppression of competition between carriers 865
- Mortgage.**
Right of lienor to proceeds where property is sold with his consent under agreement that proceeds shall be applied toward payment of the debt 166
Effect of breach of policy of insurance by mortgagor on rights of mortgagee 758
- Municipal corporations.**
Power over buildings, see BUILDINGS.
Right of municipality to establish water plant in competition with company to which it has granted a franchise 439

Liability of municipal corporations for injuries through unsafe conditions in parks or other public grounds other than streets	435	Principal and agent.	
Street cleaning as a governmental function	741	Dissolution of partnership authorized to act as agent as terminating agency	576
Name.		Principal and surety.	
Right of action for use of, for advertising purposes	839	Agreement to extend time for payment, conditional upon surety's consent, as a release of the surety	831
Negligence.		Privacy.	
Of bailee, see BAILMENT.		Right of action for use of photograph or name for advertising purposes	839
Of carrier or passenger, see CARRIERS.		Privilege.	
Contribution or indemnity as between tort feasons, see CONTRIBUTION AND INDEMNITY.		As to libel, see LIBEL AND SLANDER.	
Of municipality, see MUNICIPAL CORPORATIONS.		Public property.	
Of physician or surgeon, see PHYSICIANS AND SURGEONS.		Provision in lease of, as to payment of taxes	698
At railroad crossing, see RAILROADS.		Public service corporations.	
Of street car company, see STREET RAILWAYS.		See also CARRIERS; TELEGRAPH; TELEPHONES; WATERS.	
Liability of one who sells dangerous instrumentality to child in violation of statute or ordinance for injury inflicted thereby upon child or third person	460	Right to reduce rates of public service corporation fixed by franchise or charter	261
Liability of landowner for fall of wall or building left standing after fire	704	Effect of contract with patrons to preclude regulation of rates of public service corporations	282
Newspapers.		Right to raise rates of public service corporation fixed by franchise	287
Admissibility in evidence, see EVIDENCE.		Public water supply.	
New trial.		See WATERS.	
Consumption of liquor by jury as ground for new trial or reversal	302	Punitive damages.	
Nuisance.		See DAMAGES.	
Throwing garbage on surface	747	Railroads.	
Officers.		As carriers, see CARRIERS.	
Of corporation, see CORPORATIONS.		Contributory negligence in attempting to use railroad crossing known to be in a dangerous or defective condition	818
Power to extend term of office by postponing time of election	378	Rates.	
Parks and squares.		Of public service corporation, see PUBLIC SERVICE CORPORATIONS.	
Liability of municipal corporation for injuries through unsafe condition of	435	Release.	
Partnership.		Of surety, see PRINCIPAL AND SURETY.	
Dissolution of partnership authorized to act as agent as terminating agency	576	Remaindermen.	
Photographs.		See LIFE TENANTS.	
Right of action for use of, for advertising purposes	830	Rent.	
Physicians and surgeons.		See LANDLORD AND TENANT.	
Liability of physician or surgeon for failure to follow established practice as to method of treatment	595	Repairs.	
Master's duty to furnish medical aid to servant	789	Landlord's duty as to, see LANDLORD AND TENANT.	
Implied power of employee to employ physician to attend injured employee	809	Reversion.	
Police.		Transfer of reversion of lease, see LANDLORD AND TENANT.	
Liability of private person or corporation for acts of special police officer appointed by public authorities	1183	Sale.	
L.R.A.1915C.		Of intoxicating liquors, see INTOXICATING LIQUORS.	
		Of dangerous agencies, see NEGLIGENCE.	
		For taxes, see TAXES.	
		Schools.	
		Sale of books or other school supplies upon school property or by persons connected with schools	624

- Sentence.**
In criminal case, see CRIMINAL LAW.
- Services.**
Evidence of value of services or of customary compensation on question as to amount agreed upon 1208
- Shipping.**
Vessel striking submerged object as act of God 423
- Sickness.**
Of passenger, see CARRIERS.
- Situs.**
For purpose of taxation, see TAXES.
- Slander.**
See LIBEL AND SLANDER.
- Special police.**
Liability of private person or corporation for acts of special police officer appointed by public authorities 1183
- Statute of frauds.**
See CONTRACTS.
- Statutes.**
Applicability to existing purchasers, of changes in law relating to redemption from judicial sales 414
- Stay.**
Of execution of sentence, see CRIMINAL LAW.
- Stock and stockholders.**
See CORPORATIONS.
- Street cleaning.**
As a governmental function 741
- Street railways.**
As carriers, see CARRIERS.
Liability of street railway company to one hit by swing of car at curve 604
- Strikers.**
Assault by, on passenger, see CARRIERS.
- Succession tax.**
See TAXES.
- Suspension.**
Of attorney, see ATTORNEYS.
Of sentence or execution of sentence, see CRIMINAL LAW.
- Taxes.**
Provision in lease of public property as to payment of 698
Situs, as between different states or countries, of personal property for purposes of property taxation 903
Situs for taxation as between different states or countries of personal property held by testamentary trustee or by executor or administrator 949
Acquisition of exempt character after tax day 125
Use of lodge or club building for entertainment or social purposes as affecting right of exemption from taxation 694
- Deductions in taxation of capital stock of corporation 880**
Deductions in taxation of shares of corporate stock in hands of shareholders 386
Validity of tax sales where nonpayment is due to mistake or negligence of tax officers 158
Reimbursement of taxes paid by purchaser, as condition of equitable relief against invalid tax title 492
Succession tax; personal liability of executor or administrator 615
- Telegraphs.**
Liability of telegraph company for disclosing contents of message 487
- Telephones.**
Liability of telephone company for failure to make connections for subscriber 450
- Term.**
Of office, see OFFICERS.
- Torts.**
Of corporation, see CORPORATIONS.
- Trade unions.**
See LABOR ORGANIZATIONS.
- Trial.**
Proceedings in, as privileged communications, see LIBEL AND SLANDER.
- Trusts.**
Illegal trusts, see MONOPOLY AND COMBINATIONS.
Situs for taxation of personal property held by testamentary trustee 949
- Union.**
Trade unions, see LABOR ORGANIZATIONS.
- Usury.**
Right of creditors to set up usury in their debtor's contract with others 684
- Value.**
Evidence as to, see EVIDENCE.
- Vendor and purchaser.**
Oral contracts for land, see CONTRACTS.
- Walls.**
Negligence as to, see NEGLIGENCE.
- Waters.**
Right of municipality to establish water plant in competition with company to which it has granted a franchise 439
- Wills.**
What passes under bequest of contents of, or property, effects, etc., contained in a place or receptacle 653
Provision in bequest or devise contemplating the attainment of a specified age as rendering the gift contingent 1012
- Witnesses.**
Slander by, see LIBEL AND SLANDER.
- L.R.A.1915C.

GENERAL INDEX

NOTES ARE INDEXED BY THE WORD "ANNOTATED" AFTER THE PARAGRAPHS TO WHICH THEY APPLY.

(Separate Index to Notes Precedes this.)

ACCIDENT INSURANCE.

See Insurance.

ACCOUNT BOOKS.

Condition in insurance policy as to keeping of, see Insurance, 5.

ACCOUNTING.

By personal representative, see Executors and Administrators, 5.

ACKNOWLEDGMENT.

1. The interpolation of the words "to me" after the word "acknowledge," in the statutory form for certificates of acknowledgment of deeds, is immaterial. *Holland v. Hotchkiss*, L.R.A.1915C, 492, 123 Pac. 258, 162 Cal. 366.

2. Failure of the clerk of court to certify that an acknowledgment of a deed was taken in accordance with the law of the place where it was made, which the statute makes proof of such conformity, will not invalidate the deed if the acknowledgment complied with the laws of the place where the land was located. *Holland v. Hotchkiss*, L.R.A.1915C, 492, 123 Pac. 258, 162 Cal. 366.

3. A certificate that a grantor acknowledged that he "signed and sealed" the instrument sufficiently complies with a statutory requirement that he acknowledge that he executed it, and it is immaterial that sealing was not necessary under the statute. *Holland v. Hotchkiss*, L.R.A.1915C, 492, 123 Pac. 258, 162 Cal. 366.

ACQUIESCENCE.

Estoppel by, see Estoppel, 1, 2.

ACTION OR SUIT.

Right of payee of check to maintain action against bank for amount of check, see Banks, 7.

Limitation of action or suit, see Limitation of Actions.

Parties to action, see Parties.

1. A claim for damages for injuries to the private business of plaintiff cannot be joined with an action by one as citizen and taxpayer on behalf of all others of the class to enjoin the use of a schoolhouse for L.R.A.1915C.

private business, where the statute provides that to be joined causes of action must affect all the parties to the action. *Tyre v. Krug*, L.R.A.1915C, 624, 149 N. W. 718, 159 Wis. 39.

2. Counts at common law and under the Federal employers' liability act may be joined in the same complaint in an action to recover for alleged negligent injury to a railroad employee. *Bouchard v. Central Vermont R. Co.* L.R.A.1915C, 33, 89 Atl. 475, 87 Vt. 399. (Annotated)

ACT OF GOD.

As excuse for failure of carrier to return excursionists to their homes, see Carriers, 1.

Presumption and burden of proof as to, see Evidence, 5.

Injury to vessel by, see Shipping.

ADMINISTRATION.

Of decedent's estate, see Executors and Administrators.

ADVERTISING.

Wrongful use of name for purpose of, see Privacy.

AFFIDAVITS.

For new trial, see Libel and Slander, 2.

AGE.

Provision in devise contemplating attainment of specified age as rendering the gift contingent, see Wills, 3, 4.

AGENCY.

See Principal and Agent.

ALIENATION OF AFFECTIONS.

Of wife, see Evidence, 11; Judgment, 6; Witnesses, 1.

AMUSEMENTS.

A fair association is liable for the death of a patron by the negligence of a person to whom it has let space for a shooting gallery, in removing a cartridge from a rifle, where his carelessness was such as to require oversight or precautionary steps 1233

to protect patrons, which the association failed to exercise. *Graffam v. Saco Grange*, L.R.A.1915C, 632, 92 Atl. 649, 112 Me. 508.

ANCILLARY ADMINISTRATION.

See Executors and Administrators, 6.

ANIMALS.

Negligence in driving mule known to be afraid of automobiles, see Automobiles; Negligence, 5.

Transportation of, see Carriers, 11.

A cat is within the protection of a statute authorizing the killing of a dog found worrying, wounding, or killing any domestic animal. *Thurston v. Carter*, L.R.A. 1915C, 359, 92 Atl. 295, 112 Me. 361.

(Annotated)

ANSWER.

See Pleading, 4.

ANTI-TRUST ACT.

Combination in violation of, see Monopoly and Combinations.

APPEAL AND ERROR.

For certified question, see Cases Certified.

From tax assessment, see Taxes, 14.

Jurisdiction of particular courts.

1. A writ of error will lie from the Federal Supreme Court to review a decision of the highest state court, which sustained the action of the trial court in overruling certain contentions made by the plaintiff in error asserting a construction of the Federal employers' liability act of April 22, 1908 as amended by the act of April 5, 1910, which, if acceded to, would presumably have produced a verdict in favor of plaintiff in error, and consequent immunity from the action. *Seaboard A. L. R. Co. v. Horton*, L.R.A.1915C, 1, 58 L. ed. 1062, 34 Sup. Ct. Rep. 635, 233 U. S. 492.

Transfer of cause.

2. Making the writ of error to a state court and the citation thereon returnable "within thirty days from the date hereof," without inserting a day certain as the return day, is a substantial compliance with the provision of the United States Supreme Court rule 8, clause 5, that (with certain exceptions in favor of the more distant states and territories) "all appeals, writs of error, and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time." *Seaboard A. L. R. Co. v. Horton*, L.R.A.1915C, 1, 58 L. ed. 1062, 34 Sup. Ct. Rep. 635, 233 U. S. 492.

Record on appeal.

3. Error in argument is not available on appeal in the absence of anything in the record to show that it was made or the court's ruling upon an objection to it. *Louisville v. Hehemann*, L.R.A.1915C, 747, 171 S. W. 165, 161 Ky. 523. L.R.A.1915C.

Objections and exceptions; raising questions in lower court.

4. Mere certification of the evidence and charge of the court does not properly present the question of wrongful direction of a verdict, or of error in the charge of the court. *Cook v. Packard Motor Car Co.* L.R.A.1915C, 319, 92 Atl. 413, 88 Conn. 590. Interlocutory matters; orders, etc not appealed from.

5. The question of the validity of a judgment upon which the litigation depends may be passed upon an appeal, although no appeal was taken from the ruling of the trial judge upon the attack made upon it. *Winn v. Anderson*, L.R.A.1915C, 581, 170 S. W. 213, 161 Ky. 18.

Questions not raised below.

6. Error in the trial of one accused of homicide cannot be predicated upon the admission of testimony which at the time seems relevant, since, if, by reason of further facts, it appears to be irrelevant and prejudicial, defendant should move to strike it from the consideration of the jury; otherwise he cannot complain. *Shellenberger v. State*, L.R.A.1915C, 1163, 150 N. W. 643, — Neb. —.

7. A variance between declaration and proof, as to which no question was raised in the trial, which could have misled no one, and to cure which, had the suggestion been made, it would have been the duty of the court to permit an amendment, is not available to sustain a judgment for defendant. *Law v. Illinois C. R. Co.* L.R.A.1915C, 17, 208 Fed. 869, 126 C. C. A. 27.

Errors waived or cured below.

8. Failure of a petition for specific performance of an agreement in a lease to convey the leased property, to allege defendant's ownership of the property, does not require a reversal of a decree in plaintiff's favor if the sufficiency of the petition was not challenged until a motion in arrest of judgment, and defendant's ownership of the property was conceded at the trial. *Tebeau v. Ridge*, L.R.A.1915C, 367, 170 S. W. 871, — Mo. —.

9. A defendant waives an exception taken by him to the refusal of the trial court to exclude plaintiff's evidence, by subsequently introducing evidence upon his own behalf. *Fisher v. Sun Ins. Office*, L.R.A.1915C, 619, 83 S. E. 729, — W. Va. —.

10. An objection and exception to the exclusion of evidence is abandoned by failure to mention the ruling in the motion for new trial. *Hartnett v. Boston Store*, L.R.A. 1915C, 480, 106 N. E. 837, 265 Ill. 331.

Review of facts.

11. The verdict of a jury in case of conflicting evidence will not be disturbed where the evidence and the inferences legitimately to be drawn therefrom support the verdict. *Walters Nat. Bank v. Bantock*, L.R.A.1915C, 531, 137 Pac. 717, 41 Okla. 153.

12. The fact that the proof of loss upon a stock of goods, supported by the testimony of the insured's adjuster, places a

value upon the property lost much higher than that fixed by the insurer's adjuster and that adopted by the jury, does not show an attempt to defraud the insurer so as to overthrow the verdict of the jury rejecting that conclusion. *Rasmusson v. North Coast F. Ins. Co.* L.R.A.1915C, 1179, 145 Pac. 610, — Wash. —.

13. Failure to prove the age and condition of health of the widow and child of one killed by another's negligence does not invalidate an assessment of damages, where the age of decedent was proved and the widow and child appeared before the jury and afforded them the opportunity of determining such facts. *Philadelphia, B. & W. R. Co. v. Tucker*, L.R.A.1915C, 39, 35 App. D. C. 123.
Grounds for reversal.

14. Error in expunging allegations in a complaint is immaterial if evidence is received upon the question. *Cook v. Packard Motor Car Co.* L.R.A.1915C, 319, 92 Atl. 413, 88 Conn. 590.

15. It is error upon the trial of one accused of homicide to which he confessed, to exclude evidence of a confession to the commission of a similar crime twenty-three years before, which was proved to be false, where the defense is that the accused was weak-minded and given to making such confessions, and the evidence is not sufficient to sustain a conviction without the confession to the commission of the crime for which he was being tried. *Shellenberger v. State*, L.R.A.1915C, 1163, 150 N. W. 643, — Neb. —.

16. In an action for damages sustained in crossing the tracks of a railroad company at a public crossing alleged to be in a dangerous condition, it is prejudicial error to exclude evidence offered by the defendant to show that there was another and perfectly safe crossing by which the plaintiff might have crossed the tracks without inconvenient interruption to his journey. *Fort Smith & W. R. Co. v. Seran*, L.R.A.1915C, 813, 143 Pac. 1141, — Okla. —.

(Annotated)

17. A judgment will not be reversed because the judge erroneously singles out and comments on the testimony of a particular witness in his instruction, if it had no material effect upon the verdict. *People v. Mendelson*, L.R.A.1915C, 627, 106 N. E. 249, 264 Ill. 453.

18. The fact that three bottles of beer which were introduced in evidence in a prosecution for maintaining a common nuisance under the liquor laws, and taken by the jury into their room, were found empty at the time such jury reported they had arrived at a verdict, is ground for a reversal of a conviction, where such prejudice has not been overcome by competent evidence in support of the verdict, even though the taking of the exhibits into the jury room was not objected to by counsel for the defendant. *State v. Applegate*, L.R.A.1915C, 315, 149 N. W. 356, 28 N. D. 395.

(Annotated)

L.R.A.1915C.

19. Findings of the court in an equity cause, outside the pleadings and proof, do not require a reversal if there is enough in the pleadings and proof to justify the decree. *Tebeau v. Ridge*, L.R.A.1915C, 367, 170 S. W. 871, — Mo. —.

Judgment.
20. Judgment cannot be rendered for plaintiff upon reversal of a judgment for defendant if the abstract does not show that the evidence tending to support the amount claimed is undisputed. *Hall v. Gage*, L.R.A.1915C, 704, 172 S. W. 833, — Ark. —.

21. Where there is no error as to the trial on the merits of the action, but there is technical error in the overruling of a demurrer to the declaration, in that the appointment and qualification of the plaintiff as administratrix are not averred, which point was not expressly raised or deemed of consequence in the court below, a new trial will be limited to the issue made on the omitted averment when supplied. *Moss v. Campbells Creek R. Co.* L.R.A.1915C, 1183, 83 S. E. 721, — W. Va. —.

22. A plaintiff may recover costs on appeal if he succeeds in reversing a ruling sustaining a demurrer to his complaint on the ground that it fails to state a cause of action, although the order dissolving the preliminary injunction must be affirmed because of improper joinder of different causes of action, which matter was not passed upon by the trial court. *Tyre v. Krug*, L.R.A.1915C, 624, 149 N. W. 718, 159 Wis. 39.

APPOINTMENT.

Of committee for insane person, see Incompetent Persons, 2.

ARGUMENTATIVENESS.

Demurrer for, see Pleading, 5, 6.

ASSAULT AND BATTERY.

The rule that when parties enter into a mutual combat, and one in good faith withdraws therefrom and is afterward assaulted, he may recover damages for such assault, does not apply when one who is assaulted and severely beaten strikes his assailant immediately, in the heat of passion, upon escaping from his attack. *Eisentraut v. Madden*, L.R.A.1915C, 893, 150 N. W. 627, — Neb. —.

(Annotated)

ASSESSMENTS.

Of tax, see Taxes, 10-13.

ASSETS.

Of decedent's estate, see Executors and Administrators, 4.

ASSIGNMENT.

Check as assignment, see Banks, 7.
Assignment by landlord of reversion, see Landlord and Tenant, 8-10.

ASSUMPTION OF RISKS.

By servant see Master and Servant, 15-18.

ATTACHMENT.

As to garnishment, see Garnishment.

ATTORNEYS.

Liability of husband for services of attorney under contract with wife, see Husband and Wife, 1, 2.

An attorney at law may be suspended from practice for actively participating in the acts of a mob which takes undesirable citizens from a jail, deports them from the town, and forbids their return. *State ex rel. McLaughlin v. Graves*, L.R.A.1915C, 259, 144 Pac. 484, — Or. —. (Annotated)

AUTOMOBILES.

Measure of damages for injuries to, see Damages, 5, 6.

Evidence on question of damages for injury to, see Evidence, 25.

Disaffirmance of infant's purchase of, see Infants.

Striking out allegation in action for injury to automobile, see Pleading, 1.

Liability notwithstanding contributory negligence of person injured, see Negligence, 5.

Driving upon the highway with a mule known to be afraid of automobiles is not negligence if there was no reason to anticipate that the driver would not have time to take precautions to protect himself from injury when an automobile approached. *Butler v. Cabe*, L.R.A.1915C, 702, 171 S. W. 1190, — Ark. —.

BAILMENT.

Master's liability for theft by servant, see Master and Servant, 25.

1. One who negligently leaves valuables in the pockets of clothing when sending it to a cleaner cannot hold the latter liable for its loss as an involuntary bailee, who by statute is one in whose possession property is accidentally left without negligence on the part of the owner. *Copelin v. Berlin Dye Works & L. Co.* L.R.A.1915C, 712, 144 Pac. 961, — Cal. —. (Annotated)

2. One engaged in the business of cleaning clothing does not assume the liability of insurer for articles left in clothing sent him to be cleaned, from the fact that he employs a servant to search the clothing for such articles. *Copelin v. Berlin Dye Works & L. Co.* L.R.A.1915C, 712, 144 Pac. 961, — Cal. —.

BANKRUPTCY.

Judgment as *res judicata* against right to discharge, see Judgment, 5.

An insolvent who in good faith sells his property for a full price to a corporation organized to purchase it for the purpose of dividing the proceeds equally among his creditors cannot be denied his discharge in bankruptcy because he has actually hindered nonconsenting creditors. L.R.A.1915C.

in enforcing their claims. *Re Julius*, L.R.A. 1915C, 89, 217 Fed. 3, — C. C. A. —. (Annotated)

BANKS.

Statute raising prima facie presumption of fraud against bank officers on proof of insolvency thereof, see Constitutional Law, 2, 10-13; Evidence, 3, 4, 31.

Refusal to deduct value of real estate from value of capital stock of bank for purposes of taxation, see Taxes, 1.

Trust deposits.

Estoppel to enforce liability of bank as to, see Estoppel, 3.

1. A bank in which funds of an estate have been deposited by an administrator under express contract showing their source may be found to have had such knowledge of the misappropriation of the funds as will charge it with liability therefor, if it permits the administrator to transfer the funds of the estate by a series of checks to his individual account to meet his overdrafts upon such account. *Allen v. Puritan Trust Co.* L.R.A.1915C, 518, 97 N. E. 916, 211 Mass. 409. (Annotated)

2. A bank which permits an administrator to transfer funds of the estate to his individual account cannot escape liability for the loss to the estate by the fact that inquiry of the administrator might have elicited a reasonable explanation, if it could have learned of the misappropriation by pushing the inquiry until the truth was ascertained. *Allen v. Puritan Trust Co.* L.R.A.1915C, 518, 97 N. E. 916, 211 Mass. 409.

3. A bank is not liable for loss to an estate through the transfer of the funds by the administrator to his individual account, if it has no notice that the transfer was for the purpose of effecting a misappropriation of the funds. *Allen v. Puritan Trust Co.* L.R.A.1915C, 518, 97 N. E. 916, 211 Mass. 409.

4. A bank which cashes and places to the individual account of an administrator checks upon funds of the estate in another bank cannot, after collecting them from the drawee, be held personally liable for misappropriation of the funds by the administrator. *Allen v. Puritan Trust Co.* L.R.A.1915C, 518, 97 N. E. 916, 211 Mass. 409.

Bank's control over deposit; application of.

5. A bank has no right to appropriate trust funds deposited by one of its depositors with it and known by it to be such, to a debt of the depositor to the bank, and it is liable to the true owner for so doing. *Walters Nat. Bank v. Bantock*, L.R.A.1915C, 531, 137 Pac. 717, 41 Okla. 153.

6. A bank with knowledge that a fund on deposit with it is a trust fund cannot appropriate that fund for its private benefit, or, where charged with knowledge of

the conversion, join in assisting another to appropriate it for his private benefit, without being liable to refund the money if the appropriation is a breach of trust. *Allen v. Puritan Trust Co. L.R.A.1915C, 518, 97 N. E. 916, 211 Mass. 409.*

Payment of checks; forgeries.

7. While ordinarily the payee of a check may not maintain an action against the bank for the amount of the check, yet where the check is given, to the knowledge of the bank, as security for the performance of a land contract, and the cashier who is asked if the check is good states, that he will "fix it" and writes upon the face thereof "in escrow," for the purpose of convincing the parties that the fund represented by the check would be set apart and held for the payment thereof upon the completion of the contract, the payee may maintain an action against the bank for the amount called for in the check. *Walters Nat. Bank v. Bantock, L.R.A.1915C, 531, 137 Pac. 717, 41 Okla. 153.*

BATTERY.

See Assault and Battery.

BENEVOLENT SOCIETIES.

Exemption of, from taxation, see Taxes, 4.

BEST AND SECONDARY EVIDENCE.

See Evidence, 10.

BILLS AND NOTES.

Surety on, see Principal and Surety.

Situs of credits evidenced by, for purpose of taxation, see Taxes, 7.

Inheritance tax on, see Taxes, 18.

1. The words, "For value received I hereby guarantee payment of the within note, and waive demand and notice of protest on same when due," written on the back of a note above the signature of the payee, do not constitute an indorsement and transfer in due course, but a mere guaranty of payment. *Ireland v. Floyd, L.R.A.1915C, 661, 142 Pac. 401, 42 Okla. 609.* (Annotated)

2. The maker of a note which has been transferred by the payee with a guaranty of payment, but without indorsement, is entitled to make the same defenses against the note in the hands of the holder under such guaranty as he would be entitled to make if it were in the hands of the original payee. *Ireland v. Floyd, L.R.A.1915C, 661, 142 Pac. 401, 42 Okla. 609.*

BONDS.

Liability and release of sureties on, generally, see Principal and Surety.

BROKERS.

Written authorization to broker to sell property as memorandum of contract of sale sufficient to satisfy statute of frauds, see Contracts, 2.

The dissolution of a firm of real estate brokers terminates all authority to sell property which has been placed in their hands for that purpose. *Schlau v. Enzenbacher, L.R.A.1915C, 576, 107 N. E. 107, 265 Ill. 626.* (Annotated)

estate brokers terminates all authority to sell property which has been placed in their hands for that purpose. *Schlau v. Enzenbacher, L.R.A.1915C, 576, 107 N. E. 107, 265 Ill. 626.* (Annotated)

BUILDING AND CONSTRUCTION CONTRACTS.

Construction of, see Contracts, 3.

Right of subcontractor to recover cost of service when prevented from completing work because of defects in plans, see Contracts, 7.

Release of surety on contractor's bond, see Principal and Surety, 1.

BUILDING LINE.

Validity of ordinance establishing, see Constitutional Law, 18; Eminent Domain, 2.

BUILDINGS.

Constitutionality of ordinance establishing building line, see Constitutional Law, 18; Eminent Domain, 2.

BURDEN OF PROOF.

In general, see Evidence, 2-9.

BURGLARY.

Conviction for burglary may be based on the fact that accused in the night drove a horse and wagon to the rear door of a store which had been feloniously entered and goods piled for removal near such door, which was partly open. *People v. Mendelson, L.R.A.1915C, 627, 106 N. E. 249, 264 Ill. 453.*

BUSINESS.

Devise for life of retail business, see Life Tenants.

CANCELATION OF INSTRUMENTS.

Of insurance policy, see Insurance, 2.

CARRIERS.

Illegal combination of, see Monopoly and Combinations, 2.

Who is common carrier within meaning of policy insuring against injury while in common carrier's conveyance, see Insurance, 8, 9.

Duty to transport.

Punitive damages for failure to transport, see Damages, 1.

1. A carrier cannot avoid liability for refusal to return excursionists to their homes on a particular train, on the ground that they had been detained by act of God until the train upon which they should have gone had departed, if their tickets were good for the train upon which passage was refused. *Woodward v. Southern R. Co. L.R.A.1915C, 477, 83 S. E. 591, — S. C. —.*

Measure of care required; negligence generally.

2. Mere failure of the conductor of a street car which stops for passengers at a

place where rowdies are making an attack on intending passengers, to start the car as soon as the passengers are on board, does not, even though the passengers have requested him to do so, render the company liable for injury to a passenger by a missile thrown into the car, if the attacking party attempt to follow the passengers onto the car, and the delay is due to the conductor's ignorance as to which persons entering the car are passengers and his removal of the trespassers as soon as he discovers which they are, so that the car can be moved without danger to persons on the steps or platform. *Louisville R. Co. v. Dott, L.R.A. 1915C, 681 171 S. W. 438, 161 Ky. 759.*

(Annotated)

3. A street car company which discharges a passenger from the forward part of a car on a curve is bound to adopt some precautions to avoid injuring him by the overhang of the car as it proceeds around the curve, either by delaying the starting of the car until he is out of danger, or by warning him of the danger. *White v. Connecticut Co. L.R.A. 1915C, 609, 92 Atl. 411, 88 Conn. 614.*

(Annotated)

Contributory negligence of passenger.

4. A passenger alighting from a street car on a curve, with the intention of crossing the track to reach his destination, is not negligent merely in failing to move more than a couple of steps from the car to let it pass, so that he is struck by the overhang as it rounds the curve, if he was not notified of the danger of the situation. *White v. Connecticut Co. L.R.A. 1915C, 609, 92 Atl. 411, 88 Conn. 614.*

Ejection of passenger or trespasser.

Ejection of passenger as proximate cause of injury, see *Proximate Cause, 1.*

5. A statute authorizing the expulsion of passengers who do not pay their fares does not apply in case of a passenger whose effort to pay is ineffectual because of illness, in view of a rule of the carrier that a passenger must not be ejected who is in such feeble or helpless condition as to be unable to take care of himself at the point of ejection. *Buckley v. Hudson Valley R. Co. L.R.A. 1915C, 134, 106 N. E. 121, 212 N. Y. 440.*

(Annotated)

6. A carrier is not liable for ejecting a passenger for nonpayment of fare where he failed to respond to three efforts by the conductor to arouse him from sleep due to intoxicants and loss of sleep, to secure his fare, and made no response until he had been pushed out onto the platform in the process of ejection. *Chesapeake & O. R. Co. v. Friend, L.R.A. 1915C, 148, 169 S. W. 509, 159 Ky. 778.*

(Annotated)

Leaving at destination.

7. A carrier is liable in damages for failure to comply with the conductor's promise to see that a passenger is awake in time to leave the train at his destination, which will be reached in the night, where he informed the conductor that because of weariness he feared that he would not be able to keep awake, and requested the conductor

to assist him to leave the train. *Gilkerson v. Atlantic C. L. R. Co. L.R.A. 1915C, 664, 83 S. E. 592, — S. C. —.*

(Annotated)

Injuries in getting on or off.

Evidence on question of negligence of passenger, see *Evidence, 27.*

8. A railroad company is not liable for injury to a passenger who, having left the car at an intermediate station for exercise, is some distance from the train when the starting signal is given, and, with parcels in his hands, runs to and attempts to board the train, when it is rapidly picking up speed, so that he collides with an express truck left standing beside the track, and falls under the train. *Murphy v. Pere Marquette R. Co. L.R.A. 1915C, 536, 150 N. W. 122, — Mich. —.*

9. A passenger is negligent in alighting from a slowly moving train in the dark, on the side opposite the station, at a place which he knows to be more or less encumbered by *débris*, after he has stood on the step some time waiting for the train to slow down so that he could alight, which will prevent his holding the carrier liable for the injury in case he trips and falls under the train, although the train jerks at the moment he is stepping off. *Hayden v. Chicago, M. & G. R. Co. L.R.A. 1915C, 181, 170 S. W. 200, — Ky. —.*

(Annotated)

Freight carriers.

10. A railroad company which enters into an exclusive contract with a private corporation for the loading of logs tendered for shipment between stations along its right of way is liable for injury to the business of a shipper by the negligence of the contractor to load with reasonable promptness logs tendered. *Yazoo & M. V. R. Co. v. Crawford, L.R.A. 1915C, 250, 65 So. 462, — Miss. —.*

11. A carrier is not liable for injury to live stock loaded by the shipper into a car furnished for that purpose, because of the improper manner of loading, if it did not in fact discover the fault, although it might have done so, since it may assume that the shipper has loaded the car properly. *Illinois C. R. Co. v. Rogers, L.R.A. 1915C, 1220, 172 S. W. 948, 162 Ky. 535.*

(Annotated)

Governmental control; rates; discrimination.

Constitutionality of statute as to rate, see *Constitutional Law, 3.*

12. That an individual has built up a log loading business between stations along a railroad right of way on the faith of permission granted by the railroad company does not prevent the railroad company from withdrawing the permission and entering into an exclusive contract with another for such service. *Yazoo & M. V. R. Co. v. Crawford, L.R.A. 1915C, 250, 65 So. 462, — Miss. —.*

13. An exclusive contract between a railroad company and a private corporation to load the logs of private shippers between stations along the railroad right of way is not invalid as creating a monopoly or granting special privileges to such corpora-

tion, since the loading between stations is not a service which the railroad company is bound to undertake, and if it does undertake it for the convenience of shippers it may place such restrictions on it as it sees fit. *Yazoo & M. V. R. Co. v. Crawford*, L.R.A.1915C, 250, 65 So. 402, — Miss. —.

(Annotated)

14. A constitutional requirement that the legislature pass laws to prevent unjust discrimination in the rates of passenger tariffs by railroads renders unlawful a requirement that special rates be given to militiamen traveling on orders from the governor, where the legislature has acted upon its constitutional authority to establish a reasonable maximum passenger tariff, and the conditions under which the transportation of the Militia must occur are not materially different from those for which the rate was established. *State v. Missouri, K. & T. R. Co.* L.R.A.1915C, 778, 172 S. W. 35, — Mo. —.

CASES CERTIFIED.

Important questions of law necessarily involved in an action for breach of covenant may be transferred to the supreme court in advance of the trial. *Hampton Beach Improv. Co. v. Hampton*, L.R.A.1915C, 698, 92 Atl. 549, — N. H. —.

CATS.

See Animals.

CAUSE.

Presumption and burden of proof as to, see Evidence, 5.

Proximate cause, see Proximate Cause.

CERTIFICATE.

Of acknowledgment, see Acknowledgment.

CERTIFIED QUESTION.

See Cases Certified.

CHARITIES.

Exemption of, from taxation, see Taxes, 4.

CHARTER PARTY.

See Evidence, 5; Shipping.

CHATTEL MORTGAGE.

Waiver of lien by consenting to sale of property on condition that proceeds be applied to debt, see Garnishment.

CHAUFFEUR.

Salary of, as element of damages for injury to automobile, see Damages, 6.

CHECKS.

Right of payee to maintain action against bank for amount of, see Banks, 7.

As evidence, see Evidence, 12.

L.R.A.1915C.

CHILDREN.

In general, see Infants.

CHISEL.

Injury to servant by defect in, see Master and Servant, 10.

CITIES.

See Municipal Corporations.

CITY DUMP.

As a nuisance, see Eminent Domain, 3.

CLAIMS.

Against decedent's estate, see Executors and Administrators, 5.

CLASS LEGISLATION.

See Constitutional Law, 2-5.

CLUBS.

Estoppel to annul charter of club because of illegal sale of liquor, see Estoppel, 1.

Liability for sale of liquor, see Intoxicating Liquors, 5-7.

1. Authority to dispense intoxicating liquors to its members is not implied from the charter of a social club, where, under the statutes, a corporation cannot secure a license to sell such liquors. *State ex inf. Harvey v. Missouri Athletic Club*, L.R.A.1915C, 878, 170 S. W. 904, — Mo. —.

2. A social club with power to dispense liquors to its members cannot be organized under a statute providing for the formation of benevolent, religious, scientific, educational, and miscellaneous associations, or any association which tends to the public advantage in relation to any or several of the objects above enumerated, and whatever is incident to such objects. *State ex inf. Harvey v. Missouri Athletic Club*, L.R.A.1915C, 878, 170 S. W. 904, — Mo. —.

COLD STORAGE.

For liquor, see Intoxicating Liquors, 7.

COLLATERAL ATTACK.

On judgment, see Judgment, 2-4.

COLLATERAL INHERITANCE TAX.

See Taxes, 17, 18.

COLLUSION.

Of administrator in establishment of claim against estate, see Executors and Administrators, 5.

COMBINATIONS.

Illegal combinations, see Monopoly and Combinations.

COMITY.

See Conflict of Laws.

COMMERCE.

1. The common-law rule with respect to the employee's assumption of risk of injury from a defective appliance governs an action brought under the employers' liability.

act of April 22, 1908, where such appliance is not covered by any Federal statute enacted for the safety of employees, to the exclusion of any state statutes which, like N. C. Revisal 1905, § 2646, abolished the assumption of risk as a bar to an action by a railway employee for an injury attributable to defective appliances furnished by the employer, since otherwise the subject-matter would be controlled by the laws of the several states, and not by the Federal statute, which, in § 4, abolishes the defense of the assumption of risk only when the violation by the carrier of a Federal statute enacted for the safety of employees contributed to the death or injury of an employee. *Seaboard A. L. R. v. Horton, L.R.A. 1915C, 1, 58 L. ed. 1062, 34 Sup. Ct. Rep. 635, 233 U. S. 492.*

2. The limitation of the responsibility of a railway carrier under the employers' liability act of April 22, 1908, § 1, for injuries to its employees resulting from defects or insufficiency in places of work or appliances to those caused by such defects and insufficiencies as are "due to its negligence," governs an action brought under that statute regardless of the measure of responsibility prescribed by the local statutes. *Seaboard A. L. R. Co. v. Horton, L.R.A. 1915C, 1, 58 L. ed. 1062, 34 Sup. Ct. Rep. 635, 233 U. S. 492.*

3. Since Congress, by the act of April 22, 1908, took possession of the field of the employers' liability in interstate transportation by rail, all state laws upon the subject are superseded. *Seaboard A. L. R. Co. v. Horton, L.R.A. 1915C, 1, 58 L. ed. 1062, 34 Sup. Ct. Rep. 635, 233 U. S. 492.*

COMMITTEE.

Of incompetent person, see *Incompetent Persons, 2.*

COMMON CARRIERS.

See *Carriers.*

COMMON LAW.

Application of rule of, with respect to employee's assumption of risk, see *Commerce, 1.*

COMMUTATION.

Of sentence, see *Criminal Law.*

COMPENSATION.

For taking of property, see *Eminent Domain.*

COMPLAINT.

Of plaintiff, see *Pleading, 2, 3.*

Liability of fair association for negligence of, see *Amusements.*

CONCLUSIVENESS.

Of judgment, see *Judgment, 2-7.*

CONDEMNATION PROCEEDINGS.

See *Eminent Domain.*
L.R.A. 1915C.

CONDITION.

In insurance contract, see *Insurance, 3-7.*

Setting aside void tax sale, see *Taxes, 16.*

CONFESSION.

Evidence of, see *Evidence, 18.*

CONFLICT OF LAWS.

In an action on a writing evidencing indebtedness of a resident of one state to a resident of the state of the forum, made in such other state while the creditor resided in the state of the forum, and specifying no place of payment, the statute of limitations of the state of the forum applies, under a statute providing that upon a contract made and to be performed in another state or country by a person who then resided therein no action should be maintained after the right of action thereon is barred by the laws of such state or country. *Davidson v. Browning, L.R.A. 1915C, 976, 80 S. E. 363, — W. Va. —.*

(Annotated)

CONSIDERATION.

Of contract, see *Contracts, 1.*

Parol evidence as to, see *Evidence, 14.*

CONSORTIUM.

Wife's right of action for loss of, see *Husband and Wife, 5.*

CONSPIRACY.

Wife's right of action for conspiracy to induce husband to commit an offense, see *Husband and Wife, 5.*

CONSTITUTIONAL LAW.

Cruel and unusual punishment, see *Criminal Law, 2.*

As to taking property for public use, see *Eminent Domain.*

Construction.

1. A state statute cannot be declared unconstitutional as being violative of the 5th Amendment of the Federal Constitution, since that Amendment is not a limitation upon the power of the state, but operates upon the national government only. *Griffin v. State, L.R.A. 1915C, 716, 83 S. E. 540, 142 Ga. 636.*

Equal protection and privileges.

2. Section 204, Ga. Penal Code 1910, which raises a prima facie presumption of fraud against the president and directors of a chartered bank upon proof of the insolvency thereof, is not violative of the 14th Amendment of the Federal Constitution on the ground that it abridges the privileges and immunities of citizens of the United States, or deprives the president and directors of an insolvent bank of the equal protection of the laws, or deprives them of life, liberty, or property without due process of law, in that similar provisions had not been made in regard to the president and directors of corporations other than banks. *Griffin v. State, L.R.A. 1915C, 716, 83 S. E. 540, 142 Ga. 636.*

3. Requiring railroads to give special rates to militiamen traveling on orders from the governor does not violate a constitutional provision forbidding discrimination between transportation companies and individuals. *State v. Missouri, K. & T. R. Co.* L.R.A.1915C, 778, 172 S. W. 35, — Mo. —.

4. Consumers are not denied the equal protection of the laws by permitting public service corporations alone to apply to the proper authorities for a reduction of rates, where the consumer is given a hearing in the original fixing of the rates. *Pinney & Boyle Co. v. Los Angeles Gas & Electric Corp.* L.R.A.1915C, 232, 141 Pac. 620, — Cal. —.

5. Exempting farmers' mutual insurance companies organized and doing business under the laws of the state, and insuring only farm property, from the legislative scheme for regulation of fire insurance rates, does not render such legislation invalid as to other insurance companies, as denying the equal protection of the laws. *German Alliance Ins. Co. v. Lewis*, L.R.A. 1915C, 1189, 58 L. ed. 1011, 34 Sup. Ct. Rep. 612, 233 U. S. 389.

Due process of law; right to life, liberty, and property.

6. State taxation of the amounts due a foreign insurance company by its policy holders in the state for premiums on which credit of thirty and sixty days had been extended does not take the property of the company without due process of law, contrary to U. S. Const., 14th Amend., even though such indebtedness is not evidenced by written instruments. *Liverpool & L. & G. Ins. Co. v. Board of Assessors*, L.R.A. 1915C, 903, 55 L. ed. 762, 31 Sup. Ct. Rep. 550, 221 U. S. 346. (Annotated)

7. Assessing in excess of actual indebtedness the amounts due a foreign insurance company by its policy holders in the state, on which credits have been extended, does not take the property of the company without due process of law, where proper opportunity was afforded for correction. *Liverpool & L. & G. Ins. Co. v. Board of Assessors*, L.R.A.1915C, 903, 55 L. ed. 762, 31 Sup. Ct. Rep. 550, 221 U. S. 346.

8. Whatever either employer or employee has the right, under the due process of law clause of U. S. Const., 14th Amend., to treat as sufficient ground for terminating the employment, where there is no stipulation on the subject, he has the right to provide against by insisting that a stipulation respecting it shall be a *sine qua non* the inception of the employment or of its continuance, if it be terminable at will. *Coppage v. Kansas*, L.R.A.1915C, 960, 59 L. ed. —, 35 Sup. Ct. Rep. 240, 236 U. S. 1.

9. The rights of personal liberty and property are infringed without due process of law, by a statute under which, as construed and applied by the highest state court, an employer or his agent may be criminally punished for having prescribed as a condition upon which one may secure

employment under, or remain in the service of, such employer (the employment being terminable at will) that the employee shall enter into an agreement not to become or remain a member of any labor organization while so employed, the employee being subject to no incapacity or disability, but, on the contrary, free to exercise a voluntary choice. *Coppage v. Kansas*, L.R.A. 1915C, 960, 59 L. ed. —, 35 Sup. Ct. Rep. 240, 236 U. S. 1. (Annotated)

10. Section 204, Georgia Penal Code 1910, which raises a presumption of fraud against the president and directors of a chartered bank upon proof of the insolvency of the bank, but which allows the accused officers to rebut the presumption by introducing evidence in their behalf, is not violative of the provision of the state Constitution that no person shall be deprived of life, liberty, or property except by due process of law. *Griffin v. State*, L.R.A. 1915C, 716, 83 S. E. 540, 142 Ga. 636. (Annotated)

11. Section 204, Georgia Penal Code of 1910, which raises a presumption of fraud against the president and directors of a chartered bank upon proof of the insolvency of the bank, but which allows the officers named to rebut the presumption of fraud by evidence, is not violative of the 14th Amendment of the Federal Constitution in that it destroys or abridges the presumption of innocence which the law raises as evidence in behalf of everyone charged with crime. *Griffin v. State*, L.R.A. 1915C, 716, 83 S. E. 540, 142 Ga. 636.

12. Section 204, Georgia Penal Code 1910, which raises a presumption of fraud against the president and directors of a chartered bank upon proof of the insolvency thereof, but which allows the officers named to rebut the presumption of fraud by introducing evidence in their behalf, is not violative of the 14th Amendment of the Federal Constitution, even in a state where the defendant cannot testify, but where he may make his statement not under oath, which the jury may believe in preference to sworn evidence. *Griffin v. State*, L.R.A. 1915C, 716, 83 S. E. 540, 142 Ga. 636.

13. Section 204, Georgia Penal Code 1910, which raises a presumption of fraud against the president and directors of a chartered bank upon proof of the insolvency thereof, but which permits the officers named to rebut the presumption of fraud by introducing evidence in their behalf, is not violative of the 14th Amendment of the Federal Constitution in providing that such officers shall be punished even though they had nothing to do with the management of the bank, and though the insolvency was not brought about by their conduct or with their knowledge. *Griffin v. State*, L.R.A. 1915C, 716, 83 S. E. 540, 142 Ga. 636.

14. Section 12, chap. 144, W. Va. Code 1913, prescribing only minimum penalties for robbery, and leaving it within the power of the court to pronounce judgment of imprisonment for life, is not in contravention of the 14th Amendment, or any other

provision of the Federal Constitution. *Franklin v. Brown*, L.R.A.1915C, 557, 81 S. E. 405, — W. Va. —.

Police power.

15. The several states are debarred by U. S. Const., 14th Amend., from striking down personal liberty or property rights, or materially restricting their normal exercise, excepting so far as may be incidentally necessary for the accomplishment of some other and paramount object, and one that concerns the public welfare. The mere restriction of liberty or of property rights cannot, of itself, be denominated public welfare, and treated as a legitimate object of the police power. *Coppage v. Kansas*, L.R.A.1915C, 960, 59 L. ed. —, 35 Sup. Ct. Rep. 240, 236 U. S. 1.

16. A statutory provision which is not a legitimate police regulation cannot be made such by being placed in the same act with a police regulation, or by being enacted under a title that declares a purpose which would be a proper object for the exercise of that power. *Coppage v. Kansas*, L.R.A.1915C, 960, 59 L. ed. —, 35 Sup. Ct. Rep. 240, 236 U. S. 1.

17. To punish an employer or his agent for simply proposing certain terms of employment under circumstances devoid of coercion, duress, or undue influence, has no reasonable relation to a declared purpose, in a statute, of repressing coercion, duress, or undue influence. *Coppage v. Kansas*, L.R.A.1915C, 960, 59 L. ed. —, 35 Sup. Ct. Rep. 240, 236 U. S. 1.

18. An ordinance of a municipal corporation ordained pursuant to a provision of its charter authorizing it to establish a building line on a certain street and inhibit abutting owners from encroaching thereon, based on merely esthetic considerations, is not within the police power, and is unenforceable as a police regulation. *Fruth v. Board of Affairs*, L.R.A.1915C, 981, 84 S. E. 105, — W. Va. —. (Annotated)

Impairing obligation of contract.
19. No contract obligation by a purchaser at foreclosure sale is impaired by a statute requiring him to notify the person having a right to redeem before taking his deed, if ample time remains to give the notice before the expiration of the redemption period. *Clark Implement Co. v. Wadden*, L.R.A.1915C, 414, 149 N. W. 424, — S. D. —.

20. Where, by franchise or ordinance, public service rates within a municipality have been fixed and accepted as between a public service corporation and the public, without express delegation of power in such particular by the legislature to the municipality, a change of the rates by the public service commission does not impair the obligation of a contract. *Benwood v. Public Service Commission*, L.R.A.1915C, 261, 83 S. E. 295, — W. Va. —. (Annotated)

21. An ordinance raising the rates to be charged by a public service corporation above those at which it had contracted to render service to a consumer does not impair the obligation of the contract, since it L.R.A.1915C.

will be presumed that the contract was made in contemplation of the power of the public to fix the rates. *Pinney & Boyle Co. v. Los Angeles Gas & Electric Corp.* L.R.A. 1915C, 222, 141 Pac. 620, — Cal. —.

(Annotated)

22. No unconstitutional impairment of contract results so far as the city is concerned from a change by the state of rates fixed by a franchise granted by the municipality to a telephone company, if the municipal charter is subject to the general laws of the state. *State ex rel. Webster v. Superior Ct.* L.R.A.1915C, 287, 120 Pac. 861, 67 Wash. 37.

23. A municipal corporation which, in granting a telephone franchise fixing rates for service, reserves the right to alter or amend the conditions of the franchise, cannot raise the objection that its contract rights are unconstitutionally impaired if the state makes an alteration in rates. *State ex rel. Webster v. Superior Ct.* L.R.A. 1915C, 287, 120 Pac. 861, 67 Wash. 37.

CONSTRUCTION.

- Of constitution, see Constitutional Law, 1.
- Of contract, see Contracts, 3.
- Of statute, see Statutes, 3, 4.
- Of will, see Wills.

CONTINGENT INTERESTS.

- See Wills, 3, 4.

CONTRACTS.

- Restrictions on right of, see Constitutional Law, 8, 9.
- Impairing obligation of, see Constitutional Law, 19-23.
- Injunction to protect rights in, see Injunction, 1.
- Specific performance of, see Specific Performance.

Consideration.

- 1. An option of purchase inserted by a lessor in a lease is supported so far as consideration is concerned by the payment of the stipulated rent reserved so that it may be specifically enforced, and cannot be withdrawn during the period covered by the instrument. *Tebeau v. Ridge*, L.R.A.1915C, 367, 170 S. W. 871, — Mo. —.

Formal requisites; statute of frauds.

- 2. Where the memorandum of sale of real estate must be signed by the grantor to satisfy the statute of frauds, a binding contract is not effected by the purchaser's written acceptance upon a written authorization by the seller to a broker to effect a sale, which contains a full description of the property, price, and terms of sale, but omits the name of the vendee. *Lusky v. Keiser*, L.R.A.1915C, 400, 164 S. W. 777, 128 Tenn. 705. (Annotated)

Construction.

- 3. A clause in a building contract which, after reciting the whole sum to be paid for work and materials, provides that 80 per cent of the architect's estimates shall be paid upon the certificates of the archi-

fect, and then that "the final payment shall be made within ten days after the completion of the work included in this contract, and all payments shall be due when the certificates for the same are issued," requires the retention of 20 per cent by the owners until the final payment. *Young Men's Christian Asso. v. United States Fidelity & G. Co. L.R.A.1915C, 170, 133 Pac. 894, 90 Kan. 332.*

Validity and effect.

Statute making illegal agreement that employee shall not become or remain member of labor organization, see Constitutional Law, 9.

Contracts by infant, see Infants.

Enforcement of monopolistic contract, see Monopoly and Combinations, 1.

Provision in lease of town land that lessor will pay the taxes, see Towns.

4. A contract to pay a commission for obtaining a contract from a municipality for public work, which obligates the employee to do everything in his power to accomplish the success of and aid the business of his employer, is invalid as against public policy, since it might include the use of illegal means to induce the awarding of the contract and the securing of petitions therefor. *Hyland v. Oregon Hassam Pav. Co. L.R.A.1915C, 823, 144 Pac. 1160, — Or. —.* (Annotated)

5. A lawful agreement between parties will be enforced, even though it may be incidentally or indirectly connected with a contract that is illegal, where such lawful agreement is supported by an independent consideration, and can be proved without the aid of the illegal contract. *Walters Nat. Bank v. Bantock, L.R.A.1915C, 531, 137 Pac. 717, 41 Okla. 153.*

Performance; breach.

Measure of compensation for breach, see Damages, 2, 3.

6. An action for the breach of an agreement to find a purchaser for a tract of land at a fixed price, within a stated time, cannot be defeated by showing the impossibility of procuring such a purchaser. *Hurlless v. Wiley, L.R.A.1915C, 177, 137 Pac. 981, 91 Kan. 347.*

7. A subcontractor who is prevented from completing his work because of defects in the plans furnished by the owner may hold the contractor liable for the cost of services rendered, but not for profits which he would have realized had he completed the work, although he saw the plans before entering into the contract; since he does not assume any responsibility for the sufficiency of the plans. *Huetter v. Warehouse & Realty Co. L.R.A.1915C, 671, 142 Pac. 675, 81 Wash. 331.* (Annotated)

Change or extinguishment.

8. If a contract is so far personal that the representatives of one of the parties to it are not responsible in damages for refusing to complete its performance, the representative of the other party is not responsible for a like failure. *Homan v. L.R.A.1915C.*

Redick, L.R.A.1915C, 601, 149 N. W. 782, — Neb. —.

9. A contract between the owner of a number of parcels of improved real estate and an agent employed to manage the same for a term of years, collect the rents, and make repairs and pay the money remaining in his hands on the 15th of each month to the owner, is terminated by the death of the owner, notwithstanding it contains a provision "that the covenants in this contract shall succeed to and be binding upon the respective heirs, executors, administrators, and assigns of the parties hereto." *Homan v. Redick, L.R.A.1915C, 601, 149 N. W. 782, — Neb. —.*

10. The letting by a property owner of a storeroom for the sale of articles which by a lease signed by both parties, of another room in the building, he has covenanted with its lessee not to do, justifies the latter in rescinding his contract and surrendering possession of the property. *University Club v. Deakin, L.R.A.1915C, 854, 106 N. E. 790, 265 Ill. 257.* (Annotated)

CONTRIBUTION AND INDEMNITY.

That a retailer of oil bearing the proper inspector's stamp does not have a reinspection when the quality of the oil is questioned by customers does not prevent his recovering from the manufacturer the amount he is compelled to pay a purchaser for injury due to an explosion of oil, although the statute provides that whoever sells such oil which has not been inspected and branded, and which emits combustible vapor at less than a certain temperature, shall be liable for all damages caused thereby. *Pfarr v. Standard Oil Co. L.R.A.1915C, 336, 146 N. W. 851, — Iowa, —.* (Annotated)

CONTRIBUTORY NEGLIGENCE.

See Negligence, 4, 5.

CORPORATIONS.

Power of ancillary administrator to transfer stock of decedent upon books of corporation, see Executors and Administrators, 6.

Right of foreign corporation to invoke statute of limitations, see Limitation of Actions.

Fixing valuation of capital for purpose of taxation, see Taxes, 12, 13.

1. The president of a corporation who is also a director is not personally liable for injury to an employee through the explosion of a boiler which was part of the plant of the corporation, if he had no active supervision of the plant, which was under control of persons employed for that purpose, of whose negligence he had no notice. *Aubrey v. Stimson, L.R.A.1915C, 874, 169 S. W. 991, 160 Ky. 563.*

(Annotated)

2. A foreign corporation which maintains an office for transfer of stock in a state where an ancillary administrator has possession of shares belonging to a dece-

dent cannot refuse to transfer the stock upon its books in that state, on the theory that the situs of the stock is either at the recent domicile of the decedent or in the state where the corporation is located. *Lockwood v. United States Steel Corp.* L.R.A.1915C, 471, 103 N. E. 697, 209 N. Y. 375. (Annotated)

COSTS AND FEES.

On appeal, see Appeal and Error, 22.

COUNSEL.

See Attorneys.

COUNTIES.

Appeal from decision of board of county commissioners as to tax, see Taxes, 14.

COURTS.

Jurisdiction on appeal, see Appeal and Error.

Power to suspend sentence or execution thereof, see Criminal Law, 3.

1. An appeal would be an inadequate remedy where a telephone company has been enjoined from putting into force rates which it has been required to adopt by a state commission under penalty, within the statutory provision giving the supreme court original jurisdiction in such cases. *State ex rel. Webster v. Superior Ct.* L.R.A. 1915C, 287, 120 Pac. 861, 67 Wash. 37.

2. Any irregularity in transferring to the Federal district court for the district of Arizona a suit begun prior to statehood in a territorial court, based upon the employers' liability act of April 22, 1908, as amended by the act of April 5, 1910, is waived where defendant answered upon the merits the amended complaint filed in the Federal court, without questioning the jurisdiction. *Arizona & N. M. R. Co. v. Clark*, L.R.A.1915C, 834, 59 L. ed. —, 35 Sup. Ct. Rep. 210, 235 U. S. 669.

COVENANTS AND CONDITIONS.

Certifying questions involved in action for breach, see Cases Certified.

In lease, see Landlord and Tenant, 2, 5, 7.

CREDITS.

Situs of, for purpose of taxation, see Taxes, 6-8.

CRIMINAL LAW.

Habeas corpus, see Habeas Corpus.

As to requisites and sufficiency of indictment, information or complaint, see Indictment, Information or Complaint.

New trial in criminal case, see New Trial.

Instructions in criminal case, see Trial, 8-10.

See also Burglary; False Pretenses; Intoxicating Liquors, 4-7; Robbery.

L.R.A.1915C.

Former jeopardy.

1. A trial and acquittal of a person for feloniously entering a certain building at a certain time with intent to steal the goods of a specified person are not a bar to a subsequent prosecution for entering the same building at the same time with intent to steal goods of a different person. *People v. Mendelson*, L.R.A.1915C, 627, 106 N. E. 249, 264 Ill. 453. (Annotated)

Sentence and imprisonment.

Constitutionality of statute as to, see Constitutional Law, 14.

Cruel and unusual punishment as ground for release on habeas corpus, see Habeas Corpus.

2. Section 12, chapter 144, W. Va. Code 1913, prescribing minimum penalties for robbery, and leaving it within the power of the court to pronounce judgment of imprisonment for life, is not void as contravening § 5, art. 3, of the Constitution, prohibiting cruel and unusual punishment, and providing that penalties shall be proportioned to the character and degree of the offense. *Franklin v. Brown*, L.R.A.1915C, 557, 81 S. E. 405. — W. Va. —. (Annotated)

3. A trial court may, without encroaching upon the prerogatives of the pardoning power, suspend the execution of a sentence so as to allow an opportunity for an appeal to executive clemency. *Re Hart*, L.R.A. 1915C, 1169, 149 N. W. 568, 29 N. D. 38. (Annotated)

4. A convicted person whose sentence has been suspended under chapter 136 of the Laws of North Dakota 1913, providing for the suspension of a jail sentence in case of a defendant who has never before been imprisoned for crime, where it shall appear to the satisfaction of the court that it is not likely the defendant will again engage in an offensive course of conduct, and that the public welfare does not demand or require the suffering of the penalty imposed by law, may have such suspension revoked, and be imprisoned even after the period of the sentence has expired. *Re Hart*, L.R.A. 1915C, 1169, 149 N. W. 568, 29 N. D. 38.

5. The exclusive power to grant commutations and pardons is vested by article 3 of the amendments to the Constitution of North Dakota in the board of pardons. *Re Hart*, L.R.A.1915C, 1169, 149 N. W. 568, 29 N. D. 38.

CRUEL AND UNUSUAL PUNISHMENT.

See Criminal Law, 2.

CURVE.

Discharge of passenger from car on curve, see Carriers, 3, 4.

CUSTOM.

Evidence of, generally, see Evidence, 21. Competency of witness to show, see Witnesses, 2, 3.

DAMAGES.

Review of, on appeal, see Appeal and Error, 13.

Right of subcontractor prevented from completing work to recover lost profits, see Contracts, 7.

Relevancy of evidence as to, see Evidence, 25, 26.

For disclosure of contents of telegram, see Telegraphs.

Exemplary or punitive.

1. Punitive damages may be allowed in favor of excursionists against a carrier the managing officers of which, with knowledge that they had been detained by a storm, and with indifference to their rights, send the train which was to carry them home away with empty cars, leaving insufficient equipment to transport them on later trains. *Woodward v. Southern R. Co. L.R.A.1915C, 477, 83 S. E. 591, — S. C. —*

(Annotated)

For breach of contract.

2. One having a contract with a telephone company for service, who fails to receive it because of the negligence of it or its employees, may recover nominal damages and such actual damages as he suffered in consequence thereof. *Vinson v. Southern Bell Teleph. & Teleg. Co. L.R.A.1915C, 450, 66 So. 100, — Ala. —*

(Annotated)

3. One who suffered injury to his person through the physical effort necessary to reach a doctor on foot in the night to attend a member of his family dangerously ill, which effort is made necessary by the negligent failure of a telephone company to furnish service for which he has contracted, may hold the company liable in damages for such injury and also for the mental distress suffered because of the delay in securing the physician's services, if the company had notice of the likelihood of a necessity for physician's services at the time they were required, so as to be chargeable with notice that such injury would follow its neglect. *Vinson v. Southern Bell Teleph. & Teleg. Co. L.R.A.1915C, 450, 66 So. 100, — Ala. —*

Personal injuries; death.

Review of damages on appeal, see Appeal and Error, 13.

4. \$1,000 is the limit of allowance for the death of a boy to the only one pecuniarily interested in his life, whose life expectancy is twenty years after he will reach a productive age, where the statute limits recovery to pecuniary loss. *Graffam v. Saco Grange, L.R.A.1915C, 632, 92 Atl. 649, 112 Me. 508.*

Injury to personal property.

5. Damages for loss of use of an automobile may be allowed against one who negligently injures it, although the owner intended to use it only for pleasure, and not for rent or profit. *Cook v. Packard Motor Car Co. L.R.A.1915C, 319, 92 Atl. 413, 88 Conn. 590.* (Annotated)

6. The reasonable amount which the owner of an automobile is compelled, under L.R.A.1915C.

his contract, to pay his chauffeur during the time that his car is out of use through an injury caused by another's negligence, if the owner had no other use for the services of the chauffeur, may be allowed as a part of the damages for the injury to the car. *Cook v. Packard Motor Car Co. L.R.A.1915C, 319, 92 Atl. 413, 88 Conn. 590.*

Nuisance.

7. Illness caused by a nuisance created by a city in the performance of governmental functions is not a proper element of damages to be allowed against it. *Hines v. Rocky Mount, L.R.A.1915C, 751, 78 S. E. 510, 162 N. C. 409.*

DANGEROUS AGENCIES.

Electricity, see Electricity.

Negligence as to, generally, see Negligence, 1, 2.

DEATH.

Of patron by negligence at place of amusement, see Amusements.

Measure of damages for, see Appeal and Error, 13; Damages, 4.

Termination of contract by, see Contracts, 8, 9; Executors and Administrators, 2.

Effect on competency of witness, see Witnesses, 2, 3.

DEBTOR AND CREDITOR.

Insolvency of debtor, see Bankruptcy.

Joint creditors and debtors, see Joint Creditors and Debtors.

Right of judgment creditors to elimination of usury from prior indebtedness secured by trust deed, see Tender; Usury.

DECEDENTS.

Administration of estates of, see Executors and Administrators.

DECLARATIONS.

Evidence of, see Evidence, 19, 20.

In pleading, see Pleading, 2, 3.

DEDUCTION.

Of dower interest from purchase money, see Specific Performance, 2.

DEEDS.

Acknowledgment of, see Acknowledgment.

DEFENSES.

Of usury, see Usury.

DEFINITIONS.

Mob, see Municipal Corporations, 6.

Property, see Eminent Domain, 1.

Riotous assemblage, see Municipal Corporations, 6.

DELAY.

By carrier in forwarding shipment, see Carriers, 10.

DELEGATION OF POWER.

To municipality, see Municipal Corporations, 1, 2.

DEMURRER.

See Pleading, 5, 6.

DEPORTATION.

Suspension of attorney for participating in wrongful deportation, see Attorneys.

DESCENT AND DISTRIBUTION.

Tax on right to take property by, see Taxes, 17, 18.

Imposing trust *ex maleficio* on title to property descending to murderer, see Trusts.

The murder by an heir of his ancestor does not interfere with the operation of the statutory rules of descent; at least where the Constitution provides that conviction of crime shall not work forfeiture of estate, and the penalty for murder is merely death or imprisonment. *Wall v. Pfanschmidt*, L.R.A.1915C, 328, 106 N. E. 785, 265 Ill. 180. (Annotated)

DESTINATION.

Leaving passenger at, see Carriers, 7.

DISAFFIRMANCE.

Of infant's contract, see Infants.

DISCHARGE.

In bankruptcy, see Bankruptcy.

Of one joint debtor, see Joint Creditors and Debtors, 2, 3.

Of surety, see Principal and Surety.

DISSOLUTION.

Of firm of real estate brokers, see Brokers.

DISTRIBUTION.

Of decedent's estate, see Executors and Administrators, 5.

DIVORCE AND SEPARATION.

Admissibility in evidence of record in divorce suit, see Evidence, 11.

Liability of husband for services of attorney to wife in divorce suit, see Husband and Wife, 2.

Conclusiveness of judgment, see Judgment, 6.

Effect of, on competency of wife as witness in action by husband, see Witnesses, 1.

A divorce destroys an estate held by the parties by entireties, and they thereafter hold the property as tenants in common. *McKinnon, Currie, & Co. v. Caulk*, L.R.A.1915C, 396, 83 S. E. 559, 167 N. C. 411. (Annotated)

DOCUMENTARY EVIDENCE.

See Evidence, 11, 12.

DOGS.

See Animals.

DOMESTIC SERVICE.

Evidence as to wages to be paid under contract for, see Evidence, 21. L.R.A.1915C.

DOUBLE TAXATION.

See Taxes, 1.

DOWER.

Diminution of purchase price by value of, in action for specific performance of contract to convey real estate, see Specific Performance, 2.

DRIVER.

Imputing negligence of, to passenger, see Negligence, 4.

DRUNKENNESS.

Of passenger, see Carriers, 6.

DUE PROCESS OF LAW.

See Constitutional Law, 6-14.

EASEMENTS.

Estoppel as to, see Estoppel, 4.

Injunction against attempted use of way under claim of easement, see Injunction, 2.

1. A right to ingress and egress along a private way does not include a right to lay pipes in the soil to secure a water supply. *Watson v. French*, L.R.A.1915C, 355, 92 Atl. 290, 112 Me. 371.

2. A conveyance by a property owner of a parcel for use as a stable, cut off from the street by remaining property belonging to him, with a mere right of passage to and from the street, and with a visible pipe crossing the remaining property to supply water to the stable, includes a right to the continued use of the pipe at least after the grantor has acquiesced in the continued use for nearly twenty years. *Watson v. French*, L.R.A.1915C, 355, 92 Atl. 290, 112 Me. 371. (Annotated)

3. The possibility of securing a water supply for land in the rear of remaining property of the grantor, by an exercise of the right of eminent domain by the water company whose mains are in the street, is not sufficient to destroy the necessity of the continuance of the right to draw a supply from visible pipes crossing such remaining land of the grantor. *Watson v. French*, L.R.A.1915C, 355, 92 Atl. 290, 112 Me. 371.

4. That the grantor of land supplied with water from a pipe across his remaining land did not own the source of supply, which was a public service corporation, will not prevent the grantee from acquiring a right by the grant to the continuance of the pipes. *Watson v. French*, L.R.A.1915C, 355, 92 Atl. 290, 112 Me. 371.

5. One purchasing the portion of a farm containing the buildings has no right to the continued use of a plainly visible way from the buildings to the highway over land retained by the grantor, where it is not necessary, although it is more convenient than another route would be, and the deed included all and every the rights, ways, privileges, appurtenances, and advantages to the same belonging or in anywise appertaining. *Duvall v. Ridout*, L.R.A.1915C, 345, 92 Atl. 209, 124 Md. 193. (Annotated)

EGRESS.

Easement of, see Easements, 1.

EJECTION.

Of passenger or trespasser, see Carriers, 5, 6.

ELECTIONS.

As to local option elections, see Intoxicating Liquors, 2.

1. A constitutional provision that all elections by the people shall be by ballot, although adopted before the invention of voting machines, does not preclude the use of such machines, and therefore a local option election is not invalidated by the fact that the voting was done by machines instead of paper ballots. *Spickerman v. Goddard*, L.R.A.1915C, 513, 107 N. E. 2, — Ind.

2. A provision in a statute authorizing a local option election, giving the form of the "ballot," does not preclude the use of voting machines in such elections, if the statute further provides that all provisions of the general election laws of the state shall apply so far as applicable, and such general laws provide for the use of machines, nothing in the construction of which renders their use inapplicable to local option elections. *Spickerman v. Goddard*, L.R.A.1915C, 513, 107 N. E. 2, — Ind. —.

ELECTRICITY.

1. An electric light company which maintains overhead wires from its plant to the residence of one of its patrons, for the purpose of supplying light to the house, is under a duty to employ such approved apparatus in general use as will be reasonably necessary to prevent injury to the house or persons or property therein, arising from electricity which may be generated by a thunderstorm and strike the wires and be conducted thereby into the residence. *Columbus R. Co. v. Kitchens*, L.R.A.1915C, 570, 83 S. E. 529, 142 Ga. 677. (Annotated)

2. An electric railway company which maintains an uninsulated wire carrying a heavy current in a cut under a street below the level of the adjoining property, is not liable for injury to a boy who throws a wire over the charged one from the top of the adjoining bank, since it is not bound to anticipate such an occurrence. *Kempf v. Spokane & I. E. R. Co.* L.R.A.1915C, 405, 144 Pac. 77, — Wash. —.

3. One maintaining, some distance from the ground, an uninsulated wire carrying a heavy current of electricity, is not liable in case boys throw a piece of wire which they find on the road, over the one carrying the current, for injuries to another boy who takes hold of the one so thrown to recover it, since there was no obligation to anticipate such an occurrence. *Green v. West Penn R. Co.* L.R.A.1915C, 151, 92 Atl. 341, 246 Pa. 340.

EMBANKMENT.

Increasing overflow of water by, see Waters.

L.R.A.1915C.

EMINENT DOMAIN.

Effect of possibility of securing water supply under right of eminent domain on right to easement for water pipes, see Easements, 3.

1. "Property," within the meaning of the provision of our Constitution against the taking or damaging of private property without just compensation paid or secured to be paid, comprehends not only the thing possessed, but the right also to use and enjoy it, and every part of it, and, in the case of real estate, to the full limits of the boundary thereof. *Fruth v. Board of Affairs*, L.R.A.1915C, 981, 84 S. E. 105, — W. Va. —.

2. The constitutional rights of a property owner are infringed by an ordinance establishing a building line for esthetic purposes without making any provision for condemning the property abutting on the street, or for making compensation to the owner for the burden imposed upon his property for the public benefit. *Fruth v. Board of Affairs*, L.R.A.1915C, 981, 84 S. E. 105, — W. Va. —.

3. A city is liable in damages for depreciation in value of adjoining property in permitting a city dump to become a nuisance, under a constitutional provision requiring compensation for property taken, injured, or destroyed for public use. *Louisville v. Hehemann*, L.R.A.1915C, 747, 171 S. W. 165, 161 Ky. 523. (Annotated)

EMPLOYEES.

Rights, duties and liabilities of, generally, see Master and Servant.

EMPLOYER'S LIABILITY.

Insurance against, see Insurance, 10.
In general, see Master and Servant.

ENTIRETY.

Estate by, see Divorce and Separation.

ENTRY.

Of judgment, see Judgment, 1.

EQUALITY.

Of immunity, privilege, and protection, see Constitutional Law, 2-5.

EQUITABLE ESTOPPEL.

See Estoppel.

EQUITY.

Prejudicial error as to findings of court of, see Appeal and Error, 19.

Right to recover in action of tort where illegal acts must be shown in proving damages, see Telegraphs.

See also Injunction; Maxims.

ESTOPPEL.

Of state.

1. That a social club has been organized and expended money in furnishing and equipping its house, on the faith of a judicial construction of a statute that it would have a right to dispense liquors among its

members without a license, which construction has been acquiesced in by the legislature for a period of years, does not estop the public officials from insisting that its charter shall be annulled because of illegal sale of liquors, and that the decision is erroneous. *State ex inf. Harvey v. Missouri Athletic Club*, L.R.A.1915C, 876, 170 S. W. 904, — Mo. —.

By laches, silence, or acquiescence.

See also, *supra*, 1.

2. A contract for the purchase of a lot in a newly developed tract of land, consummated by the delivery of a deed to the purchasers, who took subject to a mortgage and gave a second mortgage to secure an unpaid portion of the purchase price, completed after over three months of negotiations with an agent of the vendor, during which time the purchasers had ample opportunity to examine the property and verify the representations of value which had been given prior to the purchase, will not be rescinded for fraud in that the agent of the vendor excessively valued the property at the time of sale, especially after the purchasers have resided on the premises without complaint for some years, paying interest upon the mortgages and reducing the principal of the second mortgage until the bill was filed for the foreclosure of the second mortgage. *Industrial Sav. & L. Co. v. Plummer (N. J. Err. & App.)* L.R.A. 1915C, 613, 92 Atl. 583, — N. J. —.

By negligence or fraud.

3. The liability of a bank which aids an administrator in appropriating money of the estate to his own use is not affected by the fact that the surety on the administrator's bond pays its liability thereon, and that the next of kin did not discover the defalcation, as they might have done by the exercise of diligence. *Allen v. Puritan Trust Co.* L.R.A.1915C, 518, 97 N. E. 916, 211 Mass. 409.

By inconsistency in acts, claims, etc.

4. A grantee claiming an absolute right to a way across remaining property of the grantor cannot be given the benefit of a right which is admitted by the grantor, to the use of the way so long as the grantee retains possession of the granted property, but which is disclaimed and disavowed by the grantee. *Duvall v. Ridout*, L.R.A.1915C, 345, 92 Atl. 209, 124 Md. 193.

EVICTION.

Of tenant, see *Landlord and Tenant*, 5.

EVIDENCE.

First objecting to variance on appeal, see *Appeal and Error*, 7.

Waiver of objection as to, see *Appeal and Error*, 9, 10.

New trial for newly discovered evidence, see *New Trial*, 2.

Reception of, on trial, see *Trial*, 1.

Judicial notice.

1. The court will take judicial cognizance that the "sweepings of the streets" of a municipality contain matter which, if L.R.A.1915C.

allowed to remain in the streets, will injuriously affect the health of the citizens of such municipality, although the petition in an action by an employee for injuries suffered while employed in removing the sweepings describes "the sweepings of the street" as "dirt and trash." *Savannah v. Jordan*, L.R.A.1915C, 741, 83 S. E. 109, 142 Ga. 409.

Presumptions and burden of proof.

Validity of statute as to, see *Constitutional Law*, 2, 10-13.

2. One seeking damages for slander alleged to have been uttered on a privileged occasion has the burden of showing malice. *Doane v. Grew*, L.R.A.1915C, 774, 107 N. E. 620, 220 Mass. 171.

3. The provisions of § 2306, Georgia Civil Code 1910, for preliminary examination of a bank and the institution of insolvency proceedings against it whenever the examiner shall become satisfied that such bank cannot resume business or liquidate its indebtedness to the satisfaction of all creditors, including its shareholders, do not furnish a test of insolvency under § 204, Georgia Penal Code 1910, which raises a prima facie presumption of fraud against the president and directors of a chartered bank upon proof of the insolvency thereof. *Griffin v. State*, L.R.A.1915C, 716, 83 S. E. 540, 142 Ga. 636.

4. Within the meaning of § 204, Georgia Penal Code 1910, which raises a prima facie presumption of fraud against the president and directors of a chartered bank upon proof of the insolvency thereof, the "insolvency" of a bank is that condition in which its entire property and assets are insufficient to pay all its debts; but a bank is not insolvent if the assets are sufficient, although it may not be able to pay its debts immediately as they become due, or to pay its depositors on demand. *Griffin v. State*, L.R.A.1915C, 716, 83 S. E. 540, 142 Ga. 636.

5. A charterer who had contracted to return the vessel to the owner in as good condition as it was when he received it, the act of God excepted, has the burden of proving that the injury was caused by the act of God in case he returned it in a damaged condition. *Alaska Coast Co. v. Alaska Barge Co.* L.R.A.1915C, 423, 140 Pac. 334, 79 Wash. 216.

6. A telephone company which fails to furnish service to one entitled to it, who pursues the usual method to effect the use of the system, has the burden of showing that the failure was not due to the negligence of itself or its employees, by showing that the cause was of an uncontrollable nature, or was unavoidable by the exercise of due care, skill, and diligence, or was the result of acts for which the company was not responsible either directly or in consequence of its negligent omission to employ due care, skill, and diligence to discover the effect of such acts, and to remove or repair it after becoming aware thereof. *Vinson v. Southern Bell Teleph. & Teleg. Co.* L.R.A.1915C, 450, 66 So. 100, — Ala. —.

7. The fall of a wall left standing for

more than a month after a fire has destroyed the building of which it was a part, without any attempt to protect it or prop it up, to the injury of adjoining property, is prima facie evidence of negligence. *Hall v. Gage*, L.R.A.1915C, 704, 172 S. W. 833, — Ark. — (Annotated)

8. The injury of an infant eight or nine years of age, while playing upon a pile of railroad ties resting against a railroad wall, upon a public street, by the falling of a stone from the wall, together with testimony from which it was inferable that the stones in the wall were loose and the wall in need of repair, makes a prima facie case of negligence on the part of the railroad company in maintaining the wall in a condition dangerous to persons lawfully upon the street. *Soriero v. Pennsylvania R. Co.* L.R.A.1915C, 710, 92 Atl. 604, 86 N. J. L. 642.

9. A large tract of land will not be presumed to have been assessed at its full valuation if the acreage stated by the taxpayer's list is only about one half of what the tract contains. *Hillman Land & Iron Co. v. Com.* L.R.A.1915C, 929, 146 S. W. 776, 148 Ky. 331.

Best and secondary.

10. The files of a newspaper in which an order for publication of notice in a tax proceeding was published are, when produced from proper custody, admissible in evidence as to the contents of the order, if all papers in the proceeding, including the order for publication, have disappeared from the files of the court. *Miller v. Keaton*, L.R.A.1915C, 690, 168 S. W. 1140, 260 Mo. 708. (Annotated)

Documentary evidence.

11. The record upon which a divorce was granted to a woman against her husband is not admissible in an action by him against her parents for the alienation of her affections, if it contains no admissions tending to defeat his right of action. *Hostetter v. Green*, L.R.A.1915C, 870, 167 S. W. 919, 159 Ky. 611.

12. In an action by an administratrix for recovery of money due on a contract with her decedent, checks of the debtor subsequent in date to the contract and bearing the indorsement of the decedent and also memoranda indicative of intent to apply them on the debt sued for, are admissible as evidence of payment. *Davidson v. Browning*, L.R.A.1915C, 976, 80 S. E. 363, — W. Va. —

Parol and extrinsic evidence concerning writings.

13. Parol evidence is admissible to contradict the terms of a fire insurance policy, respecting the location of the property and the insured's estate therein, when oral application for insurance was made to the insurer's agent, and the insured, several days thereafter, received his policy by mail, and failed to read it until after the loss. *Fisher v. Sun Ins. Office*, L.R.A.1915C, 619, 83 S. E. 729, — W. Va. —

14. Where, after a written contract for the sale of land has been entered into, the

seller signs an undertaking to find a purchaser at an advanced price, within a stated time, the buyer may obtain damages for the breach of the agreement evidenced by such subsequent writing, upon proving by parol evidence that the consideration for it was an oral promise to the same effect, made when the original contract was executed. *Hurless v. Wiley*, L.R.A.1915C, 177, 137 Pac. 981, 91 Kan. 347.

Opinions and conclusions.

15. Upon the question of waiver of prepayment of tolls for telephone service, evidence is admissible of the patron's view of a conversation with the company's manager when the tolls for the month were paid and accepted, after a failure of service for which the company is sought to be held liable. *Vinson v. Southern Bell Teleph. & Teleg. Co.* L.R.A.1915C, 450, 66 So. 100, — Ala. —

16. A nonexpert witness may, after detailing the facts and circumstances upon which he based his opinion, give his opinion upon the question of sanity, but he is not permitted to express his opinion without disclosing the facts upon which it is based. *Shellenberger v. State*, L.R.A.1915C, 1163, 150 N. W. 643, — Neb. —

17. Under a statute providing that everyone who makes insurance on property is presumed to know its value, and is subject to find if the amount is in excess of the insurable value of the property, an insurance agent who places insurance on property is competent to testify as to its value at the time in an action upon the policy. *Rasmusson v. North Coast F. Ins. Co.* L.R.A.1915C, 1179, 145 Pac. 610, — Wash. —

Confessions.

Error in excluding evidence of confession to similar crime, see Appeal and Error, 15.

Instruction as to, see Trial, 10.

18. A voluntary confession of homicide made by one while suffering from a heat stroke, after he had been taken to the county jail, not because he was accused of any crime, but in order to give him proper care, and before his arrest, is admissible in evidence upon his trial for the crime thus confessed, in connection with the testimony as to the circumstances under which it was made. *Shellenberger v. State*, L.R.A.1915C, 1163, 150 N. W. 643, — Neb. —

Hearsay; declarations; res gestae.

19. Neither the testimony of other witnesses, offered by the patient, nor his own voluntary testimony as to his physical condition at the time of his examination by a physician, nor any averments in the pleadings, amount to a waiver of his privilege, under Ariz. Rev. Stat. 1901, § 2535, subdiv. 6, against the disclosure by the physician of any communications made by the patient with reference to any physical or supposed physical disease, or any knowledge obtained by personal examination of the patient, which, according to the proviso in that section, may be waived only in the event that the patient offers himself as a

witness and voluntarily testifies with reference to the "communications" made by him to the physician. *Arizona & N. M. R. Co. v. Clark*, L.R.A.1915C, 834, 59 L. ed. —, 35 Sup. Ct. Rep. 210, 235 U. S. 669.

20. Statements of the manager of a telephone company after a failure of service for which the company is sought to be held liable are not admissible in evidence upon the question of the competence of the operator in charge at the time the service failed. *Vinson v. Southern Bell Teleph. & Teleg. Co.* L.R.A.1915C, 450, 66 So. 100, — Ala. —.

Relevancy and materiality.

Prejudicial error in excluding, see Appeal and Error, 15, 16.

21. In case of a conflict between the parties as to the wages to be paid under a contract for domestic service, evidence of the customary rate for such service is admissible to aid the jury in determining what the rate fixed actually was. *Edelen v. Herman*, L.R.A.1915C, 1208, 172 S. W. 936, 162 Ky. 500. (Annotated)

22. Evidence as to the reputation of insured for truth, veracity, honesty, and integrity is admissible after his death, in an action to recover insurance upon his property, in which the defense is fraudulent overvaluation of the property in the proofs of loss. *Rasmusson v. North Coast F. Ins. Co.* L.R.A.1915C, 1179, 145 Pac. 610, — Wash. —.

23. Evidence of the petition of a slander is admissible to show malice in an action to recover damages for its utterance, although made to agents delegated by the person slandered to procure the repetition. *Doane v. Grew*, L.R.A.1915C, 774, 107 N. E. 620, 220 Mass. 171.

24. Upon the question of malice in giving an untruthful response to a request for information as to the character of a servant, evidence is admissible tending to show that defendant was angry because plaintiff left his service. *Doane v. Grew*, L.R.A.1915C, 774, 107 N. E. 620, 220 Mass. 171.

25. Evidence of the rental value of an automobile is admissible upon the question of the compensation to be awarded the owner for being deprived of its use through another's negligence, although he did not intend to rent it or use it for profit. *Cook v. Packard Motor Car Co.* L.R.A.1915C, 319, 92 Atl. 413, 88 Conn. 590.

26. Upon the question of diminution in value of adjoining property by the maintenance of a nuisance, evidence is admissible of sickness and annoyance suffered by the owner because thereof. *Louisville v. Hehemann*, L.R.A.1915C, 747, 171 S. W. 165, 161 Ky. 523.

27. Upon the question of the negligence of a passenger in alighting from a moving train in the dark, on the opposite side from the station, where he knows there might be debris, evidence is not admissible that other passengers had alighted on that side at that place. *Hayden v. Chicago, M. & G. R. Co.* L.R.A.1915C, 181, 170 S. W. 200, — Ky. —.

L.R.A.1915C.

28. Evidence is not admissible in an action for slander in giving a character to a servant, that plaintiff was informed by persons whom she referred to defendant for information that her services were not wanted, without anything to show that defendant was the cause of such act. *Doane v. Grew*, L.R.A.1915C, 774, 107 N. E. 620, 220 Mass. 171.

29. Upon the question of negligence in failing to furnish telephone service, evidence of use and serviceableness of the telephone mechanism shortly before and after the service failed is admissible as tending to show the condition of the mechanism and the line. *Vinson v. Southern Bell Teleph. & Teleg. Co.* L.R.A.1915C, 450, 66 So. 100, — Ala. —.

30. A plaintiff in an action for damages for a nuisance maintained by a city may, in case the city asks his witness if he has a suit for the same cause pending, show that the suit was settled, to repel the idea of interest in the witness. *Louisville v. Hehemann*, L.R.A.1915C, 747, 171 S. W. 165, 161 Ky. 523.

31. Section 204 of the Georgia Penal Code of 1910, which raises a presumption of fraud against the president and directors of a chartered bank upon proof of the insolvency thereof, and which provides that these officials may repel the presumption of fraud by showing that the affairs of the bank have been fairly and legally administered, and generally with the same care and diligence that agents receiving a commission for their services are required and bound by law to observe, and that upon such showing the jury shall acquit the officials, does not prevent the accused official from rebutting the presumption of fraud by proof of other facts than those enumerated. *Griffin v. State*, L.R.A.1915C, 716, 83 S. E. 640, 142 Ga. 636.

32. In an action on a duebill by an administratrix in which the defense sought to show payment by introducing a check signed by the defendant and payable to the decedent, where it is claimed that the check was given in settlement of another action between the same parties, evidence by the attorney who conducted the former action, that he had written letters to the defendant in regard to the duebill, is not admissible where it is not shown what was written to the defendant, nor the possession of any admissions of the defendant proved or avowed. *Davidson v. Browning*, L.R.A.1915C, 976, 80 S. E. 363, — W. Va. —.

Weight, effect, and sufficiency.

Instruction as to, see Trial, 8, 9.

33. The mere loss of a foot under the care of a surgeon is not sufficient to show malpractice, in the absence of evidence tending to indicate it. *Miller v. Toles*, L.R.A.1915C, 595, 150 N. W. 118, — Mich. —.

34. Testimony that, for the purpose of fastening together two sheet-iron plates, a rivet was set on end under the overlap and a nut placed on top of the plates over the rivet, upon which a blow was struck for the purpose of driving the rivet through the

plates, which caused the nut to fly off and hit plaintiff in the eye; and that the usual way of doing such work is to drill or punch a hole for the rivet before inserting it,—has a tendency to prove negligence. *Law v. Illinois C. R. Co.* L.R.A.1915C, 17, 208 Fed. 869, 126 C. C. A. 27.

35. A verdict against one accused of obtaining property by false pretenses is not sustained by evidence which shows that he represented a tract of land which he exchanged for the property obtained, and which contained but 5 acres, to contain 10 acres, but pointed out to the person from whom he obtained the property the true boundaries of the land, where there is no evidence of any effort or intention on his part wilfully to deceive the person from whom he obtained the property, or to defraud him in the transaction, except the bare expression of his opinion that there were 10 acres in the tract, or that there were 5 acres cleared and 5 acres in woodland, the falsity of which assertion, if it was false, must have been perfectly apparent to the person from whom he obtained the property when he had the boundaries truly pointed out to him and walked over it with the defendant, and especially where the person taking the land in exchange testified that he was fairly familiar with the acreage of land. *Walker v. State*, L.R.A. 1915C, 1161, 67 So. 94, — Fla. —.

EXCLUSIVE PRIVILEGE.

Grant of, by carrier, see Carriers, 10, 12, 13.

EXCURSION.

Duty of carrier to return excursionists to their homes, see Carriers, 1; Damages, 1.

EXECUTORS AND ADMINISTRATORS.

Misappropriation by administrator of funds deposited in bank, see Banks, 1-4; Estoppel, 3; Judgment, 2.

Evidence in action by administratrix, see Evidence, 12, 32.

Competency of witness in action by, see Witnesses, 2, 3.

Appointment.

1. The committee of a lunatic, sole distributee of a decedent's estate, is entitled to administer upon the estate in right of his ward in preference to a relative of the deceased who is not a distributee, under a statute providing that, after a surviving husband or wife, administration shall be granted to such others as are next entitled to distribution. *Winn v. Anderson*, L.R.A. 1915C, 561, 170 S. W. 213, 161 Ky. 18.

(Annotated)

Powers and liabilities; conduct of estate; assets.

2. The fact that the executors of an owner of a number of parcels of improved real estate, who, previously to his death, entered into a contract with an agent to manage and control the real estate for a L.R.A.1915C.

term of years, permitted the agent for some time after the death of the owner to manage the property and collect the rents, does not constitute a ratification and adoption of the contract. *Homan v. Redick*, L.R.A.1915C, 601, 149 N. W. 782, — Neb. —.

3. If, after appraisement of a transfer tax, the estate, without fault or delinquency on the part of the executor, shrinks, so that no money comes into his hands with which to pay the tax, he is not required to pay it out of his own funds, although the statute provides that he shall not be entitled to a final accounting of the estate unless he shall produce a receipt for the tax, and that he shall be personally liable for the tax until its payment. *Re Meyer*, L.R.A. 1915C, 615, 103 N. E. 713, 209 N. Y. 386.

(Annotated)

4. The failure of the surety to enforce an indemnity agreement given by an administrator to secure its signature to the administration bond does not affect the liability of one who aided the administrator in misappropriating assets of the estate. *Allen v. Puritan Trust Co.* L.R.A.1915C, 518, 97 N. E. 916, 211 Mass. 409.

Distribution; accounting; settlement.

Collateral attack on probate decree on executor's account, see Judgment, 2.

5. Next of kin may raise the question of collusion by the administrator in the establishment of a claim against the estate by filing objections to his account. *Re Miller*, L.R.A.1915C, 736, 149 N. W. 227, — Iowa, —.

(Annotated)

Foreign and ancillary administration.

Situs in state of ancillary administrator of stock for purpose of transfer on books of company, see Corporations, 2.

6. Where by statute an ancillary administrator has the same power as a domestic administrator, except in disposing of real property for payment of debts and funeral expenses, he may transfer stock of decedent in his possession upon the books of the corporation. *Lockwood v. United States Steel Corp.* L.R.A.1915C, 471, 103 N. E. 697, 209 N. Y. 375.

EXEMPLARY DAMAGES.

See Damages, 1.

EXEMPTIONS.

From taxation, see Taxes, 3, 4.

EXHIBITS.

Taking of, into jury room, see Appeal and Error, 18.

EX MALEFICIO.

Trust *ex maleficio*, see Trusts.

EXPLOSIONS AND EXPLOSIVES.

Injury by explosion of oil, see Contribution and Indemnity; Judgment, 7.

EXTENSION OF TIME.

Discharge of surety by, see Principal and Surety, 2.

FACTS.

Review of, on appeal, see Appeal and Error, 11-13.

FAIR.

See Amusements.

FALLING OBJECTS.

Presumption and burden of proof as to negligence, see Evidence, 7, 8.

Proximate cause of injury by, see Proximate Cause, 3.

FALSE PRETENSES.

Sufficiency of proof of, see Evidence, 35.

FARMERS.

Exempting farmers' mutual insurance companies from statute regulating rates, see Constitutional Law, 5.

FEDERAL EMPLOYERS' LIABILITY ACT.

Joinder of counts under, with counts at common law, see Action or Suit, 2.

Question of construction of, as conferring appellate jurisdiction, see Appeal and Error, 1.

Effect of, to supersede state statutes, see Commerce.

In general, see Master and Servant, 8, 9.

FELLOW SERVANTS.

Generally, see Master and Servant, 22-24.

FINDINGS.

Prejudicial error as to, see Appeal and Error, 19.

FIRE INSURANCE.

See Insurance.

FIRES.

Negligence as to wall left standing after, see Evidence, 7.

FLOOD.

Liability for causing, see Waters.

FOOD.

Liability of manufacturer for injury by, see Negligence, 2.

Implied warranty as to, see Sale.

FOREIGN EXECUTORS AND ADMINISTRATORS.

See Executors and Administrators, 6.

FORMER JEOPARDY.

See Criminal Law, 1.

FRAUD AND DECEIT.

Sufficiency of proof of, to overthrow verdict, see Appeal and Error, 12.

Statute raising prima facie presumption of fraud, see Constitutional Law, 2, 10-13; Evidence, 3, 4, 31.

Rebutting presumption of, see Evidence, 31.

L.R.A.1915C.

Sufficiency of proof of fraud, see Evidence, 35.

Estoppel as to, see Estoppel, 2.

Collusion by administrator in establishment of claim against estate, see Executors and Administrators, 5.

FREEDOM OF CONTRACT.

See Constitutional Law, 8, 9.

FREIGHT CARRIERS.

See Carriers.

GARBAGE.

Nuisance created by disposal of, see Eminent Domain, 3.

Liability of city for negligence in disposal of, see Municipal Corporations, 11.

GARNISHMENT.

A landlord with claim for unpaid rent and a mortgagee of the tenant's chattels do not waive their liens on the tenant's property by consenting to its sale on condition that a certain person act as clerk of the sale and apply the proceeds on their claims, so as to subject the proceeds to garnishment in the hands of the clerk at the suit of a judgment creditor of the tenant. Hoyt v. Clemons, L.R.A.1915C, 166, 149 N. W. 442, — Iowa, — (Annotated)

GUARANTY.

Indorsement of note in form of guaranty, see Bills and Notes, 1.

Rights of maker of note transferred by payee with guaranty of payment, see Bills and Notes, 2.

GUARANTY INSURANCE.

See Insurance, 10.

GUARDIAN AND WARD.

Effect of guardian's consent to contract by infant, see Infants, 1.

For insane person, see Incompetent Persons, 2.

GUN.

Negligence in sale of, to infant, see Negligence, 1.

HABEAS CORPUS.

A judgment of imprisonment for life on conviction of robbery under § 12, chap. 144, of W. Va. Code 1913, which prescribes only minimum penalties, and leaves it within the power of the court to pronounce judgment of imprisonment for life, is not void as contravening a constitutional provision that cruel and unusual punishment shall not be inflicted and that penalties shall be proportioned to the character and degree of the offense, at least not so as to entitle the accused to discharge on habeas corpus. Franklin v. Brown, L.R.A.1915C, 557, 81 S. E. 405, — W. Va. —.

HARMLESS ERROR.

See Appeal and Error, 14-19.

HEALTH.

Of insured, warranties or representations as to, see Insurance, 7.

HEARSAY.

Evidence of, see Evidence, 19, 20.

HEAT.

Agreement by landlord to furnish heat to tenant, see Landlord and Tenant, 6.

HEIRS.

As to descent and distribution to, see Descent and Distribution.

HIGHWAYS.

Judicial notice as to effect of street sweepings on health, see Evidence, 1.

Injury to infant playing on, by falling of stone from wall, see Evidence, 8; Proximate Cause, 3.

Injury to employee of municipality while cleaning streets, see Municipal Corporations, 9.

HOLDING OVER.

By tenant, see Landlord and Tenant, 3.

HOMICIDE.

Error in admission of testimony, see Appeal and Error, 6.

Error in exclusion of evidence, see Appeal and Error, 15.

As affecting right to inherit, see Descent and Distribution.

Evidence of confession in prosecution for, see Evidence, 18.

Instructions on trial for, see Trial, 10.

HUSBAND AND WIFE.

As to divorce and separation, see Divorce and Separation.

Evidence in action by husband for alienation of affections, see Evidence, 11.

Effect of judgment to bar action for alienation of affections, see Judgment, 6.

Competency of, as witnesses, see Witnesses, 1.

Effect of divorce to destroy estate by entirety, see Divorce and Separation.

Husband's Liabilities.

1. A man is not liable for services of an attorney rendered at the request of his wife, in consulting merchants as to furnishing credit to the wife pending divorce proceedings, since she might have applied directly for credit on her own behalf. *Meaher v. Mitchell*, L.R.A.1915C, 467, 92 Atl. 492, 112 Me. 416.

2. Where the statute authorizes the court in a divorce proceeding to direct the husband to furnish sufficient money for the prosecution or defense of the suit on her behalf, the attorney cannot hold the husband liable in a direct proceeding for services rendered the wife, as for necessities for which the husband is liable. *Meaher v. L.R.A.1915C.*

Mitchell, L.R.A.1915C, 467, 92 Atl. 492, 112 Me. 416. (Annotated)

Trusts.

3. Under a statute permitting a married woman to convey her property by joint deed with her husband, she may by deed in which he joins convey her property to him as trustee. *Brandau v. McCurley*, L.R.A.1915C, 767, 92 Atl. 540, 124 Md. 243.

(Annotated)

4. The statute of uses does not execute the trust so as to vest in a married woman the fee simple estate where she and her husband join in a deed to him of her property in trust to permit her to enjoy and convey the property as if sole, all property undisposed of to become the absolute property of the trustee in case he survives her. *Brandau v. McCurley*, L.R.A.1915C, 767, 92 Atl. 540, 124 Md. 243.

Actions by wife.

5. A wife cannot, either at common law or under the married woman's act giving her a right to hold separate property and sue alone, recover damages for loss of companionship and support, from persons who have successfully conspired to induce her husband to commit an offense for which he was imprisoned, where they intended to injure him, and not her. *Neiberg v. Cohen*, L.R.A.1915C, 483, 92 Atl. 214, — Vt. —.

ILLICIT RELATIONS.

Liability of telegraph company disclosing contents of message from one maintaining illicit relations with sendee, see Telegraphs.

IMPAIRMENT OF OBLIGATIONS.

See Constitutional Law, 19-23.

IMPROVEMENTS.

Agreement to pay lessee for, see Landlord and Tenant, 5.

INCOMPETENT PERSONS.

Opinion evidence as to sanity, see Evidence, 16.

Collateral attack on judgment as to sanity, see Judgment, 4.

Right of committee to administer upon estate, see Executors and Administrators, 1.

1. A statute providing for a new inquisition every five years, before any order may be granted by the court for the maintenance of an idiot out of his own estate or out of the state treasury, does not apply alone to pauper idiots. *Winn v. Anderson*, L.R.A.1915C, 581, 170 S. W. 213, 161 Ky. 18.

2. There is no jurisdiction to appoint a new committee for an idiot before the removal of the old one, under statutes authorizing the court to appoint, suspend, and remove committees, and authorizing removal when the committee shall move out of the state, become incapable of discharging his duties, or evidently unsuited therefor, or when he fails to make proper settlement of his accounts. *Winn v. Anderson*, L.R.A.1915C, 581, 170 S. W. 213, 161 Ky. 18.

INCONSISTENCY.

Estoppel by, see Estoppel, 4.

INCREASED HAZARD.

See Insurance, 3.

INDEMNITY.

See Contribution and Indemnity.

INDICTMENT, INFORMATION AND COMPLAINT.

An indictment for robbery will support a conviction for larceny. *State v. Parker*, L.R.A.1915C, 131, 170 S. W. 1121, — Mo. —.

INDORSEMENT.

Of note, see Bills and Notes, 1.

INFANTS.

Measure of damages for death, see Damages, 4.

Liability for injury to, by electric wires, see Electricity, 2, 3.

Injury to, while playing in street, see Evidence, 8; Proximate Cause, 3.

Injury to child on city play ground, see Municipal Corporations, 10.

Negligence in sale of gun to, see Negligence, 1.

1. A guardian's knowledge of and consent to the purchase of an automobile by his minor ward, and his furnishing the money to pay for it from the ward's estate, do not make the contract binding on the minor upon his reaching maturity. *Reynolds v. Garber-Buick Co.* L.R.A.1915C, 362, 149 N. W. 985, — Mich. —. (Annotated)

2. A minor may, upon becoming of age, disaffirm his purchase of an automobile, and upon tendering back the machine recover the money paid for it regardless of the wear which he has given it. *Reynolds v. Garber-Buick Co.* L.R.A.1915C, 362, 149 N. W. 985, — Mich. —.

INGRESS.

Easement of, see Easements, 1.

INHERITANCE.

See Descent and Distribution.

INHERITANCE TAX.

See Taxes, 17, 18.

INJUNCTION.

Joining claim for damages with suit for injunction, see Action or Suit, 1.

Against putting into force rates required by state commission to be adopted under penalty, see Courts, 1.

Suit by taxpayer for, see Parties.

To protect contract rights.

1. The provision in the extension of a franchise to a water company, that the municipality shall have the right to purchase the waterworks of the company during the term of the extension of the franchise at a valuation to be fixed by arbitra-

tors, does not furnish such an objection to the construction and operation of a waterworks system by the town to supply its inhabitants with water as to entitle the water company to the equitable remedy of injunction to restrain the municipality from proceeding for this purpose, where the water company has refused to appoint arbitrators as provided in the franchise to meet with those appointed by the municipality, and has thus been guilty of the first breach of the contract. *Glenwood Springs v. Glenwood Light & W. Co.* L.R.A.1915C, 438, 202 Fed. 678, 121 C. C. A. 88. Trespass.

2. The remedy at law is not so adequate as to prevent the issuance of an injunction to prevent the attempted use of a way across farm property, which is not needed by the owner of the property, but divides the tract, and may interfere with the owner's plans for its use and development. *Duvall v. Ridout*, L.R.A.1915C, 345, 92 Atl. 209, 124 Md. 193.

INQUISITION.

As to competency, see Incompetent Persons, 1.

INSANITY.

See Incompetent Persons.

INSOLVENCY.

As to bankruptcy, see Bankruptcy.

INSTRUCTIONS.

See Trial, 6-10.

INSULATION.

Of electric wire, see Electricity, 2, 3.

INSURANCE.

Review of verdict on appeal, see Appeal and Error, 12.

Parol evidence to contradict terms of policy, see Evidence, 13.

Opinion evidence as to value of property, see Evidence, 17.

Evidence as to reputation of insured, see Evidence, 22.

Competency of agent to testify as to value of property in action on policy, see Evidence, 17.

Evidence where defense is fraudulent overvaluation of property, see Evidence, 22.

Companies, officers, and agents.

Equal protection and privileges in regulating insurance rates, see Constitutional Law, 5.

Taxation of amount due foreign insurance company by policy holders within the state, see Constitutional Law, 6, 7.

1. The business of fire insurance is so far affected with a public interest as to justify legislative regulation of its rates. *German Alliance Ins. Co. v. Lewis*, L.R.A.1915C, 1189, 58 L. ed. 1011, 34 Sup. Ct. Rep. 612, 233 U. S. 389. (Annotated)

Cancellation; notice.

2. A provision in a standard fire insurance policy containing a mortgagee clause, that it may be canceled at any time at the request of the insured, does not permit cancellation without notice to the mortgagee, where another clause provides that no act or default of any person other than the mortgagee or his agent shall affect his right to recover in case of loss. *Gilman v. Commonwealth Ins. Co.* L.R.A.1915C, 758, 92 Atl. 721, 112 Me. 528. (Annotated)

Warranties; representations; conditions.

Parol evidence to contradict terms of policy as to location of property, see Evidence, 13.

Parol evidence to contradict terms of policy as to interest of insured, see Evidence, 13.

3. Continuing work after the expiration of a building permit does not avoid an insurance policy which provides that it shall become invalid if, without the consent of the company, the situation or circumstances affecting the risk shall by, or with, the knowledge, advice, agency, or consent of the insured be so altered as to cause an increase of such risk, unless such continuance increases the risk. *Gilman v. Commonwealth Ins. Co.* L.R.A.1915C, 758, 92 Atl. 721, 112 Me. 528.

4. A policy on a vessel warranted employed in general passenger and freighting business on a designated sound does not cover it while it is laid up for the winter in a river flowing into the sound. *Canton Ins. Office v. Independent Transp. Co.* L.R.A. 1915C, 408, 217 Fed. 213, — C. C. A. — (Annotated)

5. A clause in a fire insurance policy requiring the insured to "keep a set of books which shall clearly and plainly present a complete record of business transacted, including all purchases, sales, and shipments, both for cash and credit," is not complied with by keeping books which do not show the items sold, but only the gross amounts of weekly sales. *Fisher v. Sun Ins. Office*, L.R.A.1915C, 619, 83 S. E. 729, — W. Va. —

6. A breach of the iron safe clause in a policy of fire insurance covering a stock of merchandise, fixtures, household furniture, and the building containing them, each insured for a specified sum, avoids the policy only in respect to the stock of merchandise, and does not prevent a recovery on account of the property not affected by the breach, notwithstanding that the policy stipulates that it shall be void and no action brought on it when any one of its conditions or warranties are broken, provided the insured has committed no fraud, and no act prohibited by public policy is involved. *Fisher v. Sun Ins. Office*, L.R.A.1915C, 619, 83 S. E. 729, — W. Va. —

7. An applicant for life insurance who has answered "No" to an inquiry whether or not he had ever had renal colic is bound, under penalty of forfeiting his policy, to L.R.A.1915C.

notify the insurer in case he subsequently has such an attack before the policy is issued. *Harris v. Security Mut. L. Ins. Co.* L.R.A.1915C, 153, 170 S. W. 474, — Tenn. —

Risks and causes of loss, injury, or death.

8. That a transfer company refuses to let a particular class of picnic wagons to negroes does not affect the question whether or not a person injured while a passenger in such wagon was in or on a public conveyance provided by a common carrier for passenger service, within the meaning of an accident insurance policy. *Georgia L. Ins. Co. v. Easter*, L.R.A.1915C, 456, 66 So. 514, — Ala. — (Annotated)

9. A rig let by a transfer company by the day to the public generally for picnic parties, to be controlled by its own employees and carry only those invited by the hirer, is not, although the company is as to other parts of its business a common carrier, a public conveyance provided by a common carrier for passenger service, within the meaning of a policy insuring against injury to persons while passengers in such conveyances. *Georgia L. Ins. Co. v. Easter*, L.R.A.1915C, 456, 66 So. 514, — Ala. —

Guaranty insurance.

10. Insurance of an employer against loss arising from claims on account of bodily injury accidentally suffered by an employee of insured by reason of the prosecution of the work in which the employer was engaged, and the various departments thereof, and dependent and connected operations and parts thereof, does not cover a claim for malpractice of a physician furnished by the employer according to custom and contract, to treat an employee injured in the business, from whose wages a fee has been deducted to cover medical attention. *May Creek Logging Co. v. Pacific Coast Casualty Co.* L.R.A.1915C, 155, 144 Pac. 67, — Wash. — (Annotated)

INTENT.

Of legislature in passage of statute, see Statutes, 3.

Of testator, see Wills, 2.

INTEREST.

Usurious interest, see Usury.

INTERNATIONAL LAW.

Private international law, see Conflict of Laws.

INTERSTATE COMMERCE.

See Commerce.

INTOXICATING LIQUORS.

Drinking of, by jurors, see Appeal and Error, 18; New Trial, 1.

Prohibition and regulation.

Right to use voting machine in local option election, see Elections.

1. The levying of a tax upon one who attempts to solicit orders for intoxicating liquors in prohibition territory does not permit the sale of liquors there so as to render the statute obnoxious to the provision of the Constitution forbidding such

sales in prohibition territory; at least where the sale of liquor in prohibition territory is made a felony by another statute. *Barnes v. State*, L.R.A.1915C, 101, 170 S. W. 548, — Tex. Crim. Rep. —. (Annotated)

2. Prohibition will be adopted at a local option election if a majority of the votes cast are in favor of it, in which a number of voters entering the booth failed to register their votes, under a statute providing that if a majority of the legal votes cast shall be in favor of prohibition, it shall be adopted, although the statute also provides that prohibition shall continue in force until a majority of the legal voters shall decide to the contrary. *Spickerman v. Goddard*, L.R.A.1915C, 513, 107 N. E. 2, — Ind. —.

Licenses.

Validity of statutory provision as to license, see *supra*, 1.

3. Section 1, c. 115, N. Mex. Laws 1905, which prohibits the granting of a license for the sale of intoxicating liquor at any place, except within the limits of a city, town, or village containing at least 100 inhabitants, does not justify the issuance of such a license for the sale of liquor in an isolated building more than 1,800 feet distant from any other house in an unincorporated village; the building being located upon a patented homestead claim of 160 acres, upon which no other residences have been erected, and beyond which there are no other buildings for some miles, as such building is not "within the limits" of such village. *State ex rel. Lorenzino v. Board of County Comrs.* L.R.A.1915C, 898, 145 Pac. 1083, — N. M. —. (Annotated)

Unlawful sales; offenses and proceedings.

Reversible error in prosecution for violation of liquor laws, see *Appeal and Error*, 18.

Effect of charter of club to give authority to sell liquor to members, see *Clubs*.

Estoppel to annul charter of club because of illegal sale of liquor, see *Estoppel*, 1.

4. Lending whisky to be returned in kind and amount is not within a statute prohibiting the selling, bartering, or giving away to induce trade of intoxicating liquors. *Jones v. State*, L.R.A.1915C, 648, 66 So. 987, — Miss. —. (Annotated)

5. The furnishing by a club of liquor to one of its members from a common stock, to be charged to his account, which was settled at stated periods, is a sale within the meaning of a statute forbidding a sale of liquor without license. *State ex inf. Harvey v. Missouri Athletic Club*, L.R.A.1915C, 876, 170 S. W. 904, — Mo. —. (Annotated)

6. One who under a scheme by which an organization fits up a room in prohibition territory and places therein a locked box in which members may place orders for intoxicating liquors, together with the money to pay therefor, acts as agent for the organization by taking the orders and

money from the box, paying therefrom the expenses, ordering liquors, and distributing tickets for drinks among those placing orders to be filled by a porter in charge of the room, is within the operation of a statute placing a tax on all persons that pursue the business of selling or offering for sale any intoxicating liquors by soliciting or taking orders therefor in prohibition territory. *Barnes v. State*, L.R.A.1915C, 101, 170 S. W. 548, — Tex. Crim. Rep. —.

7. One who under a scheme by which an organization fits up a room in prohibition territory and places therein a locked box in which members may place orders for intoxicating liquors, together with the money to pay therefor, acts for a week as agent for the organization by taking the orders and money from the box, paying therefrom the expenses, and ordering liquors, and placing them on ice, and distributing tickets for drinks among those who gave orders to be filled by a porter in charge of the room, in consideration that other members will act in a similar capacity in turn, is within the operation of a statute imposing a tax on whoever pursues in prohibition territory the business of keeping, maintaining, or operating what is commonly known as a cold storage, or any place by whatever name known, or whether named or not, where intoxicating liquors are kept on deposit for others, or where such liquors are kept for others under any kind or character of bailment. *Barnes v. State*, L.R.A.1915C, 101, 170 S. W. 548, — Tex. Crim. Rep. —.

IRON SAFE CLAUSE.

In insurance contract, see *Insurance*, 6.

JAILS.

Riot by prisoners confined in, see *Mobs and Riots*; *Municipal Corporations*, 6.

JEOPARDY.

See *Criminal Law*, 1.

JOINDER.

Of causes of action, see *Action or Suit*.

JOINT CREDITORS AND DEBTORS.

1. The fact that an employee of a steam railway company who was injured by the joint negligence of the steam railway company and an electric railway company had a cause of action against the electric company founded upon the common law, and against the steam company founded upon the Federal employers' liability act, so that the tortfeasors could not be sued in the same forum, or joined in the same action, does not of itself change the liability of such tortfeasors, or prevent them from being jointly liable. *Louisville & N. R. Co. v. Allen*, L.R.A.1915C, 20, 65 So. 8, — Fla. —. (Annotated)

2. An electric street railway company whose line crosses the track of a steam railway, which has negligently placed one of its trolley wires over the track of the steam

railway company, so as not to afford sufficient space for the latter's trains to pass easily and conveniently, without risk and danger to its servants and employees; and the steam railway company, which has negligently permitted such construction and maintenance of the trolley, and which negligently propels a car upon its track so that an employee is forcibly and violently thrown against such trolley wire, are jointly liable as tort feasors for such injury, within the meaning of the rule that a release executed to one tort feisor in satisfaction of the tort releases all. *Louisville & N. R. Co. v. Allen*, L.R.A.1915C, 20, 65 So. 8, — Fla. —.

3. The acceptance of a sum of money from one joint tort feisor in satisfaction of a claim for damages, and the execution of a release and discharge under seal of such joint tort feisor from all damages by reason of the injuries inflicted, reciting that such sum of money was received "in full compromise, payment, discharge, accord, and satisfaction" for or on account of such injuries, operates as a release of the other joint tort feisor, even though it is stipulated therein that the release of such tort feisor shall not operate so as to discharge the other, and the right to sue the other joint tort feisor is expressly reserved. *Louisville & N. R. Co. v. Allen*, L.R.A.1915C, 20, 65 So. 8, — Fla. —.

JOINT TORT FEASORS.

See Joint Creditors and Debtors.

JUDGMENT.

On appeal, see Appeal and Error, 20-22.

Decree in suit for specific performance, see Specific Performance, 2.

Entry; record.

1. The failure of the judge before whom a person was found to be an idiot, to sign the judgment after it is entered in the proper book, may be corrected by his successor in office, to whose attention the omission is called, under a statute providing that upon the death of the circuit judge, or when from any cause the office is vacant, or when the judge is absent, his successor, no matter how chosen, may sign any order of court left unsigned by the predecessor. *Winn v. Anderson*, L.R.A.1915C, 581, 170 S. W. 213, 161 Ky. 18.

Validity; effect and conclusiveness.

2. A probate decree on an account filed by the successor and administrator of the administrator of an estate, who died after filing an account which was not acted upon, fixing the amount of the defalcation of the first administrator, cannot be collaterally attacked in an action by the successor to hold a bank liable to make good the loss for aiding the defalcation. *Allen v. Puritan Trust Co.* L.R.A.1915C, 518, 97 N. E. 916, 211 Mass. 409.

3. A recital of due publication of notice in a judgment directing the sale of land for nonpayment of taxes cannot be collaterally

attacked, although the affidavit in proof of the publication shows a less number of publications than the statute requires. *Price v. Gunn*, L.R.A.1915C, 158, 170 S. W. 247, — Ark. —.

4. Failure of the record of a court of general jurisdiction to recite a service of summons on one adjudged insane does not subject the judgment to collateral attack. *Winn v. Anderson*, L.R.A.1915C, 581, 170 S. W. 213, 161 Ky. 18.

5. A decree of bankruptcy upon a petition alleging two grounds, one of which would prevent a discharge, without specifying the ground upon which it is based, is not *res judicata* against the right to a discharge upon a subsequent petition to secure it. *Re Julius*, L.R.A.1915C, 89, 217 Fed. 3, — C. C. A. —.

6. A judgment granting a wife a divorce for abandonment and denying one against her for that cause is no bar to a suit by her former husband against her parents for the alienation of her affections from him. *Hostetter v. Green*, L.R.A.1915C, 870, 167 S. W. 919, 159 Ky. 611.

(Annotated)

7. Notice to a manufacturer of illuminating oil to appear and defend an action by a consumer against a retailer for injuries due to an explosion of the oil will not render a judgment against the retailer binding on the manufacturer, if negligence was alleged against the retailer which might render him liable for the injury independent of any wrong on the part of the manufacturer. *Pfarr v. Standard Oil Co.* L.R.A.1915C, 336, 146 N. W. 851, — Iowa, —.

JUDICIAL NOTICE.

See Evidence, 1.

JURISDICTION.

Of appellate court, see Appeal and Error.

Of courts generally, see Courts.

Collateral attack on judgment for lack of, see Judgment, 4.

JURY.

Prejudicial error in conduct of, see Appeal and Error, 18.

New trial for matters pertaining to, see New Trial, 1.

Questions for, see Trial, 2-5.

LABOR ORGANIZATIONS.

Statute forbidding master to stipulate that employee shall not become or remain member of labor organization, see Constitutional Law, 9.

LANDLORD AND TENANT.

Agreement in lease to convey the leased property, see Appeal and Error, 8.

Consideration for option of purchase in lease, see Contracts, 1.

Specific performance of option in lease to purchase, see Specific Performance, 1.

1. The relation of landlord and tenant does not exist between an owner of property and an agent employed to manage property and collect rents, to whom, as a part of his commission, an office is furnished rent free, since the occupancy is merely ancillary to the service, and the agent does not take his power coupled with an interest. *Homan v. Redick*, L.R.A.1915C, 601, 149 N. W. 782, — Neb. —.

Covenants in lease.

Breach of covenants by lessor as ground for rescission of contract by lessee, see Contracts, 10.

2. A lessor does not relieve himself from liability for breach of a covenant not to rent another storeroom in the building for a rival business, by merely inserting in a lease of another room a provision that it shall not be used for that business. *University Club v. Deakin*, L.R.A.1915C, 854, 106 N. E. 790, 265 Ill. 257.

Terms; holding over; renewal.

3. A tenant for years who holds over after the expiration of the term becomes a tenant from year to year, subject to all the covenants and stipulations in the lease so far as they are applicable to the new condition of things. *Barber v. Watch Hill Fire Dist.* L.R.A.1915C, 245, 89 Atl. 1056, — R. I. —.

Termination of lease; forfeiture.

4. A condition, and not a covenant, is created by a provision in a lease for five years that the lessor may sell at any time, and, when sold, this lease shall cease, provided that the lessor shall then pay the lessee for improvements placed upon the premises, with a provision for arbitration in case of disagreement as to their value, so that the lease does not terminate without payment. *Diepenbrock v. Luiz*, L.R.A. 1915C, 234, 115 Pac. 743, 159 Cal. 716.

(Annotated)

5. The failure of the landlord to comply with his covenant to keep a basement in the leased building waterproof does not constitute an eviction of the tenant. *Stewart v. Childs Co.* L.R.A.1915C, 649, 92 Atl. 392, 86 N. J. L. 648.

Defective or dangerous premises.

6. The owner of a building who leased a portion of it, and in the lease covenanted to furnish heat to the tenant, is not, after he has sold the property to one who assumed all his obligations under the lease, and the tenant recognized the grantee as landlord, liable to employees of the lessee for damages for personal injury resulting from negligent failure properly to heat the premises. *Glidden v. Second Ave. Invest. Co.* L.R.A. 1915C, 190, 147 N. W. 658, 125 Minn. 471.

(Annotated)

Rent.

Waiver of landlord's lien for rent by consenting to sale of tenant's property, see Garnishment.

7. A covenant in a lease to pay rent by a tenant, and a covenant by the landlord to keep the cellar waterproof, are independent covenants, and a breach of the latter is not a defense to an action for the L.R.A.1915C.

nonpayment of rent under the former. *Stewart v. Childs Co.* L.R.A.1915C, 649, 92 Atl. 392, 86 N. J. L. 648. (Annotated)

8. A lessee who continues in possession after the reversion is sold, which, by the terms of the lease, terminates it provided payment is made for improvements, is, in case the sale is only a few days before the termination of a rental period, liable for the rent accruing for such period. *Diepenbrock v. Luiz*, L.R.A.1915C, 234, 115 Pac. 743, 159 Cal. 716.

Re-entry; recovery of possession.

9. An assignee of the reversion of a leasehold cannot enter because of rent which was due and unpaid at the time of the assignment. *Barber v. Watch Hill Fire Dist.* L.R.A.1915C, 245, 89 Atl. 1056, — R. I. —.

10. A statute permitting re-entry for default in payment of rent does not authorize re-entry by an assignee of the reversion for rent overdue at the time of the assignment, the right to which was retained by the assignor. *Barber v. Watch Hill Fire Dist.* L.R.A.1915C, 245, 89 Atl. 1056, — R. I. —. (Annotated)

LARCENY.

Plea of former jeopardy in prosecution for, see Criminal Law, 1.

Sufficiency of indictment to support conviction for, see Indictment, Information or Complaint.

Master's liability for theft by servant, see Master and Servant 25.

LAST CLEAR CHANCE.

See Negligence, 5.

LAW OF PLACE.

See Conflict of Laws.

LEASE.

In general, see Landlord and Tenant.

Of town land, provision as to taxes, see Towns.

LEGISLATURE.

Delegation by, of power to municipality, see Municipal Corporations, 1, 2.

Power as to rates, see Rates.

LEVY AND SEIZURE.

Of tax, see Taxes, 9.

LIBEL AND SLANDER.

Relevancy of evidence generally, see Evidence, 28.

Presumption and burden of proof as to malice, see Evidence, 2.

Evidence on question of malice, see Evidence, 23, 24.

1. The privilege of one who, in answering an inquiry as to the character of a servant, makes statements as of information received from others, does not depend upon his personal bona fide belief in the truth of the facts stated, or whether or not he ought to have believed them, or was reck-

less and careless in believing them. *Doane v. Grew*, L.R.A.1915C, 774, 107 N. E. 620, 220 Mass. 171.

2. A statement in an affidavit supporting a motion for new trial in an action by a widow to recover damages for the death of her husband, charging illicit relations between herself and a material witness in support of her claim, is absolutely privileged, and will not support an action for libel, although absolutely false. *Keeley v. Great Northern R. Co.* L.R.A.1915C, 986, 145 N. W. 664, 156 Wis. 181. (Annotated)

LICENSE.

For sale of liquor, see Intoxicating Liquors, 1, 3.

LIFE INSURANCE.

See Insurance.

LIFE TENANTS.

Under a devise for life of a retail business, the estate of the life tenant is entitled to the difference in value of the stock at the time he receives possession of the property and the time of his death, even though the first value is ascertained by appraisalment and the last by actual sale of the property. *Ruppert v. McArdle*, L.R.A.1915C, 646, 42 App. D. C. 392. (Annotated)

LIMITATION OF ACTIONS.

Conflict of laws as to, see Conflict of Laws.

A foreign corporation doing business within a state, which has refused to comply with the laws of that state by filing a copy of its articles of incorporation within the state, and to appoint an agent as required by law upon whom service of process may be had, cannot avail itself of the benefits of the statute of limitations enacted for the exclusive benefit of resident citizens, the running of which is suspended when a person against whom a cause of action has accrued is out of the state, although another statute authorizes service of process on local agents where the corporation has refused to comply with the law. *Hale v. St. Louis & S. F. R. Co.* L.R.A.1915C, 544, 134 Pac. 949, 39 Okla. 192. (Annotated)

LIVE STOCK.

Transportation of, see Carriers, 11.

LOAN.

Of liquor, see Intoxicating Liquors, 4.

LOCAL OPTION.

See Elections; Intoxicating Liquors, 2.

LOCATION.

Of insured property, see Insurance, 4.

LOGS AND LOGGING.

Exclusive contract by carrier with private corporation for loading of logs tendered for shipment, see Carriers, 10, 12.

L.R.A.1915C.

MALICE.

Presumption and burden of proof as to, see Evidence, 2.

Evidence as to, see Evidence, 23, 24.

MALPRACTICE.

Of physician, see Evidence, 33.

MANUFACTURER.

Liability for injury due to defects in articles manufactured, see Negligence, 2.

MARINE INSURANCE.

See Insurance, 4.

MARRIAGE.

As to divorce and separation, see Divorce and Separation.

MARRIED WOMEN.

See Husband and Wife.

MASTER AND SERVANT.

Statute forbidding master to stipulate that employee shall not become or remain member of labor organization, see Constitutional Law, 9.

Slander in giving character to servant, see Evidence, 24, 28; Libel and Slander, 1.

Evidence on question of wages to be paid under contract, see Evidence, 21.

Personal liability of officer of corporation for injury to employee, see Corporations, 1.

Municipal liability for injury to employee, see Evidence, 1; Municipal Corporations, 9.

Insurance against master's liability, see Insurance, 10.

Joint liability for injury to servant, see Joint Creditors and Debtors, 1, 2.

Liability of landlord for injury to employee of tenant by breach of covenant after sale of property, see Landlord and Tenant, 6.

Failure to establish proper rules as proximate cause of injury to servant, see Proximate Cause, 2.

Authority to employ physician; liability for physician's services.

1. A master who has undertaken to furnish surgical attention and hospital service to injured employees, and who retains money from their wages to meet the expenses, is not liable for the services of a physician employed by relatives of an injured employee after he reaches the hospital, upon being dissatisfied with the regular surgeon in attendance. *Vanderboget v. Campbell Mill Co.* L.R.A.1915C, 808, 144 Pac. 905, — Wash. —.

2. A salesman for a mill company, who is directed by the superintendent to take an injured employee to the hospital, has no implied authority to contract for the services of surgeons and nurses different from those whom the company has em-

ployed to care for its employees and who are at the time available. *Vanderboget v. Campbell Mill Co.* L.R.A.1915C, 808, 144 Pac. 905, — Wash. — (Annotated)

When relation exists.

3. A special police officer appointed by the governor at the instance of a railway company, though *prima facie* a public officer, is, when specially employed by the company to enforce its rules and to protect the passengers on its trains, in that regard a servant of the company, and if, while on a train as such servant, he inflicts injury on a passenger, not acting in his capacity as a public officer for the vindication of the law, or not justified by the law of self-defense, the company is liable, notwithstanding the injurious act is prompted by motives purely personal to the servant. *Moss v. Campbells Creek R. Co.* L.R.A.1915C, 1183, 83 S. E. 721, — W. Va. — (Annotated)

4. The relation of master and servant is not dissolved by mere cessation of duties assigned, but continues such reasonable time thereafter as will afford the servant opportunity to reach a place of safety from perils of the employment. *Jones v. Virginian R. Co.* L.R.A.1915C, 428, 83 S. E. 54, — W. Va. —

5. A locomotive fireman who, in response to a call for duty, takes a customary path across the company's tracks to assume his duties, is, after entering on the company's property and while traveling along the path, an employee within the meaning of an employers' liability act making employers liable for injury to employees during the course of their employment. *Philadelphia, B. & W. R. Co. v. Tucker*, L.R.A.1915C, 39, 35 App. D. C. 123.

(Annotated)

Duty to furnish medical aid to servant.

6. A corporation whose employee is engaged in dangerous business for it is liable for his death through its failure to use reasonable diligence to furnish him with surgical aid upon his being so badly injured while in the performance of his duties that he is physically or mentally incapable of procuring assistance for himself, and aid is necessary to save his life, although the injury was not caused by the fault of the employer. *Hunicke v. Meramec Quarry Co.* L.R.A.1915C, 789, 172 S. W. 43, — Mo. — (Annotated)

7. The liability of a master for the death of an employee through its failure to furnish him with surgical aid when he is so badly injured that he is incapacitated from securing it for himself cannot be made to depend upon the ability of the jury to determine whether or not death would have ensued even though proper medical assistance had been furnished, but liability exists if the evidence shows that in all reasonable probability the master's failure was the proximate cause of death. *Hunicke v. Meramec Quarry Co.* L.R.A.1915C, 789, 172 S. W. 43, — Mo. — L.R.A.1915C.

Federal employers' liability act.

As to assumption of risk by employee, see *infra*, 16-18.

Joining counts at common law and under Federal employers' liability act, see *Action or Suit*, 2.

Question as to construction of, as conferring appellate jurisdiction, see *Appeal and Error*, 1.

Effect of Federal employers' liability act to supersede state statutes, see *Commerce*.

See also *infra*, 13.

8. A boiler maker's helper engaged in repairing a locomotive regularly employed in interstate transportation, and which was destined for return thereto upon completion of repairs, is employed in interstate commerce and within the protection of the Federal employers' liability act. *Law v. Illinois C. R. Co.* L.R.A.1915C, 17, 208 Fed. 869, 126 C. C. A. 27 (Annotated)

9. In an action in a state court to hold a railroad company liable under the Federal employers' liability act for injury to an employee through the negligence of a co-employee, the law of the state must be looked to, to determine whether or not the act complained of amounted to negligence, where the Federal act fails to define the character or degree of negligence necessary to a recovery. *Cincinnati, N. O. & T. P. R. Co. v. Eastham*, L.R.A.1915C, 27, 169 S. W. 886, — Ky. —

Duty as to place and appliances.

10. A steel chisel for cutting iron rails, pieces of which are likely to fly off and injure employees if it is not properly tempered, and in the manufacture of which it is necessary carefully to test several out of every lot turned out, is not a simple tool in the furnishing of which the master is relieved from the use of ordinary care to furnish a reasonably safe one. *New York, N. H. & H. R. Co. v. Vizvari*, L.R.A.1915C, 9, 210 Fed. 118, 126 C. C. A. 632.

11. A path established through long-continued use by railroad employees in going to and from their work across the property of the company is a way within the meaning of a statute making the company liable for injuries to an employee through an insufficiency due to its negligence in its ways. *Philadelphia, B. & W. R. Co. v. Tucker*, L.R.A.1915C, 39, 35 App. D. C. 123.

12. Employees engaged in switching cars and engines in railroad yards may reasonably assume that coemployees, familiar with dangers incident thereto, will, when using the yards for their own convenience, exercise necessary and reasonable diligence to protect themselves from such perils as may reasonably be expected therein. *Jones v. Virginian R. Co.* L.R.A.1915C, 428, 83 S. E. 54, — W. Va. —

13. A railroad company owes no duty to a foreman of a gang engaged in construction work along the track whose duty is to know the time for the passing of trains, keep the track clear, and protect the men working under him from injury, to

keep trains under control, keep a lookout for persons on the track, or give warnings of the approach of trains which are practically on time, so that failure to do so may render it liable under the Federal employers' liability act for injuries inflicted upon him by a train which hits him. *Cincinnati, N. O. & T. P. R. Co. v. Eastham, L.R.A.1915C, 27, 169 S. W. 886, — Ky. —* (Annotated)

14. An employee's way across railroad tracks is insufficient within the meaning of a statute making the company liable for an injury to an employee resulting from insufficiency of the way due to its negligence, if no protection whatever is provided against injuries from passing trains which are likely to result from the surrounding conditions. *Philadelphia, B. & W. R. Co. v. Tucker, L.R.A.1915C, 39, 35 App. D. C. 123.*

Servant's assumption of risks.

Effect of Federal employers' liability act on, see Commerce, 1.

Right of master to benefit of evidence given by plaintiff tending to show assumption of risk, see Pleading, 4.

Question for jury as to, see Trial, 5.

15. The defense of assumption of risk is removed in an action to hold a master liable for injury to an employee, by a statute providing that no contract of employment shall constitute any bar or defense to an action brought to recover such damages. *Philadelphia, B. & W. R. Co. v. Tucker, L.R.A.1915C, 39, 35 App. D. C. 123.*

16. The Federal employers' liability act does not abrogate the defense of assumption of risk of neglect of common-law duties by the master. *New York, N. H. & H. R. Co. v. Vizvari, L.R.A.1915C, 9, 210 Fed. 118, 126 C. C. A. 632. (Annotated)*

17. Federal statutes only were intended by the phrase "any statute enacted for the safety of employees" in the employers' liability act of April 22, 1908, §§ 3, 4, abolishing the defenses of contributory negligence and assumption of risk in any case where the violation by the carrier of any statute enacted for the safety of employees contributed to the injury or death of an employee. *Seaboard A. L. R. Co. v. Horton, L.R.A.1915C, 1, 58 L. ed. 1062, 34 Sup. Ct. Rep. 635, 233 U. S. 492.*

18. The elimination of the defense of assumption of risk by the employers' liability act of April 22, 1908, § 4, in any case where the violation by the carrier of any statute enacted for the safety of the employees contributed to the injury or death of the employee, plainly evidences the legislative intent that in all other cases such assumption of risk shall have its former effect as a complete bar to the action. *Seaboard A. L. R. Co. v. Horton, L.R.A.1915C, 1, 58 L. ed. 1062, 34 Sup. Ct. Rep. 635, 233 U. S. 492. (Annotated)*

Contributory negligence of servant.

19. An employee who is injured in a railroad yard by being struck by the fender of a reversed engine, the presence of which he was at the time and place of

impact anticipating, but who, when hit, was observing the approach of a train on another track which he knew could not harm him, cannot, because of his own negligence, recover for the injuries inflicted, although no warning by bell or whistle or light was given of the movements of the engine. *Jones v. Virginian R. Co. L.R.A.1915C, 428, 83 S. E. 54, — W. Va. —*

20. A foreman of a gang engaged in construction work along a railroad track, whose duty is to know the time of and keep a lookout for trains in order to keep the tracks clear and protect his men from injury, is not entitled to rely on the observance by those in charge of trains, of the rules established for the movement of trains at meeting points and stations, so that he can hold the company liable for injuries due to such reliance when the rules were not observed. *Cincinnati, N. O. & T. P. R. Co. v. Eastham, L.R.A.1915C, 27, 169 S. W. 886, — Ky. —*

21. An engineer of a train is not guilty of disobedience of orders to meet another train at a certain station, which will prevent his holding the railroad company liable for injuries resulting from a collision with it, if he acts upon information in the train register at the station that the train has gone on, and proceeds on his journey, whereas the train to be met had gone back and was again coming towards the station where he was directed to meet it. *Bouchard v. Central Vermont R. Co. L.R.A.1915C, 33, 89 Atl. 475, 87 Vt. 399.*

Fellow servants and their negligence.

22. An employee of a railroad company who is struck in the yards by a reversed engine having no light cannot recover of the railroad company because of the failure to have the light according to its rules, since the omission is a negligent act of a fellow servant. *Jones v. Virginian R. Co. L.R.A.1915C, 428, 83 S. E. 54, — W. Va. —*

23. The negligence of employees of a railroad company in pushing another employee out of a car door to his injury, while they were wrestling inside the car, is not within the operation of the Federal employers' liability act, providing that an interstate carrier shall be liable to an employee engaged in interstate commerce for injuries resulting in whole or in part from "negligence of any of the officers, agents, or employees of such carrier," since the negligence must, to come within the statute, occur in the course of their employment. *Reeve v. Northern P. R. Co. L.R.A.1915C, 37, 144 Pac. 63, — Wash. —*

(Annotated)

24. A boiler maker and his helper are fellow servants. *Law v. Illinois C. R. Co. L.R.A.1915C, 17, 208 Fed. 869, 126 C. C. A. 27.*

Master's liability for acts of servant.

When relation exists, see *supra*, 3.

Liability of carrier for injury to business of shipper by failure of contractor to forward promptly logs tendered for shipment, see Carriers, 10.

25. A cleaner of clothing is not rendered liable for articles stolen from pockets by his employees, by a statute making employers liable for wrongful acts committed by their agents in and as a part of the transaction of their business; since the stealing of the articles is not within the scope of the employee's duties even though he is required to search the clothing. *Copelin v. Berlin Dye Works & L. Co.* L.R.A. 1915C, 712, 144 Pac. 961, — Cal. —.

MATERIALITY.

Of evidence, see Evidence, 21-32.

MAXIMS.

1. Caveat emptor. *Industrial Sav. & L. Co. v. Plummer* (N. J. Err. & App.) L.R.A.1915C, 613, 92 Atl. 583, — N. J. —.

2. Cessante ratione legis, cessat ipsa lex. *Thurston v. Carter*, L.R.A.1915C, 359, 92 Atl. 295, 112 Me. 361.

3. Damnum absque injuria. *Fruth v. Board of Affairs*, L.R.A.1915C, 981, 84 S. E. 105, — W. Va. —.

4. In pari delicto potior est conditio defendentis. *Fields v. Holland*, L.R.A.1915C, 865, 165 S. W. 699, 158 Ky. 544.

5. Mobilia sequuntur personam. *Lockwood v. United States Steel Corp.* L.R.A. 1915C, 471, 103 N. E. 697, 209 N. Y. 375.

6. No one can be permitted to take advantage of his own wrong or acquire property by his own crime. *Wall v. Pfanschmidt*, L.R.A.1915C, 328, 106 N. E. 785, 265 Ill. 180.

7. Res ipsa loquitur. *Soriero v. Pennsylvania R. Co.* L.R.A.1915C, 710, 92 Atl. 604, 86 N. J. L. 642; *Law v. Illinois C. R. Co.* L.R.A.1915C, 17, 208 Fed. 869, 126 C. C. A. 27; *Hall v. Gage*, L.R.A.1915C, 704, 172 S. W. 833, — Ark. —.

8. Respondeat superior. *Copelin v. Berlin Dye Works & Laundry Co.* L.R.A. 1915C, 712, 144 Pac. 961, — Cal. —.

9. Simplex commendatio non obligat. *Industrial Sav. & L. Co. v. Plummer* (N. J. Err. & App.) L.R.A.1915C, 613, 92 Atl. 583, — N. J. —.

10. The law will not relieve a party from the consequences of his wrongdoing. *Western U. Teleg. Co. v. McLaurin*, L.R.A. 1915C, 487, 66 So. 739, — Miss. —.

MEMORANDUM.

Required by statute of frauds, see Contracts, 2.

As evidence, see Evidence, 12.

MILITIA.

Requiring carrier to give special rate to militia men, see Carriers, 14; Constitutional Law, 3.

MINORS.

See Infants.

MISSILE.

Injury to passenger by missile thrown into car, see Carriers, 2. L.R.A.1915C.

MOBS AND RIOTS.

Suspension of attorney for participating in acts of mob, see Attorneys.

Municipal liability for acts of mob, see Municipal Corporations, 6, 7.

The fact that a large number of persons confined together in a city jail, who joined together to whip another prisoner, did not voluntarily come into the jail, does not prevent their action from being that of a mob; nor is the primary purpose for which they assembled material, if they in fact formed and executed the unlawful purpose after they were brought together. *Blakeman v. Wichita*, L.R.A.1915C, 578, 144 Pac. 816, 93 Kan. 444.

MODIFICATION.

Of instructions, see Trial, 7.

MONOPOLY AND COMBINATIONS.

Grant of, by carrier, see Carriers, 10, 12, 13.

1. Neither specific performance of a contract, its rescission, nor damages for its breach, will be awarded where it is illegal because creating a monopoly in violation of the Constitution. *Fields v. Holland*, L.R.A. 1915C, 865, 165 S. W. 699, 158 Ky. 544.

2. A contract between competing companies each engaged in transferring persons and freight in a particular city, by which one is to surrender the transfer of passengers, and the other the transfer of freight, is invalid, under a constitutional provision that no common carrier shall acquire any parallel or competing line or operate the same. *Fields v. Holland*, L.R.A.1915C, 865, 165 S. W. 699, 158 Ky. 544. (Annotated)

MORTGAGE.

Requiring purchaser under foreclosure to notify person having right to redeem before taking his deed, see Constitutional Law, 19; Statutes, 2, 4.

Rights of mortgagee under insurance policy, see Insurance, 2.

Usury in, see Usury.

Elimination of usury from, see Tender.

The title to real estate devised to executors in trust to convey to a person named upon attaining a certain age, with a devise over in case of his death before that time, is not in abeyance during a contest of the will, because of which the executors could not qualify, so as to prevent foreclosure of a mortgage given by the testator until the termination of the contest, and a foreclosure during the contest, after service upon all persons in esse who were in any manner interested in the property or the title is valid. *Shackley v. Homer*, L.R.A. 1915C, 993, 127 N. W. 145, 87 Neb. 146.

MOVING PICTURES.

Unauthorized use of likeness of person as part of film, see Privacy.

MULE.

Negligence in driving mule known to be afraid of automobiles, see Automobiles; Negligence, 5.

MUNICIPAL CORPORATIONS.

Change by state of rates fixed by franchise granted by municipality, see Constitutional Law, 22, 23; Telephones.

Power of public service commission to change rate fixed by municipal ordinance or franchise, see Public Service Commission, 2, 4.

As to towns, see Towns.

Delegation of power.

1. A grant of power by the legislature to a municipal corporation "to erect, or authorize or prohibit the erection of, . . . waterworks," does not vest the municipal corporation with power to fix water rates by franchises or agreement beyond the control of the legislature. *Benwood v. Public Service Commission*, L.R.A.1915C, 261, 83 S. E. 295, — W. Va. —.

2. The general provision in a municipal charter authorizing the municipal corporation to "contract and be contracted with" does not delegate beyond the state's control the power to fix public service rates. *Benwood v. Public Service Commission*, L.R.A.1915C, 261, 83 S. E. 295, — W. Va. —.

Ordinances.
Constitutionality of ordinance changing rates of public service corporation, see Constitutional Law, 21, 23.

3. An ordinance which prohibits a public service corporation from rendering service for less than the prescribed uniform rate is not unreasonable. *Pinney & Boyle Co. v. Los Angeles Gas & Electric Co.* L.R.A.1915C, 282, 141 Pac. 620, — Cal. —.

Contracts.

Impairment of obligation of, see Constitutional Law, 20, 22, 23.

4. Impliedly from general powers a municipal corporation may have the power to contract in the matter of public service rates, as long as the legislature does not exercise its reserved power in that particular, but any contract so made is only permissive, and is subject to future legislative action. *Benwood v. Public Service Commission*, L.R.A.1915C, 261, 83 S. E. 295, — W. Va. —.

Water supply.

5. The grant by a municipal corporation to a water company of a franchise to construct and operate a system of waterworks to supply the town and its inhabitants with water, to use the streets and alleys for this purpose, and to have the exclusive right to furnish the town, at fixed rates, all the water it shall use for public purposes during the life of the contract, does not prevent the construction and operation of a waterworks system by the municipality to supply its inhabitants with water. *Glenwood Springs v. Glenwood Light & W. Co.* L.R.A.1915C, 438, 202 Fed. 678, 121 C. C. A. 88. (Annotated) L.R.A.1915C.

Liability for damages.

Permitting creation of nuisance as a taking of property for public use, see Eminent Domain, 3.

Evidence in action for damages for nuisance, see Evidence, 30.

Judicial notice in action for injury to employee, see Evidence, 1.

Liability for injury resulting from erection of embankment by municipality, see Waters.

6. A large number of persons confined together in a city jail, who join together to whip another prisoner, and who severely whip and injure him, are a "mob" or "riotous assemblage," within the meaning of a statute making cities liable for damages resulting from mob violence. *Blakeman v. Wichita*, L.R.A.1915C, 578, 144 Pac. 816, 93 Kan. 444.

7. A city is not relieved from liability for mob violence because its officers were cognizant of the purpose of the mob before the illegal action was taken, nor even where they co-operated with the mob. *Blakeman v. Wichita*, L.R.A.1915C, 578, 144 Pac. 816, 93 Kan. 444.

8. A municipal corporation which, acting under its charter authority to dispose of rubbish accumulated within its limits, uses it to fill an excavation in a highway, and thereby creates a nuisance, is liable for injury thereby caused to neighboring property, but not for sickness among the occupants thereof. *Hines v. Rocky Mount*. L.R.A.1915C, 751, 78 S. E. 510, 162 N. C. 409.

9. The act of hauling the sweepings from the streets of a city by the use of a cart operated under the direction of the department of streets and lanes is the exercise of a governmental function, and therefore an employee who has been injured through a defect in the cart cannot recover of the municipality. *Savannah v. Jordan*, L.R.A.1915C, 741, 83 S. E. 109, 142 Ga. 409. (Annotated)

10. A municipal corporation is not liable for injury to a child on a playground maintained by it because of the negligence of an attendant in permitting him to use apparatus designed for the use of older children, and which was dangerous for him to use. *Bernstein v. Milwaukee*, L.R.A.1915C, 435, 149 N. W. 382, 158 Wis. 576. (Annotated)

11. A municipal corporation is not liable for the negligence of its agent in disposing of garbage, since it is a discharge of a governmental function. *Louisville v. Hehemann*, L.R.A.1915C, 747, 171 S. W. 165, 161 Ky. 523.

MUTUAL COMBAT.

See Assault and Battery.

NAME.

Unauthorized use of, for advertising purposes, see Privacy.

NECESSARIES.

Husband's liability for, see Husband and Wife, 1, 2.

NEGLIGENCE.

Injury to patron at place of amusement, see Amusements.
 Of bailee, see Bailment.
 As to electricity, see Electricity.
 Estoppel by, see Estoppel, 3.
 As to wall left standing after fire, see Evidence, 7.
 Sufficiency of proof of, see Evidence, 33, 34.
 Of master or servant, see Master and Servant.
 Of municipal corporation, see Municipal Corporations, 6-11.
 Of physician, see Physicians and Surgeons.
 Proximate cause of injury by, see Proximate Cause.
 Of railroads, see Railroads.
 In operation of street railway, see Street Railways.

Liability of seller or manufacturer.

Right of retailer held liable for injury to recover over from manufacturer, see Contribution and Indemnity.
 Conclusiveness on manufacturer of judgment against retailer for injuries due to article sold, see Judgment, 7.
 Implied warranty as to quality of food sold, see Sale.

1. The mere sale of a gun to a fifteen-year-old boy in violation of ordinance does not render one liable for an injury done by his loading and firing the gun, if there was no reason to anticipate probable injury because of the carelessness of the boy or his lack of skill in the use of firearms. *Hartnett v. Boston Store*, L.R.A.1915C, 480, 106 N. E. 837, 265 Ill. 331. (Annotated)

2. A manufacturer who prepares food for human consumption and places it in the hands of a dealer for sale is responsible in damages to the widow of a consumer who procures such food from the dealer, and loses his life by partaking thereof. *Parks v. C. C. Yost Pie Co.* L.R.A.1915C, 179, 144 Pac. 202, 93 Kan. 334.

Dangerous premises.

Presumption and burden of proof as to negligence, see Evidence, 7; 8.
 Liability of landlord, see Landlord and Tenant, 6.

Negligence as to wall as proximate cause of injury, see Proximate Cause, 3.

3. A railroad company is bound to use reasonable care to protect the public against defective construction or disrepair of a wall adjoining a public highway, that is, the care required of an ordinarily prudent man under similar circumstances, but it is not required to use "that degree and amount of care which is within the range of human precaution and foresight to keep the wall in such condition as not to cause injury to a person upon the public highway." *Soriero v. Pennsylvania R. Co.* L.R.A.1915C, 710, 92 Atl. 604, 86 N. J. L. 642. L.R.A.1915C.

Contributory; imputed.

Contributory negligence by person injured by automobile, see Automobiles.

Contributory negligence of passenger, see Carriers, 4, 8, 9.

Relevancy of evidence as to, see Evidence, 27.

Contributory negligence of employees, see Master and Servant, 19-21.

Allegation of freedom from, see Pleading, 3.

On street car track, see Street Railways, 2.

Question for jury as to, see Trial, 3, 4.

4. The negligence of the driver of a police patrol wagon is imputable to an officer riding therein and having entire control both of the wagon and the driver, especially where he knows that the driver is inexperienced. *Bofill v. New Orleans R. & L. Co.* L.R.A.1915C, 419, 66 So. 339, 135 La. 996.

5. Negligence, if any, in driving upon the highway with a mule known to be afraid of automobiles, will not preclude one from holding the driver of an automobile liable for injury due to the fright of the mule, if he might, after discovering the danger of the driver, have prevented the injury by the exercise of ordinary care. *Butler v. Cabe*, L.R.A.1915C, 702, 171 S. W. 1190, — Ark. —.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEWLY DISCOVERED EVIDENCE.

New trial for, see New Trial, 2.

NEWSPAPERS.

Admissibility in evidence, see Evidence, 10.

NEW TRIAL.

On appeal, see Appeal and Error, 21.

Libel by statement in affidavit supporting motion for new trial, see Libel and Slander, 2.

1. The consumption by ten of the twelve jurors sitting in a criminal case which results in conviction, of 6½ quarts of whisky during the little more than three and one half days that the trial lasted, is ground for new trial, although there is testimony that none of them were intoxicated and that the liquor did not influence the verdict. *Myers v. State*, L.R.A.1915C, 302, 163 S. W. 1177, 111 Ark. 399. (Annotated)

2. An affidavit by prosecutrix in a rape case, whose testimony was necessary to support a conviction, that accused was not guilty, but that she testified against him because neighbors who did not like him had coaxed and threatened her, secured after the termination of the trial which resulted in the conviction, is sufficient to support a motion for new trial. *Myers v. State*, L.R.A.1915C, 302, 163 S. W. 1177, 111 Ark. 399.

3. As a general rule a new trial when

granted is awarded for the entire case; but when manifest justice demands, and it is clear that the course can be pursued without confusion, inconvenience, or prejudice to the rights of any party, a new trial may be limited to a particular, separable question. *Moss v. Campbells Creek R. Co.* L.R.A. 1915C, 1183, 83 S. E. 721, — W. Va. —.

NONRESIDENTS.

Running of limitations in favor of, see Limitation of Actions.

Tax on property of, see Taxes, 5, 18.

NOTICE.

To person having right to redeem from foreclosure of mortgage, see Constitutional Law, 19.

Of tax sale, see Evidence, 10; Judgment, 3.

For cancelation of insurance policy, see Insurance, 2.

By purchaser at foreclosure sale to persons entitled to redeem, see Statutes, 2, 4.

NUISANCES.

Measure of damages for, see Damages, 7.

Depreciation of property because of, as a taking for public use, see Eminent Domain, 3.

Liability of municipality for, see Eminent Domain, 3; Municipal Corporations, 8.

Evidence on question of damages resulting from, see Evidence, 26.

Evidence in rebuttal in action for, see Evidence, 30.

OFFICERS.

Of corporation, see Corporation, 1.

Partial invalidity of statute as to, see Statutes, 1.

OIL.

Injury to purchaser by explosion of, see Contribution and Indemnity; Judgment, 7.

OMITTED PROPERTY.

Taxation of, see Taxes, 9-11.

OPINION.

As evidence, see Evidence, 15-17.

OPTION.

In lease, see Appeal and Error, 8; Contracts, 1; Specific Performance, 1.

ORDINANCES.

See Municipal Corporations, 3.

ORIGINAL JURISDICTION.

Of appellate court, see Courts, 1.

OVERFLOW.

Liability for, see Waters.
L.R.A.1915C.

PARDON.

See Criminal Law, 5.

PARENT AND CHILD.

Action against parents for alienation of affections of wife, see Evidence, 11; Witnesses, 1.

Matters as to infants generally, see Infants.

PAROL EVIDENCE.

As to writing, see Evidence, 13, 14.

PARTIES.

Action by wife, see Husband and Wife, 5.

A citizen and taxpayer of a school district may, as representative of the class of taxpayers to which he belongs, maintain an action to enjoin the use of the school building for the conducting of a private business. *Tyre v. Krug*, L.R.A.1915C, 624, 149 N. W. 718, 159 Wis. 39.

PARTNERSHIP.

Effect of dissolution of firm of real estate brokers to terminate authority, see Brokers.

PASSENGER CARRIERS.

See Carriers.

PAYMENT.

Evidence on question of, generally, see Evidence, 12, 32.

PERFORMANCE.

Of contract, see Contracts, 6, 7.

PERSONAL PROPERTY.

Damages for injuries to, see Damages, 5, 6.

Sale of, see Sale.

PETITION.

Of plaintiff, see Pleading, 2, 3.

PHOTOGRAPHS.

Use of, as part of moving picture film, see Privacy.

PHYSICIANS AND SURGEONS.

Master's liability for failure to employ, see Master and Servant, 6, 7.

Authority to employ, see Master and Servant, 1, 2.

Privileged communications to, see Evidence, 19.

Sufficiency of proof of malpractice, see Evidence, 33.

A surgeon is not liable for the loss of a patient's foot where, at the time he was called to the case, amputation was indicated, because he tried a remedy known and approved by the profession, though not generally, which had in some instances achieved remarkable results in similar cases, but failed in the case to which he was called, so that amputation was finally resorted to. *Miller v. Toles*, L.R.A.1915C, 595, 150 N. W. 118, — Mich. —. (Annotated)

PIPE LINE.

Easement for, see Easements, 1-4.

PLAY GROUND.

Liability of city for injury to child on, see Municipal Corporations, 10.

PLEA.

See Pleading, 4.

PLEADING.**Striking out.**

1. An allegation in an action for injuring an automobile and depriving the owner of its use, that defendant sold and delivered the car to plaintiff at a certain time for a certain price, cannot be expunged for immateriality and irrelevancy. *Cook v. Packard Motor Car Co. L.R.A.1915C, 319, 92 Atl. 413, 88 Conn. 590.*

Declaration or complaint.

Errors waived or cured below, see Appeal and Error, 8.

2. Setting out defendant's contract to convey real estate, in a suit to secure its specific performance, obviates the necessity of alleging that defendant owned the property. *Tebeau v. Ridge, L.R.A.1915C, 367, 170 S. W. 871, — Mo. —.*

3. Contributory negligence is sufficiently negated in a complaint to recover damages for personal injuries, by an allegation that they were solely on account of the negligence of the defendant in the premises. *Bouchard v. Central Vermont R. Co. L.R.A. 1915C, 33, 89 Atl. 475, 87 Vt. 399.*

Pleas and answers.

4. Defendant in an action by a servant to recover damages for personal injuries may have the benefit of evidence tending to show assumption of risk which is given by plaintiff, although such defense was not pleaded. *New York, N. H. & H. R. Co. v. Vizvari, L.R.A.1915C, 9, 210 Fed. 118, 126 C. C. A. 632.*

Demurrer.

Judgment on appeal in case of technical error in overruling of demurrer, see Appeal and Error, 21.

5. Argumentativeness cannot be taken advantage of by general demurrer. *Bouchard v. Central Vermont R. Co. L.R.A.1915C, 33, 89 Atl. 475, 87 Vt. 399.*

6. A special demurrer for argumentativeness is not sufficient which fails to point out wherein the argumentativeness resides. *Bouchard v. Central Vermont R. Co. L.R.A. 1915C, 33, 89 Atl. 475, 87 Vt. 399.*

POLICE.

Liability for acts of special police officer, see Master and Servant, 3.

Injury to officer in charge of police patrol wagon by street car, see Street Railways, 2.

POLICE PATROL.

Imputing negligence of driver of, to officer riding therein, see Negligence, 4.

Injury to officer in charge of police patrol wagon by street car, see Street Railways, 2.

L.R.A.1915C.

POLICE POWER.

See Constitutional Law, 15-18.

PREJUDICIAL ERROR.

See Appeal and Error, 14-19.

PREMATURITY.

Of foreclosure suit, see Mortgage.

PRESUMPTIONS.

In general, see Evidence, 2-9.

PRINCIPAL AND AGENT.

Effect of dissolution of firm of real estate brokers to terminate authority, see Brokers.

Termination of contract by death, see Contracts, 9; Executors and Administrators, 2.

Proof of agent's declarations, see Evidence, 20.

Agent employed to manage property as tenant of employer, see Landlord and Tenant, 1.

One who has entered into a contract with an agent cannot, if there was no fraud, such as denial of the principal's existence, defeat liability for breach to an undisclosed principal by establishing that he would not have entered into the contract with the principal had he been disclosed, even though the principal suspected that he could not secure the contract himself. *Kelly Asphalt Block Co. v. Barber Asphalt Pav. Co. L.R.A. 1915C, 256, 105 N. E. 88, 211 N. Y. 68.*

PRINCIPAL AND SURETY.

1. An indemnity bond executed by a surety company against pecuniary loss resulting from the failure of a contractor to comply with the terms of a building contract, containing a condition that no liability shall attach to the surety unless the owner shall give notice to and obtain consent of the surety before making the final payment provided for in the contract, is, by the failure of the owner to retain the required percentage, discharged to the extent of the premature payments. *Young Men's Christian Assn. v. United States Fidelity & G. Co. L.R.A.1915C, 170, 133 Pac. 894, 90 Kan. 332.*

2. Merely accepting the discount for renewal of notes on the understanding that completed notes, signed by the compensated surety, who is ill when the renewal period arrives, will be delivered as soon as he is able to attend to the matter, and carrying the old notes on an "incomplete file," is not such a binding agreement to extend time of payment as will, under the statute, release a nonassenting surety, although a discount tag attached to the notes indicates that they will mature at the dates to which the interest is paid, and entries are made in the bank's books indicating that the old notes are paid. *Hamilton Nat. Bank v. Cook, L.R.A.1915C, 831, 171 S. W. 86, 130 Tenn. 465.* (Annotated)

PRISONERS.

Riot by, see Mobs and Riots; Municipal Corporations, 6.

PRIVACY.

Liability of telegraph company for disclosing contents of message, see Telegraphs.

The use of the name and purported likeness of a person by photographing another made up to represent him, as part of a moving picture film for exhibition purposes, the name being used prominently in the advertising to increase the demand for the picture secured, is, where his personal movements are featured without relation to the other scenes for the amusement of the audience, and without design to instruct or educate them, a violation of a statute giving a right of action to anyone whose name or picture is used for advertising purposes or for the purpose of trade without his consent. *Binns v. Vitagraph Co. L.R.A. 1915C, 839, 103 N. E. 1108, 210 N. Y. 51.* (Annotated)

PRIVILEGED COMMUNICATIONS.

Evidence of, see Evidence, 19.
In libel case, see Libel and Slander.

PROHIBITION.

Of sale of intoxicating liquors, see Intoxicating Liquors, 1, 2.

PROMISSORY NOTE.

See Bills and Notes.

PROOFS OF LOSS.

See Evidence, 22.

PROPERTY.

Compensation for taking or damaging of, see Eminent Domain.

PROXIMATE CAUSE.

Liability of telegraph company disclosing contents of message where no damages would have resulted but for plaintiff's own wrongful acts, see Telegraphs.

1. The expulsion of a sick and helpless passenger in the night from an electric car on a rural highway, contrary to the rules of the carrier, may be found to be the proximate cause of his being run over and killed by another car near the place of his expulsion, which passed a short time after his expulsion. *Buckley v. Hudson Valley R. Co. L.R.A.1915C, 134, 106 N. E. 121, 212 N. Y. 440.*

2. Failure to establish proper rules and give proper orders is the proximate cause of injury to a railroad engineer by collision with a train which he was ordered to meet at a certain station the train register at which showed that it had gone on, upon which information he acted and proceeded on his journey, whereas it had gone back and was again coming over the road towards him. *Bouchard v. Central Vermont R. Co. L.R.A.1915C, 33, 89 Atl. 475, 87 Vt. 399.* L.R.A.1915C.

3. The fact that an infant eight or nine years of age, who was injured by the falling of a stone from a railroad wall, while playing upon a pile of ties resting against the wall, upon a public street, was playing upon the ties, did not charge it with contributory negligence, since the ties were upon a public street and the fall of the stone, and not the act of playing upon the ties, was the proximate cause of the injury, and under the testimony in nowise connected therewith as a causal factor in the accident. *Soriero v. Pennsylvania R. Co. L.R.A.1915C, 710, 92 Atl. 604, 86 N. J. L. 642.*

PUBLIC POLICY.

Right to recover in tort action where plaintiff's wrongful acts must be shown to make out case, see Telegraphs.

PUBLIC PROPERTY.

Exemption of, from taxation, see Taxes, 3.

PUBLIC SCHOOLS.

See Schools.

PUBLIC SERVICE COMMISSION.

Validity of change of rates by, see Constitutional Law, 20.

Injunction against putting into force rates established by, see Courts, 1.

1. The Public Service Commission has power to change any intrastate rate for service rendered the public, when to do so will conflict with no paramount law or constitutional inhibition. *Benwood v. Public Service Commission, L.R.A.1915C, 261, 83 S. E. 295, — W. Va. —.*

2. The Public Service Commission may change a public service rate which was fixed for a municipality by franchise or ordinance prior to the enactment of the law creating the Commission, where authority to fix such rate was not expressly delegated to the municipal corporation by the legislature. *Benwood v. Public Service Commission, L.R.A.1915C, 261, 83 S. E. 295, — W. Va. —.* (Annotated)

3. The legislature may confer upon a Commission authority to regulate the rates of telephone companies. *State ex rel. Webster v. Superior Ct. L.R.A.1915C, 287, 120 Pac. 861, 67 Wash. 37.*

4. Under constitutional provisions making municipal corporations subject to general laws, the legislature may confer upon a Commission created under constitutional authority the power to revise rates established by a franchise conferred upon a telephone company by a municipal corporation which had not been given express power to fix rates, where under the Constitution all laws relating to corporations may be altered or modified. *State ex rel. Webster v. Superior Ct. L.R.A.1915C, 287, 120 Pac. 861, 67 Wash. 37.*

PUBLIC SERVICE CORPORATIONS.

Constitutionality of statute regulating rates of, see Constitutional Law, 3, 4, 20-23.

Delegation to municipality of power to fix rates, see Municipal Corporations, 1, 2.

Reasonableness of ordinance fixing rates, see Municipal Corporations, 3.

Implied power of municipality to contract as to rates of, see Municipal Corporations, 4.

Power of Public Service Commission as to rates of, see Public Service Commission.

Rates of generally, see Rates.

See also Carriers; Railroads; Street Railways; Telegraphs; Telephones; Waters.

The duty which a producer has undertaken to perform for the public, and not the use which a consumer makes of a commodity furnished by an alleged public service corporation, is the test of public service, so as to bring the charges within public regulation. *Pinney & Boyle Co. v. Los Angeles Gas & Electric Co.* L.R.A. 1915C, 282, 141 Pac. 620, — Cal. —.

PUBLIC UTILITIES.

See Public Service Corporations.

PUBLIC WORK.

Validity of contract to pay commission for obtaining contract from municipality for, see Contracts, 4.

PUNITIVE DAMAGES.

See Damages, 1.

QUALITY.

Implied warranty as to, see Sale.

RAILROADS.

Error in excluding evidence to show contributory negligence, see Appeal and Error, 16.

Liability for injury to employee, see Master and Servant.

Negligence as to wall adjoining public highway, see Negligence, 3.

Question for jury as to contributory negligence, see Trial, 4.

A railroad company may be liable for negligence in failing to exercise ordinary care to stop a train after discovering a trespasser pushing a push car along a track in front of the train, so that it collides with and injures him. *Great Northern R. Co. v. Harman*, L.R.A.1915C, 843, 217 Fed. 959, — C. C. A. —.

RAPE.

New trial, see New Trial, 2.

RATES.

Of carrier, see Carriers, 14; Constitutional Law, 3.

Constitutionality of statute regulating, see Constitutional Law, 3-5, 20-23. L.R.A.1915C.

Fire insurance rates, see Constitutional Law, 5; Insurance, 1.

Of telephone company, see Constitutional Law, 22, 23; Courts, 1; Public Service Commission, 3, 4; Telephones.

Delegation to municipality of power to fix, see Municipal Corporations, 1, 2.

Reasonableness of ordinance as to, see Municipal Corporations, 3.

Municipal contract as to, see Municipal Corporations, 4.

Power of Public Service Commission as to, see Public Service Commission.

1. A business may be so far affected with a public interest as to permit legislative regulation of its rates and charges, although no public trust is imposed upon the property, and although the public may not have a legal right to demand and receive service. *German Alliance Ins. Co. v. Lewis*, L.R.A.1915C, 1189, 58 L. ed. 1011, 34 Sup. Ct. Rep. 612, 233 U. S. 389.

2. Unless there has been a delegation of the rate-making power by the legislature by clear and unmistakable terms, the power remains in the legislature to exercise when it sees fit. *Benwood v. Public Service Commission*, L.R.A.1915C, 261, 83 S. E. 295, — W. Va. —.

RATIFICATION.

By executors of contract with agent by testator, see Executors and Administrators, 2.

REAL ESTATE BROKER.

See Brokers.

REAL PROPERTY.

Oral contract as to, see Contracts, 2.

Evidence of damages to, see Evidence, 26.

Matters as to landlord and tenant, see Landlord and Tenant.

Mortgage on, see Mortgage.

Specific performance of contract as to, see Specific Performance.

REBUTTAL.

Evidence in, see Evidence, 30, 31.

RECORD.

On appeal, see Appeal and Error, 3.

Records as evidence generally, see Evidence, 11.

RE-ENTRY.

Of leased premises, see Landlord and Tenant, 9, 10.

RELEASE.

Of one joint debtor, see Joint Creditors and Debtors, 2, 3.

Of surety, see Principal and Surety.

RELEVANCY.

Of evidence, see Evidence, 21-32.

REMAINDERMEN.

See Life Tenants.

REMOVAL OF CAUSES.

Transfer of cause between different state or territorial courts, see Courts, 2.

RENT.

Liability for, generally, see Landlord and Tenant, 7, 8.

REPETITION.

Of slander, see Evidence, 23.

REPRESENTATIONS.

By insured, see Insurance, 3-7.

REPUTATION..

Evidence of, see Evidence, 22.

RETROSPECTIVE LAWS.

As to when laws are retrospective, see Statutes, 4.

RETURN.

Of process on appeal, see Appeal and Error, 2.

REVERSIBLE ERROR.

See Appeal and Error, 14-19.

REVERSION.

Transfer of, by landlord, see Landlord and Tenant, 6, 8-10.

RIOTS.

See Mobs and Riots.

ROBBERY.

Statute giving court discretion as to extent of punishment, see Constitutional Law, 14; Criminal Law, 2.

Cruel and unusual punishment for, see Criminal Law, 2.

Habeas corpus to secure release of one convicted of, see Habeas Corpus.

Indictment for, see Indictment, Information or Complaint.

Merely inserting one's hand into another's pocket and abstracting therefrom loose change with intent to steal it does not come within a statute making everyone guilty of robbery who feloniously takes the property of another from his person and against his will by violence to his person. *State v. Parker*, L.R.A.1915C, 121, 170 S. W. 1121, — Mo. —.

SALE.

Seller's liability for injury by article sold, see Negligence, 1, 2.

For taxes, see Taxes, 15, 16.

A dealer who sells food for immediate human consumption does so under an implied representation and guaranty that it is wholesome for the purpose for which it is sold. *Parks v. C. C. Yost Pie Co.* L.R.A. 1915C, 179, 144 Pac. 202, — Kan. —.

SANITY.

See Incompetent Persons. L.R.A.1915C.

SCHOOLS.

Joining suit to restrain use of school house for private business with claim for damages, see Action or Suit, 1.

Injunction against use of school building for private business, see Parties.

Authority to permit the principal to conduct a business of selling school supplies at a profit in a school building is not conferred on the school board by a provision that it may adopt rules and regulations for the management of the public schools, and adopt such measures as shall promote the public usefulness of the schools. *Tyre v. Krug*, L.R.A.1915C, 624, 149 N. W. 718, 150 Wis. 39. (Annotated)

SENTENCE.

For crime, see Criminal Law, 2-4.

SEPARATION.

See Divorce and Separation.

SEVERABILITY.

Of insurance contract, see Insurance, 6.

SHIPPING.

Burden of proving that injury was caused by act of God, see Evidence, 5.

Insurance on vessel, see Insurance, 4.

1. Negligence is not necessary to render a charterer liable for injury to the vessel under a charter party requiring it to return the vessel in as good condition as it was when he received it, natural wear and tear, the act of God, or the public enemy excepted. *Alaska Coast Co. v. Alaska Barge Co.* L.R.A.1915C, 423, 140 Pac. 334, 79 Wash. 216.

2. That a vessel struck its propeller on a submerged obstruction in deep water several miles from land does not show that the injury was caused by an act of God within an exception of liability in a charter party, although it was an inevitable accident. *Alaska Coast Co. v. Alaska Barge Co.* L.R.A. 1915C, 423, 140 Pac. 334, 79 Wash. 216. (Annotated)

SHOOTING GALLERY.

Negligence as to, see Amusements.

SICKNESS.

Of passenger, effect on carrier's duty, see Carriers, 5; Proximate Cause, 1.

Caused by nuisance as element of damages, see Damages, 7.

Liability of municipality for sickness resulting from nuisance, see Municipal Corporations, 8.

SIGNATURE.

To writing required by statute of frauds, see Contracts, 2.

To judgment, see Judgment, 1.

SITUS.

Of stock for purpose of transfer on

books of company, see Corporations, 2; Executors and Administrators, 6.

For purpose of taxation, see Taxes, 5-8.

SLANDER.

See Libel and Slander.

SOCIAL CLUBS.

See Clubs.

SPECIAL DEMURRER.

See Pleading, 6.

SPECIAL POLICE.

Liability for acts of, see Master and Servant, 3.

SPECIFIC PERFORMANCE.

Waiver of error in petition, see Appeal and Error, 8.

Sufficiency of consideration to justify specific performance, see Contracts, 1.

Of monopolistic contract, see Monopoly and Combinations, 1.

Pleading in suit for, see Pleading, 2.

1. A landowner who drafts a lease giving an option to purchase cannot defeat specific performance of the option because it does not form an integral part of the lease in the sense that it does not dovetail in logical precision and grammatical construction with what precedes and follows it. *Tebeau v. Ridge*, L.R.A.1915C, 367, 170 S. W. 871, — Mo. —.

2. In enforcing specific performance of a contract to convey real estate in favor of one who did not know that the grantor was married, diminution of the purchase price by the present value of the wife's inchoate right of dower may be allowed where the vendor has not attempted to secure her signature to the conveyance and the contract does not call for a warranty deed. *Tebeau v. Ridge*, L.R.A.1915C, 367, 170 S. W. 871, — Mo. —.

STABLE.

Easement for pipe line to secure water for, see Easements, 2.

STATE.

Application of Federal Constitution to, see Constitutional Law, 1.

Effect of admission of, on transfer of cause from territorial to Federal district court, see Courts, 1.

Estoppel of, see Estoppel, 1.

STATUTE OF FRAUDS.

See Contracts, 2.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTE OF USES.

See Husband and Wife, 4.

STATUTES.

Constitutionality of, see Constitutional Law.

L.R.A.1915C.

Estoppel by judicial construction of, see Estoppel, 1.

1. A statute fixing the times for the election of certain officers, and the terms of their incumbency, is not void *in toto* because its literal effect might be to extend the terms of certain present incumbents, which the legislature had no power to do. *Best v. Moorehead*, L.R.A.1915C, 378, 148 N. W. 551, 96 Neb. 602. (Annotated)

2. That a statute requiring a purchaser at foreclosure sale to notify persons entitled to redeem before taking his deed may be unconstitutional as to sales in which the period for redemption has expired does not affect its validity in respect to sales in which ample time to give the notice remains before expiration of the redemption period. *Clark Implement Co. v. Wadden*, L.R.A.1915C, 414, 149 N. W. 424, — S. D. —.

3. When the words of a statute are not explicit, the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt, and the objects and remedy in view; and the intention is to be taken or presumed according to what is consonant to reason and good discretion. *State ex rel. Lorenzino v. Board of County Comrs.* L.R.A.1915C, 898, 145 Pac. 1083, — N. M. —.

4. A statute requiring a purchaser at foreclosure sale to notify persons entitled to redeem before taking his deed is not retroactive when applied to existing purchasers, if at the time of its passage ample time for the notice remains before the expiration of the redemption period. *Clark Implement Co. v. Wadden*, L.R.A.1915C, 414, 149 N. W. 424, — S. D. —. (Annotated)

STREET CLEANING.

As governmental function, see Municipal Corporations, 9.

STREET RAILWAYS.

As carriers, see Carriers.

1. In view of the well-known fact that in rounding a curve the rear end of a street car will swing beyond the track and overlap the street to a greater extent than the front, the motorman is justified in presuming that an adult person standing in the street near the track, who is apparently able to see, hear, and move, having notice of the approach of the car and of the existence of the curve in the track, will draw back far enough from it to avoid being struck by the rear of the car as it swings around the curve in the usual and expected manner, and under such circumstances it is not negligent operation on the part of the motorman to continue the progress of the car without warning such person of the possible danger of collision with the rear of the car, because of the swing, if he remains in the same position. *Miller v. Public Service R. Co.* L.R.A.1915C, 604, 92 Atl. 343, 85 N. J. L. 631. (Annotated)

2. The officer in charge of a police patrol wagon cannot recover for injuries suf-

ferred in a collision with a street car, where it appears that the wagon was driven at a brisk speed and without stopping, from one narrow street into another narrow and intersecting street, upon a railroad track on which the driver might have expected to see a car, without observing the rule to stop, look, and listen, and where it appears that the motorman in charge of the car did all that could be done to avert the collision. *Bofill v. New Orleans R. & L. Co.* L.R.A.1915C, 419, 66 So. 339, 135 La. 996.

STRIKING OUT.

Of pleading, see Pleading, 1.

SUCCESSION TAX.

See Taxes, 17, 18.

SUPREME COURT OF THE UNITED STATES.

Jurisdiction on appeal, see Appeal and Error, 1.

SURETIES.

In general, see Principal and Surety.

SURGEONS.

See Physicians and Surgeons.

SUSPENSION.

Of attorney, see Attorneys.

Of sentence, see Criminal Law, 3, 4.

TAXES.

Presumption and burden of proof as to acts of officers, see Evidence, 9.
Provision in lease of town land that lessor will pay the taxes, see Towns.

Double taxation.

1. The taxation of stock of a national bank in the hands of its shareholders, and also the taxation of real estate belonging to the bank in which a part of its capital has been invested, is not unlawful taxation. *Re First Nat. Bank*, L.R.A.1915C, 386, 146 N. W. 1064, 25 N. D. 635. (Annotated)
What taxable.

2. A statutory oath required of taxpayers which must contain a full and complete list of all property held by or belonging to each on a certain date, indicates an intention that such property shall be listed and assessed with reference to the quantity held or owned on such date, although there is no express statute fixing the date for that purpose. *Wood v. McCook Waterworks Co.* L.R.A.1915C, 125, 149 N. W. 417, — Neb. —.

3. One who owns personal property subject to taxation at the time when it is returnable for assessment and taxation for any year cannot escape liability for the tax for such year by subsequently selling the property to a municipal corporation in whose hands such property thereafter is not subject to taxation. *Wood v. McCook Waterworks Co.* L.R.A.1915C, 125, 149 N. W. 417, — Neb. —. (Annotated)

4. A building owned by a lodge and L.R.A.1915C.

used as meeting place for its members and for the social enjoyment of members and their guests, the surplus funds of which, together with voluntary contributions of members, are devoted to the relief of the needy, is not exempt from taxation as being exclusively used for services purely charitable. *St. Louis Lodge No. 9 v. Koeln*, L.R.A.1915C, 694, 171 S. W. 329, — Mo. —. (Annotated)

Where taxable; situs.

Due process as to, see Constitutional Law, 6, 7.

5. Money sent by a nonresident into the state to pay debts or meet the expenses of a business under the control of an agent, for which the income from the business is not sufficient, acquires no situs there for purposes of taxation. *Hillman Land & Iron Co. v. Com.* L.R.A.1915C, 923, 146 S. W. 776, 148 Ky. 331. (Annotated)

6. The credits of a partnership engaged in the live stock, commission, and money-lending business, that maintains but one office in Nebraska, are subject to taxation in the county, township, precinct, city, and school district where that office is located. *Clay Robinson & Co. v. Douglas County*, L.R.A.1915C, 923, 129 N. W. 548, 88 Neb. 363. (Annotated)

7. The doctrine that movables follow the person will not be applied so as to defeat the taxation of partnership credits evidenced by promissory notes executed by residents of Nebraska, and payable in Chicago, to a partnership transacting business in Nebraska, where it appears that the payee for many years has maintained and still maintains an office and a place of business in that state, in charge of an agent, through whom the loans evidenced by the notes were negotiated, and at which place an extensive commission business is transacted by the partnership. *Clay Robinson & Co. v. Douglas County*, L.R.A.1915C, 923, 129 N. W. 548, 88 Neb. 363.

8. The tax upon securities held by trustees, which were substituted for real estate located in another state, and which passed under a will of a person who died domiciled within the state, for beneficiaries also so domiciled, should, where the securities are actually in the state and the general trustees under the will are domiciled there, be assessed at the domicile of the beneficiaries, under a statute providing that personal property held in trust by a trustee, the income of which is payable to another person, shall be assessed to the trustee in the town in which such other person resides; and, although the trustees also secured an appointment under the clause of the will disposing of the foreign real estate, by the courts of the state where it was located, the tax cannot be assessed under the clause of the statute providing for the tax where the trustee is not an inhabitant of the state. *Hemenway v. Milton*, L.R.A.1915C, 949, 104 N. E. 362, 217 Mass. 230. (Annotated)
Levy.

9. The validity of a tax levy cannot be questioned in a proceeding to add omitted

property to the list. *Hillman Land & Iron Co. v. Com. L.R.A.1915C, 929, 146 S. W. 776, 148 Ky. 331.*

Assessment.

Presumption as to assessment of land at full valuation, see *Evidence, 9.*

10. The deficiency cannot escape taxation by the fact that a taxpayer in listing his land for taxation by honest mistake states the number of acres too low. *Hillman Land & Iron Co. v. Com. L.R.A.1915C, 929, 146 S. W. 776, 148 Ky. 331.*

11. A witness to fix the value for taxation of land omitted from the tax list should be required to state the fair cash value of the land, estimated at the price it would bring at a fair voluntary sale, where that is the valuation for taxation provided by the Constitution. *Hillman Land & Iron Co. v. Com. L.R.A.1915C, 929, 146 S. W. 776, 148 Ky. 331.*

12. The value of stock in other corporations cannot be deducted in fixing the value of the capital of a corporation for taxation, where the statute provides only for the deduction of the assessed value of real and personal property upon which it pays taxes, although another statute provides that corporations legally holding stock in other corporations upon which a tax has been paid by the corporation issuing it shall not be required to pay any tax on such stock or list the same. *State ex rel. Corporation Com. v. J. K. Morrison & Sons Co. L.R.A.1915C, 380, 70 S. E. 1079, 155 N. C. 53. (Annotated)*

13. The valuation for purposes of taxation of the paid up capital of a corporation at par is not excessive where it pays dividends at 24 per cent per annum, and the statute requires it to pay a tax on the actual value of its whole capital stock, with certain deductions to avoid double taxation. *State ex rel. Corporation Com. v. J. K. Morrison & Sons Co. L.R.A.1915C, 380, 70 S. E. 1079, 155 N. C. 53.*
Review; correction; appeal.

14. Under § 1927, N. D. Rev. Code 1895, allowing an appeal from all decisions of the board of county commissioners, an appeal will lie from a decision of the board of county commissioners made while equalizing and correcting assessments in a controversy then pending before them, judicial in its character. *Re First Nat. Bank, L.R.A.1915C, 386, 146 N. W. 1064, 25 N. D. 635.*

Sale; deed; rights of purchasers.

Secondary evidence of order for publication of notice in tax proceedings, see *Evidence, 10.*

Conclusiveness of recital of notice in judgment, see *Judgment, 3.*

15. A request for tax bills on a list of property is not a sufficient attempt to pay the taxes to render a sale for nonpayment upon certain parcels included in the list, for which no bills were received, void. *Price v. Gunn, L.R.A.1915C, 158, 170 S. W. 247. — Ark. — (Annotated)*

16. In setting aside a void tax sale at the instance of the taxpayer, the court *L.R.A.1915C.*

should make repayment of the tax and those subsequently paid by the purchaser with interest from the respective times of payment less rents received, a condition to affording the relief sought. *Holland v. Hotchkiss, L.R.A.1915C, 492, 123 Pac. 258, 162 Cal. 366. (Annotated)*

Succession or transfer tax.

Personal liability of executor for, see *Executors and Administrators, 3.*

17. A transfer tax cannot be set aside on the sole ground that the appraisement of the estate was inaccurate, and that there was in fact no transferable property. *Re Meyer, L.R.A.1915C, 615, 103 N. E. 713, 209 N. Y. 386.*

18. Notes belonging to a nonresident secured by mortgage within the state, which were taken by a resident agent to whom money was intrusted for investment, may be subjected to collateral inheritance tax, upon the owner's death, although just prior thereto they were all removed from the state, if the agent retains control of them by virtue of his agency. *Re Adams, L.R.A.1915C, 95, 149 N. W. 531, — Iowa, —.*

TAXPAYER.

Action by, see *Parties.*

TELEGRAPHS.

One cannot hold a telegraph company liable in damages for his humiliation and loss of social caste and business opportunities through its disclosure to strangers of the contents of a message showing, in connection with the proof that he is compelled to introduce to make a case, that he was maintaining illicit sexual relations with the sender. *Western U. Teleg. Co. v. McLaurin, L.R.A.1915C, 487, 66 So. 739, — Misc. —. (Annotated)*

TELEPHONES.

Constitutionality of regulation of rates, see *Constitutional Law, 22, 23.*

Injunction against putting into force rates established by state commission, see *Courts, 1.*

Power of Public Service Commission to regulate rates, see *Public Service Commission, 3, 4.*

Measure of damages for failure of service, see *Damages, 2, 3.*

Burden of proving that failure to furnish service was not due to negligence, see *Evidence, 6.*

Waiver of prepayment of tolls for service, see *Evidence, 15.*

Proof of declarations of agent of company after failure of service, see *Evidence, 20.*

Evidence as to condition of telephone at other times on question of negligence in failing to furnish service, see *Evidence, 29.*

Question for jury as to injury resulting from failure of service, see *Trial, 2.*

Where municipal charters are subject

to general laws the legislature may direct a telephone company to raise its service rates from those fixed in the franchise granted it by the municipality, if it is necessary to secure effective service. *State ex rel. Webster v. Superior Ct. L.R.A.1915C, 237, 120 Pac. 861, 67 Wash. 37.*

(Annotated)

TENANTS.

See Landlord and Tenant.

TENDER.

Judgment creditors of an insolvent debtor need not tender the amount due to secure elimination of usury from a prior indebtedness secured by a trust deed on the property, where they are unable to state the true balance owing to the holder because they have not access to the accounts. *Spinks v. Jordan, L.R.A.1915C, 634, 66 So. 405, — Miss. —.*

TERMINATION.

Of lease, see Landlord and Tenant, 4, 5.

TERMS.

Of tenant, see Landlord and Tenant, 3.

TESTAMENTARY TRUSTEE.

Situs for taxation of personal property held by, see Taxes, 8.

THUNDER STORM.

Injury by shock from electric wire during thunder storm, see Electricity, 1.

TORTS.

Contribution between wrongdoers to, see Contribution and Indemnity.

TOWNS.

A provision in a lease of town land that the lessor will pay the taxes assessed on the property or permit them to be deducted from the rent is enforceable so as to permit a recovery of the taxes paid, although they are greater than the annual rental, and not invalid as an agreement to exempt the lessee from taxation. *Hampton Beach Improv. Co. v. Hampton, L.R.A.1915C, 698, 92 Atl. 549, — N. H. —.*

(Annotated)

TRANSFER.

Of corporate stock, see Corporations, 2.
Of cause, see Courts, 2.

TRANSFER COMPANIES.

Illegal combination of, see Monopoly and Combinations, 2.

TRANSFER TAX.

See Taxes.

TRESPASS.

Injunction against, see Injunction, 2.

TRESPASSERS.

Liability for injury to, by electric wires, see Electricity, 2, 3.
L.R.A.1915C.

Injury to, on or near railroad track, see Railroads; Trial, 4.

TRIAL.

Taking exhibits into jury room as reversible error, see Appeal and Error, 18.

Necessity that error in argument be shown by record on appeal, see Appeal and Error, 3.

How question of error in directing verdict should be raised, see Appeal and Error, 4.

Proceedings in or reports of, as privileged communications, see Libel and Slander, 2.

New trial, see New Trial.

Reception of evidence.

1. Evidence cannot be excluded because of absence of an offer of proof as to what the answer to the question will be, where the question shows the purpose and materiality of the evidence. *Hartnett v. Boston Store, L.R.A.1915C, 460, 106 N. E. 837, 265 Ill. 331.*

Questions of law and fact.

Prejudicial error as to, see Appeal and Error, 14.

2. The jury must determine whether or not exhaustion suffered by one compelled to go on foot for a doctor to attend a dangerously sick member of his family, because of negligent failure of telephone service for which he had contracted, results in injury to his person. *Vinson v. Southern Bell Teleph. & Teleg. Co. L.R.A.1915C, 450, 66 So. 100, — Ala. —.*

3. The question of contributory negligence is for the court where the facts are uncontroverted and but one conclusion may fairly be drawn therefrom. *Hayden v. Chicago, M. & G. R. Co. L.R.A.1915C, 181, 170 S. W. 200, — Ky. —.*

4. A trespasser pushing a push car along a railroad track is not, as matter of law, negligent in attempting to remove the car from the track upon discovering the approach of a train, instead of getting himself out of danger, so as to relieve the railroad company from liability for negligently injuring him; but the question of such negligence is for the jury. *Great Northern R. Co. v. Harman, L.R.A.1915C, 843, 217 Fed. 959, — C. C. A. —.*

5. It cannot be said as matter of law that a railroad employee assumes the risk of injury from using a chisel to cut rails, in continuing to use it after complaining of its defective character, upon the assurance of the foreman that it is good, and that he can try it or go home. *New York, N. H. & H. R. Co. v. Vizvari, L.R.A.1915C, 9, 210 Fed. 118, 126 C. C. A. 632.*

Instructions.

How question of error in instructions should be raised, see Appeal and Error, 4.

Prejudicial error as to, see Appeal and Error, 17.

6. Instructions to a jury should be confined to and be in accord with the evi-

dence submitted upon the trial. *Eisentraut v. Madden*, L.R.A.1915C, 893, 150 N. W. 627, — Neb. —.

7. A modification which there is no evidence to support should not be made to a requested instruction. *Hall v. Gage*, L.R.A.1915C, 704, 172 S. W. 833, — Ark. —.

8. A cautionary instruction as to the evidence of police officers is proper only when the officer is a witness for the state in the endeavor to convict the accused. *Shellenberger v. State*, L.R.A.1915C, 1163, 150 N. W. 643, — Neb. —.

9. An instruction which singles out the testimony of policemen who were witnesses in a criminal case, and attempts to state the rule for determining its weight, is erroneous. *People v. Mendelson*, L.R.A.1915C, 627, 106 N. E. 249, 264 Ill. 453.

10. An instruction upon the trial of one accused of homicide which stated in direct terms, "the confession of defendant, if he made such confession, is competent evidence to prove his connection with such crime," without further instructions sufficiently qualifying the direct statement, is erroneous, where it is claimed that the accused was mentally deficient. *Shellenberger v. State*, L.R.A.1915C, 1163, 150 N. W. 643, — Neb. —.

Verdict or findings of jury.

Review of verdict on appeal, see Appeal and Error, 11-13.

11. A general finding by a jury in favor of a party includes a finding in his favor on all the material issues in the case. *Walters Nat. Bank v. Bantock*, L.R.A.1915C, 531, 137 Pac. 717, 41 Okla. 153.

TRUST DEED.

See Mortgage.

TRUSTEE PROCESS.

See Garnishment.

TRUSTS.

Bank's duty as to trust funds, see Banks, 1-6.

For wife, see Husband and Wife, 3, 4. Illegal trust, see Monopoly and Combinations.

Situs for property taxation of personal property held by trustee, see Taxes, 8.

No trust *ex maleficio* can be imposed upon the title to property which, under the statute, descends to one who murders his ancestor to secure it. *Wall v. Pfanschmidt*, L.R.A.1915C, 323, 106 N. E. 785, 265 Ill. 180.

UNDISCLOSED PRINCIPAL.

Rights of, see Principal and Agent.

UNITED STATES SUPREME COURT.

Jurisdiction on appeal, see Appeal and Error, 1.

USES.

Statute of, see Husband and Wife, 4. L.R.A.1915C.

USURY.

Right of judgment creditors to elimination of usury from prior indebtedness secured by trust deed, see Tender.

Judgment creditors of an insolvent debtor may show usury in a prior note of their debtor secured by deed of trust, and have it eliminated from such indebtedness. *Spinks v. Jordan*, L.R.A.1915C, 634, 66 So. 405, — Miss. —. (Annotated)

VALUATION.

Of property for taxation, see Taxes, 11-13.

VALUE.

Opinion evidence as to, see Evidence, 17.

Evidence of, see Evidence, 26.

VARIANCE.

Between pleading and proof, see Appeal and Error, 7.

VENDOR AND PURCHASER.

Oral contracts for land, see Contracts, 2.

Estoppel as to, see Estoppel, 2.

Parol evidence as to consideration for agreement of seller to find a purchaser at an advanced price, see Evidence, 14.

Pleading as to, see Pleading, 2.

Specific performance of contract, see Specific Performance.

Sale for taxes, see Taxes, 15, 16.

VERDICT.

Review of, on appeal, see Appeal and Error, 11-13.

In general, see Trial, 11.

VESTED INTEREST.

See Wills, 3, 4.

VOTERS AND ELECTIONS.

See Elections.

VOTING MACHINES.

See Elections.

WAGES.

Evidence on question of amount of, see Evidence, 21.

WAIVER.

Of irregularity in transferring cause from territorial to Federal district court, see Courts, 2.

Of prepayment of tolls for telephone service, see Evidence, 15.

Of privilege, see Evidence, 19.

WALL.

Negligence as to, see Evidence, 7, 8; Negligence, 3; Proximate Cause, 3.

WARRANTY.

In insurance contract, see Insurance, 3-7.

On sale of personalty, see Sale.

WATERS.

Easement for pipe line to secure water supply, see Easements, 1-4.

Municipal purchase or ownership of waterworks, see Municipal Corporations, 5.

Injunction against construction of waterworks system by municipality, see Injunction, 1.

Delegation to municipality of power to fix rates, see Municipal Corporations, 1.

A municipal corporation situated on the lowlands along a stream may erect an embankment to prevent flood water from the stream overflowing and injuring property within its limits, although the result is to cause the water to rise somewhat higher on the property on the opposite side of the stream than it otherwise would have done. *Smeltzer v. Ford City*, L.R.A.1915C, 700, 92 Atl. 702, 246 Pa. 560.

WAY.

Easement of, see Easements, 5.

WILLS.

Right to foreclose mortgage pending contest of will, see Mortgage.

1. In the construction of wills, a presumption prevails, especially in items not residuary, that where a more general description is coupled with an enumeration of things, the description shall cover only things *ejusdem generis*. *Creamer v. Harris*, L.R.A.1915C, 653, 106 N. E. 967, — Ohio St. —.

2. A bequest of a "bureau and contents" in a will disposing of a small estate does not pass title to the legatee, to the sum of \$320 in money found therein, where it appears from the entire will that the intention of the testator was that the title to the money should not thus pass. *Creamer v. Harris*, L.R.A.1915C, 653, 106 N. E. 967, — Ohio St. —. (Annotated)

3. A devise to executors in trust to convey to a person named upon his attaining a certain age, with a devise over in case of his death before that time, confers upon him a vested estate in fee simple, subject to the prior chattel interest of the trustees and to defeasance in the event of his death before attaining the age indicated. *Shackley v. Homer*, L.R.A.1915C, 993, 127 N. W. 145, 87 Neb. 146.

4. A devise to children on their arriving respectively at the age of twenty-one L.R.A.1915C.

years is vested, and not contingent, when the will also provides that in case of the death of either before arrival at that age without surviving issue his share shall be divided among the survivors, and that part of the income shall be used for their education and support until their arrival at the age specified; especially where in a codicil testator states that he has given the property to the children on their arrival at the specified age, and gives directions for the care and disposition of the property on that basis. *Re Paxson*, L.R.A.1915C, 1009, 88 Atl. 673, 241 Pa. 452. (Annotated)

WITHDRAWAL.

From mutual combat, see Assault and Battery.

WITNESSES.

Opinions and conclusions of, see Evidence, 15-17.

1. A woman who has secured a divorce from her husband is not precluded from testifying, in an action by him against her parents for the alienation of her affections, that the parents offered to provide a farm for the husband and wife to live on, by a statute providing that neither husband nor wife shall testify while the marriage exists, nor afterwards, concerning any communication between them during marriage. *Hos-tetter v. Green*, L.R.A.1915C, 870, 167 S. W. 919, 159 Ky. 611.

2. In an action by an administratrix to recover a debt claimed to be due the estate of her decedent, in which the defendant claims payment and introduces as evidence of payment certain checks payable to the decedent and signed "The Browning Mines, by J. S. Browning" (the defendant), the defendant is a competent witness to prove his custom or habit of paying his personal debts by checks so drawn and signed. *Davidson v. Browning*, L.R.A.1915C, 976, 80 S. E. 363, — W. Va. —.

3. Testimony of one who is sued by an administratrix on a debt claimed due her decedent and who introduces checks as evidence of payment which are signed "Browning Mines, by J. S. Browning" (the defendant), that it was his custom to pay his personal debts by checks signed in this manner is not a violation of the rule prohibiting testimony as to transactions with deceased persons. *Davidson v. Browning*, L.R.A.1915C, 976, 80 S. E. 363, — W. Va. —.

